IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ANSWERS CORPORATION	:	CONSOLIDATED
SHAREHOLDERS LITIGATION	:	C.A. No. 6170-VCN

MEMORANDUM OPINION

Date Submitted: January 17, 2012
Date Decided: April 11, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

This action arises out of the merger (the "Merger") of Answers Corporation ("Answers" or the "Company") with A-Team Acquisition Sub, Inc. ("A-Team"), a wholly-owned subsidiary of AFCV Holdings, LLC ("AFCV"), which, in turn, is a portfolio company of the private equity firm Summit Partners, L.P. ("Summit" and collectively, with A-Team and AFCV, the "Buyout Group"). Plaintiffs, who, at all relevant times were owners of Answers' stock (the "Plaintiffs"), have filed a purported class action on behalf of themselves and all other similarly situated public stockholders of Answers, alleging that Answers' Board of Directors (the "Board") breached its fiduciary duties in connection with the Merger, and that the Buyout Group aided and abetted that breach. The Board and the Buyout Group (the "Defendants") have moved to dismiss all of the claims asserted against them. This is the Court's decision on the Defendants' motions.

II. BACKGROUND[1]

A. *The Parties*

Before the Merger, Answers was a Delaware corporation with its principal place of business in New York. Defendants Robert S.

[1] Except in noted instances, the factual background is based on the allegations in the Second Amended and Supplemental Class Action Complaint (the "Complaint" or "Compl.").

Rosenschein, W. Allen Beasley, R. Thomas Dyal, Yehuda Sternlicht, Mark B. Segall, Mark A. Tebbe, and Lawrence S. Kramer were, at all relevant times, the members of the Board. Rosenschein founded Answers in December 1998 and was, at all relevant times, Chairman of the Board, as well as the Company's President and Chief Executive Officer ("CEO"). Beasley and Dyal are partners of non-party Redpoint Ventures ("Redpoint"), and they were appointed to the Board by Redpoint. Before the Merger, Redpoint was Answers' largest stockholder, owning about 30% of the Company.[2]

Summit is a private equity firm that invests in rapidly growing companies. AFCV is the social media and online information resources portfolio company of Summit. "Affiliated entities of Summit hold a majority voting interest in AFCV."[3] A-Team is an indirect wholly-owned subsidiary of AFCV.

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[2] *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *1 (Del. Ch. Apr. 11, 2011) (the "Preliminary Injunction Opinion" or "Prelim. Inj. Op."). The Court draws certain background facts and aspects of the procedural history from the Preliminary Injunction Opinion and a letter opinion—*In re Answers Corp. Shareholders Litigation*, 2011 WL 1562518 (Del. Ch. Apr. 13, 2011) (the "Letter Opinion" or "Letter Op."). Nothing taken from the Preliminary Injunction Opinion or the Letter Opinion is material to the Court's analysis of the issues now before it.

[3] Opening Br. of Defs. AFCV Holdings, LLC, A-Team Acquisition Sub, Inc., and Summit Partners L.P. in Supp. of their Mot. to Dismiss Pls.' Second Am. and Suppl. Class Action Compl. ("Buyout Group's Opening Br.") at 2.

B. *Factual Background and Procedural History*

Answers' common stock was thinly traded before the Merger. Although an individual Answers shareholder could likely efficiently convey her interest in Answers by simply selling her shares, Redpoint, with its 30% ownership stake, would only be able to monetize its entire interest if the whole Company were sold. By early 2010, Redpoint appears to have wanted to bring its investment in Answers to an end. At that time, Beasley and Dyal began arranging for meetings and calls during which Rosenschein could talk with potential acquirers of Answers.

On March 12, 2010, Redpoint received an e-mail from Jefferies & Company, Inc. ("Jefferies"), AFCV's financial advisor, indicating that AFCV and Summit wanted to discuss a possible acquisition of Answers. On March 15, Beasley and Dyal followed up with Jefferies and agreed to meet with AFCV's CEO, David Karandish. On March 17, the Board held a meeting and discussed the possibility of exploring strategic alternatives, including a transaction with AFCV.

Months of discussions between Rosenschein and AFCV ensued. By June 2010, Redpoint observed that merger activity in Answers' business sector "had heated up,"[4] and Redpoint informed the Board that if Answers

[4] Compl. ¶ 34.

could not be sold in the near future, then Answers' entire management team, including Rosenschein, would be replaced. On July 14, 2010, Answers and AFCV entered into a mutual confidentiality agreement. Talks between Rosenschein and AFCV continued through August when one of Answers' shareholders saturated the market for Answers' stock by selling several hundred thousand shares in two days. During that week, the Company's stock price dropped from $7.99 to $4.58 per share.

On September 8, 2010, Karandish sent Rosenschein a non-binding letter of intent, indicating AFCV's interest in acquiring Answers for between $7.50 and $8.25 per share. At a meeting on September 15, 2010, the Board authorized Rosenschein and his management team to continue exploring a transaction with AFCV. On September 17, 2010, Answers retained UBS to serve as its financial advisor.

On October 19, 2010, AFCV raised its offer to $9.00 per share. On October 28, Answers provided AFCV with non-public information about the Company's projections and strategic plans for 2010 and 2011. Those projections suggested that Answers' performance would improve in the last quarter of 2010 and through 2011. On November 4, Karandish delivered a revised letter of intent to Answers, raising AFCV's offer to $10.00 per share and proposing that Answers enter into an exclusivity agreement with AFCV.

Answers refused to enter into an exclusivity agreement, but Answers and AFCV continued to negotiate. On November 8, AFCV raised its offer to $10.25 per share, but again insisted on exclusivity. Several days later, the two sides agreed to move forward at $10.25 without an exclusivity agreement, but on the condition that Answers would reimburse AFCV's expenses if Answers agreed to a sale to a different entity at a higher price.

Having failed to secure exclusivity, the Buyout Group pressed the Board to do an extremely quick market check. Specifically, on December 8, 2010, UBS informed Beasley, Dyal, and Rosenschein that the Buyout Group continued to "push again the idea that we should do a quick market check in the next two weeks."[5] UBS told the Board that the two week market check that the Buyout Group was urging was not a "real" market check.[6] Moreover, UBS expressed concern that the market check would coincide with the December holidays, which could negatively affect any possible interest or feedback. Nevertheless, the Board agreed to authorize a two-week market check that coincided with the holidays.

The Complaint explains the Board's decision to do a quick market check as follows:

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[5] *Id.* at ¶ 56.
[6] *Id.* at ¶ 57.

> [The Board was] concerned that the Company's operating and financial performance was increasing, which would cause a rise in . . . [Answers'] stock price over and above the $10.25 price offered by AFCV. A "quick" purported market check . . . prevented this from happening because the Board approved the . . . [Merger] prior to the time the Company was required to report[] these improved results.[7]

The Complaint also alleges that UBS told the Board that "time is not a friend to this deal with continued out performance and a looming q4 earnings call,"[8] and that, in response, the Board sped up the sales process.

In performing the market check, UBS contacted ten companies. Ultimately, however, none expressed a desire to pursue a change of control transaction with Answers. UBS then advised Answers that it could inquire about a transaction with "second tier prospects,"[9] but the Board rejected any more exhaustive search so as not to jeopardize the Buyout Group's bid.

By late January 2011, Answers' cash position was improving, and the Company's stock price had moved up significantly from where it was when AFCV had made its $10.25 offer.[10] Therefore, Rosenschein called Karandish to see if he could persuade AFCV to raise its bid. On February 1, 2011, AFCV increased its offer to $10.50 per share. The Board met on February 2 and received an opinion from UBS that $10.50 per share was a

[7] *Id.* at ¶ 58.
[8] *Id.*
[9] *Id.* at ¶ 60.
[10] Answers' stock traded above $8 per share at the end of 2010 and traded as high as $8.78 per share in 2011 before the Merger was publicly announced.

fair price for the Company. That same day, the Board approved the Merger, and entered into a merger agreement with AFCV (the "Merger Agreement"). The Board did not perform any analysis regarding alternatives to the Merger. Specifically, "[n]o analysis was performed concerning the likely trading value or other realizable value that the Company's stock might attain in the event that the Company remained independent."[11]

"Answers scheduled a shareholder vote on the [M]erger . . . for April 12, 2011, and filed its Definitive Proxy Statement on February 7; it filed additional proxy materials on February 8 and 28 and on March 2, 9, 17, and 24."[12] On February 7, 2011, the Plaintiffs moved to enjoin preliminarily the Merger. On April 8, 2011, after the Court had held oral argument on the motion for a preliminary injunction, the Board received an offer from Brad D. Greenspan (the "Greenspan offer") to acquire a controlling interest in Answers for $13.50 per share. On April 11, the Court denied the motion for a preliminary injunction,[13] but noted that its decision did "not consider the consequences, if any, of the [Greenspan] offer."[14] Also on April 11, the Board rejected the Greenspan offer, stating that it was not (and was not likely to become) a transaction superior to the Merger. The Board, however,

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[11] Compl. ¶ 67.
[12] Prelim. Inj. Op., 2011 WL 1366780, at *2 (citations omitted).
[13] *Id.* at *10.
[14] *Id.* at *2 n.23.

did continue the shareholders' meeting from April 12 until April 14, 2011. On April 12, the Plaintiffs requested that the Court continue the stockholders' meeting for a longer period of time, perhaps until April 22, "in order to assure that Answers' stockholders . . . [were] properly informed about the Greenspan offer . . . [before] they vote[d] on the . . . [Merger]."[15] On April 13, the Greenspan offer was increased to $14.00 per share. That same day, the Court denied the Plaintiffs' request for a longer continuance. The Court explained that "[t]he Greenspan offer is widely-known—although likely not uniformly known—by Answers' stockholders; ultimately, whether they know of it or not is not material as a matter of law to their informed decision as participants in the stockholders' meeting."[16] The Court concluded that the Board's decision to reject the Greenspan offer could not be "seriously questioned" because, among other things, there was substantial doubt that the Greenspan offer had sufficient financial backing, and it was unclear when the Greenspan offer could be consummated.[17] On April 14, 2011, the Merger was approved by a majority of the Answers shares entitled to vote.

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[15] Letter Op., 2011 WL 1562518, at *1.
[16] *Id.* at *2.
[17] *Id.* at *1.

III. CONTENTIONS

The Complaint consists of two causes of action. The First Cause of Action alleges that the Board "breached . . . [its] fiduciary duties of care, loyalty and good faith" by conducting a "fatally flawed" sales process.[18] The First Cause of Action also alleges that the Board breached its fiduciary duties by: (1) locking-up the Merger with unreasonable deal protection measures;[19] (2) using the Merger to extract certain benefits for itself, including the acceleration of Board members' stock options and a $40,000 bonus for Rosenschein;[20] and (3) issuing materially misleading proxy materials in connection with the Merger.[21] The Second Cause of Action alleges that the Buyout Group aided and abetted the Board's breaches of its duties. The Plaintiffs seek to: (1) certify this action as a class action; (2) rescind the Merger or, in the alternative, recover rescissory damages for the purported class; (3) have the Board account for all of the damages it caused the purported class; and (4) recover the costs of this action, including reasonable attorneys' fees.

The Board has moved to dismiss the Complaint, arguing that it fails to state a claim for any breach of fiduciary duty. The Board contends that any

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[18] Compl. ¶¶ 112-13.
[19] *Id.* at ¶ 87.
[20] *Id.* at ¶¶ 97-98
[21] *Id.* at ¶¶ 104-05.

"duty of care claim is legally deficient because Answers' charter contains an exculpatory provision pursuant to 8 *Del. C.* § 102(b)(7), and plaintiffs have not . . . [pled] bad faith as would be necessary to overcome that provision."[22] It also contends that any duty of loyalty claim fails because a majority of the Board was disinterested. Finally, to the extent the Plaintiffs are pursuing disclosure claims, the Board argues that those claims "are moot because the Merger that is the subject of the disclosures has already closed."[23]

The Buyout Group has also moved to dismiss the Complaint. It argues that, for at least three reasons, the Complaint fails to state a claim for aiding and abetting. First, the Plaintiffs fail to state an underlying claim for breach of fiduciary duty against the Board, and without an underlying breach there is nothing for the Buyout Group to have aided or abetted. Second, the Plaintiffs have failed to allege that the Buyout Group knowingly participated in any alleged breach, which is one of the elements of an aiding and abetting claim. Third, the Plaintiffs' own allegations show that the negotiations between Answers and AFCV were at arms-length, and a showing that negotiations were at arms-length negates any claim for aiding and abetting.

[22] The Answers Defs.' Opening Br. in Supp. of their Mot. to Dismiss the Second Am. Compl. ("Board's Opening Br.") at 12.
[23] *Id.* at 13.

In opposing the Board's motion to dismiss, the Plaintiffs argue that three conflicted Board members co-opted the sales process, and that the remainder of the Board members abdicated their fiduciary duties, allowing the three conflicted Board members to run a sales process that was not aimed at getting, for Answers' shareholders, the best price reasonably available for their shares. The Plaintiffs contend that Rosenschein, Beasley, and Dyal were all conflicted because they possessed interests that were different from, and became adverse to, the interests of Answers' public shareholders. The Plaintiffs contend that Rosenschein knew he would lose his job if Answers did not engage in a change of control transaction, and, therefore, he wanted to see the Company sold in order to salvage a chance at continued employment. Moreover, according to the Plaintiffs, Beasley and Dyal wanted Redpoint to monetize its holdings in Answers, and the only way that that could happen was if Answers engaged in a change of control transaction; Answers' common stock was so thinly traded that Redpoint could not sell its entire 30% equity interest in the public market.

Intent on having Answers engage in a change of control transaction, the argument continues, Rosenschein, Beasley, and Dyal started to search for someone who would buy Answers. The one entity that seemed interested was AFCV, and Rosenschein, Beasley, and Dyal started negotiating with

AFCV in the spring of 2010. By November 2010, AFCV was willing to buy Answers for $10.25 per share. During the relevant time, Answers' stock had always traded below $10.25 per share; thus AFCV had been offering a premium. By December 2010, however, AFCV and Answers were still negotiating, but the market price for Answers' stock was increasing. Moreover, according to the Complaint, "[the Board was] concerned that the Company's operating and financial performance was increasing, which would cause a rise in . . . [Answers'] stock price over and above the $10.25 price offered by AFCV."[24] Therefore, the Complaint alleges that, at the urging of Rosenschein, Beasley, and Dyal, the Board agreed to complete the sales process quickly before Answers' stock price rose above $10.25 per share.

Those allegations, the Plaintiffs argue, adequately plead that all of the members of the Board breached their duty of loyalty. The Plaintiffs argue that Rosenschein, Beasley, and Dyal breached their duty of loyalty because, to advance their own self interests, they pushed the other Board members to end the sales process quickly and to enter into a change of control transaction. With regard to the Board members other than Rosenschein, Beasley, and Dyal, the Plaintiffs argue that they breached their duty of

[24] Compl. ¶ 58.

loyalty because they acted in bad faith—they agreed to end the sales process knowing that the reason why Rosenschein, Beasley, and Dyal wanted to end that process was to enable the Board to execute the Merger Agreement before the market price for Answers' stock exceeded AFCV's offer price.

In opposing the Buyout Group's motion to dismiss, the Plaintiffs argue that the Complaint adequately pleads that the Buyout Group aided and abetted the Board's breach of its duty of loyalty. Specifically, the Plaintiffs contend that the Buyout Group knew that Answers' operating and financial performance was increasing in December 2010, and, therefore, the Buyout Group insisted that the Board do a quick market check in order to complete the sales process before the market price for Answers' stock eclipsed AFCV's offer price. Moreover, the Plaintiffs contend that they have adequately alleged that the Board breached its duty of care, and, even if the Board is exculpated from monetary liability for breaches of the duty of care, according to the Plaintiffs, the Buyout Group is not. Therefore, the Plaintiffs argue that the Buyout Group can be held monetarily liable for aiding and abetting the Board's breach of its duty of care even if the Board itself cannot be held monetarily liable for that breach.

IV. ANALYSIS

"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."[25] "[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[26] As the Supreme Court has explained:

> 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 . . . [a] motion [to dismiss] unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[27]

Although the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'"[28] the Court may only grant a motion to dismiss when there is no reasonable possibility that the plaintiff could recover.[29]

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[25] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011).
[26] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs, LLC*, 27 A.3d 531, 537 (Del. 2011) (citation omitted).
[27] *Id.* at 536 (citation omitted).
[28] *Alloy*, 2011 WL 4863716, at *6 (citing *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).
[29] *Id.* ("Delaware's reasonable 'conceivability' standard asks whether there is a 'possibility' of recovery.") (citing *Central Mortg.*, 27 A.3d at 537 n.13).

A. *The Claims Against the Board*

The directors of a Delaware corporation owe the fiduciary duties of care and loyalty to the corporation they direct. When a board decides to undertake the process of selling the corporation it directs, "the 'board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.'"[30] "There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end."[31] Moreover, the board has the burden of proving that it acted reasonably.[32]

When a board decides to consider a change of control transaction, it has the option of refusing, or at least recommending that the stockholders refuse, to enter into any transaction. A company may keep its current control structure. Therefore, if a board chooses to compare sale options to the option of keeping the company's current control structure and determines that the company's current control structure will yield the company's shareholders more value than any available change of control transaction, the board should keep the company's current control structure.

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[30] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

[31] *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *10 (Del. Ch. May 20, 2011, revised May 24, 2011) (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)).

[32] *QVC*, 637 A.2d at 45.

"A sale of control has significant consequences for the shareholders, and . . . [they] 'are entitled to receive, and should receive, a control premium and/or protective devices of significant value.'"[33] Moreover, just as a board may not manipulate the sales process to benefit a bidder that it prefers but who is not offering shareholders the best value,[34] a board may not manipulate the sales process to benefit a change of control if the current control structure offers shareholders more value than any available change of control transaction. Once a board has decided to undertake a sales process it is required to seek the highest value reasonably available for the shareholders regardless of where that value comes from.

The requirement to seek the highest value, however, is not a separate, distinct duty.

> 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

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[33] *Wayne County Employees' Ret. Sys. v. Corti*, 2009 WL 2219260, at *16 (Del. Ch. July 24, 2009) (quoting *QVC*, 637 A.2d at 43).

[34] *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986) ("[W]hen the Revlon board entered into an auction-ending lock-up agreement with Forstmann on the basis of impermissible considerations at the expense of the shareholders, the directors breached their primary duty of loyalty."); *Golden Cycle, LLC v. Allan*, 1998 WL 892631, at *14 (Del. Ch. Dec. 10, 1998) ("[A] board may not favor one bidder over another for selfish or inappropriate reasons.").

> must state a nonexculpated claim, *i.e.,* a claim predicated on a breach of the directors' duty of loyalty or bad faith conduct.[35]

Answers' Certificate of Incorporation contains a provision exculpating the Board from monetary liability for breaches of the duty of care.[36] Thus, in order to survive the Board's motion to dismiss, the Complaint must state a claim that the Board breached its duty of loyalty.

In the context of a sales process, a plaintiff can plead that a board breached its duty of loyalty by alleging non-conclusory facts, which suggest that a majority of the board either 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."[37] A director acts in bad faith where 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."[38]

The Complaint adequately alleges that all of the members of the Board breached their duty of loyalty. The Complaint alleges, in a non-

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[35] *Alloy*, 2011 WL 4863716, at *7 (citations omitted).
[36] *See* Board's Opening Br., Ex. I at Article XI. "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).
[37] *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)).
[38] *Lyondell*, 970 A.2d at 243 (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

conclusory manner, that Rosenschein, Beasley, and Dyal were financially interested in the Merger, and that the remainder of the Board consciously failed to seek the highest value reasonably available for Answers' shareholders. Rosenschein allegedly knew that he would lose his job as Answers' President and CEO if he did not sell the Company, and thus, it was in Rosenschein's self-interest to have Answers engage in a change of control transaction. As alleged in the Complaint:

> for Rosenschein and his team, the possibility (even if not a certainty) of employment at the Company he founded was better than the certain notion that he would be replaced as CEO if the Company remained independent. To further that end, Rosenschein discussed with . . . Karandish, keeping his position at the Company.[39]

Although this Court has questioned the theory that the managers of a target company should be considered "interested" in a change of control transaction simply because those managers will, post-transaction, manage the acquiring company,[40] here, the Complaint alleges that Rosenschein would lose his job unless he completed a change of control transaction.[41]

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[39] Compl. ¶ 36.

[40] *See In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011) ("A competent executive who will stay on after the transaction may be viewed as value-adding by an acquirer."); *Corti*, 2009 WL 2219260, at *11 ("That Kotick and Kelly did not have to pursue the transaction with Vivendi in order to retain their positions as managers significantly alleviates the concern that Kotick and Kelly were acting out of an impermissible 'entrenchment' motive.'").

[41] Unfortunately for Rosenschein, he seems to have lost his job despite the Merger. At oral argument, counsel for the Buyout Group reported: "We know that, in fact, after the

Moreover, the Complaint alleges that Rosenschein's desire to keep his job is what caused him to seek a sale of Answers. Those allegations are sufficient to suggest that Rosenschein was interested in the Merger.

Furthermore, the Complaint alleges that Beasley and Dyal sought a sale of the Company in order to achieve liquidity for Redpoint.[42] "Liquidity has been recognized as a benefit that may lead directors to breach their fiduciary duties."[43] Although "all of . . . [Answers'] shareholders received cash in the Merger, *liquidity* was a benefit unique to . . . [Redpoint]."[44] According to the Complaint, "[Redpoint's] interest in a prompt liquidation event conflicted with those of common shareholders who, unlike Redpoint, could sell their shares into the market . . . ."[45] Moreover, the Complaint asserts that Beasley and Dyal's desire to gain liquidity for Redpoint caused them to manipulate the sales process.[46] Thus, the Complaint alleges

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deal closed, . . . [Rosenschein] was fired. He was let go." *See* Oral Arg. Tr. 20 (Jan. 17, 2012).

[42] Compl. ¶ 41.

[43] *New Jersey Carpenters Pension Fund v. InfoGroup, Inc.*, 2011 WL 4825888, at *9 (Del. Ch. Sept. 30, 2011, revised Oct. 6, 2011) (citing *McMullin v. Beran*, 765 A.2d 910, 922-23 (Del. 2000)).

[44] *Id.* at *10.

[45] Compl. ¶ 2.

[46] *Id.* The Complaint sets forth that Beasley and Dyal pushed the Board to enter quickly into the Merger Agreement before Answers' stock price rose above AFCV's offer price. If Answers' stock price had moved beyond AFCV's offer price, Answers' shareholders would have benefitted, but the Merger would likely have been scuttled, leaving Redpoint with an illiquid block of Answers' stock. Although an increase in Answers' stock price would, at least on paper, benefit Redpoint—the price of its stock would increase just like that of every other Answers stockholder—the Complaint alleges that Redpoint, unlike

sufficient facts to suggest that Beasley and Dyal were interested in the Merger.

As for the rest of the Board members, the Complaint adequately alleges that they acted in bad faith. As stated above, once a board has initiated a sales process, it has a duty to seek the highest value reasonably available for the company's shareholders r*egardless of where that value comes from*. A board acts in bad faith, if it consciously disregards that duty.[47] Sternlicht, Segall, Tebbe, and Kramer allegedly knew that Rosenschein, Beasley, and Dyal wanted to end the sales process quickly so that the Board would enter into the Merger Agreement before the market price for Answers' stock rose above AFCV's offer price. Nevertheless, they agreed to expedite the sales process. In other words, the Complaint alleges that Sternlicht, Segall, Tebbe, and Kramer agreed to manipulate the sales process to enable the Board to enter quickly into the Merger Agreement before Answers' public shareholders appreciated the Company's favorable

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Answers' other stockholders, would not be able to turn that value into cash. And, according to the Complaint, it was Redpoint's inability to monetize its Answers stock that caused Beasley and Dyal to drive the Board into the Merger Agreement quickly. Thus, the Complaint contains an allegation that Beasley and Dyal subordinated Answers' best interests to their desire to achieve liquidity for Redpoint. *See In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6440761, at *19 n.68 (Del. Ch. Oct. 14, 2011, revised Dec. 20, 2011) ("I believe it would be mistaken to consider . . . [a liquidation] interest as constituting an interest in the formal sense of imposing liability for breach of the duty of loyalty absent a showing that the director in bad faith subordinated the best interests of the company in getting a fair price to his desire to have the liquidity available to other stockholders.").

[47] *Lyondell*, 970 A.2d at 243.

prospects.[48] That is a well-pled allegation that those Board members consciously disregarded their duty to seek the highest value reasonably available for Answers' shareholders.[49] Thus, the Complaint adequately pleads that the Board breached its duty of loyalty by conducting a flawed sales process.

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[48] The Plaintiffs have not offered any particularly persuasive explanation as to why Sternlicht, Segall, Tebbe, and Kramer agreed to manipulate the sales process, but, at this procedural stage, an explanation is not needed. One wonders if an explanation will emerge because disinterested and independent directors do not usually act in bad faith.

[49] Although the allegations in the Complaint sufficiently present the argument that the Board intentionally manipulated the sales process in violation of its duty of loyalty, at oral argument, Plaintiffs' counsel described, in greater detail, the extent of the alleged manipulation. Specifically, counsel argued:

> [B]lowout results in the January 24th forecast were shared only with AFCV. They were not shared with any [other] potential acquirer, and certainly not with the public. More importantly, they were not shared with the shareholders or the market. When did they disclose the blowout quarter? Only after the announcement of the deal at [$]10.50 on February 3. Answers' stock price, prior to February 3, was created only on information about Q3. The market had no information about the blowout results for Q4.

Oral Arg. Tr. 48 (Jan 17, 2012). Counsel then went on to state:

> We challenge this premium because it was contrived by not waiting a few days to release the Q4 actual blowout numbers to the market. . . . A premium to market was contrived through the bad faith of the defendants by rushing to do the deal to benefit defendants and AFCV and to hurt Answers' public shareholders.

Id. at 51-52. It may be worth observing, however, that on or around February 8, 2011, Answers appears to have released information "about the blowout results" for the fourth quarter of 2010. *Id.* at 48. Thus, Answers' shareholders knew about those results well before April 12, 2011 when the Merger received the support of a majority of Answers' shares.

The Plaintiffs also claim in the First Cause of Action that the Board breached its fiduciary duties by: (1) locking-up the Merger with unreasonable deal protection measures; (2) using the Merger to extract certain benefits for itself, including the acceleration of Board members' stock options and a $40,000 bonus for Rosenschein; and (3) issuing materially misleading proxy materials in connection with the Merger. The Court cannot, at this time, dismiss the first two of those claims because they are tag-along claims—each alleges a continuation of the breach of the duty of loyalty that the Plaintiffs have adequately pled the Board committed during the sales process. There is nothing inherently unreasonable, individually or collectively, about the deal protection measures at issue here.[50] Moreover, it is not inherently unreasonable for a board to accelerate stock options or provide an executive with a bonus for his role in negotiating a transaction. Nonetheless, the Court has determined that the Plaintiffs have adequately pled a claim that the Board breached its fiduciary duties by entering into the Merger Agreement. If the Court ultimately determines that the decision to enter into the Merger Agreement was a breach of fiduciary duty, then the fact that the Board received benefits from the Merger that it

[50] Those measures included: (1) a "no shop" clause; (2) a "no-talk" provision limiting the Board's ability to discuss an alternative transaction with an unsolicited bidder; (3) a matching rights provision; (4) a termination fee plus expense reimbursement worth approximately 4.4% of the Merger's equity value; and (5) a force-the-vote provision pursuant to 8 *Del. C.* § 146.

had locked up might increase the Plaintiffs' recovery. Thus, the Court will not, at this time, dismiss the Plaintiffs' claims that the Board breached its fiduciary duties by locking up the Merger and using the Merger to extract benefits for itself, even though such claims may not have independent viability. The Plaintiffs' claim that the Board breached its fiduciary duties by issuing materially misleading proxy materials, however, is dismissed because the Plaintiffs have abandoned it.[51]

Whether the Plaintiffs have stated a claim against the Board is a pleading issue. As discussed above, "a trial court should accept all well-pleaded factual allegations in the Complaint as true . . . ."[52] The Complaint alleges that (1) Rosenschein knew he was going to lose his job unless he entered into a change of control transaction, (2) Beasley and Dyal wanted Answers to engage in a change of control transaction so that their other company could gain liquidity, and (3) the remainder of the Board agreed to manipulate the sales process to increase the likelihood that the Merger would occur. Those are not legal conclusions, they are well-pled factual allegations that, at this stage, the Court must accept. On a motion to dismiss, the issue is not whether the Court believes that the Plaintiffs' theory of the case is

[51] *See* Pls.' Answering Br. in Opp. to Defs.' Mots. to Dismiss at 31 n.13 ("Here, Plaintiffs assert no disclosure claims . . . .").
[52] *Central Mortg.*, 27 A.3d at 536 (citation omitted).

plausible, much less accurate. The question is: can the Plaintiffs recover under any reasonably conceivable set of circumstances? If the facts are as the Plaintiffs allege them, they could recover, and therefore, the motions to dismiss the First Cause of Action are denied, except as to the disclosure claim that the Plaintiffs have abandoned.[53]

B. *The Claims Against the Buyout Group*

In the Second Cause of Action, the Plaintiffs contend that the Buyout Group aided and abetted the Board's breaches of its duties of loyalty and care. To state a claim that the Buyout Group aided and abetted a breach of the Board's fiduciary duty, the Plaintiffs must plead: "'(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing

[53] This case, unavoidably, is somewhat out of sequence procedurally. After the Plaintiffs moved for a preliminary injunction against the Merger and after the Court denied that motion, the Plaintiffs moved forward with the action by seeking rescission of the Merger or, alternatively, rescissory damages. Thus, the Court cannot now rely on the record developed by the parties for the preliminary injunction hearing; instead, it is guided by the allegations of the Complaint. The Court will eventually be able to look behind the Complaint, and the last time it had that opportunity, the record, at least at that preliminary stage, favored the Defendants. When the Court again gets the opportunity to test the allegations in the Complaint, it may determine that this case ultimately involves, as Answers' counsel stated at the preliminary injunction hearing, "a classic board decision; do you take a bird in the hand or do you take some uncertainty where . . . [the stock] could go to, I don't know, 15, 20 or go to two." Hr'g Tr. 67 (Apr. 5, 2011). The motion currently before the Court, however, is a motion to dismiss, and on that motion, the Court may not look beyond the Complaint. The Complaint states a claim on its face, and that is necessarily the end of the Court's analysis at this procedural juncture.

participation in that breach by the . . . [Buyout Group],' and (4) damages proximately caused by the breach."[54]

As discussed above, the Plaintiffs have stated a claim that the Board breached its fiduciary duty. The Board was in a fiduciary relationship with Answers' stockholders, which it allegedly breached by intentionally conducting a flawed sales process that deprived Answers' stockholders of the best value for their shares. Thus, the Plaintiffs have adequately pled the first, second, and fourth elements of a claim for aiding and abetting a breach of fiduciary duty. With regard to the third element, the Plaintiffs have pled that the Board provided AFCV with non-public information about the Company's projections and strategic plans for 2010 and 2011. Moreover, A-Team is allegedly a wholly-owned subsidiary of AFCV,[55] and the Buyout Group has admitted that Summit controls AFCV.[56] Therefore, it is reasonable for the Court to infer that all of the members of the Buyout Group saw the non-public information that the Company provided to AFCV.

That non-public information allegedly showed that Answers' operating and financial performance was increasing[57] and, the Plaintiffs

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[54] *Malpiede*, 780 A.2d at 1096 (quoting *Penn Mart Realty Co. v. Becker*, 298 A.2d 349, 351 (Del. Ch. 1972) (other citations omitted)).
[55] Compl. ¶ 21.
[56] *See* Buyout Group's Opening Br. at 2 ("Affiliated entities of Summit hold a majority voting interest in AFCV.").
[57] Compl. ¶¶ 50-52.

allege, after the Buyout Group saw that information, it pushed the Board to do a quick market check in order to finish the sales process before the market price for Answers' stock rose above AFCV's offer price.[58] That is an allegation that the Buyout Group knowingly participated in the Board's breach of its fiduciary duty. The Buyout Group allegedly used non-public information about Answers to pressure the Board to conduct the flawed, expedited sales process that is adequately alleged to have been a breach of the Board's fiduciary duty. Therefore, the Plaintiffs have adequately pled that the Buyout Group aided and abetted a breach of the Board's fiduciary duty.[59]

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[58] *Id.* at ¶¶ 56-58.

[59] It may be an interesting theoretical issue whether a plaintiff could plead a claim for aiding and abetting a breach of fiduciary duty when a complaint only adequately pleads an underlying breach of the duty of care by the fiduciary. As discussed above, to allege that a third party, such as the Buyout Group, aided and abetted a breach of fiduciary duty, a plaintiff must plead non-conclusory facts which suggest that the third party "knowingly participated" in the fiduciary's breach. *See, e.g.*, *Malpiede*, 780 A.2d at 1096. In *Greenfield v. Tele-Communications, Inc.*, this Court explained that "where the charge is conspiracy or knowing participation with a breaching fiduciary, some facts must be alleged that would tend to establish, at a minimum, knowledge by the third party that the fiduciary was *endeavoring to breach his duty* to his . . . shareholders . . . ." 1989 WL 48738, at *3 (Del. Ch. May 10, 1989) (emphasis added). If a fiduciary "endeavors" to breach his duty, then the fiduciary would not appear to have committed (only) a breach of the duty of care; he would seem to have committed a breach of the duty of loyalty. *See Lyondell*, 970 A.2d at 243 ("[B]ad 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.'") (quoting *Disney*, 906 A.2d at 67). Therefore, it is not clear that a claim for aiding and abetting a breach of fiduciary duty could survive a motion to dismiss if a complaint only pleads an underlying breach of the duty of the care by the fiduciary. Here, however, the Plaintiffs have adequately pled that the Buyout Group aided and abetted a breach of the Board's duty of loyalty, and the issue of whether the Buyout Group aided and abetted a breach of the duty of care is so entwined with the issue

Nonetheless, it is important to note that the Plaintiffs do not simply plead that the Buyout Group received confidential information in connection with the Merger. When a board is negotiating the sale of the company it directs, the board typically provides potential purchasers with confidential information about the company, and the receipt of confidential information, without more, will not usually be enough to plead a claim for aiding and abetting. Here, the Plaintiffs are able to present a claim for aiding and abetting because they allege that (1) the Buyout Group received confidential information showing that the market price for Answers' stock would likely be rising, and (2) the Buyout Group used that information to push the Board to end the sales process quickly to assure the Merger Agreement would be executed before Answers' shareholders learned of the Company's favorable prospects.[60]

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of whether the Buyout Group aided and abetted a breach of the duty of loyalty that the Court will, at this time, allow both "claims" to go forward. *See, e.g.*, *Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001) (explaining that on summary judgment it is not appropriate for a court to consider the effect of an exculpatory provision adopted pursuant to 8 *Del. C.* § 102(b)(7) if "the inherently interested nature of transactions . . . [is] inextricably intertwined with issues of loyalty.") (citations omitted).

[60] The Plaintiffs' allegation that the Buyout Group pushed the Board to enter into the Merger Agreement before the Board released information that would likely cause an increase in the market price for Answers' stock deprives the Buyout Group, at this procedural stage, of the argument that the Merger was simply an arm's-length transaction. *See, e.g.*, *Malpiede*, 780 A.2d at 1097 ("[A] bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting. . . .") (citations omitted). The Plaintiffs have alleged that the Buyout Group received confidential information from the Board—information that arguably would have been material to the public shareholders, if only they had known—and that the Buyout

V. CONCLUSION

For the foregoing reasons, the motions to dismiss the First Cause of Action are denied, except as to the disclosure claims that the Plaintiffs have abandoned, and the motions to dismiss the Second Cause of Action are denied. An implementing order will be entered.

Group used that information to drive the Board to agree to the Merger—a transaction that benefitted the Buyout Group and certain Board members, but which did not necessarily benefit Answers or its public shareholders. Thus, the Plaintiffs have pled allegations that suggest the Merger was not an arm's-length transaction.