EFiled: Aug 16 2021 04:46PM EDT
Transaction ID 66853360
Case No. 2017-0862-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MELVYN KLEIN, Plaintiff, v. H.I.G. CAPITAL, L.L.C.; H.I.G. SURGERY CENTERS, LLC; H.I.G. BAYSIDE DEBT & LBO FUND II; BCPE SEMINOLE HOLDINGS LP; BAIN CAPITAL INVESTORS, LLC; and BAIN CAPITAL PRIVATE EQUITY, LP, Defendants, and SURGERY PARTNERS, INC., Nominal Defendant.	C.A. No. 2017-0862-LWW

THE BAIN DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Dated: August 9, 2021
PUBLIC VERSION FILED:
August 16, 2021

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PRELIMINARY STATEMENT

An aiding and abetting claim is "among the most difficult to prove" under Delaware law. *RBC Capital Mkts., LLC* v. *Jervis*, 129 A.3d 816, 865-66 (Del. 2015) (citations omitted). That adage applies with particular force when the defendant is a third-party acquirer, like Bain,[1] which was entitled to bargain in its own interests. "[T]he long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism." *Morgan* v. *Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010). Extensive discovery has shown unequivocally that Bain bargained at arm's length and played no role whatsoever in the purported fiduciary breaches Plaintiff asserts, and that the central allegations in the complaint that led to the denial of Bain's motion to dismiss are false.

Plaintiff's primary claim is that HIG, then the controlling stockholder of Surgery Partners, breached its fiduciary duties in connection with a three-part

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[1] "Bain" refers collectively to Defendants Bain Capital Private Equity, LP, Bain Capital Investors, LLC, and BCPE Seminole Holdings LP. "HIG" refers collectively to Defendants H.I.G. Capital, L.L.C., H.I.G. Surgery Centers, LLC, and H.I.G. Bayside Debt & LBO Fund II. Surgery Partners, or the Company, refers to Surgery Partners, Inc. "NSH" refers to National Surgical Healthcare Inc.

transaction agreed to in May 2017, consisting of: (a) HIG's sale of its 55% interest in Surgery Partners to Bain (the "HIG Share Sale"); (b) Surgery Partners' acquisition of a competitor, National Surgical Healthcare (the "NSH Acquisition"), and (c) Surgery Partners' issuance to Bain of convertible preferred stock (the "Preferred Stock Investment") to finance the NSH Acquisition (together, the "Transactions"). Plaintiff's theory is that, in order to obtain the HIG Share Sale on favorable terms, HIG influenced Surgery Partners to enter into the allegedly unfair Preferred Stock Investment through a conflicted and defective process. Plaintiff contends that Bain is liable for aiding and abetting because it supposedly knowingly participated in that compromised process, and overpaid for the HIG Share Sale to incentivize HIG.

There is, however, no evidence whatsoever supporting Plaintiff's conspiracy theory against Bain. Far from satisfying the "stringent standard that turns on proof of scienter" required for an aiding and abetting claim, *FrontFour Capital Group LLC* v. *Taube*, 2019 WL 1313408, at *31 (Del. Ch. Mar. 11, 2019), years of litigation and discovery—including production of more than 150,000 documents and over twenty fact depositions—have shown that Bain bargained at arm's length and had nothing to do with the alleged defects in Surgery Partners' process.

In the fall of 2016 and January 2017, Bain negotiated with HIG to purchase HIG's 55% interest in Surgery Partners for $19 per share. Bain ***separately*** negotiated the Preferred Stock Investment at arm's length with Surgery Partners to

finance the NSH Acquisition. There is no evidence that terms of the HIG Share Sale were ever traded for terms of the Preferred Stock Investment. In fact, the $19 price for the HIG Share Sale was finalized when negotiations on the Preferred Stock Investment were just beginning, and that $19 price never changed. And far from attempting to use the HIG Share Sale as improper leverage to influence the Preferred Stock Investment negotiations, Bain twice told the Company that it would proceed with the Preferred Stock Investment ***without*** the HIG Share Sale.

The market reaction to announcement of the Transactions, including the Preferred Stock Investment, was overwhelmingly positive. Rather than indicating that the Company had been harmed, its stock price ***increased*** by almost 20% and securities analysts uniformly praised the Transactions.

Plaintiff nevertheless argues that Surgery Partners' process for evaluating the Transactions was defective, primarily because the Company did not form a special committee, did not seek minority shareholder approval and did not obtain a fairness opinion. Bain did not participate in those decisions or any other aspect of the Board's process. *See Morrison* v. *Berry*, 2020 WL 2843514, at *11–12 (Del. Ch. June 1, 2020) (dismissing aiding and abetting claim against bidder that partnered with an influential shareholder because "[p]laintiff does not plead any facts suggesting that [bidder] *knew* the Board was breaching its duties and caused or attempted to exploit this breach").

This Court denied Bain's motion to dismiss, finding that the allegations of the Complaint concerning the terms of the Transactions sufficiently "undercut[] the suggestion that the [Preferred Stock Investment] was the product of arm's-length bargaining" to allow Plaintiff to state a "reasonably conceivable" claim. *See Klein* v. *H.I.G. Capital, L.L.C.*, 2018 WL 6719717, at *17 (Del. Ch. Dec. 19, 2018). Discovery has now shown that no such inference can be credited. Moreover, the Court's opinion highlighted Plaintiff's allegation that the Company and Bain had the same counsel—an allegation that has been proven false. *Id.*

This Court has not hesitated—as recently as earlier this year—to grant summary judgment on aiding and abetting claims where factual allegations that defeated a motion to dismiss were not supported by the discovery record. *See, e.g.*, *Cambria Equity Partners L.P.* v. *Relight Enters. S.A.*, 2021 WL 2336984, at *12–16 (Del. Ch. June 8, 2021); *Crescent/Mach I P'ship, L.P.* v. *Turner*, 2005 WL 3618279, at *4 (Del. Ch. Dec. 23, 2005). It should do the same here.[2]

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[2] Bain understands that HIG is also moving for summary judgment. If that motion is granted, then the aiding and abetting claim against Bain also necessarily fails. *Malpiede* v. *Townson*, 780 A.2d 1075, 1096 (Del. 2001). If, however, Plaintiff's claim against HIG proceeds to trial, there is nevertheless no genuine issue of material fact as to the claim against Bain, and we submit that Bain's summary judgment motion should be granted.

STATEMENT OF FACTS

A. The Parties

Nominal Defendant Surgery Partners is a provider of surgical services. (Compl. ¶ 18.) Its common stock is listed on the Nasdaq stock exchange. (*See, e.g.*, Surgery Partners, Inc., Annual Report (Form 10-K) at 1, 45 (Mar. 11, 2016).)

Plaintiff Melvyn Klein is a common stockholder in Surgery Partners. (Ex. 35,[3] Klein Tr. 124:5–7.)

Defendants HIG and Bain are global private equity firms. (*See* Compl. ¶¶ 7, 12.) HIG owned 55% of Surgery Partners' equity from the Company's October 2015 IPO until closing of the Transactions. (*See, e.g.*, Surgery Partners, Inc., Annual Report (Form 10-K) at 41 (Mar. 11, 2016).) During that period of time, the Company's Board consisted of its CEO, certain HIG-appointed representatives, and certain independent directors. (*See, e.g.*, Surgery Partners, Inc., Proxy Statement (Schedule 14A) at 6–7 & n.4, 10 (Mar. 29, 2016); Surgery Partners, Inc., Information Statement (Schedule 14C) at 3, 18 (July 3, 2017).)

B. Surgery Partners Commences a Process to Consider Strategic Alternatives.

In the fall of 2016, Surgery Partners' Board decided to explore potential strategic and financial alternatives, [redacted]

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[3] All exhibits cited herein are attached to the accompanying transmittal declaration of S. Michael Sirkin ("Sirkin Decl."), dated August 9, 2021.

(*See* Ex. 1, SP-00000092, at -92.) To that end, Surgery Partners retained Jefferies LLC ("Jefferies") and Citigroup Global Markets, Inc. ("Citi," and together with Jefferies, the "Financial Advisors"). (*Id.* at -93; *see also* Ex. 31, Feinstein Tr. 38:8–10.) Surgery Partners and the Board also retained Ropes & Gray LLP ("Ropes & Gray") as counsel. (*See* Ex. 1, SP-00000092, at -92; Ex. 29 DeLuca Tr. 55:17–19.)

The Financial Advisors reached out to [redacted] potential suitors. (Ex. 3, SP-00000038, at -39.) Bain—one of the world's leading private equity firms, which had particular experience in the healthcare sector (*see* Ex. 2, Bain_00018766, at -66)—was among the parties approached. (Ex. 3, SP-00000038, at -39.) Bain was also a client of Ropes & Gray in various unrelated matters, as Ropes & Gray disclosed to Surgery Partners. (Ex. 38, Marcellino (Ropes & Gray) Tr. 51:8–54:19.) Bain conducted due diligence on Surgery Partners and was one of [redacted] parties that responded with interest regarding a potential transaction. (Ex. 3, SP-00000038, at -39.)

Bain expressed that interest in an October 28, 2016 letter. (Ex. 2, Bain_00018766.) While Bain [redacted], it was willing to "explor[e] alternative forms of a transaction such as partnering to pursue scale M&A as well as direct purchase of shares from concentrated shareholders." (*Id.* at -68–69.) Bain proposed exploring that opportunity further, "should it be of interest to the Board." (*Id.* at -69)

C. The HIG Share Sale and Preferred Stock Investment Are Negotiated Separately and at Arm's Length.

Bain was interested in a synergistic transaction combining Surgery Partners and NSH, another surgical services provider Bain had been evaluating. (Ex. 7, Bain_000000001, at -01.) Accordingly, on November 12, 2016, Bain proposed to Surgery Partners a three-part transaction through which (1) the Company would acquire NSH (as previously defined, the "NSH Acquisition"); (2) Bain would finance that acquisition, in part, by purchasing preferred stock from the Company (as previously defined, the "Preferred Stock Investment"); and (3) Bain would purchase HIG's controlling stake in Surgery Partners (as previously defined, the "HIG Share Sale," and together with (1) and (2), the "Transactions"). (Ex. 4, Bain_00076637, at -38–39.)

Over the following two months, Bain and the Company together conducted negotiations with, and due diligence of, NSH. Ropes & Gray represented the Company, and Kirkland & Ellis represented Bain. (Ex. 29, DeLuca Tr. 55:17-19; Ex. 32, Gordon Tr. 14:22–15:5; Ex. 38, Marcellino (Ropes & Gray) Tr. 11:25–12:5.) The Company and Bain engaged PricewaterhouseCoopers to conduct diligence of NSH. (Ex. 34, Kaplan Tr. 116:12-18.)

At the same time, Bain and HIG negotiated the terms of the HIG Share Sale. Those discussions involved "a good amount of back-and-forth between Bain and H.I.G in terms of the negotiations of the price." (Ex. 32, Gordon Tr. 126:19–

127:5; *see id.* at 126:9-18; Ex. 27, Chopra (Jefferies) Tr. 193:3–6; Ex. 33, Jackey (Citi) Tr. 212:10–13; Ex. 34, Kaplan Tr. 212:15–18; Ex. 36, Laitala Tr. 261:7–10; Ex. 37, Lozow Tr. 228:21–24; Ex. 39, O'Reilly Tr. 256:24–257:3.) In November 2016, with the parties still unable to agree on a share price, Bain suggested dropping the HIG Share Sale, telling Jefferies that if the Company "wanted to pursue just primary equity to support [NSH] we'd still be interested in that and HIG could just hold and stay on for the ride." (Ex. 5, Bain_00035359, at -59.) Bain's suggestion was ignored, and negotiations proceeded. Bain and HIG's negotiations were hard-fought, with HIG arguing strenuously for $20 or more per share, and Bain refusing to go above $19. (Ex. 37, Lozow Tr. 228:2–13 (HIG "attempted to negotiate a $20-per-share-price," but "Bain communicated that it was tapped out at $19 per share"); Ex. 27, Chopra (Jefferies) Tr. 98:10–23 ("$19 was about as much as Bain was willing to pay"); Ex. 34, Kaplan Tr. 155:4–13 (Bain "wasn't interested in paying $20 per share"); Ex. 39, O'Reilly Tr. 113:4–8.) HIG ultimately agreed to $19 per share, as reflected in a term sheet sent on December 8, 2016. (*Id.*; Ex. 6, Bain_00035321, at -22.) From that day forward, that price never changed—even though, in the next five months until the Transaction agreements were signed, the Company's publicly traded stock price rose from $14.25 to $18.20 per share, making the HIG Share Sale significantly less favorable to HIG. (Ex. 25, O'Reilly Ex. 14, at 2–5.)

After the agreement on the HIG Share Sale, Bain continued separate negotiations with the Company over the Preferred Stock Investment. Each party negotiated vigorously and made concessions on key terms. As Surgery Partners' CEO Michael Doyle explained, "we had some tough negotiations and had some disagreements on strategy … I liked [Bain] as people but we didn't always see eye to eye on the business piece of it. And we had a tough negotiation." (Ex. 30, Doyle Tr. 287:7–20.) For example, in response to the Company's requests, Bain agreed to modify several key terms in the Company's favor: (i) lowering the proposed dividend rate [redacted] (ii) permitting the Company to force conversion of the preferred stock into common stock; and (iii) reducing the stock price at which the Company could force conversion [redacted] (*Compare* Ex. 4, Bain_00076637, at -39, *and* Ex. 6, Bain_00035321, at -23, *and* Ex. 8, Bain_00130907, at -09, *with* Ex. 9, SP-00284351, at -51–52.) Bain also agreed to a perpetual term and a payment-in-kind ("PIK") feature. (*Compare* Ex. 4, Bain_00076637, at -39, *with* Ex. 9, SP-00284351, at -51–52.) These provisions were significant to the Company, [redacted] Surgery Partners "insisted on" these terms [redacted]

(Ex. 27, Chopra (Jefferies) Tr. 189:12–190:6.)

The record unequivocally shows that the HIG Share Sale and the Preferred Stock Investment were each negotiated separately and at arm's length. Indeed, every participant in the discussions who was asked—the Financial Advisors; Company management (including its CEO); the HIG principals involved in negotiating the HIG Share Sale; and the Bain principals involved in negotiating the Transactions—testified that the HIG Share Sale and the Preferred Stock Investment were negotiated separately and at arm's length.[4]

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[4] Ex. 33, Jackey (Citi) Tr. 212:14–17 (Financial Advisor) (Preferred Stock Investment negotiated at arm's length); *id.* at 212:10–13 (same for HIG Share Sale); *id.* at 213:6–20 (HIG principals did not participate in Preferred Stock Investment negotiations nor "ever attempt to influence the terms of the preferred stock"); Ex. 27, Chopra (Jefferies) Tr. 188:6–9, 189:12–190:10 (Financial Advisor) (Preferred Stock Investment negotiations were "back-and-forth and arm's length"); *id.* at 193:3–6 (same for HIG Share Sale); Ex. 30, Doyle Tr. 288:15–24, 308:17–309:8 (Company's CEO) ("we conducted the negotiation [of the preferred stock] at an arm's length" and "[t]here was give-and-take"); *id.* at 298:20–24, 299:4–14, 300:4–7 (HIG negotiated the HIG Share Sale with Bain, and HIG did not "try to pressure or influence the company as to what terms it should agree to for the preferred stock issuance"); Ex. 40, Sparks Tr. 150:3–16 (Company's CFO) (Preferred Stock Investment negotiations were "certainly arm's length"); *id.* at 149:14–22 (HIG Share Sale was solely "a negotiation between H.I.G. and Bain"); Ex. 36, Laitala Tr. 260:16–261:6 (HIG principal) (not involved in negotiation of the Preferred Stock Investment, and not aware "of anyone ever linking" the HIG Share Sale and Preferred Stock Investment terms); *id.* at 261:7–10 (HIG Share Sale "negotiated at arm's length"); Ex. 37, Lozow Tr. 226:19–21, 232:5–8, 235:15–236:3 (HIG principal) (not involved in negotiation of the Preferred Stock Investment, and not aware of anyone at HIG being so involved); *id.* at 228:21–24 ("interactions over the H.I.G. share sale" were "arm's length"); Ex. 39, O'Reilly Tr. 151:1–4, 256:12–15, 256:20–23 (Bain principal) (no discussions with HIG over the Preferred Stock Investment, and no knowledge of "anyone at H.I.G. ever attempt[ing] to influence the terms of the preferred share issuance"); *id.* at 256:24–257:3 (HIG Share Sale was "the result of arm's

Bain, HIG and the Company executed a non-binding term sheet reflecting the agreed-upon terms of the Transactions on January 24, 2017. (*See* Ex. 9, SP-00284351.)

D. Bain Excludes the HIG Share Sale from the Transactions in Early February.

Shortly after execution of the January 24 term sheet, Bain learned that Surgery Partners' "near-term performance was … below expectations" and that the Company "would miss its forecast for Q4 2016." (Ex. 34, Kaplan Tr. 173:21–174:8, 176:9–17.) As a result, Bain was unwilling to proceed with the HIG Share Sale at $19 per share. (*Id.* at 176:1–17.) Bain sent a February 1 letter to the Company communicating that position. (Ex. 10, SP-00000204, at -04.)

Bain's February 1 letter explained that, notwithstanding its withdrawal from the HIG Share Sale, Bain still "remain[ed] enthusiastic about providing preferred equity financing" for the NSH Acquisition. (*Id.* at -05.) Bain believed this would "de-lever the Company" from its "current [high] leverage levels," be

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length negotiations"); Ex. 32, Gordon Tr. 127:15–22 (Bain principal) (Preferred Stock Investment negotiations occurred between Bain and the Company "at arm's length"); *id.* at 126:9–127:2 (HIG Share Sale negotiations were "at arm's length," and "there was a good amount of back-and-forth" between HIG and Bain); *id.* at 128:2–10 (unaware of HIG attempting to influence the Preferred Stock Investment); Ex. 34, Kaplan Tr. 213:19–22 (Bain principal) (Preferred Stock Investment was "negotiated at arm's length between Surgery Partners and Bain"); *id.* at 212:15–18 (Bain's "agreement to purchase H.I.G.'s common shares" was "the result of arm's length negotiations"); *id.* at 213:3–6, 213:11–14 (HIG not involved in negotiations of the Preferred Stock Investment).

"accretive to earnings," and thereby "further the Board's goal of maximizing value for all of the Company's shareholders." (*Id.* at -04.) Bain also believed that the Preferred Stock Investment would "increas[e] investor confidence in the Company" as a result of "Bain Capital's public announcement of an investment in Surgery Partners." (*Id.*) Bain therefore proposed proceeding with the NSH Acquisition and the Preferred Stock Investment "on the same terms as when all three parts of the originally proposed transaction had been contemplated," while walking away from the HIG Share Sale. (Ex. 11, SP-00000070, at -71.)

Bain's formal proposal—made for the second time, *see supra*—to exclude the HIG Share Sale from the Transactions belies any notion that Bain was somehow using the HIG Share Sale to gain an improper benefit through the Preferred Stock Investment. Had Bain sought to induce HIG to assert leverage over the Board to sway the Preferred Stock Investment terms, it would not have altogether abandoned the HIG Share Sale—its supposed means of influencing HIG.

Doyle responded simply by acknowledging receipt of Bain's letter and expressing disappointment. (Ex. 12, Bain_00036296.) Bain was then advised that the Board had decided to reject its proposal and discontinue discussions. (*See* Ex. 13, Bain_00101686.) Bain, of course, was not involved in that decision. (*See* Ex. 30, Doyle Tr. 290:15–17; 293:8–12.) Negotiations then ended.

E. Bain Reassesses the Transactions in Late April and Early May.

Bain's focus returned to a possible transaction in late April when it learned from NSH's financial advisor that NSH was close to being sold to another buyer but the deal might fall through, leaving an opportunity to purchase NSH if a deal could be done quickly. Without Bain, Surgery Partners had not been able to pursue an acquisition of NSH. (*See* Ex. 18, SP-00000078, at -79.) NSH had, however, been pursuing its own options, and by late April 2017, [redacted] (*See* Ex. 14, Bain_00019275; Ex. 15, Bain_00036509; Ex. 16, Bain_00066989, at -89; Ex. 30, Doyle Tr. 66:18–67:17; Ex. 34, Kaplan Tr. 49:13–24.)

At the same time, Bain was reassessing the Transactions because Surgery Partners' Q4 2016 earnings miss "did not lead to the challenges that" Bain had previously "believed were to occur." (Ex. 34, Kaplan Tr. 184:15–185:4; *see also* Ex. 39, O'Reilly Tr. 215:11–216:5.) Indeed, in April, Surgery Partners' stock had even traded above the $19 price for the HIG Share Sale. (Ex. 25, O'Reilly Ex. 14, at 4.) Bain was therefore willing to proceed with all three Transactions as originally negotiated.

On May 2, Bain wrote to the Surgery Partners Board proposing to proceed with all three Transactions on the terms in the January 24, 2017 term sheet. (Ex. 17, Bain_00019277.) Bain's letter described how the NSH Acquisition would

be "a unique and transformative opportunity to create additional value for all shareholders." (*Id.* at -77.) Bain proposed "immediate negotiations with Surgery Partners and HIG with respect to definitive documentation for" the Transactions, noting that, given Bain's extensive past work in assessing the Transactions, it had already "materially completed [its] commercial, legal, and accounting due diligence on Surgery Partners." (*Id.* at -77–78.) Bain concluded: "We are ready to move as expeditiously as possible to achieve an exceptionally accelerated path forward and are prepared to devote the full resources of our firm and our advisors to meet any reasonable timeline set forth by the Board." (*Id.* at -78.)

Bain's proposal to conclude the Transactions immediately was crucial, because NSH gave Surgery Partners just one week to finalize any acquisition, failing which NSH would sign another deal. (*See* Ex. 30, Doyle Tr. 66:18–67:17, 317:24–318:11.) The Company, HIG, and Bain proceeded to finalize the Transactions—based on the terms agreed upon in January 2017—in that week. (Ex. 18, SP-00000078, at -79.)

On May 9, the Board met to approve the Transactions. (*See* Ex. 21, SP-00000027, at -36.) The Transaction documents were executed the same day. (*See* Ex. 23, Surgery Partners, Inc., Report of Unscheduled Material Events or Corporate Event (Form 8-K) (May 11, 2017).)

F. Surgery Partners Announces the Transactions.

On May 10, before the market opened, the Company announced the Transactions and hosted a conference call with Wall Street analysts. (*See* Ex. 22, Bain_00037120.) The Company noted, among other things, that the NSH Acquisition was "structured in a leverage-neutral manner," including through an "approximate $300 million convertible preferred note[] from Bain" which "has a five-year term," "[r]oughly a … 10% coupon" and "converts at … $19 stock price." (*Id.* at -24, -31.) Surgery Partners' stock price increased 15.1% that day, closing at $20.95 per share. (Ex. 25, O'Reilly Ex. 14, at 5.)

On May 11, before the market opened, the Company disclosed further details of the Transactions, including the full Preferred Stock Investment agreement. (*See* Ex. 23, Surgery Partners, Inc., Report of Unscheduled Material Events or Corporate Event (Form 8-K) (May 11, 2017).) Surgery Partners' stock price increased another 4.8% that day to close at $21.95. (Ex. 25, O'Reilly Ex. 14, at 5.)

Surgery Partners' stock price increased by approximately 20% over these two days even though its Q1 2017 earnings—released after the market close on May 9—were below the consensus forecasts of equity analysts. (*See* Ex. 49, Bain_00027787, at -87; Ex. 48, SP-00089496, at -96; Ex. 43, Bain_00019334, at -35.) Indeed, some analysts cut their 2017 and 2018 estimates for the Company

based on the earnings announcement. (*See, e.g.*, Ex. 42, HIG_0007110, at -10; Ex. 47, SP-00089496, at -96.)

In total, ten equity analysts issued more than thirty reports discussing the Transactions. (*See* Sirkin Decl. n.1; *e.g.*, Exs. 42–49.) Not a single analyst commented negatively on the Preferred Stock Investment. (Ex. 26, Canessa Tr. 78:16–79:12.) Not a single institutional investor complained about the Preferred Stock Investment. (*Id.* at 89:4–17.) Equity analysts instead praised the Transactions, emphasizing, for instance, that "Bain Capital's participation brings a new, healthcare-savvy partner" (Ex. 46, SP-00048637, at -37) and "a sophisticated [healthcare] investor to help drive further growth" (Ex. 44, SP-00089483, at -83); that Surgery Partners "was wise in structuring the deal to be leverage neutral" and the Transactions would "actually help[] reduce consolidated leverage over time" (Ex. 46, SP-00048637, at -39; Ex. 42, HIG_0007110, at -10; *see also* Ex. 47, SP-00089490); that Bain's purchase would reduce the overhang on the stock price from HIG's ownership (Ex. 42, HIG_0007110, at -10; Ex. 46, SP-00048637, at -37); and even that "we are pleased and surprised that the company could pull off this deal in light of both its capital structure and the ASC [ambulatory surgery center] scarcity value" (Ex. 45, SP-00054329, at -29). Even Plaintiff's damages expert conceded these were advantages of the Transactions. (Ex. 26, Canessa Tr. 98:22–100:23, 537:5–22, 678:17–680:18, 676:6–678:12.)

The Transactions closed on August 31, 2017. (*See* Ex. 24, JEFF000125575, at -75.)

G. This Litigation

Plaintiff did not seek to enjoin the Transactions before they closed. Instead, Plaintiff waited several months to file a complaint asserting direct and derivative claims against HIG and Bain for alleged breaches of fiduciary duty and aiding and abetting. (Compl. ¶¶ 68–81, 86–98.) Plaintiff alleged that Bain was a "de facto controller" even before the Transactions closed and thus directly liable for breaches of fiduciary duty along with HIG (*id.* ¶¶ 2, 27–32), and that Bain was further liable for aiding and abetting those breaches (*id.* ¶¶ 76–81). All Defendants moved to dismiss.

In December 2018, the Court granted in part and denied in part Defendants' motions, allowing only two claims to survive. *See Klein*, 2018 WL 6719717, at *1. The Court dismissed Plaintiff's direct claims as "exclusively derivative." *Id.* at *5–6, *9 & n.82. The Court also dismissed Plaintiff's derivative breach of fiduciary duty claim asserting that Bain was liable as a controller, noting that "[t]o say that [this claim] is novel is an understatement." *Id.* at *13.

The Court denied HIG's motion to dismiss the derivative claim against it for breach of fiduciary duty. In view of the benefits it received through the HIG Share Sale, the Court found that the claim against HIG was subject to entire fairness

review. *Id.* at *14–15. Further, Plaintiff's allegations about defective process combined with allegations about the price of the Preferred Stock Investment were sufficient to allow the fiduciary duty claim to proceed. *Id.* at *16.

Taking the bare allegations of the Complaint as true, as required on a motion to dismiss, the Court pointed to the same process allegations as "support[ing] a reasonable inference that Bain may have knowingly exploited HIG's conflict to its advantage" through the Transactions. *Id.* at *17. The discovery record has now shown that none of Plaintiff's allegations supports a claim against Bain. The Court's brief discussion of the claim against Bain focused on five allegations:

First, Plaintiff alleged that "the Board did not utilize a special committee to exclude HIG's representative on the Board (Lozow) from participating in the negotiations concerning the [Preferred Stock] despite the conflict that transaction presented to HIG with respect to selling its control position to Bain." *Id.* However, it is now indisputable that Bain had no insight into the Board's efforts to manage conflicts and no involvement in the decision whether to form a special committee. (*E.g.*, Ex. 29, DeLuca Tr. 139:20–23; Ex. 39, O'Reilly Tr. 55:7–11; Ex. 27, Chopra (Jefferies) Tr. 189:4–7; Ex. 28, Cole Tr. 251:8–12; Ex. 30, Doyle Tr. 292:1–4; Ex. 31, Feinstein Tr. 147:14–18; Ex. 33, Jackey (Citi) Tr. 214:14–17; Ex. 37, Lozow Tr. 230:2–13; Ex. 40, Sparks Tr. 151:23–152:3; Ex. 41, Turner Tr. 184:15–20.) Bain was also uninvolved in the decision whether to recuse HIG's

representatives from voting on any aspect of the Transactions. (*See, e.g.*, Ex. 30, Doyle Tr. 290:15–17, 293:8–12.) Indeed, Bain did not even know which directors had voted on the Transactions. (*See, e.g.*, Ex. 37, Lozow Tr. 231:19–232:2.)

Second, Plaintiff alleged that "no stockholder other than HIG would have any say in approving any of the Transactions." *Klein*, 2018 WL 6719717, at *17. There is again no evidence that Bain was involved in the Board's decision-making as to whether to require a vote of other Company stockholders. (*See* Ex. 30, Doyle Tr. 292:10–24; Ex. 31, Feinstein Tr. 147:24–148:3; Ex. 32, Gordon Tr. 75:11–18; Ex. 33, Jackey (Citi) Tr. 214:18–22; Ex. 34, Kaplan Tr. 167:23–168:2; Ex. 37, Lozow Tr. 230:7–13; Ex. 40, Sparks Tr. 152:4–8; Ex. 41, Turner Tr. 185:2–6.) Plaintiff has relied on term sheets from Bain stating that the "Preferred Stock will [be] structured such that the issuance ***can be done*** without prior shareholder approval" (Ex. 4, Bain_00076637, at -39 (emphasis added)), or that "***[t]o the extent necessary to comply with Nasdaq listing rules***, HIG will approve the issuance of the Preferred Stock by executing a shareholder written consent" (Ex. 9, SP-00284351, at -52 (emphasis added)). But there is nothing unusual about such provisions, which give the parties a measure of deal certainty, reduce transaction costs and improve deal pricing. Critically, nothing Bain did prevented the Board from insisting upon seeking minority stockholder approval of the Preferred Stock Investment. And there is no evidence that anyone at the Company ever discussed these provisions with Bain

or that anyone ever told Bain these provisions could somehow undermine or jeopardize the proper approval of the Transactions.

Third, Plaintiff alleged that "the Company's financial advisor would not provide a fairness opinion concerning the consideration paid for the Preferred Stock." *Klein*, 2018 WL 6719717, at *17. Again, there is no evidence that Bain had any involvement in that decision. (*See, e.g.*, Ex. 28, Cole Tr. 251:19–22; Ex. 29, DeLuca Tr. 139:24–140:3; Ex. 37, Lozow Tr. 230:21–25; Ex. 41, Turner Tr. 184:21–25.) When the agreements were executed, Bain did not even know whether the Company had obtained a fairness opinion. (Ex. 39, O'Reilly Tr. 254:11–22.)

Fourth, Plaintiff alleged that "Bain used the same counsel … as the Company during the negotiations." *Klein,* 2018 WL 6719717, at *17. But the record is now clear that Bain was represented exclusively by Kirkland & Ellis, and the Company was represented exclusively by Ropes & Gray. (*E.g.*, Ex. 32, Gordon Tr. 14:22–15:6; Ex. 38, Marcellino (Ropes & Gray) Tr. 11:25–12:5 ("Q. Did any attorney at Ropes & Gray represent Bain or any of its subsidiaries or employees in any part of this multipart transaction? A. No.").) And Bain had no involvement in the Board's decision to engage Ropes & Gray. (Ex. 28, Cole Tr. 251:4–7; Ex. 29, DeLuca Tr. 139:15–19; Ex. 31, Feinstein Tr. 147:4–8; Ex. 33, Jackey (Citi) Tr. 215:8–11; Ex. 37, Lozow Tr. 229:11–16.) Although one Ropes & Gray marketing document suggested that the firm also represented Bain in the Transactions, that was

a mistake made by Ropes & Gray after the fact. (Ex. 38, Marcellino (Ropes & Gray) Tr. 95:3–7.) When confronted with these facts, Plaintiff's fallback argument was that in early August—months ***after*** the Transactions were agreed—Bain offered Ropes & Gray the opportunity (which it accepted) to co-invest in the Transactions as part of a standard arrangement between the firms. (*Id.* at 66:2–67:18, 119:11–16.) But Ropes & Gray had "no expectation" that it would be given that opportunity while the Transactions were being negotiated. (*Id.* at 119:21–22.) And no evidence suggests that Ropes & Gray ever caused any aspect of the Transactions to be slanted in Bain's interests, much less that Bain was somehow involved in any such effort.

Fifth, Plaintiff alleged that Bain also "used the same … accounting advisor as the Company during the negotiations" of all of the Transactions. *Klein*, 2018 WL 6719717, at *17. But Bain and the Company both used PricewaterhouseCoopers as an accounting advisor only for the purpose of conducting their joint diligence on NSH. (Ex. 34, Kaplan Tr. 116:12–18.)

In sum, discovery caused the alleged factual bases for Plaintiff's aiding and abetting claim against Bain to collapse.

ARGUMENT

Summary judgment is appropriate if there is "no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). Although the moving party has the initial burden to show that there

are no genuine issues of material fact, the burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Ct. Ch. R. 56(e); *see Paul* v. *Deloitte & Touche LLP*, 974 A.2d 140, 145 (Del. 2009). To do so, a plaintiff "must make a showing sufficient to establish the existence of every element essential to its case on which it will bear the burden of proof at trial." *Norman* v. *Paco Pharm. Servs., Inc.*, 1992 WL 301362, at *5 (Del. Ch. Oct. 21, 1992) (citing *Burkhart* v. *Davies*, 602 A.2d 56, 59 (Del. 1991)), *aff'd*, 625 A.2d 279 (Del. 1993). As the Delaware Supreme Court stated in *Burkhart* v. *Davies*:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

602 A.2d 56, 59 (Del. 1991) (quoting *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322–23 (1986)).

Here, Plaintiff bears the burden of proving the elements of his aiding and abetting claim against Bain. *In re Rural Metro Corp.*, 88 A.3d 54, 84–85 (Del. Ch. 2014), *decision clarified on denial of reargument sub nom. In re Rural Metro Corp. S'holders Litig.*, 2014 WL 1094173 (Del. Ch. Mar. 19, 2014). Plaintiff must prove (1) the existence of a fiduciary relationship; (2) a breach of fiduciary duty; (3)

Bain's knowing participation in that breach; and (4) damages proximately caused by the breach. *Malpiede*, 780 A.2d at 1096. Because Plaintiff cannot establish that Bain knowingly participated in any alleged fiduciary breach, Bain is entitled to summary judgment (although Plaintiff's claim also fails for multiple other reasons).

I. Bain Did Not Knowingly Participate in Any Alleged Breach of Fiduciary Duty.

"Knowing participation in a [fiduciary's] breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Malpiede*, 780 A.2d at 1097. This is a "stringent standard that turns on proof of scienter." *FrontFour*, 2019 WL 1313408, at *31 (alteration and citation omitted). It requires that the third party: (a) tortiously act in concert with a fiduciary or pursuant to a common design with him, or (b) know that the fiduciary's conduct constitutes a breach of duty and give substantial assistance or encouragement to that conduct. *Id.* at *31 (citing *Restatement (Second) of Torts* § 876(b)). There is no evidence of such wrongdoing here.

As emphasized in *Cambria*:

> [T]he Court can grant an alleged aider and abettor's motion for summary judgment where the nonmovant has failed to offer evidence that the defendant participated in the fiduciary's decisions, conspired with the fiduciary, or otherwise caused the fiduciary to make the decisions at issue, and therefore there are no facts in the record that would allow the Court to hold the defendants as knowledgeable participants.

2021 WL 2336984, at *13 (alterations and citations omitted); *see also Crescent*, 2005 WL 3618279, at *4 (granting acquirers' motion for summary judgment where "[t]here are no facts in the record that would allow the Court to hold [the acquirers] as knowledgeable participants"). That is precisely the situation here.

As discussed below, the undisputed facts show that: (a) the negotiations between Bain and Surgery Partners concerning the Preferred Stock Investment were conducted at arm's-length and therefore cannot have been wrongful; and (b) Bain had no involvement in or influence over any of the purported process shortcomings that form the basis of Plaintiff's case.

A. The Negotiations Were Conducted at Arm's Length and Thus Cannot Give Rise to Aiding and Abetting Liability.

"[T]he long-standing rule that arm's length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism." *Morgan*, 2010 WL 2803746, at *8. A transactional counterparty has "the right to secure for itself a favorable deal, even if [it] knew its offer was inferior" to other options. *Jacobs* v. *Meghji*, 2020 WL 5951410, at *12 (Del. Ch. Oct. 8, 2020) (citation omitted); *see id.* ("To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to

operate in tandem." (citation omitted)); *Malpiede*, 780 A.2d at 1097 ("[A] bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting … ."); *Ryan* v. *Lyondell Chem. Co.*, 2008 WL 2923427, at *21 (Del. Ch. July 29, 2008) ("A hard bargain … cannot suffice to establish an aiding and abetting claim where the parties negotiated at arm's-length."), *rev'd as to other issues*, 970 A.2d 235 (Del. 2009). As the *Cambria* court recently explained:

> [A] third-party bidder who negotiates at arms' length rarely faces a viable claim for aiding and abetting. This Court adheres to the long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting. A bidder has the right to work in its own interests to maximize its value, and the plaintiff faces a high burden when asserting an aiding and abetting claim against a transactional counterparty.

2021 WL 2336984, at *12–13 (citations and internal quotation marks omitted).

Delaware courts have therefore routinely granted motions for summary judgment on aiding and abetting claims where the defendant transacted at arm's length. *See, e.g.*, *id.* at *16–17 (granting summary judgment to transactional counterparty); *Lyondell*, 2008 WL 2923427, at *21–22 (granting summary judgment for acquirers because "[t]here is no evidence in the record to support an inference that the parties to this transaction did not deal with each other at arm's-length"); *Tomczak* v. *Morton Thiokol, Inc.*, 1990 WL 42607, at *16 (Del. Ch. Apr. 5, 1990)

(granting summary judgment for acquirer that "simply pursue[d] arm's-length negotiations ... to obtain [an asset] at the best price that it could," even though its actions "certainly had the effect of putting economic pressure" on its counterparty).

Here, the undisputed facts show that Bain and the Company engaged in arm's length negotiations on the terms of the Preferred Stock Investment. (*See supra* pp. 9–10 & n.4.) The Company bargained vigorously and extracted significant concessions across the range of material terms of the Preferred Stock Investment: Bain agreed to a 50% PIK feature, a lower dividend rate, a perpetual term, a feature that allowed the Company to force conversion, and reductions in the price at which the Company could force conversion. (*See supra* p. 9.) Each of these terms was requested by the Company, was beneficial to the Company, and was the product of robust negotiations between Bain and the Company. (*See supra* pp. 9–10.)

Every witness who was asked testified that the negotiations over the HIG Share Sale and those concerning the Preferred Stock Investment were kept completely separate. For example, Doyle testified that HIG had no "input" and "no conversations or negotiation power in that [preferred stock] process." (Ex. 30, Doyle Tr. 49:2–11.) His testimony was corroborated by the Company's financial advisors (*see* Ex. 33, Jackey (Citi) Tr. 213:6–9), by Bain's negotiators (*see* Ex. 34, Kaplan Tr. 213:3–6; Ex. 39, O'Reilly Tr. 151:1–4, 256:12–15; Ex. 32, Gordon Tr. 127:23–128:1), and by HIG's (*see* Ex. 36, Laitala Tr. 194:18–22, 260:20–23; Ex. 37, Lozow

Tr. 226:19–21, 232:3–8, 235:15–24). These same witnesses testified that they were unaware of HIG ever attempting to "pressure or influence" the Company as to the terms of the Preferred Stock Investment, much less that Bain was somehow aware of any such pressure or influence. (*See* Ex. 30, Doyle Tr. 299:10–14; *see also* Ex. 33, Jackey (Citi) Tr. 213:16–20; Ex. 36, Laitala Tr. 260:24–261:6; Ex. 34, Kaplan Tr. 213:11–14; Ex. 39, O'Reilly Tr. 256:20–23.)

Indeed, rather than attempting to use the HIG Share Sale as leverage to influence the Preferred Stock Investment terms, Bain twice told the Company—both in November 2016 and February 2017—that it was willing to proceed ***without*** purchasing HIG's shares at all, while continuing negotiations over the Preferred Stock Investment. On the latter occasion, Bain even formally proposed excluding the HIG Share Sale from the Transactions in a letter to the Company's Board (Ex. 10, SP-00000204, at -04), and negotiations then ceased entirely. These facts cannot be reconciled with Plaintiff's claim that Bain was somehow corruptly using the HIG Share Sale to create or exploit conflicts of interest that could influence the Preferred Stock Investment terms.

Discussions between Bain and the Company only restarted in May 2017, when NSH gave the Company just one week "to get the deal done." (*See supra* pp. 13–14; Ex. 30, Doyle Tr. 66:18–67:17, 317:24–318:13.) Bain—a healthcare-savvy investor that had already conducted diligence of both companies,

had agreed to an earlier term sheet with the Company to provide hundreds of millions of dollars to fund the NSH Acquisition, and had the resources to quickly provide that funding—was uniquely positioned to meet NSH's deadline and offered to proceed on the same terms previously agreed. (Ex. 17, Bain_00019277, at -77; *see supra* pp. 13–14.) Bain and the Company quickly concluded the NSH Acquisition and the Preferred Stock Investment on those terms. There was nothing wrongful about that—to the contrary, as the market and equity analysts immediately recognized, the Transactions were hugely beneficial to the Company.

In sum, Bain's negotiations with the Company (and HIG) reflect precisely the type of "intensive arm's-length bargaining between the parties with demands made and concessions granted on both sides" that precludes aiding and abetting liability. *See Repairman's Serv. Corp.* v. *Nat'l Intergroup, Inc.*, 1985 WL 11540, at *9 (Del. Ch. Mar. 15, 1985).

B. Bain Had No Involvement in Any of the Purported Process Deficiencies That Form the Basis of Plaintiff's Case.

The aiding and abetting claim should also be dismissed because discovery has overwhelmingly demonstrated that Bain did not knowingly participate in any of the actions or omissions that are alleged to have been breaches of fiduciary duty. Plaintiff's case against HIG is predicated on allegations that a defective and conflicted process for the Company's consideration and approval of the Transactions gave rise to breaches of fiduciary duty. *Klein*, 2018 WL 6719717, at *1. And as

discussed above (*supra* pp. 18–21), the Court only denied Bain's motion to dismiss the aiding and abetting claim because Plaintiff alleged that Bain "may have knowingly exploited" HIG's purported conflict through involvement in those process deficiencies. *Klein*, 2018 WL 6719717, at *17. But discovery has conclusively shown that Bain had nothing to do with any of those alleged deficiencies, much less knowingly participated in them:

(i) Bain was not involved in the Board's decision whether to form a Special Committee, or whether HIG's directors should recuse themselves from Board votes. (*See supra* pp. 18–19.)

(ii) Bain was not involved in the Board's decision whether to require a vote of other Company shareholders. (*See supra* pp. 18–20.)

(iii) Bain was not involved in the Board's decision whether to obtain a fairness opinion. (*See supra* p. 20.)

(iv) Plaintiff's allegation that Bain and the Company were represented by the same counsel was wrong. Bain was represented by Kirkland & Ellis, and the Company was represented by Ropes & Gray. (*See supra* pp. 20–21.)

(v) Plaintiff's allegation that Bain and the Company used the same accounting advisor in connection with all of the Transactions was wrong. (*See supra* p. 21.)

Indeed, the evidence universally shows that Bain did not attend Surgery Partners' Board meetings, direct its Board members on how to act, or provide them with any advice or guidance. As CEO Doyle testified: "Q. And did anyone associated with Bain attend any board meetings before the transactions closed? A. Not that I recall. No."; "Q. Do you recall having any discussions with Bain about the Surgery Partners board's process for approving the transactions? A. No, I don't recall any specifics around. That would be a board discussion." (Ex. 30, Doyle Tr. 290:15–17, 293:8–12.) The evidence also universally shows that Bain never encouraged HIG to influence the Board's decisions and did not even know whether HIG was doing so.

Bain's complete lack of involvement in the alleged process deficiencies is also fatal to Plaintiff's theory that Bain somehow acted wrongfully by cross-conditioning the HIG Share Sale and Preferred Stock Investment, thereby supposedly incentivizing HIG to provide better terms to Bain on the Preferred Stock Investment. There is no evidence whatsoever supporting that theory—no witness testified that Bain cross-conditioned the Transactions for this reason, no document shows that, and the evidence clearly shows that the Transactions were negotiated separately. And the mere fact that Bain proposed a transaction structure in which HIG may be interested cannot give rise to liability: "Absent specific facts supporting an inference of knowing participation in a breach, allegations that an investor merely

participated alongside a known controller are insufficient to subject the investor to liability." *Jacobs*, 2020 WL 5951410, at *1. In *Jacobs*, for example, the defendant proposed that the company's controlling stockholder co-invest in preferred stock to be issued by the company, meaning that the controlling stockholder would also obtain benefits from the transaction. *See id.* at *2–3, *11. The court nevertheless dismissed aiding and abetting claims, because there was no indication that the defendant knew the controlling stockholder "wrongfully orchestrated and infected [the company's] transaction process such that [the defendant] would know the [company's directors] were breaching their duties." *Id.* at *11.

As *Jacobs* illustrates, there are many common arrangements between bidders and company insiders that are completely permissible under Delaware law, unless the bidder acts with scienter and knows it is participating in a breach of fiduciary duty. *See, e.g., id.*; *Morrison*, 2020 WL 2843514, at *11–12 (dismissing aiding and abetting claim against bidder that partnered with a large shareholder with allegedly significant influence over Board processes, because "[p]laintiff does not plead any facts suggesting that [bidder] *knew* the Board was breaching its duties and caused or attempted to exploit this breach"); *Cambria*, 2021 WL 2336984, at *15–16 (granting summary judgment on aiding and abetting claim against acquirer that negotiated directly with controlling stockholder because "[p]laintiffs have offered no evidence to suggest that [acquirer] knew or should have known that [stockholder]

was breaching its duties"); *In re Hansen Med., Inc. S'holders Litig.*, 2018 WL 3025525, at *12 (Del. Ch. June 18, 2018) (dismissing aiding and abetting claim against acquirer that "negotiated a not-uncommon agreement to reduce its cash outlay by having the major investors in [target company] rollover their stock" and also "negotiated directly with the Key Stockholders"); *van der Fluit* v. *Yates*, 2017 WL 5953514, at *6, *12 (Del. Ch. Nov. 30, 2017) (dismissing aiding and abetting claim against acquirer that offered post-closing employment and options rollover to the target's 30% owners, because that did not establish "knowing participation by [acquirer] in an alleged breach of fiduciary duty by [target's] board"); *Frank* v. *Elgamal*, 2012 WL 1096090, at *12 (Del. Ch. Mar. 30, 2012) (dismissing aiding and abetting claim against purchasers that allowed a control group to roll over their stock into post-closing company while minority stockholders were cashed out, despite purchasers' understanding that the control group and minority stockholders were competing for the same consideration, because there was no suggestion "that the [purchasers] attempted to exploit that competition.").

Here, too, Bain's complete lack of involvement in any of the purportedly defective processes for the Company's review and approval of the Transactions is singularly fatal to Plaintiff's aiding and abetting claim. *See Malpiede*, 780 A.2d at 1098 (affirming dismissal of aiding and abetting claim where there was no allegation that defendant "participated in the board's decisions,

conspired with [the] board, or otherwise caused the board to make the decisions at issue"); *Morgan*, 2010 WL 2803746, at *7 (dismissing aiding and abetting claim because plaintiff has "not pled any facts showing that [defendant] actually attempted to exploit the … board's alleged conflicts"); *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *10 (Del. Ch. Oct. 27, 2020) (dismissing claim against bidder that was not "privy to the internal process of the [target's] board or [to have] conspired with anyone who was" because it "was not in a position to taint the Board's internal deliberations"); *Ryan*, 2008 WL 2923427, at *21–22 (granting summary judgment in part because there was "no evidence to suggest that [defendant's] representatives participated in [the target's] board meetings or that [defendant] otherwise injected itself into the Board's process of approving the [defendant's] Proposal").

After years of litigation, the production of more than 150,000 documents, two dozen depositions, and broad non-party discovery—Plaintiff has not found a single document or witness to support his claim against Bain. Indeed, the confidential material that has been exchanged in discovery only undermines Plaintiff's case. For example, nothing in Bain's 48-page presentation for its Investment Committee—the most complete and comprehensive summary document explaining Bain's rationale for the Transactions and seeking approval for them—even remotely suggests that Bain believed it was obtaining some sort of improper

benefit on the Preferred Stock Investment. (Ex. 19, Bain_00019769.) No notes of the meeting even remotely suggest that either. (Ex. 20, Bain_00000333.) In fact, the notes show that—far from Bain believing that it was securing some sort of special advantage—two of the seven Investment Committee members voted ***against*** the deal on its merits. (*See id.*) Summary judgment cannot be defeated by theories or speculation. Plaintiff must "set forth specific facts showing that there is a genuine issue for trial" as to Bain's knowing participation. Ct. Ch. R. 56(e); *Burkhart*, 602 A.2d at 59. He cannot do so.

CONCLUSION

For the foregoing reasons, Bain's motion for summary judgment should be granted.

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Dated: August 9, 2021

PUBLIC VERSION FILED:
August 16, 2021

CERTIFICATE OF SERVICE

I, S. Michael Sirkin, hereby certify that on August 16, 2021, I caused a true and correct copy of the foregoing *PUBLIC VERSION of The Bain Defendants' Opening Brief in Support of Their Motion For Summary Judgment* to be served through File & Serve*Xpress* on the following counsel of record:

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