Unreported Cases

INTRODUCTION

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IN RE NOVELL, INC. SHAREHOLDER LITIGATION

No. 6032-VCN

In the Court of Chancery of the State of Delaware

January 3, 2013

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NOBLE, *Vice Chancellor*

I. BACKGROUND

A. The Parties

The Plaintiffs, Oklahoma Firefighters Pension and Retirement System, Louisiana Municipal Police Employees' Retirement System, Operating

Engineers Construction Industry and Miscellaneous Pension Fund, and Robert Norman, were shareholders of Novell, Inc. ("Novell").[1] They brought a class action against the individual members of Novell's Board of Directors (the "Board" or the "Novell Defendants"), Defendant Attachmate Corporation ("Attachmate"), and Defendant Elliott Associates LP (with affiliates and associates, "Elliott").[2]

Novell, a Delaware corporation, provides information technology products and services.[3] On November 21, 2010, the Board approved a merger agreement, under which Novell would be acquired by a wholly-owned subsidiary of Attachmate (the "Merger Agreement").[4] Also on November 21, 2010, Elliott agreed to contribute a portion of its Novell shares to Attachmate in order to provide part of the financing for the acquisition.[5] Attachmate is a software company, and its principal stockholders are Francisco Partners, L.P. ("Francisco Partners"), Golden Gate Private Equity, Inc. ("Golden Gate"), and Thoma Bravo, LLC.[6] Elliott is a private investment fund.[7]

The Board had nine members, eight of whom were outside directors,[8] when it approved the Merger Agreement. The Plaintiffs question the disinterestedness and independence of only two members of the Board: Defendants Gary G. Greenfield ("Greenfield") and Ronald W. Hovsepian ("Hovsepian"). Greenfield served as an Operating Partner with Francisco Partners from December 2003 to December 2007.[9] Hovsepian served as Novell's President and Chief Executive Officer from June 2006 until the

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[1] Pl's Second Am. Verified Consolidated Class Action Compl. (the "Amended Complaint" or "Am. Compl.") ¶¶ 15-18.

[2] Am. Compl.

[3] Transmittal Aff. of Cliff C. Gardner in Supp. of the Novell Defs.' Mot. to Dismiss ("Gardner Aff.") Ex. A, Novell, Inc., Definitive Proxy Statement (Schedule 14A) (Jan. 14, 2011) (the "Proxy") 2. The Delaware Supreme Court has held that matters outside of the pleadings usually should not be considered in ruling on a Rule 12(b)(6) motion to dismiss unless: (1) the document is integral to a plaintiff's claim and incorporated into the complaint, or (2) the document is not being relied upon to prove the truth of its contents. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995); *see also Metropolitan Life Ins. Co. v. Tremont Group Hldgs., Inc.*, 2012 WL 6632681, at *2 n.2 (Del. Ch. Dec. 20, 2012). Here, to the extent that the Proxy is integral to, and cited in, the Amended Complaint, it will be considered for purposes of the pending motion to dismiss. Plaintiffs, in cases of this nature, almost by necessity, draw from a proxy statement. Tension between favorable facts and unfavorable facts in a proxy statement results all too frequently. *See, e.g.*, *In re Synthes S'holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012).

[4] Am. Compl. ¶ 76.

[5] Am. Compl. ¶ 86.

[6] Am. Compl. ¶ 19.

[7] Am. Compl. ¶ 20.

[8] Am. Compl. ¶¶ 21-29.

[9] Am. Compl. ¶ 24.

closing of the Merger Agreement.[10] Hovsepian's severance agreement included incentives triggered by a change of control.[11]

In a separate agreement, also entered into on November 21, 2010 (the "Patent Purchase Agreement"), Novell agreed to sell 861 issued patents and pending patent applications, and 20 lapsed patent applications (the "Patent Portfolio") to CPTN Holdings LLC ("CPTN").[12] CPTN is a consortium of technology companies organized by Microsoft Corporation ("Microsoft").[13] The Patent Purchase Agreement provided that, subject to certain conditions, CPTN could proceed with its purchase of the patents even if the Merger Agreement was terminated.[14]

The Plaintiffs seek damages, alleging breaches of fiduciary duties, and the aiding and abetting thereof, by the Defendants in connection with the sale of Novell to Attachmate (the "Acquisition") and the Board's sale of the Patent Portfolio (the "Patent Sale"). The Defendants—the Board, Attachmate, and Elliott—have each moved to dismiss these claims. The Court now addresses those motions.

B. Elliott's Unsolicited, Non-Binding Proposal

On February 12, 2010, Elliott filed a Schedule 13D with the Securities and Exchange Commission reporting that it held 7.1%—or 24.7 million shares—of Novell's outstanding common stock.[15] Elliott's representatives met with certain members of Novell's management on February 26, 2010, to discuss its publicly-stated acquisition plan.[16] On March 2, 2010, Elliott conveyed to the Board an unsolicited, non-binding proposal to acquire Novell for $5.75 per share in cash.[17] On the same day, Elliott amended its Schedule 13D to reflect that it then held an additional 1.4% economic interest in Novell common stock (in addition to its existing 7.1% stake).[18]

After several meetings during which the Board discussed the Elliott proposal and received advice from its legal and financial advisors, on March 20, 2010, the Board rejected Elliott's $5.75 per share proposal as inadequate.[19] In the same press release in which it announced its rejection of

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[10] Am. Compl. ¶ 26.
[11] Am. Compl. ¶ 26.
[12] Am. Compl. ¶ 103.
[13] Am. Compl. ¶ 109.
[14] Proxy 62.
[15] Am. Compl. ¶ 39.
[16] Am. Compl. ¶ 42.
[17] Am. Compl. ¶ 42.
[18] Proxy 30.
[19] Am. Compl. ¶ 47.

Elliott's bid, the Board announced that it would explore various alternatives to enhance stockholder value.[20] This effort was primarily conducted by the Board's financial advisor, J.P. Morgan, from March 2010 until August 2010.[21] During this exploratory period, J.P. Morgan contacted over fifty potential buyers for the sale of Novell, including large public technology companies and a number of financial buyers.[22] Of those contacted, more than thirty entered into a non-disclosure agreement with Novell. The Board was kept informed by its advisers throughout the solicitation process.[23]

C. The Acquisition

In May 2010, the Board authorized Attachmate to partner with two of its principal shareholders, Francisco Partners and Golden Gate, for the purpose of submitting a preliminary proposal, which Attachmate did.[24] Eight other potential buyers submitted preliminary non-binding proposals to acquire Novell.[25] Attachmate's proposal was between $6.50 and $7.25 per share, while the other eight proposals ranged from $5.50 to $7.50 per share.[26] On May 25, 2010, the Board considered the proposals received and decided to pursue further discussions with five potential buyers, including Attachmate.[27] In June 2010, the Board made presentations to these five entities.[28] Attachmate met with the Board on June 14, 2010.[29] In June and July 2010, the Board worked with J.P. Morgan to solicit additional potential buyers.[30]

At the end of July 2010, Attachmate—citing difficulties with financing—asked J.P. Morgan for the opportunity to speak with a broader set of partners and financing sources, including Elliott.[31] As a result, J.P. Morgan contacted Elliott to solicit its interest in acting as a potential financing source for a possible transaction with Novell.[32] On August 6,

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[20] Am. Compl. ¶ 47.
[21] Proxy 31.
[22] Proxy 31.
[23] Proxy 31-35.
[24] Am. Compl. ¶ 55.
[25] Proxy 32.
[26] Proxy 32.
[27] Proxy 32.
[28] Proxy 33.
[29] Proxy 33.
[30] Proxy 33.
[31] Proxy 34.
[32] Proxy 34.

2010, Novell entered into a non-disclosure agreement with Elliott, under which it also agreed to a sixty-day standstill provision.[33]

On August 11, 2010, Novell requested that Attachmate and Party C, a private equity firm,[34] each submit a "best and final offer" by August 16, 2010, including a proposed purchase price for each of the following scenarios: (i) acquisition of all of Novell's businesses (including the patents) and (ii) acquisition of all of Novell (including the patents) but excluding Novell's open platform solutions business.[35] As of August 27, 2010, Attachmate offered $4.80 per share while Party C bid $4.86 per share (both bids excluding the open platform solutions business).[36]

After considering various proposals throughout August and September 2010,[37] the Board granted Attachmate exclusivity until September 27, 2010, based on its revised proposal to acquire Novell (excluding its open platform solutions business) for $4.80 per share in cash.[38] On October 15, 2010, the Board agreed to a new exclusivity period with Attachmate through October 25, 2010, during which the parties discussed: (1) Attachmate's interest in acquiring Novell without its open platform solutions business and certain patents, (2) the possible acquisition of Novell as a whole, (3) the viability of a stand-alone entity that would include the businesses and patents that Attachmate had previously not been interested in acquiring; and (4) interest from other entities in a transaction involving those businesses and/or patents.[39]

On October 21, 2010, the Board received a non-binding letter of intent from Microsoft either to license or to acquire some of Novell's patent portfolio.[40] Thereafter, exclusivity with Attachmate was extended until November 1, 2010.[41] On October 28, Attachmate submitted a revised letter of intent to acquire all of Novell's stock for $5.25 per share in cash.[42] On that same day, the Board also received an unsolicited, non-binding proposal from another entity ("Party C") to acquire all of Novell for $5.75 per share.[43] On October 29, Microsoft submitted a revised letter of intent indicating its

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[33] Proxy 34.
[34] Am. Compl. ¶ 54.
[35] Am. Compl. ¶ 61.
[36] Am. Compl. ¶ 62.
[37] Proxy 33-37.
[38] Am. Compl. ¶¶ 65, 69.
[39] Proxy 39-40.
[40] Proxy 39.
[41] Proxy 40.
[42] Am. Compl. ¶ 71.
[43] Am. Compl. ¶ 72. The parties have treated the identity of another bidding entity, Party C, as confidential. The Court will do the same.

interest in acquiring certain patents and patent applications for $450 million.[44]

The Board, with its advisors, subsequently met to discuss Novell's strategic options.[45] In particular, the Board discussed pursuing a transaction with Attachmate for Novell as a whole, exclusive of the patents encompassed by the Microsoft offer.[46] Management later approached Attachmate to solicit its interest in an offer of that kind and, as a result, on November 2, 2010, Attachmate submitted a revised letter of intent to acquire all of Novell's outstanding shares of common stock for $6.10 per share in cash.[47] It conditioned that offer on a patent sale for no less than $450 million, with after-tax proceeds of no less than $315 million.[48]

At a November 1, 2010 meeting to deliberate on Novell's options, the Board decided to pursue discussions with Attachmate and Microsoft. Accordingly, during November, documents and draft agreements were exchanged and negotiations continued.[49] At a November 21, 2010 special meeting, the Board approved the Acquisition and the Patent Sale.[50] The Merger Agreement and the Patent Purchase Agreement were executed that same day and announced the following morning.[51]

The Merger Agreement included three deal protection measures. First, Novell agreed not to solicit proposals for alternative transactions and, subject to certain limited exceptions, not to enter into discussions or negotiations concerning, or to provide information in connection with, alternative transactions (the "no solicitation provision").[52] Second, the Merger Agreement provided matching rights to Attachmate regarding any "superior proposal" (the "matching rights provision").[53] The matching rights provision required the Board to provide Attachmate promptly with full information about competing acquisition proposals. Attachmate was then given five days to match the competing proposal. Third, the Merger Agreement also contained certain termination rights for both Novell and Attachmate.[54] For example, a termination by Novell to accept a superior proposal would have required Novell to pay Attachmate a termination fee of

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[44] Am. Compl. ¶ 73.
[45] Proxy 40.
[46] Proxy 40.
[47] Am. Compl. ¶ 75.
[48] Proxy 41.
[49] Proxy 41.
[50] Proxy 43-44.
[51] Proxy 44.
[52] Am. Compl. ¶ 142.
[53] Am. Compl. ¶ 143.
[54] Am. Compl. ¶ 144.

$60 million (the "termination fee"). The termination fee represented 2.7% of the equity value of the proposed transaction,[55] and more than 8% of the $750 million actually paid by Attachmate.

Under the terms of the Acquisition, holders of Novell common stock received $6.10 per share in cash.[56] Under the terms of the Patent Transaction, CPTN paid $450 million in cash for the Patent Portfolio.[57]

D. The Equity Commitment

On the same day the Merger Agreement was executed, Elliott agreed with Attachmate to contribute to Wizard Parent LLC ("Wizard"), Attachmate's ultimate parent entity, a portion of its Novell shares to help finance the Merger (the "Equity Commitment").[58] In exchange, Elliott, unlike other Novell shareholders, received a post-merger equity interest in Wizard.[59] Specifically, Elliott made the following exchanges of its Novell stock: $72.5 million worth of Novell shares in exchange for 17.06% of the "New Money Units" of Wizard, and $22.5 million worth of Novell shares in exchange for 6.0% of the "Existing Units" of Wizard. Based on $6.10 per share, Elliott transferred a total of 15,573,770 Novell shares to Wizard.[60]

Elliott acquired a net equity interest of 21.9% of the new combined company (consisting of Attachmate and Novell, with Novell's cash from the sale of the Patent Portfolio, the "Combined Company").[61] The Combined Company had an equity value of $705 million.[62] Elliott's ownership stake of the Combined Company was valued at $154,436,470; Elliott received Wizard stock valued at $9.92 per share.[63] Elliott also obtained a seat on the Combined Company's board of directors.[64]

E. Party C's Competing Bids

At two points in the bidding process, Attachmate faced a competing bidder. On August 11, 2010, Novell requested that both Attachmate and Party C submit a "best and final offer" for Novell. As of August 27, 2010,

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[55] Am. Compl. ¶ 144.
[56] Am. Compl. ¶ 77.
[57] Am. Compl. ¶ 103.
[58] Gardner Aff. Ex. G.
[59] Proxy 8.
[60] Am. Compl. ¶ 87.
[61] Am. Compl. ¶ 88.
[62] Am. Compl. ¶ 89.
[63] Am. Compl. ¶ 89.
[64] Am. Compl. ¶ 91.

Attachmate had offered $4.80 per share, compared to Party C's bid of $4.86 per share (both bids for Novell excluding its open platform solutions business).[65] As of October 28, 2010, Attachmate had raised its offer to $5.25 per share for all of Novell, including its patents and open platform systems, while Party C had raised its price to $5.75 per share for all of Novell.[66] Interestingly, the Board did not allow Party C to work with strategic partners, even though it allowed Attachmate to work with Francisco Partners and Golden Gate.[67]

F. The Patent Purchase Agreement

The Patent Purchase Agreement involved the sale of 861 issued patents and pending patent applications, together with 20 lapsed patent applications.[68] The issued patents and patent applications related primarily to enterprise-level computer systems management software and enterprise-level file management and collaboration software in addition to patents relevant to Novell's identity and security management business, although some of the issued patents and patent applications may have involved a range of different software products.[69]

Historically, the issued patents and patent applications included in the Patent Portfolio were used by Novell to facilitate and to protect its existing and planned business activities, and to reduce the risk of potential infringement claims.[70] Novell did not license any of the issued patents and patent applications on a royalty-bearing basis, but the patents were subject to specific non-royalty bearing licenses granted by Novell.[71]

On August 20, 2010, Party B offered to arrange a transaction through which members of a consortium would purchase Novell's open platform solutions business, and Party B would acquire some of Novell's issued patents and patent applications for an aggregate purchase price between $525 million and $575 million in cash.[72] On August 26, 2010, Party B submitted a revised proposal in which it offered to arrange a transaction through which a consortium would purchase Novell's open platform solutions business and Party B would purchase the issued patents and patent

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[65] Am. Compl. ¶ 61.
[66] Am. Compl. ¶ 72.
[67] Am. Compl. ¶ 55.
[68] Proxy 63.
[69] Am. Compl. ¶ 103.
[70] Am. Compl. ¶ 146.
[71] Am. Compl. ¶ 146.
[72] Am. Compl. ¶ 105.

applications for an aggregate purchase price of $550 million in cash.[73] On September 1, 2010, Party D submitted a proposal to acquire all of Novell's intellectual property for an aggregate price of $570 million in cash.[74]

On October 14, 2010, Party B indicated to Novell that it had decided against proceeding with its proposal to acquire Novell's open platform solutions business and the Patent Portfolio.[75] On October 21, 2010, Microsoft submitted a nonbinding letter of intent proposing to enter into either a license agreement for the Patent Portfolio for $100 million or a license and acquisition agreement for the Patent Portfolio for $300 million.[76] On October 29, 2010, Novell received a revised letter of intent from Microsoft proposing to acquire, together with at least two other interested investors, the Patent Portfolio for $450 million.[77] J.P. Morgan's fairness opinion, dated November 21, 2010, does not address the fairness of the Patent Purchase Agreement.[78]

G. The Litigation

Between November 23, 2010 and December 16, 2010, various shareholder actions were filed in this Court challenging the Acquisition and the Patent Sale. Novell filed its preliminary proxy statement on December 14, 2010, which was revised on December 27, 2010. Thereafter, the Delaware actions were consolidated and Co-Lead Plaintiffs were appointed. They filed an amended complaint on January 6, 2011, and, on that same day, the Court entered a scheduling order that set February 9, 2011 as the date for argument on the Co-Lead Plaintiffs' motion for a preliminary injunction.

On January 14, 2011, Novell filed the Proxy, the definitive proxy statement, which, according to the Co-Lead Plaintiffs, addressed many of their disclosure claims. For that reason and after the Defendants agreed not to dispute the Co-Lead Plaintiffs' ability to pursue any money damages claims, they withdrew their request for a preliminary injunction. Subsequently, counsel for the Co-Lead Plaintiffs identified for Novell's counsel additional purported disclosure defects based on the Definitive Proxy. On February 3, 2011, Novell issued a supplemental proxy statement (the "Supplemental Disclosures"), that dealt with some of the Plaintiffs' concerns.

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[73] Proxy 36.
[74] Proxy 36.
[75] Am. Compl. ¶ 109.
[76] Proxy 39.
[77] Am. Compl. ¶ 109.
[78] Proxy 47.

On February 17, 2011, Novell's shareholders voted in favor of the Acquisition.[79] On April 27, 2011, the Merger closed and the Patent Sale was completed.[80] Plaintiffs' counsel filed an application for interim attorneys' fees, but the Court denied that application as premature.[81] The Plaintiffs filed the Second Amended Verified Complaint, which alleged various breaches of fiduciary duties by the Board and the aiding and abetting of those breaches by Attachmate and Elliott. Thereafter, the Defendants filed motions to dismiss which the Court now addresses.

II. CONTENTIONS

Attachmate has closed on its acquisition of Novell. Thus, the Plaintiffs seek damages for breaches of fiduciary duties by the Novell Defendants. They assert that the Novell Defendants (i) because of "an improper and opaque" sales process failed to maximize shareholder value with respect to both Attachmate's acquisition and the Patent Sale; (ii) failed to disclose all material facts and issued a misleading proxy; (iii) allowed Attachmate to taint the process; and (iv) allowed Elliott to obtain additional consideration not available to other shareholders.[82] Also, the Plaintiffs assert that Attachmate and Elliott aided and abetted the Novell Defendants' violations of their fiduciary duties.[83]

The Defendants deny that any breach of fiduciary duty occurred. The Novell Defendants argue that, even if they breached any of their fiduciary duties, at most, those breaches only amounted to breaches of the duty of care and that Novell's charter contained a Section 102(b)(7) provision which exculpated them from monetary liability. Attachmate and Elliott also argue that they had nothing to do with any fiduciary duty breach that may have occurred.

The Plaintiffs, in response, maintain that the Novell Defendants' bad faith conduct deprives them of the benefit of the Section 102(b)(7) charter provision.

III. ANALYSIS

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[79] Gardner Aff. Ex. D, Novell (Form 8-K) (Feb. 17, 2011).
[80] Gardner Aff. Ex. E, Novell (Form 8-K) (Apr. 27, 2011).
[81] *In re Novell, Inc. S'holder Litig.*, 2011 WL 4091502 (Del. Ch. Aug. 30, 2011).
[82] Am. Compl. ¶ 158.
[83] Am. Compl. ¶ 162.

A motion to dismiss under Court of Chancery Rule 12(b)(6) is subject to a "reasonable conceivability" standard.[84]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[85]

Although the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'"[86] a motion to dismiss will be denied under Delaware's pleading standard if there is a reasonable possibility that a plaintiff could recover.[87] With these principles in mind, the Court turns first to the breach of fiduciary duty claims brought against the Board.

A. Count I: Claims For Breach Of Fiduciary Duties Against the Novell Defendants

The Plaintiffs allege that the Novell Defendants: (1) conducted a sales process that failed to maximize shareholder value with respect to both the Acquisition and the Patent Sale, including deal protection devices such as the no solicitation provision,[88] the matching rights provision,[89] and the termination fee;[90] (2) failed to disclose properly all material facts concerning both the Acquisition and the Patent Sale, resulting in a false and misleading proxy; (3) allowed Attachmate to taint the process, violating the Novell Defendants' fiduciary duties generally and their nondelegable duty under 8 Del. C. § 251(b)[91] to approve the Acquisition only if it was in the best

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[84] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

[85] *Id.* at 536 (citation omitted).

[86] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (citing *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).

[87] *See id.* (citing Cent. Mortg., 27 A.3d at 537 n.13) ("Delaware's reasonable 'conceivability' standard asks whether there is a 'possibility' of recovery.").

[88] Am. Compl. ¶ 142.

[89] Am. Compl. ¶ 143.

[90] Am. Compl. ¶ 144.

[91] The Plaintiffs did not address their claim under 8 Del. C. § 251(b) in their Omnibus

interests of Novell and its shareholders; and (4) allowed Elliott to receive disparate, additional consideration at the expense of Novell's other shareholders in connection with both the Acquisition and the Patent Sale.[92] The Court will first address the claims as they relate to the Acquisition; consideration of the Patent Sale will follow.

1. The Acquisition

(a) The Sales Process

The Plaintiffs allege that the Board guided the outcome of the sale process toward Attachmate as a buyer, even though shareholders could have obtained a higher price for their shares from other bidders.[93] The Plaintiffs therefore claim that the Novell Defendants breached their fiduciary duties in bad faith by guiding the outcome of the process toward a favored bidder at the expense of Novell's shareholders.[94] The Plaintiffs also challenge the deal protection devices agreed to by the Board in the Merger Agreement.[95]

At the time of the Acquisition, the Board consisted of nine directors, eight of whom were outside directors. Hovsepian, the Board's only inside director, was Novell's President and CEO.[96] In addition, Greenfield formerly worked for approximately four years, until 2007, at Francisco Partners, a private equity firm affiliated with investment funds that hold part interest in Attachmate.[97] The Plaintiffs do not challenge the independence or disinterestedness of the other seven members of the Board.[98] Therefore, on the basis of the Amended Complaint, a majority of the Board was disinterested and independent.

The directors of a Delaware corporation owe fiduciary duties of care and loyalty to the corporation and its shareholders. When a board decides to undertake the process of selling the corporation it directs, it "must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[99] "There is no single path that a board must follow

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Answering Brief in Opposition to Defendants' Motions to Dismiss the Second Amended Verified Consolidated Class Action Complaint ("Answering Br."), despite being challenged by the Brief in Support of Novell Defendants' Motion to Dismiss ("Novell Br.") 42-43. That claim, thus, has been abandoned

[92] Am. Compl. ¶ 158.

[93] Answering Br. 2.

[94] Answering Br. 3.

[95] Am. Compl. ¶¶ 141-44.

[96] Am. Compl. ¶ 26.

[97] Am. Compl. ¶ 24.

[98] Am. Compl. ¶¶ 21-29.

[99] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (quoting *Malpiede v.*

in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end."[100]

"Once a board has decided to [pursue] a sales process it is required to seek the highest value reasonably available for the shareholders regardless of where that value comes from."[101] That requirement, however, "is not a separate, distinct duty."[102]

> So-called Revlon duties are only a specific application of directors' traditional fiduciary duties of care and loyalty in the context of control transactions. In that regard, if the corporation's certificate contains an exculpatory provision pursuant to § 102(b)(7) barring claims for monetary liability against directors for breaches of the duty of care, the complaint must state a nonexculpated claim, i.e., a claim predicated on a breach of the directors duty of loyalty or bad faith conduct.[103]

Novell's Certificate of Incorporation contains a provision exculpating the Board from monetary liability for breach of the duty of care.[104] Thus, in order to survive the Defendants' motion to dismiss, the Complaint must state a claim that the Novell Defendants breached their duty of loyalty or acted in bad faith.

In challenging a sales process, a plaintiff may plead that a board breached the duty of loyalty by alleging non-conclusory facts suggesting that a majority of the board lacked independence, was interested in the sales process, or acted in bad faith in conducting the sales process. "A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[105] A director lacks independence if, for example, her judgment is controlled by

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Townson, 780 A.2d 1075, 1083 (Del. 2001)).

[100] *In re Smurfit–Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *10 (Del. Ch. May 20, 2011, revised May 24, 2011) (footnote omitted) (citing *Paramount Commc'ns v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

[101] *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *6 (Del. Ch. Apr. 11, 2012).

[102] *Id.*

[103] Alloy, 2011 WL 4863716, at *7 (citations omitted).

[104] Gardner Aff. Ex. I (Restated Certificate of Incorporation of Novell, Inc.) "The court may . . . take judicial notice of the contents of the certificate of incorporation of a Delaware corporation where, as here, there is no dispute among the parties as to its actual contents (as opposed to the legal effect of those contents)." *Louisiana Mun. Police Employees' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *6 (Del. Ch. July 28, 2009) (citations omitted).

[105] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)); *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984).

another director or driven by extraneous considerations.[106] A director acts in bad faith when he or she "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties."[107]

As noted above, the Plaintiffs have not attempted to plead that a majority of the Board was interested or lacked independence. The Plaintiffs, in order to survive a motion to dismiss, must therefore allege that the Board acted in bad faith. Allegations that the Board should have done more under the circumstances are not enough to raise a bad faith claim.[108] Bad faith is also not shown by disagreement with the Board's decisions during an auction process.[109] "There is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."[110]

The Plaintiffs argue that the Novell Defendants acted in bad faith because: (1) the Board knowingly favored Attachmate over other bidders,[111] (2) the Board knowingly permitted conflicted directors to funnel confidential information to Attachmate and to taint the sale process,[112] (3) the Board conspired with J.P. Morgan to justify an inadequate merger price,[113] and (4) members of the Board favored their own interests and Elliott's interests by knowingly appeasing Elliott.[114]

(i) Did the Board knowingly favor Attachmate over other bidders?

The Plaintiffs argue that the Board favored Attachmate over other bidders due to, first, the disparate treatment given to a competing bidder, Party C, and,second, the deal protection measures set forth in the Merger Agreement.

(aa) Party C

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[106] *See* Aronson, 473 A.2d at 816.

[107] *Lyondell Chem. Co.*, 970 A.2d at 243 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

[108] *Wayne County Employees' Ret. Sys. v. Conti*, 2009 WL 2219260, at *14 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010) ("Bad faith cannot be shown by merely showing that the directors failed to do all they should have done under the circumstances.").

[109] Paramount Commc'ns Inc., 637 A.2d at 44; Barkan, 567 A.2d at 1286-87; Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 68 (Del. 1989); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1287 (Del. 1989).

[110] Lyondell Chem. Co., 970 A.2d at 243.

[111] Answering Br. 12.

[112] Answering Br. 15.

[113] Answering Br. 18.

[114] 114 Answering Br. 20.

As of August 27, 2010, Party C had submitted a bid of $4.86 per share for Novell without its open platform systems, as compared to Attachmate's bid of $4.80 per share for the same. The Plaintiffs claim that there is no evidence that theBoard, Novell management, or J.P. Morgan asked, before granting Attachmate exclusivity, whether Party C would increase its bid.[115] The Plaintiffs also claim that the Board, Novell management, and J.P. Morgan never informed Party C of the offer made by Party B to acquire the Patent Portfolio along with Novell's open platform systems business. They allege that Party C may have increased its bid if it knew this information.[116]

On October 28, 2010, Party C submitted a bid to acquire all of Novell for $5.75 per share, as compared to Attachmate's offer at that time of $5.25 per share.[117] The Plaintiffs claim that the Board made no effort to negotiate with Party C following receipt of Party C's October proposal.[118] The Plaintiffs further claim that Party C was not informed of Microsoft's October 29 proposal to acquire the Patent Portfolio for $450 million,[119] and that Party C could have increased its offer of $5.75 per share had it known that it would be receiving $450 million in cash upon acquiring Novell.[120]

The Plaintiffs also allege that the Board did not allow Party C to work with any strategic partners, even though it allowed Attachmate to work with Francisco Partners and Golden Gate.[121] Had Party C been allowed to work with other strategic partners, as Attachmate did, it could have potentially increased the price Party C would have offered for Novell.[122]

Absent some reasonable explanation, the Novell Defendants and their financial advisor treated Party C in a way that was both adverse and materially different from the way they treated Attachmate. Party C could not team with any other interested bidder and, more importantly, was not informed of the Patent Sale which would have provided a substantial amount of cash at closing. The availability of additional funds might have allowed (or incentivized) Party C to increase its offer. Because its offer was roughly comparable to the price Attachmate was offering, it is reasonably conceivable that Party C would have increased its bid to an amount higher than that of Attachmate.

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[115] Am. Compl. ¶ 70.
[116] Am. Compl. ¶ 70.
[117] Am. Compl. ¶ 72.
[118] Am. Compl. ¶ 74.
[119] Am. Compl. ¶ 74.
[120] Am. Compl. ¶ 74.
[121] Am. Compl. ¶ 55. Of course, Francisco Partners and Golden Gate are among the owners of Attachmate. More importantly, Attachmate was allowed to team with Elliott
[122] Am. Compl. ¶ 55.

An independent and disinterested board, however, is not absolutely required to treat all bidders equally.[123] The Board could have dealt with bidders differently if the shareholders' interests justified such a course. From the factual sources (primarily, the Amended Complaint) available to the Court on this motion to dismiss, those reasons—if they existed—cannot be ascertained. Perhaps the Attachmate offer was more credible. Perhaps Attachmate had no more due diligence needs. Perhaps Attachmate had its funding for the transaction arranged, while Party C was still searching for financing. Perhaps Novell had been for sale too long and there was concern that the process would become "stale" or that, if Party C were allowed an opportunity to evaluate the benefits of the Patent Sale, Attachmate would lose interest in a possible transaction.[124]

The Amended Complaint, when considered under the applicable standard, states a reasonably conceivable claim that the Novell Defendants treated a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably attainable. It might not take much evidence from the Novell Defendants to put that disparate treatment in a different context and to show that Plaintiffs' claim lacks merit. The Novell Defendants, however, do not have the opportunity to "prove their case" on a motion to dismiss.

The Amended Complaint, thus, states a claim for a breach of fiduciary duty. The question becomes one of whether the Novell Defendants acted in bad faith or merely breached the duty of care. In the absence of bad faith, their actions would be exculpated by the Section 102(b)(7) provision in Novell's charter. If their conduct is adequately alleged to have been in bad faith, the exculpation provision will not shield them at this point.[125]

A fiduciary's conduct was in bad faith if the fiduciary acted with a purpose other than advancing shareholder interests (i.e., the best interests of the corporation), intentionally violated relevant positive law, intentionally failed to respond to a known duty or exhibited a conscious disregard of a known duty.[126] If the allegations involve a fiduciary's duty to act, the effort required to satisfy that duty is minimal. In that context, the question is whether the fiduciary "utterly failed to attempt to obtain the best sale

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[123] *See, e.g.*, *In re Fort Howard Corp. S'holder Litig.*, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988).

[124] The Court need not decide whether such potential explanations would have been sufficient.

[125] A duty of loyalty breach would not be exculpated by Section 102(b)(7), but, as set forth above, no basis for a duty of loyalty claim, independent of bad faith, has been stated.

[126] *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006); *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007).

price."[127] Here, the Amended Complaint demonstrates that the Board, through the prolonged sales process, far exceeded that threshold.

A plaintiff has the burden to overcome the presumption that a fiduciary acts in good faith. One way to accomplish that objective would be for the plaintiff to demonstrate that the fiduciary's actions were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[128] This formulation of the bad faith standard best captures the focus of the Plaintiffs' challenge. Why the Novell Defendants did not tell Party C about the proceeds of the Patent Sale has no apparent answer in the record before the Court. That conduct, coupled with the fact that Novell kept Attachmate fully informed, is enough for pleading stage purposes to support an inference that the Board's actions were in bad faith.[129] As indicated, there may be a plausible explanation for their conduct, but the Court does not have access to those facts. Because it is reasonably conceivable that the Plaintiffs may be able to demonstrate that the Novell Defendants' conduct was in bad faith, the exculpation of the Section 102(b)(7) charter provision is not available. Accordingly, this claim may not be dismissed at this time.[130]

(bb) Deal Protection Devices

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[127] Lyondell Chem. Co., 970 A.2d at 244.

[128] *In re Alloy, Inc.*, 2011 WL 4863716, at *12; *see also White v. Panic*, 783 A.2d 543, 554 (Del. Ch. 2001) ("the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interest."); *In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 781 (Del. Ch. 1988) ("so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.").

[129] The information not shared with Party C was not merely of passing interest. It, one may reasonable infer, was highly material and could have induced a bidder to offer more. Moreover, Party C, through the relatively extended solicitation process, had put competitive numbers on the table. The Amended Complaint demonstrates that it was a serious participant.

[130] As addressed below, one of the Plaintiffs' other allegations states (barely) a duty of care claim; the others state no claim. The duty of care claim is intertwined with the claims regarding the Novell Defendants' treatment of Party C and, thus, may not be dismissed at this time under the Section 102(b)(7) charter provision. *See, e.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1223-24 (Del. 1999); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.13[b] (2012 Supp.). If there were no bad faith claim asserted in this case, any due care claim, which would not be tainted by such alleged conduct, would be dismissed. Other causes of action which do not adequately allege any claim may be separately dismissed. *See, e.g.*, *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *19 (Del. Ch. Aug. 24, 2004) (dismissing inadequate claims while allowing certain breach of fiduciary duty claims to survive a motion to dismiss). *See also Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, at *12-15 (Del. Ch. July 26, 2010).

The deal protection devices in the Merger Agreement – the no solicitation provision, the matching rights provision, and the termination fee – are customary and well within the range permitted under Delaware law. The mere inclusion of such routine terms does not amount to a breach of fiduciary duty:

> The provisions that plaintiffs attack have been repeatedly upheld by this Court. For instance, plaintiffs complain that the no solicitation provision, the matching rights provision, and the termination fee effectively preclude any other bidders who might be interested in paying more than . . . . But this Court has repeatedly held that provisions such as these are standard merger terms, and are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty.[131]

Delaware courts have recognized that these provisions are common in merger agreements, and may sometimes be necessary to secure a strong bid.[132]

The Board's approval of these standard deal protections, alone, cannot form the foundation of a fiduciary breach claim. The Plaintiffs plead no facts suggesting that the no-solicitation and matching rights provisions were unreasonable or somehow were the product of fiduciary failure.[133] In addition, the Plaintiffs' argument that the termination fee constituted 8% of the actual purchase price, and thus was actionable, fails because the proper measure of a termination fee is based on its percentage of equity value.[134]

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[131] *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *4 (Del. Ch. Dec. 18, 2009) (internal citations omitted).

[132] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 502 (Del. Ch. 2010) ("[I]t is reasonable for a seller to provide a buyer some level of assurance that he will be given adequate opportunity to buy the seller, even if a higher bid later emerges."); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975 (Del. Ch. 2005) (declining to enjoin merger with no-solicitation and matching rights provisions coupled with 3.75% termination fee); *see also In re Atheros Commc'ns*, 2011 WL 864928, at *7 n.61.

[133] *See, e.g.*, *In re 3Com*, 2009 WL 5173804, at *7 (finding plaintiffs' challenge to matching rights provision not colorable, explaining that agreeing to termination fees, no-solicitation and matching rights provisions did not "constitute breaches of fiduciary duty"); *In re Dollar Thrifty*, 14 A.3d 573, 619 (Del. Ch. 2010) (denying motion for preliminary injunction, finding matching rights and no-solicitation provisions neither preclusive nor unreasonable); *In re Toys "R" Us*, 877 A.2d at 1022.

[134] *See, e.g.*, *In re Cogent*, 7 A.3d at 502-03 (rejecting attempt to omit cash from fee calculation and holding 3% equity value termination fee reasonable); *In re Dollar Thrifty*, 14 A.3d at 613-14 (rejecting attempt to omit special dividend, stock options, and units from fee calculation and holding 3.5% equity value termination fee reasonable).

The $60 million termination fee represents 2.7% of the equity value of the proposed transaction.[135] Termination fees well in excess of this size are routinely considered reasonable by this Court.[136] Thus, the deal protection measures do not give rise to a claim for breach of fiduciary duty.

(ii) Did the Board knowingly permit conflicted directors to funnel confidential information to Attachmate or otherwise to influence impermissibly the process?

Of the nine-member Novell Board, the Plaintiffs only make allegations regarding the conduct of two: Greenfield and Hovsepian. The Amended Complaint does not allege that either Hovsepian or Greenfield dominated or controlled the remaining disinterested and independent directors. Merely asserting that each wished to promote his own interests is not a sufficient pleading of domination or control under Delaware law.[137]

(aa) Greenfield

Plaintiffs allege that Greenfield "secretly funneled information to Francisco Partners and Attachmate."[138] They claim that Greenfield kept Francisco Partners abreast of critical and confidential Board deliberations.[139] The parties seem to agree that the Board was fully aware of, and authorized, Greenfield's communications with Attachmate.[140]

A board may, of course, properly designate a director or member of management to contact, or negotiate with, a potential merger partner.[141]

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[135] Am. Compl. ¶ 144.

[136] *See, e.g.*, *In re Cogent*, 7 A.3d at 502-03 (finding a termination fee 3% of equity value reasonable); *In re Dollar Thrifty*, 14 A.3d at 614 (finding a termination fee 3.5% of equity value reasonable); *In re 3Com*, 2009 WL 5173804, at *7 (approving termination fee and expense reimbursement greater than 4% of equity value).

[137] *See, e.g.*, *In re NYMEX S'holder Litig.*, 2009 WL 32006051, at *6 (Del. Ch. Sept. 30, 2009) ("That directors acquiesce in, or endorse actions by, a chairman of the board . . . does not, without more, support an inference of domination . . . ."). That Greenfield was with Francisco Partners several years earlier, similarly, does not demonstrate any conflict. *See, e.g.*, *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 123 (Del. Ch. 1986) (because of director's retirement there was "no relationship . . . that might give rise to a potential conflict"); *State of Wis. Inv. Bd. v. Bartlett*, 2000 WL 238026, at *6 (Del. Ch. Feb. 24, 2000) (denying preliminary injunction because, contrary to plaintiff's contention, board members did not have conflicts of interest arising from past business dealings).

[138] Am. Compl. ¶ 121.

[139] Am. Compl. ¶ 124.

[140] Reply Br. in Further Supp. of the Novell Defs.' Mot. to Dismiss ("Reply Br.") 16.

[141] *See, e.g.*, *Wayne County*, 2009 WL 2219260, at *10-11 (dismissing loyalty claims challenging board's decision to allow two members of board, who would remain employed by the

That, however, does not necessarily validate preferential treatment in the form of delivery of confidential information. Perhaps there is no breach of fiduciary duty here, but it is "reasonably conceivable" based on the pleadings. These specific allegations cannot readily be separated from other claims of favorable treatment of Attachmate. Resolution of this claim will have to await further proceedings.

(bb) Hovsepian

Hovsepian served as Novell's President and Chief Executive Officer from June 2006 until the closing of the Merger Agreement.[142] Hovsepian's severance agreement included incentives triggered by a change of control.[143] The Plaintiffs allege that the Board impermissibly allowed Hovsepian the opportunity to control the sales process.[144]

The Plaintiffs claim that Hovsepian had a number of improper or personal reasons to orchestrate a complete sale of Novell, instead of pursuing Novell's strategic alternatives such as only executing the Patent Sale, or a standalone plan.[145] These include the allegations that Hovsepian was at risk of being ousted if there was a potential change in management,[146] and that Hovsepian stood to gain, and did ultimately receive, a lump sum cash payment of almost $9 million when he was not retained by Attachmate after consummation of the Acquisition.[147]

However, Plaintiffs do not allege that Hovsepian exerted any undue influence over any of the seven other independent and disinterested members of the Board in their consideration of the Attachmate bid. Further, the possibility of receiving change-in-control benefits pursuant to pre-existing employment agreements does not create a disqualifying interest as a matter of law.[148] If all Hovsepian wanted to do was to collect the change-in-control

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company post-merger, to conduct negotiations); *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 20 (Del. Ch. 2004) (explaining that a board can appropriately rely on its CEO to conduct negotiations); *Parnes v. Bally Entm't Corp.*, 2001 WL 224774, at *10 (Del. Ch. Feb. 23, 2001), *aff'd mem.*, 788 A.2d 131, 2001 WL 1692172 (Del. 2001) (TABLE); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 706 (Del. Ch. 2001).

[142] Am. Compl. ¶ 26.

[143] Am. Compl. ¶ 26.

[144] Am. Compl. ¶ 132.

[145] Am. Compl. ¶ 132.

[146] Am. Compl. ¶ 133.

[147] Am. Compl. ¶ 135.

[148] *See In re Smurfit-Stone*, 2011 WL 2028076, at *22; *Nebenzahl v. Miller*, 1993 WL 488284, at *3 (Del. Ch. Nov. 8, 1993) (finding no reasonable probability of breach of duty of loyalty when merger agreement guaranteed payment of pre-existing change-in-control benefits for directors of target company); *see also In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *12 (Del. Ch. May 22, 2000) (stating that cash severance payment and accelerated vesting of options would

payouts in his severance agreement, he could have encouraged the acceptance of Elliott's original offer to acquire Novell. Instead, Hovsepian, along with the rest of the Board, embarked upon an eight-month sales process resulting in the sale of Novell to Attachmate.

There is therefore no reasonably conceivable set of facts to indicate that Hovsepian's role in the Acquisition, regardless of his purported incentives, led to a breach of the Board's fiduciary duties.

(iii) Did the Board conspire with J.P. Morgan to justify an inadequate merger price?

The Plaintiffs claim that the Board acted in bad faith when it allowed J.P. Morgan to use artificially low projections to justify the inadequate merger price offered by Attachmate.[149] They allege that the numbers used by J.P. Morgan in its March 19, 2010 presentation rejecting the Elliott proposal differed from the numbers used in its November 21, 2010 presentation supporting the Attachmate proposal.[150]

Attempts to infer a breach of fiduciary duty from hindsight quibbles with a financial advisor's fairness opinion do not succeed as a general matter.[151] J.P. Morgan's numbers did change, but revisions are not inherently wrongful. The Plaintiffs do not allege that the Board had knowledge of any purported improprieties on the part of J.P. Morgan.[152] In short, the Amended Complaint does not adequately allege that the Board violated its fiduciary duties when it relied upon J.P. Morgan's work.

(iv) Did Elliott dominate the process?

The Plaintiffs claim that Elliott, as a minority shareholder and as the entity that put Novell in play, dominated the Board's sales process throughout. According to Plaintiffs, the Board was "cowed by Elliott's threats and favored Elliott's interests as a result."[153] These alleged "threats"

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not give rise to improper motive to accomplish merger).

[149] Answering Br. 19.

[150] Am. Compl. ¶ 94.

[151] *See, e.g.*, *In re 3Com*, 2009 WL 5173804, at *6; *In re JCC Holding Co., Inc. S'holders Litig.*, 843 A.2d 713, 721 (Del. Ch. 2003).

[152] The Plaintiffs allege only that the Board was provided different numbers by J.P. Morgan in March 2010 as compared to November 2010. Am. Compl. ¶¶ 98-102; Answering Br. 16-20.

[153] Answering Br. 20. Pleadings regarding the specific "threats" are sparse.

depend upon linking Elliott's status as a 7.1% shareholder and the risk that Elliott would initiate a proxy contest.[154]

However, Delaware law is clear that a plaintiff cannot plead domination or control by mere conclusion.[155] "In the absence of majority stock ownership, a plaintiff must demonstrate that the minority shareholder held a dominant position and actually controlled the corporation's conduct."[156] A minority shareholder's desire to sell its shares does not, on its own, evince domination and control, even if a sale does eventually occur.[157] Control over a corporation's conduct requires control over the "business and affairs of the corporation."[158]

The Plaintiffs do not sufficiently allege that Elliott controlled the business and affairs of Novell or that Elliott had control over the Novell Defendants. There is no allegation of direct control, and the claim that Elliott could have (but did not) mount a proxy contest adds little, even if the Board "took Elliott's threats seriously."[159] The possible initiation of a proxy contest is not sufficient to establish domination and control, or to create a disqualifying interest.[160] Moreover, the Plaintiffs do not allege that a proxy contest was under actual consideration, that other shareholders would support a proxy contest, or that one would have been successful.[161]

The Plaintiffs credit Elliott, with its less than ten percent stake in Novell, with unjustified power and influence. Elliott did not have a representative on the Board, but it did induce the Board to consider the advisability of the sale. However, merely making such a suggestion and obtaining the desired response hardly is sufficient evidence of domination or undue influence. The Plaintiffs' speculation that the Board feared reprisals if Elliott's notions were not implemented is not supported with factual allegations. There are no specific allegations that make it reasonably conceivable that control by (or even fear of) Elliott resulted in any breach of fiduciary duty.

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[154] Am. Compl. ¶ 38.

[155] *Aronson*, 473 A.2d at 816 (Del. 1984) ("The shorthand shibboleth of 'dominated and controlled directors' is insufficient.").

[156] *In re W. Nat'l Corp.*, 2000 WL 710192, at *6 (finding that 46% shareholder did not dominate and control board).

[157] *See In re Answers*, 2011 WL 1366780, at *3 n.40 (denying preliminary injunction where 30% shareholder's possible interest in selling its shares in the company did not taint the process where a disinterested and independent board approved the transactions).

[158] *Id.*

[159] Answering Br. 20.

[160] *In re Lukens Inc.*, 757 A.2d at 729 (explaining that concluding independent disinterested directors would act disloyally because of perceived stockholder dissatisfaction is illogical).

[161] *See e.g.*, Am. Compl. ¶¶ 49-50.

(b) Disclosure of Material Facts

The Plaintiffs assert that the Board, in bad faith, failed to make ten material disclosures.[162] They claim that Novell's public disclosures relating to both the Acquisition and the Patent Sale were inadequate and precluded a meaningful shareholder vote on either agreement.[163] When seeking the affirmative vote of stockholders, the Board has a duty to disclose all material information.[164] Since a vote on the Patent Sale was not required, the disclosure claims are irrelevant with regard to the Patent Sale. The Plaintiffs are left with their allegation that "the Novell shareholders were forced to vote on the Acquisition without all material information necessary to make a fully informed decision."[165]

The materiality standard requires that directors disclose all facts which "under all the circumstances . . . would have assumed actual significance in the deliberations of the reasonable shareholder."[166] In other words, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "'total mix' of information made available."[167] While disclosure allegations "need not be pleaded with particularity," "some factual basis must be provided from which the Court can infer materiality of an identified omitted fact."[168] Under Delaware law, this is "inherently a requirement for a disclosure claim."[169]

The first eight purported disclosure violations relate to Elliott's role in the Board's sale process.[170] These include requests for the full background of Elliott's involvement in the sales process,[171] Elliott's communications with Attachmate,[172] whether Elliott was in fact necessary for Attachmate's financing,[173] and what Elliott would receive as a result of the Acquisition.[174]

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[162] Am. Compl. ¶ 151 (i)-(x).

[163] Am. Compl. ¶ 152.

[164] *Zirn v. VLI Corp.*, 621 A.2d 773, 778 (Del. 1993).

[165] Am. Compl. ¶ 150.

[166] *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[167] *Id.*

[168] *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997).

[169] *Id.*

[170] Am. Compl. ¶ 151(i)-(viii).

[171] Am. Compl. ¶ 151(i).

[172] Am. Compl. ¶ 151(ii)-(iv).

[173] Am. Compl. ¶ 151(v).

[174] Am. Compl. ¶ 151(vi)-(viii).

As a minority shareholder, Elliott's conduct does not rise to the level of assuming "actual significance in the deliberations of the reasonable shareholder."[175]

The actions of a minority (less than ten percent) holder with no representative on the board simply do not require the disclosures that the Plaintiffs argue would have been material.[176] Other than allowing Attachmate and Elliott to work together (and Novell shareholders were aware of this),[177] the Board had no effective control over what Elliott did and, as set forth above, how a perceived fear of Elliott may have influenced the sales process, once initiated, is not backed by any specific factual allegations.

The other two alleged disclosure violations relate to the valuation data provided by Novell.[178] The Plaintiffs allege that the Board failed to disclose "the value of Novell if the stockholders voted down the Acquisition but the Patent Sale closed,"[179] and "the firm value on a per share basis in March compared to November 21, 2010 after subtracting out the case on hand."[180] Delaware law, however, does not mandate the disclosure of every conceivable valuation datum, method, or alternative.[181] All that is required is a "fair summary" of a financial advisor's work,[182] which was disclosed by Novell. The Plaintiffs therefore fail to plead the materiality of any of the ten purported disclosure violations.[183]

(c) Attachmate's Involvement

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[175] *Arnold*, 650 A.2d at 1277 (quoting *TSC Indus.*, 426 U.S. at 449).

[176] The Plaintiffs' contentions regarding the economics of the Attachmate-Elliott relationship are addressed in more detail in Part III.A.1(c)-(d) *infra*.

[177] Proxy 34.

[178] Am. Compl. ¶ 151(ix)-(x).

[179] Am. Compl. ¶ 151(ix).

[180] Am. Compl. ¶ 151(x).

[181] *See, e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006) ("A disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis.").

[182] *See, e.g.*, *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *2-3 (Del. Ch. Nov. 1, 2007) (directors have no duty to provide a specific "checklist" of items when drafting proxy statement and need only provide a "fair summary" of a financial advisor's work).

[183] If the Novell Defendants failed to make the necessary disclosures, that would have constituted a breach of the duty of care, but there is no reasonable basis for attributing disloyal or bad faith motives to the Board. If the disclosure claims did not mix together with the surviving bad faith claim, they would have been exculpated by the § 102(b)(7) provision in Novell's charter. The Plaintiffs' disclosure claims, also, are subject to the almost inevitable issues involving post-closing challenges addressed in *In re Transkaryotic Therapies Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008).

The Plaintiffs allege that the Board allowed Attachmate to taint the sales process, violating the Novell Defendants' fiduciary duties generally and their duty under 8 *Del. C.* § 251(b) to approve the Acquisition only if it was in the best interests of Novell and its shareholders.[184] Specifically, the Plaintiffs claim that the Board allowed Attachmate unfairly to divert merger consideration to Elliott by way of the Equity Commitment, consideration that would otherwise have been paid to the other Novell stockholders.[185] The Plaintiffs allege that the Board permitted Attachmate to negotiate directly with Elliott for the consideration to be paid for Elliott's Novell stock.[186]

One problem with the Plaintiffs' argument is that Novell was not a party to any of the relevant agreements governing the Equity Commitment and is not alleged to have negotiated any of them.[187] The Equity Commitment was negotiated and executed between Attachmate and Elliott, because Attachmate either required financing in order to complete its purchase of Novell or wanted the advantages of pooling resources with Elliott. Although Attachmate and Elliott were, in effect, allowed by the Board to work together in their efforts to acquire Novell, how they allocated their rights and obligations to that mission was beyond the control of the Novell Defendants. By facilitating the Attachmate and Elliott alliance—something not inherently objectionable—the Novell Defendants did not put their fiduciary standing on the line for whatever understanding Attachmate and Elliott might eventually reach. The Board did not breach its fiduciary duties with respect to a transaction it did not approve, and to which Novell is not a party.[188]

(d) Elliott's receipt of disparate or additional consideration

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[184] The Plaintiffs have abandoned the 8 *Del. C.* § 251(b) component of this argument. *See supra* note 91.

[185] Am. Compl. ¶ 80.

[186] Am. Compl. ¶ 80.

[187] Am. Compl. ¶ 148 (quoting Supplemental Proxy) ("Novell is not a party to any agreement with the Elliott Parties other than with respect to the non-disclosure letter entered into by [Elliott].").

[188] *See In re Sea-Land Corp. S'holders Litig.*, 642 A.2d 792, 803 (Del. Ch. 1993) (rejecting similar claims of disparate treatment, stating that "the board must at the very least have approved the transaction creating the disparity"), *aff'd mem. sub nom. Sea-Land Corp. S'holder Litig. v. Abely*, 633 A.2d 371 (Del. 1993) (TABLE). Also, Plaintiffs do not sufficiently allege that Elliott or Attachmate exercised control over the Board's decision-making process regarding the sale of Novell to Attachmate, a transaction which included the separately-negotiated Equity Commitment.

Elliott agreed to contribute a portion of its Novell shares to Attachmate to help finance for the Acquisition.[189] Elliott acquired a net equity interest allegedly of 21.9% of the Combined Company following the Acquisition.[190] The Combined Company had an equity value of $705 million,[191] and Elliott's ownership stake was thus valued at almost $155 million.[192] Elliott also gained a seat on the Combined Company's board of directors.[193]

Plaintiffs claim that "[u]nfettered by any oversight or participation of the Board in the negotiations," Elliott was able to obtain "an over 60% return on its investment in Novell – nearly $10 per share compared to the $6.10 price to Novell's shareholders" at the expense of the other Novell shareholders.[194] Central to the Plaintiffs' allegations is that the Board conspired with Elliott and Attachmate by misleading shareholders as to the reasons why Elliott was permitted to participate as a member of the buy-side group.[195] The Plaintiffs assert that Elliott's participation was unnecessary for the Acquisition, and that the Board falsely claimed that Attachmate had to bring in Elliott due to difficulty in arranging the necessary financing for the Acquisition on its own.[196] The real reason for Elliott's participation, the Plaintiffs claim, was because of a scheme among the Board, Attachmate and Elliott in order to cut Elliott in on the action.

If Attachmate had obtained financing for the Acquisition from another source, it could have compensated this other source for lending Attachmate

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[189] Am. Compl. ¶ 86.

[190] Am. Compl. ¶ 88.

[191] Am. Compl. ¶ 89.

[192] Am. Compl. ¶ 89.

[193] Am. Compl. ¶ 91. The parties genuinely dispute whether Elliott was paid a premium. Elliott has argued that Plaintiffs made a fundamental miscalculation. *See* Br. of Def. Elliott Assocs., L.P. in Supp. of its Mot. to Dismiss the Second Am. Compl. 20-24; Reply Br. of Def. Elliott Assocs., L.P. in Further Supp. of its Mot. to Dismiss the Second Am. Compl. 12. The Plaintiffs may well have backed away from their initial allegations of a premium. *Compare* Am. Compl.¶ 88 (Elliott received 23.0% of Wizard) *with* Answering Br. 28 (Elliott received 11.9%). The Plaintiffs now seemingly base their claim on an allegation that an immediate profit could have been obtained and that apparently depends on a Francisco Partners' projection of possible synergies from the acquisition. Answering Br. at 29-30. Any premium that might have been achieved by Elliott, to some extent, depends upon how one values the Novell business on a going-forward basis when compared with what could have been done with cash proceeds from the disposition. It may be that Plaintiffs' claims regarding a transaction premium should not survive under Court of Chancery Rule 12(b)(6), but that conclusion would require an extensive—and thus perhaps inappropriate at this stage—factual inquiry. Ultimately, the Plaintiffs cannot avoid the proposition that there are circumstances, such as these, in which a premium may be paid.

[194] Am. Compl. ¶¶ 85-86.

[195] Reply Br. 27.

[196] Am. Compl. ¶¶ 36, 57, 58.

money. However, because Attachmate turned to an existing minority shareholder in Novell for the Equity Commitment, one which had put Novell in play in the first place, Plaintiffs question whether the compensation received by Elliott is truly due to the financing provided, or due to the specter of undue influence exerted by a minority shareholder involved in the process.

As discussed above, Novell is not a party to any of the relevant agreements governing the Equity Commitment and is not alleged to have negotiated any of them.[197] The Equity Commitment was negotiated and executed between Attachmate and Elliott, because, it is alleged, Attachmate required financing in order to execute its purchase of Novell. Likewise, Elliott is not a party to the Merger Agreement. The Board did not breach its fiduciary duties with respect to a transaction it did not approve, and to which Novell is not a party.[198]

2. The Patent Purchase Agreement

The Plaintiffs claim that the Board breached an alleged duty to auction properly the Patent Portfolio in order to maximize value for its shareholders.[199] They cite a range of valuations for the Patent Portfolio, some of which are higher than the $450 million CPTN/Microsoft offer Novell accepted.[200] The Plaintiffs allege that while "the Board knew that the patents had the greatest value to Microsoft," it "did not conduct an auction or solicit competitive bidding when Microsoft expressed its interest."[201] They claim that the Board, "rather than negotiating the price of the patents at all . . . got an initial offer of $450 million, and then left it to Attachmate to actually negotiate the details of the patent sale."[202] Further, the Plaintiffs allege that Attachmate based its $6.10 per share offer for Novell on the premise that the Patent Sale would yield $315 million in after tax proceeds. They claim, however, that the net proceeds of the Patent Sale were actually $365 million, with the additional $50 million not passed on to the Novell shareholders who owned the Patent Portfolio at the time of its sale.[203]

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[197] Am. Compl. ¶ 148 ("Novell is not a party to any agreement with the Elliott Parties other than with respect to the non-disclosure letter entered into by [Elliott].").

[198] *See In re Sea-Land Corp.*, 642 A.2d at 803 (rejecting similar claims of disparate treatment, stating that "the board must at the very least have approved the transaction creating the disparity").

[199] Am. Compl. ¶ 119.

[200] Am. Compl. ¶¶ 115-17.

[201] Am. Compl. ¶ 10.

[202] Am. Compl. ¶ 11.

[203] Am. Compl. ¶ 120.

The Plaintiffs are mistaken as to the duties the Board had concerning the Patent Sale. The Board did not have a specific duty to auction the Patent Portfolio. In approving a sale of assets, directors are not required to solicit other offers in the hope of procuring one with a higher dollar value.[204] As to the propriety of the Patent Sale itself, this Court presumes that directors act honestly and in good faith with respect to a sale of assets.[205] This presumption is an important aspect of Delaware's business judgment rule,[206] and provides directors with a wide ambit of business judgment in fixing the terms and conditions of a sale of assets.[207] The presumption applies if the directors are properly informed in making the business judgment.[208] Plaintiffs do not attempt to plead any facts suggesting that the Board was somehow uninformed about the Patent Sale or the value of Novell's Patent Portfolio.[209] In fact, Plaintiffs allege that the Board knew of the value of the Patent Portfolio,[210] and had even considered two expert valuations prior to its sale.[211]

Because the directors were reasonably informed, the asset sale must be examined under the business judgment rule, "with the presumption in its favor that the directors who negotiated it honestly believed that they were securing terms and conditions which were expedient and in the corporation's best interests."[212] The Board did not have a duty to obtain a fairness opinion on the Patent Sale, as fairness opinions "are generally not essential, as a matter of law, to support an informed business judgment."[213] The other

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[204] *Abelow v. Midseaters Oil Corp.*, 189 A.2d 675, 678-79; *Bowling v. Bonneville, Ltd.*, 2 Del. J. Corp. L. 162, 169 (Del. Ch. Jan. 14, 1963) (directors' duty to obtain best offer "does not require that the assets be placed upon the auction block"); *Gimbel v. Signal Cos.*, 316 A. 599, 615 n.10 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974) ("competitive bids are not required").

[205] *Robinson v. Pittsburgh Oil Ref. Corp.*, 126 A. 46, 48 (Del. Ch. 1924) ("[T]he directors of the defendant corporation are clothed with that presumption which the law accords to them of being actuated in their conduct by a bona fide regard for the interests of the corporation whose affairs the stockholders have committed to their charge. This being so, the sale in question must be examined with the presumption in its favor that the directors who negotiated it honestly believe that they were securing terms and conditions which were expedient and for the corporation's best interest.").

[206] *Gimbel*, 316 A.2d at 608-09.

[207] *See Gimbel*, 316 A.2d at 609 (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)) (under the business judgment rule, a board's "decisions will not be disturbed if they can be attributed to any rational business purpose").

[208] *Gimbel*, 316 A.2d at 609.

[209] Plaintiffs list a range of valuations developed under Novell's auspices for the Patent Portfolio. Am. Compl. ¶ 116.

[210] Am. Compl. ¶¶ 115-20.

[211] Am. Compl. ¶¶ 115-17.

[212] *Gimbel*, 316 A.2d at 608-09 (quoting *Robinson*, 126 A. at 48 (Del. Ch. 1924)).

[213] *Alloy*, 2011 WL 4863716, at *10 (citation omitted); *Kleinhandler v. Borgia*, 1989 WL

valuations or retracted offers cited by the Plaintiffs do not defeat the presumption accorded to the Board in discharging its duties. Directors will be presumed to have acted properly in accepting the highest actual sale offer, even if there were some appraisals indicating a higher valuation of the assets.[214] Directors are not "derelict in their duty to obtain the best offer" simply because "at some time in the past some third person [other than the proposed acquirer] had evinced an interest in the corporate assets."[215]

Because the business judgment rule applies, the Plaintiffs can only challenge the Patent Sale by alleging a "reasonably conceivable set of circumstances susceptible of proof" that the Board acted in bad faith or committed fraud.[216] The Plaintiffs have not alleged fraud. What is left of the Plaintiffs' arguments is the claim that the Board abdicated its duties in connection with the Patent Sale.[217] However, Plaintiffs do not contend that the decision ultimately to approve the Patent Sale was made by someone other than the Board. The most that Plaintiffs allege is simply that Attachmate had conversations with CPTN about the Patent Sale at some point in the process.[218] Because Attachmate was considering the acquisition of the Novell business and software lines to which those patents related, this is unremarkable.

Plaintiffs also allege that the Board did nothing in the Patent Sale to secure any after tax proceeds that exceeded the $315 million Attachmate used to fund its $6.10 per share offer,[219] and instead, allowed Attachmate to benefit from an extra $50 million in net proceeds from the Patent Sale.[220] Perhaps this was a bad business decision on the part of the Board. The Amended Complaint offers no reason to infer that the Board was grossly negligent at the time it made the decision that eventually resulted in the criticized outcome. The Amended Complaint offers no reason to infer that the Board made the decision in bad faith. Thus, there is no adequate allegation of breach of any fiduciary duty.

Plaintiffs therefore cannot recover under any reasonably conceivable set of circumstances susceptible of proof with regard to the Patent Sale, and any claim relating to the sale of the patents will be dismissed.

B. Count II: Claim For Aiding And Abetting Breach Of Fiduciary

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76299, at *5 (Del. Ch. July 7, 1989).

[214] *Allaun v. Consol. Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929).

[215] *Bowling*, 2 Del. J. Corp. L. at 169.

[216] *Cent. Mortg.*, 27 A.3d at 536 (citation omitted).

[217] Am. Compl. ¶ 158.

[218] Am. Compl. ¶¶ 111-12.

[219] Answering Br. 22-23.

[220] Am. Compl. ¶ 120.

Duties Against Attachmate And Elliott

To state a claim for aiding and abetting, a plaintiff "must allege facts that satisfy the four elements of an aiding and abetting claim: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach."[221]

To avoid dismissal, the Plaintiffs must plead non-conclusory facts to support a reasonable inference of knowing participation by Attachmate/Elliott in a breach by the Novell directors of their fiduciary duties. Knowing participation requires "that the third party act with the knowledge that the conduct advocated or assisted constitutes . . . a breach [of fiduciary duty]."[222] Therefore, the Amended Complaint should set forth factual allegations from which Attachmate/Elliott's knowing participation can be reasonably inferred.[223] Plaintiffs make no direct allegations of Attachmate or Elliott's knowing participation. In the absence of specific allegations, knowing participation may be inferred where (i) an acquirer sought to induce the breach of fiduciary duty such as through the offer of side payments intended as incentives for the fiduciaries to ignore their duties; (ii) it appears that the acquiror may have used knowledge of the breach to gain a bargaining advantage in the negotiations; or (iii) a fiduciary breaches its duty in an "inherently wrongful manner," and the plaintiff alleges specific facts from which the Court could reasonably infer knowledge of the breach by the non-fiduciary.[224]

The Plaintiffs' only surviving claim for breach of fiduciary duty (and, thus, the only one which Attachmate or Elliott could have aided or abetted) involves the Board's favorable treatment of Attachmate to the detriment of Party C. The Plaintiffs do not allege, other than in conclusory fashion, that Attachmate knowingly gained any benefit from any breach of fiduciary duty by the Novell Defendants. They do not, by their factual allegations, provide an understanding of how Attachmate used knowledge of any unfair process carried out by the Board. The question is whether, because of the confidential information provided to Attachmate, is it reasonable to infer that Attachmate knew that comparable information was not being provided to Party C? If Attachmate knew that Party C was not receiving substantially

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[221] *Malpiede*, 780 A.2d at 1096 (internal quotation omitted).

[222] *Malpiede*, 780 A.2d at 1097.

[223] See *McGowan v. Ferro*, 2002 WL 77712, at *2 (Del. Ch. Jan. 11, 2002); *Lukens*, 757 A.2d at 734-35.

[224] See *Morgan v. Cash*, 2010 WL 2803746, at *4 (Del. Ch. July 16, 2010); *McGowan*, 2002 WL 77712, at *2.

the same information—especially with regard to the Patent Sale—then Attachmate might well have been in the position of an aider and abetter.

The core of the Plaintiffs' surviving claim against the Novell Defendants is that the Novell Defendants' failure to tell Party C about the Patent Sale is not explainable, except for possible bad faith. Where the Court is induced not to dismiss a particular claim alleging bad faith because there is no apparent other reason for the challenged conduct, it is difficult to see how the facts in the Amended Complaint give rise to an inference—there is no express allegation—that Attachmate knew of the inconsistent treatment with respect to material business developments. It must be remembered, however, that the Court is not called upon to choose which is the better of two reasonable inferences; the question is whether the inference favorable to the Plaintiffs in this context—that Attachmate must have known—is a reasonable and plausible one based on the factual allegations. The Amended Complaint fails to offer any reason why Attachmate would have known that information regarding the Patent Sale was not being shared with other potential bidders who had gone far into the acquisition process. Without that inference, it is not reasonably conceivable that Attachmate aided and abetted the Novell Defendants in any breach of fiduciary duty.[225]

Elliott's initial bid for Novell in March 2012 was a catalyst for the sales process that resulted in the Acquisition, but that does not demonstrate—and the Plaintiffs have not adequately alleged—any material role for Elliott in the Board's decision-making process. Elliott, as a relatively small minority shareholder, engaged in an arms-length process—as far as Novell is concerned—and arms-length negotiations do not support an aiding and abetting claim.

Thus, no aiding and abetting claim has been alleged.

IV. CONCLUSION

For the foregoing reasons, the Amended Complaint states a reasonably conceivable bad faith claim based on the Novell Defendants' unexplained, extremely favorable treatment of Attachmate during the acquisition process. The balance of the Amended Complaint, however, does not meet the

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[225] That leaves the "inherently wrongful manner" prong of the aiding and abetting standard. Between the lack of any reason why Novell should have known of the specifically-challenged fiduciary conduct and the discretion that boards have in structuring and negotiating with potential acquirers, the factual asymmetry may suffice to enable the Plaintiffs to avoid dismissal of their claim against the Novell Defendants, but the limited understanding of motivations and relationships provided by the Amended Complaint does not refute Attachmate's arguments as to why it should not be deemed to have aided or abetted any fiduciary duty breaches.

standards required by Court of Chancery Rule 12(b)(6). Thus, the Defendants' motions to dismiss are denied with respect to the claims of paragraph 158(a) of Count I of the Amended Complaint related to the favoring of Attachmate over other bidders, but, otherwise, they are granted.

An implementing order will be entered.

IN RE BJ'S WHOLESALE CLUB, INC. SHAREHOLDERS LITIGATION

No. 6623-VCN

In the Court of Chancery of the State of Delaware

January 31, 2013

Jessica Zeldin, Esquire and P. Bradford deLeeuw, Esquire, of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware; Labaton Sucharow LLP, Wilmington, Delaware; Motley Rice, LLC, Mt. Pleasant, South Carolina; Robbins Geller Rudman & Dowd LLP, Boca Raton, Florida; and Faruqi & Faruqi, LLP, New York, New York, Liaison Counsel and Lead Counsel for Plaintiffs.

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R. Judson Scaggs, Jr., Esquire and Pauletta J. Brown, Esquire, of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendants Laura J. Sen and Herbert J. Zarkin.

Raymond J. DiCamillo, Esquire and Susan M. Hannigan, Esquire, of Richards, Layton & Finger, P.A., Wilmington, Delaware; Paul C. Gluckow, Esquire and Mark D. Villaverde, Esquire, of Simpson Thacher & Bartlett LLP, New York, New York; and Blair G. Connelly, Esquire and Sarah M. Lightdale, Esquire, of Latham & Watkins LLP, New York, New York, Attorneys for Leonard Green & Partners, L.P., CVC Capital Partners, Beacon Holding, Inc., and Beacon Merger Sub, Inc.

NOBLE, *Vice Chancellor*

Lead Plaintiffs, a collection of individual and institutional former shareholders of Defendant BJ's Wholesale Club, Inc. ("BJ's" or the

"Company"), bring a direct shareholder class action against BJ's former board of directors (the "Board" or "Defendant Directors"), for breach of their fiduciary duties in connection with the September 30, 2011 sale of all of BJ's outstanding shares to private equity firms Defendant Leonard Green & Partners, L.P. ("LGP") and Defendant CVC Capital Partners ("CVC") for $51.25 per share (the "Buyout"). The Plaintiffs also allege that LGP, CVC, and Defendant Beacon Holding, Inc., an affiliate of LGP and CVC ("Beacon Holding"), and Defendant Beacon Merger Sub, a wholly owned subsidiary of Beacon Holding used to effectuate the Buyout (collectively, the "Buyout Group"), aided and abetted the Defendant Directors' breach of their fiduciary duties. Defendants have filed a joint motion to dismiss Plaintiffs' Second Amended Complaint. For the following reasons, their motion is granted.

I. BACKGROUND

A. The Parties

Lead Plaintiffs in this consolidated class action are Norfolk County Retirement System, Employees' Retirement System of the Government of the Virgin Islands, Freddie Wayne Baumgartner, and Maxine Phillips, all of whom were—at all relevant times—holders of BJ's common stock.[1]

BJ's, formerly a publicly traded Delaware corporation, is a membership based warehouse club that offers, among other items, food, apparel, office equipment, and household products. Its principal competitors are Costco and Sam's Club (a division of Wal-Mart Stores, Inc.).[2] As the third-largest wholesale retailer in the United States, BJ's operates 190 stores in 15 eastern states.[3]

Defendant Laura J. Sen ("Sen") was BJ's President and Chief Executive Officer from February 2009 and served as a director from January 2008.[4] As of May 2010, Defendant Herbert J. Zarkin ("Zarkin") was the non-executive Chairman of the Board and served as a consultant to Sen (the CEO) and senior management of the Company. Previously, he had served as Chairman of the Board for almost 13 years and, for a short period, as President and CEO of the Company.[5] Defendant Thomas J. Shields ("Shields") was a director of the Company from July 1997 until the Buyout.

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[1] Verified Consolidated Second Am. Class Action Compl. (the "Complaint" or "Compl.") ¶ 11.

[2] *Id.* at ¶ 32.

[3] *Id.* at ¶ 12.

[4] *Id.* at ¶ 13.

[5] *Id.* at ¶ 14.

The Plaintiffs cursorily challenge Shield's independence from Zarkin and Sen (both of whom are allegedly interested in the transaction) because of his long-term professional relationship with them, which dates as far back as 1992.[6] Also, the other members of the Board at the time of the Buyout are Defendants.[7]

LGP is a private-equity investment firm specializing in organizing, structuring, and sponsoring management buyouts of established companies.[8] CVC is one of the largest private equity firms in the world. Beacon Merger Sub, the entity into which BJ's was merged, is a subsidiary of Beacon Holding, which is an affiliate of LGP and CVC.[9]

B. LGP Expresses Interest in Acquiring BJ's

On July 1, 2010, LGP filed a Schedule 13D with the Securities & Exchange Commission (the "SEC") disclosing its 9.5% beneficial ownership of the Company's common stock and signaling its interest in a private buyout of the Company.[10] On July 7, 2010, the Company engaged Greenhill & Co., Inc. ("Greenhill") as its financial advisor to assist the Company in exploring strategic alternatives. Before August 24, 2010—when the Board formed a special committee charged with evaluating potential strategic alternatives (the "Special Committee")—Zarkin exclusively discussed with LGP the prospect of a going private transaction.[11] As of September 1, however, Zarkin was prohibited from communicating with LGP except under the direction of the Special Committee, which was led by Shields, and included four other directors: Schlesinger, Cournoyer, Peters, and Sheehan.[12]

By early November, Shields, allegedly at Zarkin's request, had abruptly terminated Greenhill's engagement when he decided to hire Morgan Stanley instead.[13] Discussions between LGP and the Special Committee

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[6] *Id.* at ¶ 68 n.3.

[7] Those Defendants are: Christine M. Cournoyer ("Cournoyer"), Paul Danos ("Danos"), Edmond J. English ("English"), Helen Frame Peters ("Peters"), Leonard A. Schlesinger ("Schlesinger"), and Michael J. Sheehan ("Sheehan").

[8] At least as alleged in the Complaint, LGP was the most serious bidder until late in the sales process when it joined forces with CVC. Many of the allegations in the Complaint refer exclusively to LGP and not to the Buyout Group as a whole. In any event, that distinction does not matter here because Plaintiffs have failed to state a claim against any of the Defendants.

[9] *Id.* at ¶¶ 23-26.

[10] *Id.* at ¶ 61.

[11] *Id.* at ¶¶ 66, 68.

[12] *Id.* at ¶¶ 68, 70.

[13] *Id.* at ¶¶ 67, 72. The Special Committee hired Morgan Stanley as its financial advisor on

followed in late December and early January 2011.[14] On February 3, the Company issued a press release announcing that the Board, based on the Special Committee's recommendation, had decided to explore strategic alternatives.[15]

C. Other Expressions of Interest

Shortly thereafter, Party A, a strategic competitor of BJ's, repeatedly expressed interest to Morgan Stanley about a potential acquisition. According to Sen, Morgan Stanley was dismissive about Party A's expression of interest because it had no prior history of acquiring domestic companies. Sen also characterized Party A's interest as "something to shrug off."[16] Nevertheless, the Board discussed Party A's interest during a March 7, 2011 board meeting. The next day, Morgan Stanley informed Party A that BJ's would not be comfortable sharing material, non-public information with a direct competitor at that stage. In contrast, the Board provided a confidential offering memorandum ("offering memorandum") to twenty-three private equity firms.[17]

In early April, Party A sent a letter to BJ's proposing, subject to certain conditions, to acquire it in an all-cash transaction at a purchase price in the range of $55 to $60 per share. Among other things, the letter noted that Party A had retained Gibson Dunn & Crutcher ("Gibson Dunn") as its corporate and regulatory counsel and that Party A had conducted an extensive review of the regulatory risks. The letter requested that BJ's regulatory counsel confer with Gibson Dunn, which occurred on April 15.[18] Also in response to that letter, BJ's held a meeting with representatives from Party A on April 18, 2011, which was attended by Zarkin, Sen, Shields, English, and Schlesinger. On that same day, BJ's later determined that it would not be in the best interests of the Company to pursue the expression of interest by Party A.[19] No other negotiations with Party A occurred and the Complaint provides no indication that Party A continued to pursue its interest in acquiring the Company.

Party B, a private equity firm, first contacted BJ's in July 2010 after LGP's Schedule 13D filing, and made further overtures to Morgan Stanley in November. Following receipt of the offering memorandum, Party B

November 10, 2010.

[14] *Id.* at ¶ 75.

[15] *Id.* at ¶ 76.

[16] *Id.* at ¶ 78.

[17] *Id.* at ¶ 79.

[18] *Id.* at ¶ 80.

[19] *Id.* at ¶ 81.

proposed a hybrid transaction that valued BJ's between $60 and $72 per share (the "recapitalization proposal"). In addition to a one-time $20 per share dividend, the recapitalization proposal called for BJ's to acquire Party B's warehouse club franchise. The Board rejected this proposal two days after receiving it. Undeterred, Party B then submitted on April 25 an all-cash proposal to buy BJ's at a price range from $50 to $53 per share. However, Party B never advanced to the final round of bidding, and none of the other four private equity firms which had expressed some interest ultimately submitted a bid.[20]

D. LGP & CVC Complete the Buyout

On May 8, LGP was allowed to submit a joint acquisition proposal with CVC even though the Board had previously prohibited proposed partnerships between Bain and Ares and between LGP and Party B. On June 16, Morgan Stanley received a final joint proposal from the Buyout Group to acquire the Company for $50 per share in an all-cash transaction.[21] At a meeting on June 20, the Special Committee rejected that offer as insufficient and countered with a $55 per share offer. In response, the Buyout Group increased its offer to $50.75 on June 23. The next day the Special Committee countered at $52.50 and the Buyout Group immediately responded with its "best and final" offer of $51.25, which the Board ultimately accepted.[22] In accepting the Buyout Group's offer, the Board relied upon Morgan Stanley's fairness opinion (the "fairness opinion").[23]

On June 28, 2011, BJ's publicly announced that it had agreed to be acquired by the Buyout Group in an all-cash, going private transaction valued at $2.8 billion or $51.25 per share (the "Merger Agreement").[24] That price represented a 6.6% premium to the $48.08 closing price of BJ's common stock on June 28, 2011, the day before BJ's publicly announced the Buyout, and a 38% premium to the closing price of BJ's common stock on June 30, 2010, the day before LGP announced its 9.5% ownership stake.[25]

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[20] *Id.* at ¶¶ 83-86.

[21] *Id.* at ¶ 87.

[22] *Id.* at ¶¶ 88, 90.

[23] *Id.* at ¶ 89.

[24] *Id.* at ¶ 95.

[25] *Id.* at ¶¶ 95, 131. Plaintiffs attempt to discount this substantial premium by arguing that most, if not all, of this increase can be explained by changes in the market, and not the typical run-up based on merger rumors. Specifically, they argue that, as of June 20, 2011, BJ's cumulative returns since June 30, 2010 were 23.14% while the S&P 500's returns for the same period were 24.03%. *Id.* at ¶ 132. This argument has no merit. Just because the S&P 500 closely tracked the returns of BJ's, a company that had been considering strategic alternatives since at least early 2011,

The Merger Agreement included various deal protection devices on behalf of the Buyout Group, including a no-shop provision that prevented the Company from soliciting a better offer, information rights, bid matching rights, a termination fee of $80 million, and a force-the-vote provision, by which BJ's was required to hold a shareholder vote on the Buyout even if it received a bona fide superior proposal.[26]

The first of the actions challenging the Buyout was filed on June 29, 2011, the day after it was announced. The Board filed a proxy statement with the SEC on August 4, 2011. After the Plaintiffs' moved for a preliminary injunction on August 24, the proxy statement was supplemented on August 29, 2011 with additional information, including the expressions of interest by Party A and Party B and the proposals that the Buyout Group made to management on June 27, 2011.[27] A second supplementary proxy was filed on August 31, 2011.[28] As a result of these disclosures, the Plaintiffs withdrew their motion for a preliminary injunction, and the transaction was consummated on September 30, 2011.[29]

E. Shareholder Class Allegations

In Count I of their Complaint, the Plaintiffs allege that the Defendant Directors breached, in bad faith, their fiduciary duties of loyalty and care by agreeing to a buyout that did not provide the best available value to BJ's former shareholders (the "Bad Faith Claim").[30] In support of this contention, the Plaintiffs allege that the Defendant Directors (1) were improperly motivated to support the Buyout Group; (2) intentionally shunned Party A and Party B to secure a deal with the Buyout Group; (3) knowingly ignored an inaccurate valuation analysis in the fairness opinion to create an illusion that the Company was less valuable; (4) filed a misleading and deficient

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does not necessarily mean that BJ's returns were attributable to or caused by the overall market returns. What causes a stock price to go up (or down) is an imprecise science, one that is not reliably explained by reference to a standard market measure.

[26] *Id.* at ¶¶ 135-38. Defendants argue that the Merger Agreement did not contain a "force the vote" provision because, while Section 6.5(b) required BJ's to proceed with a stockholder meeting even if the Board changed its recommendation, the Company had the unilateral right to terminate the agreement under Section 8.1(f). Defs.' Br. in Supp. of their Joint Mot. to Dismiss Pls.' Verified Consolidated Second Am. Class Action Compl. ("Defs.' Br.") 31 n. 24. The Court need not address this argument because the deal protection devices, even with a force the vote provision, are not unreasonably preclusive.

[27] Compl. ¶ 145.

[28] *Id.* at ¶ 147.

[29] *Id.* at ¶ 148.

[30] *Id.* at ¶¶ 150-52.

proxy statement; and (5) agreed to unreasonably preclusive deal protection measures.

First, they allege that Sen and Zarkin were motivated by financial incentives and future employment to support a deal with LGP. Sen, for instance, was to receive $9 million in payments or benefits upon a change of control, and allegedly was promised, as early as January 2011, that she could remain in her current post following the Buyout.[31] As for Zarkin, he apparently sent an email to Shields the day before the Company accepted the Buyout Group's offer noting that LGP still had open questions about management's package and complaining that LGP had only offered management five percent equity.[32] With the exception of the two officer-directors (Sen and Zarkin), however, the Complaint does not allege that any of the other directors were interested in the transaction.

Second, the Plaintiffs allege that the Board, led by Sen and Zarkin, shunned Party A (in favor of a deal with LGP) despite its superior offer of $55 to $60 per share. As objective evidence of bad faith, the Plaintiffs point to the fact that the Board (1) did not share non-public information with Party A, as it did with the private equity suitors, and (2) dismissed Party A's proposal in a mere ten days, demonstrating that BJ's could have done more to resolve the regulatory obstacles to that offer.[33] The Plaintiffs similarly allege that the Board spurned Party B and its recapitalization proposal valued at more than $60 per share.[34]

Third, the Plaintiffs allege that the Board justified its acceptance of an inferior offer by (1) knowingly relying upon improper assumptions and valuation metrics employed by Morgan Stanley in its fairness opinion[35] and (2) intentionally and improperly lowering the Company's own financial projections.[36] As to the fairness opinion, the Complaint disagrees with various assumptions utilized by Morgan Stanley. The Plaintiffs argue that these "errors" were so blatant that the Board knew that the fairness opinion was inaccurate and misrepresented the true value of the Company. For instance, the Plaintiffs argue that the terminal growth rate of 2.8% used in the discounted cash flow analysis undervalued the Company and that Morgan Stanley should have used 4.0% as the growth rate because that was the projected long-term growth rate in the United States.[37] The Complaint

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[31] *Id.* at ¶ 103.
[32] *Id.* at ¶ 93.
[33] *Id.* at ¶ 108.
[34] *Id.* at ¶ 87.
[35] *Id.* at ¶ 109.
[36] *Id.* at ¶ 116.
[37] *Id.* at ¶ 113. Plaintiffs also argue that the 2.8% terminal growth rate is "nonsensical"

also disagrees with Morgan Stanley's comparisons in its public company analysis. Instead of comparing BJ's to only other membership warehouse clubs—such as Sam's Club and Costco—the Plaintiffs claim that it improperly compared BJ's to two supermarkets, which do not receive membership fees. The improper inclusion caused the group average multiple to be lower, resulting in a lower valuation of the Company.[38]

As to the Company's own financial projections, the Plaintiffs allege that Sen modified its five-year plan projections immediately after LGP's initial expression of interest in order to paint a less "rosy" picture of the Company's future outlook.[39] Sen allegedly manipulated the numbers to facilitate a deal with LGP. The Plaintiffs also point to the fact that cash flow projections used by Morgan Stanley were significantly lower than those utilized in a May 2011 presentation by BJ's management.[40] They also allege that the Board knew that the fairness opinion did not include the efficiencies related to the information technology system, and therefore, did not properly value the Company.[41]

In further support of the Plaintiffs' allegations that BJ's shareholders should have received a higher price and that the Board knew that the Company was worth more than $51.25 per share, they cite various analyst reports and commentary suggesting that BJ's fair value was at least $55 per share and as high as $60 per share.[42]

Fourth, the Plaintiffs contend that the Board, although it eventually acquiesced in disclosing all of the Plaintiffs' requested disclosures, exhibited bad faith by issuing initially a misleading and inaccurate proxy statement.[43] Finally, the Plaintiffs allege that the deal protection devices, when considered collectively, unreasonably limited the Board's ability to pursue alternative superior transactions.[44]

In Count II of their Complaint, the Plaintiffs claim that the Buyout Group knowingly participated in, and thereby aided and abetted, the Defendant Directors' breach of their fiduciary duties (the "Aiding and Abetting Claim").[45] Specifically, the Plaintiffs assert that the Buyout Group

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considering that Morgan Stanley assumed BJ's would grow its free cash flows by 20% in 2015, 17% in 2016, and then drop to 2.8% in 2017, and thereafter. *Id.* at ¶ 114.

[38] *Id.* at ¶¶ 118-19.

[39] *Id.* at ¶¶ 62-65.

[40] *Id.* at ¶ 116.

[41] *Id.* at ¶ 117.

[42] *Id.* at ¶¶ 121-30.

[43] *Id.* at ¶¶ 143-44.

[44] *Id.* at ¶¶ 135-42.

[45] *Id.* at ¶¶ 155-60.

rendered "substantial assistance to the Defendant Directors in their breaches of their fiduciary duties to BJ's former shareholders."[46]

II. ANALYSIS

A. Applicable Standard

Before the Court is Defendants' motion to dismiss the Complaint. "Pursuant to [Court of Chancery] Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief."[47] "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability."[48]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[49]

While the Plaintiffs have repeatedly emphasized (in their briefs and at oral argument) that this standard is a minimal one, the Court will not credit conclusory allegations or draw unreasonable inferences in favor of the Plaintiffs.[50] If the complaint states facts that could explain otherwise inexplicable bad faith conduct, the Court will not ignore those reasonable explanations.[51] However, a motion to dismiss will be denied "as long as there is a reasonable possibility that a plaintiff could recover."[52]

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[46] *Id.* at ¶ 159.

[47] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011).

[48] Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC, 27 A.3d 531, 537 (Del. 2011).

[49] *Id.* at 536 (citation omitted).

[50] *In re Alloy, Inc.*, 2011 WL 4863716, at *6 (quoting *Price v. E.I. DuPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).

[51] *Id.*, 2011 WL 4863716, at *7.

[52] *Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2012 WL 2053329, at *2 (Del. Ch. May 25, 2012); *see In re Alloy, Inc.*, 2011 WL 4863716, at *6 (citing *Cent. Mortg. Co.*, 27 A.3d at 537 n. 13) ("Delaware's reasonable 'conceivability' standard asks whether there is a 'possibility' of

B. The Bad Faith Claim

A fundamental principle of Delaware law is that directors of a corporation manage and direct the business and affairs of the company.[53] "In exercising these powers, directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."[54] When directors decide to engage in a change of control transaction, their fiduciary duties of loyalty and care require that they seek to maximize the sale price of the enterprise.[55]

Where, as here, a corporation's certificate of incorporation contains an exculpatory provision authorized by 8 *Del. C.* § 102(b)(7), which immunizes directors from damages arising from a breach of the duty of care, plaintiffs must "plead sufficient facts to show that *a majority of the Board of Directors* breached the fiduciary duty of loyalty."[56] Accordingly, the Defendant Directors "are entitled to dismissal unless the [P]laintiffs have pled facts that, if true, support the conclusion that the [Defendant Directors] failed to secure the highest attainable value as a result of their own bad faith or otherwise disloyal conduct."[57] As applied to this case, the facts alleged in the Complaint must show that (1) a majority of the Board was not both disinterested and independent or (2) "that the [Board] did not act in good faith."[58]

First, the Plaintiffs have not pleaded facts sufficient to show that the Board was not disinterested and independent. Under Delaware law, "[a] director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[59] That benefit must be "significant enough 'in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.'"[60] "Independence

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recovery.").

[53] 8 *Del. C.* § 141(a).

[54] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

[55] *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citing *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182-83 (Del. 1986)).

[56] *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009).

[57] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000).

[58] *In re Alloy, Inc.*, 2011 WL 4863716, at *7.

[59] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

[60] *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (italics omitted) (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999)).

means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[61]

In their Complaint, the Plaintiffs did not seriously challenge the disinterestedness and independence of the Board. The Buyout was approved by all nine of BJ's directors. The Complaint fails to make any allegations that six of the directors were interested. Four of the six concededly disinterested directors were members of the Special Committee that ultimately recommended the transaction (Schlesinger, Cournoyer, Peters, and Sheehan). The two other disinterested directors were Danos and English. The Plaintiffs also did not make any well-pleaded allegations that the six disinterested directors were somehow dominated or controlled by the two allegedly interested directors (Zarkin and Sen).[62] As for Shields, the Complaint only cursorily challenges his independence from Zarkin and Sen.[63]

The Plaintiffs offer conclusory allegations that management (supposedly Sen and Zarkin) influenced the Company's disinterested directors,[64] but the Complaint lacks any facts buttressing that conclusion. Without more, the Court is not persuaded that the balance of the Board is beholden to management or that management controls and directs the corporation to the exclusion of the Board—a position contrary to the fundamental structure of corporations.[65] Thus, the Plaintiffs have not

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[61] *Aronson*, 473 A.2d at 816.

[62] The Court need not determine whether Zarkin and Sen were in fact interested, although the Court acknowledges that they, as officers of the Company, had a significant interest in continued employment and the receipt of significant benefits conditioned upon a change of control transaction.

[63] The Complaint alleges that Shields has "nearly twenty years of Board service alongside Zarkin and a long-term relationship with Sen." Compl. ¶ 68. This type of allegation does not raise a reasonable doubt as to the independence of a director under Delaware law. *See Beam v. Stewart*, 845 A.2d 1040, 1050-52 (Del. 2004) (directors were independent despite having longstanding personal and professional relationships to allegedly interested directors).

[64] Compl. ¶ 2 ("Board . . . acted in bad faith by yielding to the will of self-interested management"), ¶ 69 ("all significant decisions concerning the Company's evaluation of strategic alternatives were made by the Board, along with members of BJ's management"), ¶ 93 ("The obvious reason the Board approved the takeover is because it was influenced by management").

[65] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 821 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006) ("The board is dominated by outsiders. Eleven of the twelve directors are not employees of JPMC. Harrison [the CEO of JPMC] cannot fire any of them. Additionally, Harrison is not a controlling stockholder of JPMC and therefore has no power to oust them as directors through a stockholder vote. On the contrary, it is the eleven outside directors who collectively have the power to dismiss Harrison and the rest of his management team. The plaintiffs allege that the defendant directors are beholden to Harrison, but they fail to demonstrate why that is so. Even in cases in which the CEO had a supermajority of voting power, courts have upheld outside directors' independence in the face of additional relationships. Here, Harrison reports to a board of

pleaded a duty of loyalty claim against the Defendant Directors arising from any disabling interest or lack of independence.

Second, "bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'"[66] The Delaware Supreme Court has emphasized that an "extreme set of facts" is "required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties."[67] A breach of the duty of loyalty may also exist, notwithstanding approval by a majority of disinterested and independent directors, "where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[68]

The Complaint does not allege facts that support a reasonable inference that the Board consciously disregarded its so-called *Revlon* duties. Indeed, the conduct of the Board and the Special Committee, as described in the Complaint, militates against such a claim. For instance, the Board met regularly to discuss strategic alternatives and formed an independent Special Committee to steer the process. The Special Committee retained its own financial and legal advisors, conducted a publicized review of strategic alternatives, and met with every party which made a serious overture. As important, after receiving only one formal offer for $50 per share, the Board drove the price up before agreeing to the Buyout Group's "best and final offer" of $51.25. The Board relied upon Morgan Stanley's opinion that the price was fair. It also negotiated some favorable deal terms, including a fiduciary out clause and a reverse termination fee. These actions sufficiently counter any inference that the Defendant Directors "utterly failed to attempt to obtain the best sale price."[69] Therefore, in order for the Plaintiffs to succeed on a claim that the Board acted in bad faith, they must allege that the decision to sell the Company was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[70]

1. The Board's Treatment of Party A and Party B

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directors that he cannot fire or remove, a fact that appears lost in the allegations that each director, no matter how indirectly, has some external relationship to JPMC.") (footnote omitted).

[66] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

[67] *Lyondell Chem. Co.*, 970 A.2d at 243 (internal quotation marks omitted) (quoting *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008)).

[68] *In re Alloy, Inc.*, 2011 WL 4863716, at *7 (internal quotation marks omitted).

[69] *Lyondell Chem. Co.*, 970 A.2d at 244.

[70] *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (internal quotation marks omitted).

First, the Plaintiffs generally contend that the Board exhibited bad faith when it did not sufficiently explore preliminary expressions of interest from Party A and Party B. As an initial matter, allegations that the Board should have done more, even if supported by well-pleaded facts, would, at best, only support a duty of care claim. A complaint that criticizes the "Special Committee for not evaluating fully alternative transactions . . . does not support an inference that the Special Committee acted disloyally or in bad faith."[71] To the extent that the Plaintiffs' allege that the Board's treatment of Party A and Party B was in bad faith, those allegations are not supported by facts in the Complaint sufficient to draw a reasonable inference of bad faith.

The Plaintiffs' contention that the Board acted in bad faith by summarily rejecting Party B's recapitalization proposal that valued BJ's shares between $60 and $72 does not support a reasonable inference that the Board acted disloyally. The Board was considering the sale of the Company, not the purchase of Party B's affiliate. It had no obligation under its Revlon duties to pursue this fundamentally different proposal based upon Party B's speculative estimation of what the value of such a transaction would be worth to BJ's shareholders. Thus, the Board's rejection of this different proposal in only two days supports no inference that it acted in bad faith. The Complaint also does not carry an inference that the Board treated Party B different from LGP or any other bidders. Party B was given access to BJ's confidential information and the opportunity to submit formal bids after completing its due diligence. Although Party B submitted a preliminary proposal to acquire BJ's for between $50 and $53 per share, it never submitted a formal bid, and never offered to top the Buyout Group's best and final offer.[72]

Furthermore, the Plaintiffs' contention that the Board acted in bad faith by shunning Party A also fails for similar reasons. As recited in the Complaint, Morgan Stanley was "dismissive" about Party A's expression of interest and Sen characterized that expression of interest as "amusing" or "something to shrug off."[73] That the proxy statement failed to disclose Party A's interest, and even disclosed inaccurately that there was no interest from a strategic buyer, is evidence, the Plaintiffs argue, that the Defendant Directors were attempting to hide Party A's interest and somehow thwart its opportunity to acquire BJ's.[74] The Board also allegedly acted in bad faith

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[71] *Id.* at *8.
[72] *See* Compl. ¶¶ 82-86.
[73] Compl. ¶ 78.
[74] Pls.' Answering Br. in Opp'n to Defs.' Joint Mot. to Dismiss Pls.' Verified Consolidated

when it directed Morgan Stanley to solicit interest only from private equity firms. Consequently, the offering memorandum was not shared with Party A, while it was shared with twenty-three private equity firms. The Plaintiffs further contend that the Board acted in bad faith when, after only ten days, it decided not to pursue Party A's preliminary expression of interest (valued in a range of $55 to $60 per share) due supposedly to regulatory concerns.[75]

Morgan Stanley's dismissive disposition toward Party A and Sen's characterization of Party A's interest, as told to her by a banker at Morgan Stanley, does not support a reasonable inference that the Board acted in bad faith. First, why the Court should attribute Morgan Stanley's attitude toward Party A to Sen, the Special Committee or the Board is not adequately pleaded in the Complaint. Even assuming that Sen believed and communicated to the Board that Party A's interest was "something to shrug off," her statement is not necessarily indicative of bad faith. Nor does it reasonably show the Board's disposition toward Party A as a possible acquirer. Something of a negative attitude toward a competitor is not unusual. Second, and more importantly, the Defendant Directors had no reason not to rely upon Morgan Stanley's advice that strategic buyers, including Party A, would not likely be interested or that their interest would not likely lead to a serious offer.[76] Thus, even if the Board had adopted an indifferent attitude toward Party A, that attitude would not have been unreasonable given the fact that Party A, according to Morgan Stanley, had no history of acquiring domestic companies. At the very least, any judgment that the Board did make that Party A was not a serious bidder was not "so far

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Second Am. Class Action Compl. ("Pls.' Answering Brief") 8-9.

[75] In its recent opinion, *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 (Del. Ch. Jan. 3, 2013), the Court held that the Novell's board's unexplained disparate treatment of a bidder to acquire the company was explicable only as bad faith. *Id.* at *10. In contrast, the Board's disparate treatment of Party A is explained by facts in the Complaint that tend to show that the Board's actions were reasonable under the circumstances. Perhaps the crucial difference is that in *Novell* the board's actions, which resulted in an asymmetrical distribution of information, occurred after the board had determined that the bidder was a serious participant. In this case, however, the Board was making an initial assessment, in its business judgment, whether pursuit of Party A's expression of interest was in the best interest of the Company and whether a transaction with Party A raised serious regulatory issues.

[76] *See* Compl. ¶ 74; Transmittal Affidavit of P. Bradford deLeeuw, Esq. ("deLeeuw Aff."), Ex. A (Sen Dep. Tr.) at 82 ("Q. Okay. What did he tell you? A. He told me [Party A] called, and at that time he thought it was mildly amusing, insofar as they have some sort of M&A group in Party A; and they don't do domestic M&A, have no history of doing domestic M&A, and he thought that that was almost, you know, something to shrug off."); Pls.' Answering Br. 7-8. As this testimony makes clear, Sen was describing what a banker at Morgan Stanley had told her, not necessarily her own firsthand knowledge of Party A's interest.

beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[77]

Similarly, the Board's decision not to share confidential information with Party A does not raise an inference of bad faith. Because Party A was one of only two direct channel competitors to BJ's, the Board could reasonably have had concerns about sharing confidential business information with a competitor, especially where, as here, the seriousness of Party A's interest was in doubt. That decision, therefore, was also not "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[78]

The Board's decision not to pursue further an acquisition transaction with Party A after it made a preliminary expression of interest is also not supported by facts necessary to sustain a duty of loyalty claim. Just the opposite of bad faith, the Board's conduct, as alleged in the Complaint, seems entirely reasonable. Although its offer for BJ's shares was higher than any previous offer, Party A's proposal was subject to further due diligence and regulatory analysis that would require "non-public information to be provided by BJ's management."[79] In response to Party A's request, the Special Committee directed its legal counsel to confer with Party A's regulatory advisors. A few days later, members of the Board met with representatives from Party A to discuss a potential transaction and the antitrust risks. Thereafter, the Board determined that it would not be in the best interests of the Company and its shareholders to pursue a transaction with Party A.[80]

Contrary to the Plaintiffs' contention, the Board did not summarily reject Party A's offer without due consideration. Rather, the only reasonable inference that can be drawn from these facts is that the Board had legitimate concerns about the potential antitrust risks inherent in a transaction between two of the three largest players in the warehouse club industry.

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[77] *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (internal quotation marks omitted).

[78] *Id.* (internal quotation marks omitted).

[79] Defs.' Br. Ex. 5 (Letter from Party A), at 2. Plaintiffs rely on and selectively quote from both Morgan Stanley's March 8, 2011 email to Party A (Compl. ¶¶ 79-80) and Party A's April letter to BJ's outlining its proposal (Compl. ¶ 80). "When a plaintiff expressly refers to and heavily relies upon documents in her complaint, these documents are considered to be incorporated by reference into the complaint." *Freedman v. Adams*, 2012 WL 1345638, at *5 (Del. Ch. Mar. 30, 2012). Accordingly, both documents will be considered incorporated by reference to the Complaint and may be considered by the Court.

[80] Compl. ¶ 81.

> The need for potential regulatory approvals relating to antitrust considerations presents a legitimate risk factor for the Board to consider in determining whether a proposed transaction would maximize stockholder value. If regulatory approval is denied or drawn out in a costly delay, then a higher bid price does not necessarily mean a greater return for stockholders.[81]

The antitrust risks here were self-evident. Those concerns were considered by the Board and informed by legal advisors. Accordingly, the Board's decision is entitled to a presumption of good faith.[82]

The Plaintiffs have failed to rebut that presumption. Without more, the Plaintiffs' argument that the Board should have done more to resolve the regulatory concerns does not implicate bad faith. Moreover, the Complaint fails to allege a bad faith motive for why a disinterested majority of the Board would use regulatory concerns as a pretext for shunning Party A in favor of the Buyout Group. As this Court has stated before, "the absence of an illicit directorial motive and the presence of a strong rationale for the decision . . . makes it difficult for a plaintiff to state a loyalty claim."[83] Finally, that it took only ten days for the Board to decide against attempting a transaction with Party A states, at best, a duty of care claim.[84] Delaware law does not require that a board consider a proposal for a certain length of

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[81] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 512 (Del. Ch. 2010); *see also In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 781 n. 6 (Del. Ch. 1988) ("That, of course, does not mean that material factors other than 'price' ought not to be considered and, where appropriate, acted upon by the board. Such consideration might include form of consideration, timing of the transaction or risk of non-consummation. Thus, although it hardly needs to be said, the Special Committee was entirely justified in considering any legitimate threat that the antitrust laws posed to the consummation of any West Point proposal.").

[82] *See* McMillan, 768 A.2d at 505 n. 55 ("The board's reliance upon an investment banker (whose independence and qualifications are not challenged in the complaint) is another factor weighing against the plaintiffs' ability to state an actionable claim that the defendant directors breached their fiduciary duties by failing to secure the highest value reasonably attainable."); 8 *Del. C.* § 141(e). To the extent that the Board reasonably relied upon its legal advisors, such reliance is entitled to the same effect as a board's reliance upon an investment banker's fairness opinion. Because the Plaintiffs have not challenged the independence, qualifications, or legal advice of the Board's legal counsel, they have not rebutted the presumption that the Defendant Directors acted in good faith. For the same reasons, the Court need not examine the likelihood that the transaction would have stalled because of regulatory issues.

[83] *In re Lear Corp. S'holder Litig.*, 967 A.2d at 654 n.62.

[84] The Court does not decide whether these allegations state a duty of care claim. The Court acknowledges, however, that the Board received legal counsel, met with senior representatives of Party A, and had known about and presumably discussed Party A's interest for some time before Party A's proposal.

time.[85] Thus, the Board's decision to terminate discussions with Party A was not "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[86]

2. Manipulation of the Sales Process

Second, the Plaintiffs allege that the self-interested directors Sen and Zarkin[87] manipulated the sales process in favor of the Buyout Group and that the remaining Defendant Directors knowingly acquiesced.[88] Because of this self-interest, the Plaintiffs allege that Sen and Zarkin conspired to sell the Company to LGP. They also allege that Sen, shortly after LGP first expressed interest in acquiring BJ's, revised sales downward in the Company's five-year plan to make it appear more pessimistic. For his part, Zarkin began communicating with LGP in the months before the Board formed the Special Committee, despite the Company's retention of Greenhill as its financial advisor. This initial conduct allegedly set the stage for the *pro forma* sales process that followed.[89] Then, cutting short Greenhill's engagement, Zarkin, through Shields, handpicked Morgan Stanley, which, in concert with their plans, immediately dismissed the possibility that strategic buyers would be interested in acquiring BJ's.[90] The Complaint also alleges that during discussions with LGP that Zarkin and Sen sought and obtained

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[85] *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). "[T]here is no single blueprint that a board must follow to fulfill its duties . . . a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule." *Id.*

[86] *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (internal quotation marks omitted).

[87] For purposes of this analysis, the Court assumes that Sen and Zarkin were interested in the Buyout.

[88] According to the Plaintiffs, Sen had a significant financial incentive to promote the sale of the Company because she would receive more than $9 million in potential payments and benefits upon a change of control. Sen was supposedly further conflicted because she was informed, perhaps as early as January 2011, that she would be retained to run LGP's post-takeover business. Her interest in future employment, however, allegedly only applied to financial buyers because, unlike strategic acquirers, they typically retain management following a buyout. *See* Defs.' Br. Ex. 5, at 1; *see supra* note 62 (This may not be true in this case. Party A's proposal stated: "We view the Company's management team and employees as significant assets and would expect to retain a significant portion of the existing team following the consummation of this transaction."). As for Zarkin, the Plaintiffs allege that because he was a consultant to Sen and senior management at BJ's, he could expect to retain his role following the sale of the Company. Compl. ¶ 75. Zarkin also allegedly had an interest in promoting the best interests of Sen because of his long-term professional relationship with her.

[89] Compl. ¶¶ 66-67, 71.

[90] *Id.* at ¶ 74.

material benefits for themselves, including equity interests in the new private company. In sum, the Plaintiffs would have this Court hold that it is reasonably conceivable that the Defendant Directors' year-long sales process, in which they solicited over twenty-three buyers, and met with all interested acquirers, was nothing but "window dressing" to legitimize the Company's sale to the Buyout Group at a wholly disproportionate price.

Allegations that the Defendant Directors manipulated the sales process are largely unsubstantiated by facts in the Complaint. Moreover, they are belied by a year-long sales process, reasonable explanations for the Board's conduct with respect to Parties A and B, and the fact that the Buyout was ultimately approved by a majority of disinterested and independent directors. The Plaintiffs' remaining arguments in support of a sham sales process also fall short. The Plaintiffs make much of the fact that Zarkin communicated with LGP prior to the formation of the Special Committee, but that does not provide an inference of bad faith. "It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to the Chairman."[91] The Plaintiffs also do not explain why the disinterested and independent directors would disregard their fiduciary duties in order to secure Sen's future employment. The Board's adjustment to the five-year plan, even assuming that the timing of the adjustment is suspicious,[92] does not square with the Plaintiffs' bad faith theory: the adjustment took place months before Party A entered the negotiations and could not have favored the Buyout Group because the private equity bidders had access to the same confidential information as the Buyout Group. In short, the Plaintiffs have failed to allege how Sen's and Zarkin's personal interest in the Buyout caused a majority of independent and disinterested directors to shirk their fiduciary duties.

The Plaintiffs rely heavily on the Court's decision in *In re Answers Corporation Shareholders Litigation* to support their theory that the sales process was manipulated.[93] In *Answers*, the complaint alleged that the board consciously acquiesced in the desire of three interested directors to expedite the sales process so that the merger agreement could be consummated before the company's stock price rose above the bidder's offer.[94] It did so apparently to aid one director who "knew that he would lose his job as Answers'

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[91] *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *7.

[92] Plaintiffs would have this Court draw inferences of bad faith from comparing the optimistic statements made by Sen in the Company's 2010 Annual Report with her decision to modify the internal sales projections in the five-year plan in August 2010. Pls.' Answering Br. 15-16. That inference is too tenuous.

[93] 2012 WL 1253072 (Del. Ch. Apr. 11, 2012).

[94] *Id.* at *7-8.

President and CEO if he did not sell the Company" and to help two directors who "sought a sale of the Company in order to achieve liquidity for" their separate company, a significant shareholder of Answers.[95] The Court held that it was reasonably conceivable that the board breached its duty of loyalty by depriving the company's shareholders of the increased stock price as a standalone company.[96]

Unlike in *Answers*, however, where the company's financial advisor warned that its increasing stock price might derail the proposed deal,[97] here there was no reasonable indication or certainty that BJ's stock price would soon rise above the offer price. Moreover, unlike *Answers*, where the board allegedly "agreed to speed up the sale process" to ensure consummation of the deal,[98] there are no allegations that the Board agreed to sell the Company quickly with knowledge that a superior offer was likely or with a reasonably certain standalone prospect that offered a higher value than the Buyout Group's final offer. The Plaintiffs' reliance on *Answers* is therefore unavailing.[99]

3. The Board's Reliance on Morgan Stanley's Fairness Opinion

The Plaintiffs next argue that the Defendant Directors knowingly (1) approved the Buyout at an unfair price and (2) relied upon an inaccurate analysis of BJ's value in Morgan Stanley's fairness opinion. In support of these claims, the Plaintiffs make various arguments. First, they cite an April 18, 2011 presentation to the Board in which management stated that it was confident of its ability to develop and execute a strategic plan that would deliver more than an 11% premium (a share price of $52) to shareholders over the long-term.[100] Second, the Complaint alleges that the Board knew that Morgan Stanley's terminal growth rate assumption of 2.8% in its discounted cash flow analysis was "nonsensical" given that the long-term growth rate projection for the United States economy was roughly 4.0%.[101] Third, the Complaint alleges that the Board knowingly provided Morgan

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[95] *Id.* at *7.

[96] *Id.* at *8.

[97] *Id.* at *3.

[98] *Id.* at *8.

[99] In denying reconsideration of the *Answers* decision, the Court noted that the "case [was] not typical," stating: "[m]ost cases do not involve a company's board speeding up a sales process to get a deal done because the company's investment advisor had told the board that, with a failure to act quickly, the market will learn the company is worth more than the deal price and the deal will be scuttled." *In re Answers Corp. S'holders Litig.*, 2012 WL 3045678, at *2 (Del. Ch. July 19, 2012).

[100] Compl. ¶ 91.

[101] *Id.* ¶¶ 110-15.