SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DARWIN DEASON,

Plaintiff,

- against -

FUJIFILM HOLDINGS CORP., XEROX CORP., JEFF JACOBSON, GREGORY Q. BROWN, JOSEPH J. ECHEVARRIA, WILLIAM CURT HUNTER, ROBERT J. KEEGAN, CHERYL GORDON KRONGARD, CHARLES PRINCE, ANN N. REESE, STEPHEN H. RUSCKOWSKI, SARA MARTINEZ TUCKER, and URSULA M. BURNS,

Defendants.

Index No. 650675/2018

(Ostrager, J.)

DARWIN DEASON,

Plaintiff,

- against -

XEROX CORP., JEFF JACOBSON, GREGORY Q. BROWN, JOSEPH J. ECHEVARRIA, WILLIAM CURT HUNTER, ROBERT J. KEEGAN, CHERYL GORDON KRONGARD, CHARLES PRINCE, ANN N. REESE, STEPHEN H. RUSCKOWSKI, and SARA MARTINEZ TUCKER,

Defendants.

Index No. 650988/2018

(Ostrager, J.)

Motion Sequence No. ___

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Defendants Xerox Corporation ("Xerox" or the "Company"), Jeff Jacobson, Gregory Q. Brown, Joseph J. Echevarria, William Curt Hunter, Robert J. Keegan, Cheryl Gordon Krongard, Charles Prince, Ann N. Reese, Stephen H. Rusckowski, Sara Martinez Tucker, and Ursula M. Burns[1] ("Director Defendants") (collectively, together with Xerox, the "Xerox Defendants"), respectfully submit this memorandum of law for an order, pursuant to CPLR 3211(a)(7), dismissing in their entirety the complaints of Plaintiff Darwin Deason in the consolidated actions of *Deason* v. *FUJIFILM Holds. Corp. et al.*, Index No. 650675/2018, filed on February 13, 2018 ("*Deason I*") and *Deason* v. *Xerox Corp. et al.*, Index No. 650988/2018, filed on March 2, 2018 ("*Deason II*").

PRELIMINARY STATEMENT

In January 2018, the Xerox Board of Directors (the "Xerox Board") unanimously approved a strategic transaction with Fujifilm Holdings Corp. ("Fujifilm"), Xerox's long-standing joint venture partner (the "Proposed Transaction"), following a year-long exploration of strategic alternatives and based on the Xerox Board's business judgment that the Proposed Transaction is the best available alternative to create value for Xerox shareholders. The Proposed Transaction is subject to a shareholder vote anticipated to take place in June 2018.

Plaintiff Darwin Deason has waged a multi-front campaign against the Proposed Transaction since it was announced. Together with Carl Icahn, another Xerox shareholder, Mr. Deason has published numerous open letters to Xerox shareholders opposing the Proposed Transaction. He has also formed a group with Mr. Icahn to solicit proxies to

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[1] Ursula M. Burns, the former CEO and Chairman of Xerox who resigned as CEO in May 2016 and has not served on the Board since May 2017, *see Deason I* Compl. ¶ 24, was named as a defendant in *Deason I*, but not in *Deason II*.

elect four new director candidates at Xerox's 2018 annual meeting, nominations timely submitted by Mr. Icahn. Finally, Mr. Deason has filed two actions in this Court seeking to enjoin the Xerox shareholders' vote on the Proposed Transaction. Neither of Mr. Deason's actions has any merit, and both should be dismissed for failure to state a claim.

In his first action (*Deason I*), Mr. Deason seeks to enjoin the Proposed Transaction, alleging that the Director Defendants breached their fiduciary duties in approving it. The breach of fiduciary duty claim in *Deason I* overlaps entirely with the breach of fiduciary duty claim asserted in the Consolidated Class Action[2] complaint: both allege that the Xerox Board breached its fiduciary duties to shareholders in (i) negotiating and endorsing the Proposed Transaction, (ii) failing to terminate the agreements in its joint venture with Fujifilm ("Fuji Xerox" or the "Joint Venture"), and (iii) failing to disclose in their entirety, prior to January 2018, two of the agreements governing the Joint Venture. The breach of fiduciary duty claim in *Deason I* should be dismissed for the same reason as the fiduciary duty claim in the Consolidated Class Action: the complained-of board action is presumed to be proper under the business judgment rule, and Mr. Deason (like the Class Plaintiffs) has raised no factual basis to rebut that presumption.[3]

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[2] Four putative class action complaints against the Xerox Defendants and Fujifilm were filed in connection with the Proposed Transaction: *Asbestos Workers Philadelphia Pension Fund* v. *Fujifilm Holds. Corp.*, No. 650766/2018; *Iron Workers District Council of Philadelphia & Vicinity Benefit & Pension Plan* v. *Xerox Corp.*, No. 650795/2018; *Carpenters Pension Fund of Illinois* v. *Xerox Corp.*, No. 650841/2018; and *Lowinger* v. *Fujifilm Holds. Corp.*, No. 650824/2018. On March 9, 2018, this Court ordered consolidation of these actions, and the complaint filed by the Asbestos Workers Philadelphia Pension Fund became the operative class action complaint. *See In re Xerox Shareholder Litigation*, No. 650766/2018 (the "Consolidated Class Action") NYSCEF Doc. No. 35. The Xerox Defendants have moved this day to dismiss the operative complaint in the Consolidated Class Action. *See* Xerox Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss, *In re Xerox Corporation Consolidated Shareholder Litigation*, No. 650766/2018 NYSCEF Doc. No. 35 ("Xerox Class MTD").

[3] To reduce the burden on the Court of duplicative briefing, the Xerox Defendants incorporate by reference all of the arguments made in their motion to dismiss the Consolidated Class Action complaint filed simultaneously herewith.

Unlike the Consolidated Class Action complaint, *Deason I* tacks on a claim for common law fraud. Mr. Deason alleges that the Xerox Defendants' failure to disclose the Joint Venture agreements in their entirety was a material omission and, had he known of the terms of the agreements, "he would have altered his decision-making with respect to the purchase and sale of his Xerox stockholdings." *Deason I* Compl. ¶ 102. This "throw-away" claim should be dismissed for failure to plead the elements of fraud with the requisite particularity. Among other things, Mr. Deason fails to plead specific facts that would support his claim of either material omission, justifiable reliance or purported damages.

In his second action (*Deason II*), Mr. Deason seeks to oust the Director Defendants who approved the Proposed Transaction, by nominating a dissident slate of directors for election at the 2018 annual shareholder meeting, notwithstanding the fact that Xerox's by-laws established a December 11, 2017 deadline for shareholders to provide notice of director nominations (the "Advance Notice By-Law"). Mr. Deason claims that the "very significant decisions and disclosures" that occurred after the nomination deadline had passed, *Deason II* Compl. ¶ 3—specifically, the announcement of the Proposed Transaction and the disclosure of the Joint Venture agreements in their entirety—make it inequitable and a breach of fiduciary duty for the Xerox Board to enforce the Advance Notice By-Law. On that basis, Mr. Deason asks this Court to enjoin the Xerox Defendants from enforcing the Advance Notice By-Law and thereby permit Mr. Deason "an opportunity to now notice a slate of directors for consideration and election at the 2018 Annual Meeting." *Id.* Prayer for Relief (b).

Deason II should be dismissed for failure to state a claim. No court applying New York law has ever endorsed Mr. Deason's legal theory that material changes occurring

after the nomination deadline somehow excuse compliance with an Advance Notice By-Law. While a handful of Delaware cases have discussed Mr. Deason's legal theory, relief has been granted only where the changed circumstances were so drastic that they could not have been anticipated. That is clearly not the case here. As reflected in Mr. Deason's own allegations, as early as May 2018, *almost six months before the deadline for director nominations*, Mr. Deason wrote to Xerox expressing his "firm[] support" for the Xerox Board's "explor[ation]" of "Xerox's relationship and contractual arrangements with Fuji and Fuji Xerox," urging the Xerox Board "to explore its strategic alternatives regarding Fuji" and to act "with all haste" to "optimize Xerox's relationship, to the extent it continues, with Fuji." *Deason II* Compl. Ex. C at B-3. Thus, Mr. Deason clearly could have anticipated that the Xerox Board might announce a strategic transaction with Fujifilm or another party. While Mr. Deason might disagree with the Board's view that the Proposed Transaction "optimize[s]" Xerox's relationship with Fujifilm and Fuji Xerox (and Mr. Deason has been vocal in expressing that disagreement), the announcement of a strategic transaction was not a wholly unanticipated development and is not a basis to enjoin the application of a duly enacted Advance Notice By-Law. *Id.* Given his identification of these "critical and timely" issues in May 2017, Mr. Deason was free to nominate a competing director slate on December 11, 2017, as Mr. Icahn did. *Id.*

STATEMENT OF FACTS

A full statement of the relevant facts regarding the Proposed Transaction, the Joint Venture, and Mr. Deason's fiduciary breach claim in *Deason I*, which entirely overlaps with the claim asserted in the Consolidated Class Action, is set out in the Xerox Defendants' Motion to Dismiss the Consolidated Class Action, incorporated herein by reference. *See*

Xerox Class MTD pp. 5–11. The Xerox Defendants state here additional facts relevant to Mr. Deason's claims for common law fraud and to be excused from compliance with the Advance Notice By-Law.

Since 2006, Xerox's by-laws have contained a requirement that any stockholder wishing to nominate a slate of directors must provide advance notice of the nominees "not less than 120 days nor more than 150 days in advance of the date which is the anniversary of the date the Company's proxy statement was released to security holders in connection with the previous year's annual meeting . . . ." *Deason II* Compl. Ex. A, Art. I § 6. Pursuant to this Advance Notice By-Law, the deadline to nominate a slate of directors for the 2018 annual shareholders meeting expired on December 11, 2017. *Id.* ¶ 30.

On May 22, 2017, almost six months before that deadline, Mr. Deason wrote Xerox CEO and Director Jeff Jacobson to express his "firm[] support" for the Board's "explor[ation]" of "Xerox's relationship and contractual arrangements with Fuji and Fuji Xerox." *Deason II* Compl. Ex. C at B-3. Mr. Deason discussed his concerns relating to "[t]he recent accounting scandal at Fuji Xerox" and his belief that "it [was] urgent for Xerox to explore its strategic alternatives regarding Fuji, including exercising Xerox's rights under its agreements to market check the overall relationship and its terms." *Id.* He also described his understanding that the market perceived Xerox to be "inextricably intertwined with Fuji," creating "a potentially major loss in value for Xerox in any change in control of the company." *Id.* Mr. Deason added: "I also want to caution you and the board that time is not our friend and that this matter should be concluded with all haste as the window of opportunity to optimize Xerox's relationship, to the extent it continues, with Fuji is now." *Id.*

The 30-day window for nominating directors under the Advance Notice By-Law opened on November 12, 2017. *See Deason II* Compl. Ex. A, Art. I § 6. Though he had expressed his concerns to the Xerox Board in his May 22, 2017 letter, Mr. Deason did not submit a slate of directors at any time prior to the December 11, 2017 deadline established by the Advance Notice By-Law.

Prior to December 11, 2017, another Xerox shareholder, Carl Icahn, timely submitted a slate of four director candidates. *See id.* ¶ 35. Shareholders will have the opportunity to vote on Mr. Icahn's nominees at the upcoming 2018 annual meeting. Since at least January 22, 2018, Mr. Deason and Mr. Icahn have been working together to elect Mr. Icahn's slate of directors. On that date, Mr. Deason and Mr. Icahn jointly filed a Form DFAN14A disclosure with the U.S. Securities and Exchange Commission to report that they had formed a group for the purpose of soliciting proxies for Xerox's 2018 annual meeting to elect the four director candidates nominated by Mr. Icahn in December. *See id.* ¶ 38.

On January 31, 2018, Xerox announced the Proposed Transaction and publicly disclosed the Joint Venture agreements. *Deason I* Compl. ¶ 73. Since that announcement, Mr. Deason, acting in concert with Mr. Icahn, has waged a campaign against the Proposed Transaction, jointly authoring numerous open letters to Xerox shareholders opposing the Proposed Transaction. *See* Carl Icahn et al., Schedule 13D/A Ex. 99.1 (March 2, 2018) (March 2, 2018 Letter) (Cohen Aff. Ex. A)[4]; Carl Icahn et al., Schedule 13D/A Ex. 1 (Feb. 20, 2018) (February 20, 2018 Letter) (Cohen Aff. Ex. B); Carl Icahn et al., Schedule 13D/A Ex. 99.1 (Feb. 12, 2018) (February 12, 2018 Letter) (Cohen Aff. Ex. C).

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[4] Citations in the form of "Cohen Aff. Ex. __" refer to exhibits attached to the Affirmation of Jay Cohen in Support of the Xerox Defendants' Motion to Dismiss Deason's claims.

On February 13, 2018, Mr. Deason filed the *Deason I* complaint with this Court, alleging breaches of fiduciary duty and common law fraud against the Xerox Defendants in connection with their decisions not to terminate the Joint Venture with Fujifilm and to enter into the Proposed Transaction, and seeking an expedited hearing on a motion for a preliminary injunction to bar the Proposed Transaction from proceeding.

On February 26, 2018, Mr. Deason sent a letter to Xerox seeking "to nominate a full slate of directors of Xerox at the upcoming 2018 Xerox annual meeting." *Deason II* Compl. Ex. C; *see Deason II* Compl. ¶ 46. While acknowledging that the nomination deadline was December 11, 2017, Mr. Deason claimed he was entitled to "a waiver of enforcement" of the Advance Notice By-Law given the material decisions and disclosures that occurred after the deadline, specifically the announcement of the Proposed Transaction and the disclosure of the Joint Venture agreements. *Deason II* Compl. Ex. C. On March 1, 2018, the Xerox Board responded to Mr. Deason's letter and declined to waive Xerox's Advance Notice By-Law. *Deason II* Compl. ¶ 46.

On March 2, 2018, Mr. Deason filed the *Deason II* complaint against the Xerox Defendants, alleging breach of fiduciary duty by the Xerox Board in refusing to waive the Advance Notice By-Law and asking the Court to enjoin or invalidate the Advance Notice By-Law. On March 6, 2018, this Court consolidated *Deason I* and *Deason II* and scheduled the hearing on Mr. Deason's motions for preliminary injunctions and Defendants' motions to dismiss with respect to both actions for April 26, 2018.

ARGUMENT

A complaint must be dismissed where it fails to state a cause of action. *See* CPLR 3211(a)(7). To survive dismissal, a complaint must "contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson ATA Holdings LLC* v. *Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011) (citations and internal quotation marks omitted). Allegations that are conclusory, or that are plainly contradicted by documents cited in the complaint or other documents of which the Court may take judicial notice, should be disregarded. *See Biondi* v. *Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (N.Y. 1st Dep't 1999). New York law requires that "[c]laims alleging breach of fiduciary duty must 'be stated in detail.'" *Berger* v. *Spring Partners, L.L.C.*, No. 600935-2005, 2005 WL 2807415, at *4 (N.Y. Sup. Ct. Oct. 24, 2005) (quoting CPLR 3016(b)).

New York law also has a heightened standard for pleading fraud and requires that "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). To survive a motion to dismiss, fraud allegations must be "non-conclusory," *Katz 737 Corp.* v. *Cohen*, 104 A.D.3d 144, 151 (1st Dep't 2012), and supported by more than "mere speculation [or] conjecture." *Ferman* v. *Chase Manhattan Bank*, Nos. 603245/98, 13822, 1999 WL 1568298, at *3-4 (N.Y. Sup. Ct. Apr. 19, 1999). "Bare allegations of fraud, which merely list the material elements of fraud without any supporting detail, are insufficient to satisfy the pleading requirements of CPLR 3013 or CPLR 3016 (subd. (b))." *Langford* v. *Cameron*, 73 A.D.2d 1001, 1003 (3d Dep't 1980).

I. Mr. Deason's Breach of Fiduciary Duty Claim in *Deason I* Should Be Dismissed Under the Business Judgment Rule

For all the reasons set forth in the Xerox Class MTD (*see* pp. 11–22), which the Xerox Defendants hereby incorporate by reference, Mr. Deason's claim that the Director Defendants breached their fiduciary duty in negotiating and approving the Proposed Transaction, in failing to terminate the Joint Venture agreements, and in failing to make additional disclosures with respect to the Joint Venture agreements, should be dismissed under the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach* v. *Bennett*, 47 N.Y.2d 619, 629 (N.Y. 1979).

II. Mr. Deason's Fraud Allegations in *Deason I* Are Insufficient to State a Cause of Action

Mr. Deason's claim for common law fraud in *Deason I* should likewise be dismissed under CPLR 3211(a)(7) for failure to state a cause of action. Where fraud is alleged, CPLR 3016(b) requires that "the circumstances constituting the wrong shall be stated in detail." *Swartz* v. *Swartz*, 145 A.D.3d 818, 823 (2d Dep't 2016). Therefore, the complaint must allege with particularity: "(1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages." *Id.* Further, when the claim is based on fraudulent concealment, the complaint must also sufficiently allege that the defendants had a duty to disclose the information. *See id.*

As a threshold matter, Mr. Deason's complaint fails to articulate the basis for an alleged duty to disclose the Joint Venture agreements in their entirety. The mere fact that a shareholder is interested in an agreement does not mean that its disclosure is legally

required. *See Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 43 (2011) (holding that the test for materiality is a fact-specific inquiry "that requires consideration of the source, content, and context" of an alleged misstatement or omission). But even if—contrary to fact and law—a duty to disclose did exist, Mr. Deason fails to allege sufficient facts to support a claim of justifiable reliance. Indeed, the aspects of the Joint Venture agreements that he claims would have been significant to his decision-making—a purported "crown jewel" lock up that would dissuade third party acquirers—were, as Mr. Deason's own May 22, 2017 letter reflects, already perceived and factored in by the market. Specifically, Mr. Deason wrote that: "the perception by the market that Xerox is inextricably intertwined with Fuji in a market as important as Asia has created a potentially major loss in value for Xerox in any change in control of the company." *Deason II* Compl. Ex. C at B-3.[5] Moreover, Mr. Deason has not pled—let alone with the requisite particularity—any facts with respect to the actions that he took, or did not take, as a result of his purported reliance on the omission. *See Deason I* Compl. ¶ 102 (claiming that, but for failure to disclose, plaintiff would have "altered his decision-making with respect to the purchase and sale of his Xerox stockholdings"); *see also Waggoner* v. *Caruso*, 886 N.Y.S.2d 368, 371–72 (1st Dep't 2009) (dismissing fraud claim for

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[5] In addition, it is implausible that Mr. Deason, a major shareholder of Affiliated Computer Services, did not have access to due diligence materials with respect to Xerox, including the Joint Venture agreements, in connection with Xerox's 2009 acquisition of Affiliated Computer Services. *See* Xerox Corp., Current Report at Item 2.01 (Form 8-K) (Feb. 8, 2010) (Cohen Aff. Ex. D) (listing the date of the merger as February 5, 2010); Xerox Corp., Registration Statement at 59 (Form S-4) (Oct. 23, 2009) (Cohen Aff. Ex. E) (noting that, at the time of the acquisition, Deason, "ACS's founder and sole holder of ACS's Class B common stock, [held] approximately 44% of the outstanding voting power of ACS's common stock"). Where a sophisticated party had access to allegedly critical information, but failed to avail himself of that access or review the corporate records at his disposal, courts are "particularly disinclined to entertain claims of justifiable reliance." *ACA Fin. Guar. Corp.* v. *Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1049 (N.Y. 2015) (quoting *Lazard Freres & Co.* v. *Protective Life Ins. Co.*, 108 F.3d 1531, 1541 (2d Cir. 1997)). Further, "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring." *Big Apple Consulting USA, Inc.* v. *Belmont Partners, LLC*, No. 23105/07, 2008 WL 4210533, at *3 (N.Y. Sup. Ct. Sept. 15, 2008) (citation omitted).

failure to plead with particularity "how [plaintiffs] changed their position or otherwise relied upon any purported misrepresentations or omissions to their detriment").

Further, Mr. Deason's conclusory allegations do not evince any suggestion of the Xerox Defendants' intent to induce reliance. Without more, Mr. Deason's claim of intent to induce reliance fails. *See, e.g.*, *Hogan Willig, PLLC* v. *Kahn*, 145 A.D.3d 1619, 1622 (4th Dep't. 2016) (rejecting plaintiff's fraudulent concealment claim because defendant had neither knowledge of the alleged misrepresentation or omission nor an intent to induce plaintiff's reliance); *see also Reno* v. *Bull*, 226 N.Y. 546, 551 (N.Y. 1919) (holding that claims for common law fraud must allege "a willful purpose resorted to with intent to deprive another of his legal rights").

Because Mr. Deason has failed to allege the requisite elements of common law fraud under New York law, his fraud claim should be dismissed.

III. Mr. Deason's Breach of Fiduciary Duty Claim in *Deason II* Concerning the Xerox Board's Enforcement of the Advance Notice By-Law Should Be Dismissed

Under New York law, Mr. Deason agreed to be bound by Xerox's corporate by-laws when he became a shareholder of Xerox. *ALH Properties Ten, Inc.* v. *306–100th St. Owners Corp.*, 191 A.D.2d 1, 16, 600 N.Y.S.2d 443 (1st Dep't 1993) ("The by-laws of the corporation constitute a contract between the shareholders and the corporation.") (citation omitted); *see also Strougo* v. *Hollander*, 111 A.3d 590, 597 (Del. Ch. 2015) ("Corporate charters and bylaws are contracts among a corporation's shareholders.") (citation and internal quotation marks omitted). This includes the Advance Notice By-Law, which Xerox enacted in 2006.

Mr. Deason does not dispute the validity of the Advance Notice By-Law. *See Deason II* Compl. ¶¶ 24–29. Nor does he dispute that, pursuant to the Advance Notice By-

Law, the window for nominating directors for election at the 2018 annual meeting closed on December 11, 2017. *Id.* ¶ 30. Instead, Mr. Deason claims that the Xerox Board violated its fiduciary duty by "wrongful[ly] refus[ing] to waive" enforcement of the Advance Notice By-Law given that Mr. Deason purportedly decided to nominate directors only on the basis of "significant decisions and disclosures" occurring after the nomination deadline had passed. *Id.* ¶ 3.[6] According to Mr. Deason, these "significant decisions and disclosures" are the announcement of the Proposed Transaction and the disclosure of the "deal-prohibitive 'crown-jewel' lock-up right in favor of Fuji" in the Joint Venture agreements. *Id.* ¶ 50.

No court applying New York law has ever endorsed Mr. Deason's legal theory or enjoined the operation of a duly enacted Advance Notice By-Law. While a handful of Delaware cases have discussed the legal theory Mr. Deason urges here, only one, *Hubbard* v. *Hollywood Park Realty Enter.*, Civ. A. No. 11779, 1991 WL 3151 (Del. Ch. Jan. 14, 1991), has found a sufficiently radical change in circumstance after the nomination deadline had passed to justify enjoining the operation of a longstanding advance notice by-law. But Delaware law does not apply here and, even if it did, the changed circumstances Mr. Deason alleges would not be sufficient under Delaware law to justify the extraordinary remedy he seeks. *Hubbard* involved "an unanticipated change of allegiance of a majority of [the board]" after the nomination deadline had passed. 1991 WL 3151, at *12. Specifically, a majority of

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[6] The *Deason II* complaint purports to state breach of fiduciary duty claims against "all defendants", including Xerox. *Deason II* Compl. ¶ 48; *see id.* Prayer for Relief (a). Of course, Xerox as a matter of law does not owe fiduciary duties to its shareholders. *Hyman* v. *N.Y. Stock Exch.*, 46 A.D.3d 335, 337 (N.Y. 1st Dep't 2007) ("[A] corporation does not owe fiduciary duties to its members or shareholders. . . . [T]o recognize a fiduciary relationship between the corporation and its shareholders would lead to the confounding possibility that a shareholder of a corporation could bring a derivative action on behalf of the corporation against the corporation itself."). Mr. Deason does not allege otherwise, and his claims in *Deason II* should be dismissed in their entirety as against Xerox for this reason alone.

the board switched allegiance to back a dissident shareholder who had previously been attempting to run a competing slate of director candidates. *Id.* at *4. But there is nothing "unanticipated" about the "decisions and disclosures" that Mr. Deason points to here.

As early as May 22, 2017, *almost six months before the deadline for director nominations*, Mr. Deason wrote to Xerox expressing his "firm[] support" for the Xerox Board's "explor[ation]" of "Xerox's relationship and contractual arrangements with Fuji and Fuji Xerox," urging the Xerox Board "to explore its strategic alternatives regarding Fuji" and to act "with all haste" to "optimize Xerox's relationship, to the extent it continues, with Fuji." *Deason II* Compl. Ex. C at B-3. Thus, Mr. Deason clearly could have anticipated well prior to the expiration of the December 11, 2017 nomination deadline that the Xerox Board might announce a strategic transaction with Fujifilm (or another party); indeed, he had been advocating that course. In the same May 22, 2017 letter, Mr. Deason further described his understanding that the market perceived Xerox to be "inextricably intertwined with Fuji," creating "a potentially major loss in value for Xerox in any change in control of the company." *Id.* Thus, neither were the supposed "deal-prohibitive" features of the Joint Venture agreements that Mr. Deason also claims justify an exception to the Advance Notice By-Law unanticipated; indeed, he claims they were generally perceived by the market. None of the "decisions or disclosures" that Mr. Deason points to represents a radical change in circumstances that could not have been anticipated in advance of the nomination deadline. Indeed, given Mr. Deason's identification of these "critical and timely" issues in May 2017, *see id.*, Mr. Deason was free to nominate a competing director slate on December 11, 2017, as Mr. Icahn did.[7]

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[7] In *Icahn Partners* v. *Amylin Pharm.*, *Inc.*, C.A. No. 7404, 2012 WL 1526814 (Del. Ch. Apr. 20, 2012), the court found the allegations of "radically changed" circumstances sufficient to warrant expedited discovery

Deason II should be dismissed for failure to state a claim.

CONCLUSION

For the reasons set forth above, and in the Xerox Defendants' Motion to Dismiss the Consolidated Class Complaint incorporated by reference, the Xerox Defendants respectfully request that the Court dismiss Mr. Deason's claims in their entirety.

Dated: New York, New York
March 16, 2018

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under Delaware law; but the case was settled in advance of any hearing. 2012 WL 1526814, at *3. In *Icahn*, after the nomination deadline had passed, the board allegedly "rejected without considering" an acquisition proposal at a significant premium. *Id.* at *2. The plaintiff argued that "a key element of the investment thesis for [the company] was the prospect for a value maximizing transaction," and thus the board's post-deadline action constituted a radical change justifying an injunction against the enforcement of the company's Advance Notice By-Law. *Id.* Here, however, Mr. Deason was urging the Xerox Board to review its strategic options and optimize or terminate its relationship with Fujifilm many months before the nomination deadline. Thus, the Xerox Board's announcement of a strategic transaction hardly represents a radical departure from the investment thesis for Xerox.