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Case No. 6170-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: October 16, 2013
Date Decided: February 3, 2014

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NOBLE, Vice Chancellor

I. INTRODUCTION

Defendants are the former directors of a corporation that operated an Internet questions and answers site, the corporation, and the buyout group which acquired it by merger. Shareholder plaintiffs' surviving claims challenging the transaction allege 1) that the CEO director and the two director nominees of the corporation's primary venture capital investor were conflicted and controlled the board, and 2) that the four remaining directors on the seven-person board breached their duty of loyalty and acted in bad faith. Finally, plaintiffs assert that the buyout group aided and abetted the directors' breach of fiduciary duty. Defendants have moved for summary judgment, and for the reasons that follow, their motions for summary judgment are granted.

II. BACKGROUND

Before the merger from which this litigation arises, Answers Corporation ("Answers" or the "Company") was a publicly-traded Delaware corporation with its principal place of business in New York. Answers operated Answers.com, a leading question and answer ("Q&A") Web site which supported six languages.[1] The site utilized wiki-based technologies to provide community-generated social knowledge, which allowed its answers to be improved and updated over time.[2] The site was, however, dependent on Google for its traffic and for its advertising

[1] Zeldin Aff., Ex. 1 (the "Proxy") at 20.
[2] *Id.*

revenues. Approximately 90% of the site's traffic came from search engines, principally Google's. Approximately 75% of its revenue came from Google's AdSense.[3] The Company had no control over the algorithms routing traffic to the Company's site or over the algorithms placing ads on the site.[4]

Answers' seven-person board (the "Board") was comprised of Defendants Robert Rosenschein, Allen Beasley, Thomas Dyal, Mark Tebbe, Lawrence Kramer, Mark Segall, and Yehuda Sternlicht (the "Director Defendants"). Rosenschein founded Answers in 1998 and was its Chairman, President, and Chief Executive Officer ("CEO"). The venture capital firm Redpoint Ventures ("Redpoint") was the Company's largest shareholder and owned approximately 30% of it. Beasley and Dyal are partners of Redpoint and served as its nominees to the Board. Segall was the chairman of the Company's Financing Committee; Beasley and Sternlicht were the committee's other members.[5] It is uncontested that four directors of the seven-member board, Tebbe, Kramer, Segall, and Sternlicht, were disinterested directors.[6]

AFCV Holdings, LLC ("AFCV") is a portfolio company of private equity firm Summit Partners, L.P. ("Summit") and has a focus on social media and online

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[3] *Id.* at 32.
[4] *Id.*
[5] *Id.* at 21.
[6] Defendants' brief describes Tebbe as a software pioneer, Kramer as the current President and Publisher of *USA Today*, Segall as a respected investment banker, and Sternlicht as an accountant with more than thirty years of experience. Answers Defs.' Opening Br. in Supp. of Their Mot. for Summ. J. ("OB") at 7.

information resources. Answers merged with A-Team Acquisition Sub, Inc. ("A-Team" and, collectively with AFCV and Summit, the "Buyout Group"), a wholly-owned subsidiary of AFCV. The Director Defendants, along with the Company and the Buyout Group, are referred to, collectively, as the "Defendants." Plaintiffs were shareholders of the Company.

A. *AFCV Indicates its Interest in Answers and Other Events in 2010*

In March 2010, Redpoint received an unsolicited expression of interest from AFCV concerning a possible business combination with Answers.[7] Answers, through Beasley and Dyal, responded to the expression of interest by setting up an initial meeting with AFCV's CEO, David Karandish.[8] The Board discussed the possibility of exploring strategic alternatives at a meeting on March 17, 2010, including the recent expression of interest from AFCV.[9] The Board decided it was in the best interest of the Company and its stockholders to explore these possibilities and to engage a financial advisor to assist in evaluating the Company's options.[10] Segall, as an independent director and chairman of the

[7] Proxy at 21.

[8] Zeldin Aff., Ex. 8. Beasley testified that he had only one meeting with Karandish in response to his expression of interest and then turned further negotiation over to the Company's management. *See* Beasley Tr. 144, 174 ("We would typically, as we did in the case of [AFCV], field the initial call and then turn it over to the Answers management . . . for them to follow up on."). As explained below, he and Dyal had one other meeting with AFCV representatives, but without other Company representatives. Beasley would also later reach out to the Buyout Group to attempt to negotiate a price increase.

[9] Proxy at 21.

[10] *Id.*

Financing Committee, was selected to evaluate potential financial advisors to recommend to the Board.[11]

Between March and September of 2010, representatives of Answers continued to meet with AFCV and engaged in early discussions related to a possible combination.[12] Beasley and Dyal met with AFCV representatives on June 25, acting in their capacity as representatives of AFCV.[13] However, the vast majority of communications between the Buyout Group and Answers at this time were conducted by Rosenschein.[14]

Answers also received expressions of interest from other entities around the time that AFCV expressed its interest.[15] The Company's Proxy reports that the Board considered alternative strategies on several occasions.[16] Also throughout

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[11] *Id.*
[12] *Id.* at 21-24.
[13] *Id.* at 23.
[14] *Id.* at 21-24. Beasley appears to have been a participant alongside Rosenschein in some of these conversations, although he was not a participant in a majority of them. *See id.*
[15] *Id.* A media company and private equity group initiated contact in January 2010; a further presentation was made to the private equity group in February 2010. Another private equity firm initiated contact in May 2010 and two additional meetings with that party occurred in July and August. A third private equity firm contacted Rosenschein in November 2010, after which an additional presentation was made later that month and the Company's financial advisor, UBS, followed up with the firm. The potential media acquirer did not pursue its expression of interest and the private equity firms terminated conversations with Answers and indicated they would not pursue an acquisition.
[16] *Id.* Specifically, the Board considered strategic alternatives during an executive session of its March 17, 2010 meeting; the Board "continued to believe it was in the best interests of the Company and its stockholders to explore strategic alternatives such that it would be fully informed" during a special meeting on April 16, 2010; certain members of the Board, during "informal conversations," were supportive of continued discussions and the exploration of strategic alternatives with AFCV after a May 10, 2010 meeting with AFCV; and, following the

that time the Board considered financial advisors and was informed about conversations with AFCV.[17]

Plaintiffs assert that Rosenschein sought a deal out of his fear of being fired as CEO. They make much of what appears to be an internal Redpoint document, dated June 2010, which evaluates its investment in Answers. The document indicates that the Company's status was "[b]elow expectations" and that Redpoint was considering options with its investment including "either tak[ing] advantage of inbound M&A interest or replac[ing the] team."[18] Despite Plaintiffs' assertions to the contrary, no evidence in the record demonstrates that Rosenschein or other directors of Answers were aware of Redpoint's assessments at this time or until discovery in this litigation.[19] Finally, although Rosenschein and other managers discussed future employment with AFCV prior to the signing of the merger agreement, Rosenschein stated that he was a representative of the shareholders

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August 9, 2010 earnings release, the Board agreed it was advisable to continue to explore strategic alternatives.

[17]Wagner Aff., Exs. 11-14.

[18] Zeldin Aff., Ex. 39 (the document's author notes a preference to take advantage of an M&A event rather than to replace the team).

[19] Plaintiffs primarily direct the Court to several emails between Beasley and Dyal in which they either express some frustration with Rosenschein or discuss a conversation with an Answers consultant who they were considering as a possible CEO replacement. Zeldin Aff., Exs. 15, 23. They also direct the Court to deposition testimony indicating that Redpoint wanted its investment to perform better and that management was aware of a certain amount of frustration about the Company's performance. Beasley Tr. 12-30; Steinberg Tr. 67-68, 71-72. However, none of these conversations can reasonably be interpreted as evidence that Redpoint had decided to, or threatened to, replace management or that such information was conveyed to management.

until the deal was completed.[20] AFCV also indicated that it would not make any firm commitments about future employment for any of the Company's employees.[21]

In June, upon the recommendation of the Board's Financing Committee and after reviewing the terms of engagement of the financial advisors under consideration, the Board decided to engage UBS as the Company's financial advisor.[22] Negotiations between Answers and UBS were not completed until September 17, 2010.

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[20] Rosenschein Tr. 218-19. Rosenschein testified:

> My specific representation to Mr. Karandish is that, and I told him this quite explicitly, up until the minute we sign the papers at closing, my first and only responsibility is to the shareholders of answers.com, and as much as I'd like to cooperate and we have certainly obligations, but I really, when we close, you know, he'll have my loyalty, but up until then I represent the shareholders.
>
> Now, specifically having to do with employment, we have no management contracts. We have no written or oral understandings regarding any medium to long-term employment, none. . . .
>
> That means my entire management team, everybody on the list, including myself, does not know if I have a job in five or six months – do not know it.

[21] Karandish testified:

> [A]ny team members and executives would be determined on a case-by-case basis as to whether to not they would stay and combine company, assuming that we closed, on a case-by-case basis at my discretion. . . .
>
> Case-by-case for everyone, including the CEO.
>
> Mr. Rosenschein has said that he would like to be part of the combined company. He has also said that he is a "big boy," . . . and that if he's not part of the combined company, that's okay, too.

Karandish Tr. 111-13.

[22] Proxy at 23.

On July 14, 2010, Answers and AFCV entered into a Mutual Confidentiality Agreement. On August 9, 2010, Answers issued its second quarter earnings release which reported a second consecutive quarterly drop in revenues, after which its stock price fell from $7.99 to $4.58 within a week.[23] Rosenschein's testimony suggests that the stock price decline was based on a single shareholder which dumped several hundred thousand shares in two days and not upon market fundamentals.[24] Answers also began providing information concerning the business with AFCV at this time. On August 31, 2010, Karandish informed Rosenschein that he had received the green light from Summit's investment committee to pursue a transaction with Answers.[25]

B. *Answers and AFCV Negotiate a Sale Price*

On September 2, 2010, Karandish called Rosenschein to discuss delivering a letter of intent for a purchase of Answers by AFCV and explained that AFCV was considering a price of $8.00 per share. On September 7, 2010, Karandish sent Rosenschein a non-binding letter of intent for an acquisition within a range of $7.50 to $8.25 per share.[26] The Board concluded at its next meeting on September 15, 2010, that a price in that range was inadequate.[27] Following further

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[23] *Id.* at 24.
[24] Rosenschein Tr. 77 ("It did not fundamentally alter our view of, you know, of the value [of the Company].").
[25] Zeldin Aff., Ex. 17.
[26] Zeldin Aff., Ex. 18.
[27] Wagner Aff., Ex. 15.

discussions between the financial advisors of Answers and AFCV, AFCV raised its offer to $9.00 per share on October 19, 2010. Rosenschein discussed "AFCV's willingness to increase its price" with certain Answers board members.[28] They decided that it was in the best interests of the Company and its stockholders to continue discussions and to exchange additional information with AFCV.[29]

On October 28, Rosenschein, Karandish, and other representatives of their companies met, and Answers provided AFCV with an updated management presentation and additional diligence materials and information, including projections and the strategic plan for the remainder of fiscal year 2010 and for 2011.[30] Thereafter, on November 4, 2010, AFCV raised its offer to $10.00 per share and also sent the Company an exclusivity agreement which would prevent it from discussing the possibility of a strategic transaction with other parties for a period of time.[31] The Financing Committee apparently considered this offer on November 5. It concluded that the $10.00 offer was a positive development, but would not agree to exclusivity with AFCV, and directed UBS to communicate its conclusions to AFCV's financial advisor.[32]

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[28] Proxy at 24.
[29] *Id.*
[30] *Id.* at 25.
[31] *Id.*
[32] *Id.* No minutes of this meeting of the Financing Committee have been produced. One member of the Financing Committee, during his deposition, asserted that minutes were prepared for every Financing Committee meeting. Sternlicht Tr. at 54-55.

Additional negotiations culminated in an offer from AFCV's financial advisor to UBS on November 8, 2010 for $10.25. AFCV again sought to condition the offer upon exclusivity.[33] After learning of AFCV's offer, Segall wrote the Company's lead financial advisor at UBS, Janine Shelffo, and Beasley: "Disappointing response. That suggests they will accept exclusivity at $10.50 if they are playing in quarters now. . . Feels at least $0.50 low to me (if not $1.50!)."[34]

The Financing Committee directed management and UBS to continue to negotiate with AFCV, although without exclusivity, because it believed it was in the best interest of Answers to retain its ability to consider other offers. AFCV agreed to continue negotiations if Answers would reimburse it for expenses if Answers engaged in another transaction at a higher price. During a special meeting on November 15 to consider AFCV's updated non-binding letter of intent and its expense reimbursement agreement, the Board determined it would be in the Company's best interest to allow AFCV to proceed with due diligence and for management to cooperate with it.[35] However, the Board made no final decision about whether to pursue the AFCV transaction or another transaction.[36]

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[33] Proxy at 25.
[34] Zeldin Aff., Ex. 24.
[35] Wagner Aff., Ex. 16.
[36] *Id.*

C. *Answers Evaluates Interest from Other Possible Acquirers*

Although Answers had received unsolicited interest from some potential acquirers from January 2010 to November 2010, the Board formally authorized UBS to approach ten other potential strategic buyers during its December 8 meeting.[37] UBS may have taken certain steps related to the market check slightly before this time. For example, it appears to have developed a list of potential bidders as of September 2010[38] and the minutes of the December 8 Board meeting and accompanying materials indicate that UBS initiated the market check in November.[39]

Plaintiffs focus on two emails sent just before the December 8 Board meeting in which Shelffo relayed negotiation information to Rosenschein, Beasley, Dyal, and Segall.[40] Shelffo, in both emails, describes AFCV "push[ing] the idea" that Answers conduct a quick market check in the two weeks preceding Christmas to satisfy the Board's fiduciary duties and then sign up a deal.[41] In the first of these emails, dated December 6, Shelffo wrote "I told [AFCV's banker] the board was

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[37] Wagner Aff., Ex. 17 at 3 ("The Board also instructed UBS to explore the interest of other parties who might be interested in pursuing the acquisition of the Company, in parallel to management's discussions and negotiations with [AFCV], and to report to the Board and management on the results of its inquiries."); Proxy at 26.

[38] *See* Wagner Aff., Ex. 22 at 1, 18-19.

[39] Wagner Aff., Ex. 17 at 3 (UBS's representative "next described the status of conversations with other interested parties, and shared her thoughts as to the probability of any of these parties becoming serious candidate acquirers."); Wagner Aff., Ex. 23 at 3 ("Beginning in November 2010, after receiving an unsolicited offer from [AFCV], UBS conducted a market check contacting potential buyers to gauge their interest in a potential transaction with [Answers.]").

[40] Zeldin Aff., Ex. 26.

[41] *Id.*

not comfortable with that approach satisfying their fiduciary duty and that our UBS recommendation to complete a real market check would be to do something in the new year."[42]

At a special meeting of the Board on December 23, 2010, Shelffo reported the responses of the ten strategic acquirers that UBS contacted. Two companies had not responded, one was "probably not interested" due to a pending going-public transaction, and four indicated they were not interested in pursuing a transaction.[43] Board meeting minutes report that three companies expressed some interest in a transaction and that management had already presented information to those companies.[44] Shelffo assessed the interest of these parties in an acquisition, noted that UBS was waiting for additional information, and stated that UBS would be more able to gauge their interest once it received additional feedback.[45] In response to questions, Shelffo also discussed the advisability of soliciting interest from a wider range of potential acquirers. She commented that UBS was prepared to do so, but the Board should also balance the speculative benefits of running a more thorough search against the risks of delay which could jeopardize the AFCV transaction.[46]

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[42] *Id.*
[43] Wagner Aff., Ex. 18 at 4.
[44] *Id.*
[45] *Id.*
[46] *Id.*

Board members, during depositions, explained that the Board never told UBS to stop its market check[47] and that the check continued until the date the parties signed the merger agreement.[48] The Court cannot divine from the record the means by which the three interested acquirers indicated their lack of interest in Answers and when, if at all, such information was conveyed to the Board. However, the minutes from the Board's February 2, 2011[49] meeting confirm that the market check was limited to the strategic buyers discussed and that all three of the interested acquirers indicated a lack of interest.[50] Thus, AFCV's offer was the only offer that the Company received in 2010.

D. *The Fourth Quarter Results of 2010*

During the December 23, 2010 Board meeting, the Company's financial condition appeared to be improving. The Board was informed that the Company's fourth quarter performance "significantly" exceeded that of the plans submitted to

[47] Dyal Tr. at 188.
[48] Kramer Tr. 86-87; Tebbe Tr. 201.
[49] Although the minutes are misdated February 2, 2010, the litigants clearly understand them to be the minutes from February 2, 2011. *See* OB at 16; Pls.' Answering Br. in Opp'n to All Defs.' Mots. for Summ. J. ("AB") at 29 n.18.
[50] Wagner Aff., Ex. 21 at 5 (noting "UBS had reached out to those it deemed to be the motivated buyers, but found that potential buyers were not interested in the Q&A space, especially as the Company's stock price began to rise." Shelffo stated "the process tested interest in the market in an acquisition of the Company, but that no such interest had been found."), 8 ("Questions were then asked whether there might be other potential acquirers whom UBS had not canvassed and whether any such acquirer could still come forward. In response Ms. Shelffo said that UBS was not aware of any such 'dark horse,' and that, based on the market check performed by UBS, it was not likely that the Company would receive a topping bid."); *see also* Proxy at 26.

AFCV in October and that it expected record revenues.[51] Specifically, anticipated revenues were projected to be $6.06 million or even higher, which was far beyond the $5.2 million forecast in the plans submitted to AFCV.[52] EBIDTA was also $800,000 higher than projected. Business metrics the Company relied upon were also favorable. Page views exceeded projections by 10%, although management attributed approximately 7% of that to page views received from Google.[53] Revenue per thousand page views ("RPMs")[54] had also exceeded projections by 5%.

The minutes also offered certain cautionary notes and contemplated the need to weigh the new projections. The minutes warned that there was "no assurance we will see continued strength as seen in Q4" and that "[p]ast experience leads us to expect negative Google surprises in 2011."[55] Based on this new information, management would prepare an updated forecast to be presented to the Board in January, which the Board would "need to evaluate and understand . . . before approving the [AFCV] transaction."[56]

Plaintiffs rely heavily on this relatively strong fourth quarter (the "Fourth Quarter Results"). They focus on a December 12 email exchange among

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[51] Wagner Aff., Ex. 18 at 1.
[52] *Id.* at 2.
[53] *Id.* at 1-2.
[54] Beasley Tr. 21.
[55] Wagner Aff., Ex. 18 at 2.
[56] *Id.*

Rosenschein, other managers, and UBS discussing which financials should be presented to potential interested acquirers during the market check. In the email chain, Shelffo wrote that "we should present the 2011 numbers as presented to [AFCV] so we don't have multiple sets of numbers floating out there. We can address verbally the outperformance we've seen in q4 and explain that we are still in the process of revising our forecast for 2011."[57] The Company's Chief Financial Officer ("CFO") replied that he would send a revised 2010 forecast should UBS wish to include it in any presentations.[58] By January 5, 2011, the CFO sent UBS an updated forecast for 2011.[59]

The Fourth Quarter Results also played some role in the Company's negotiations with AFCV. By January 2011, the Company's negotiators became concerned that AFCV was delaying finalizing the transaction and was unable to obtain financing for it. Shelffo referenced the Fourth Quarter Results to explain that the recent improvement in performance by Answers had decreased the Board's

[57] Zeldin Aff., Ex. 31.
[58] Plaintiffs make several arguments based on these emails. AB at 23. First, the Court notes that because much of the evidence Plaintiffs muster here is based on a concern over the ability of individuals preparing information for presentations or presenting such information to do so in a timely manner based on last-minute requests, it seems far afield of Plaintiffs' bad faith claim against the disinterested directors. More importantly, because Plaintiffs' factual account in this section concerns an interchange between UBS and Answers's CFO, it provides little, if any, basis for assessing the Board's bad faith or its domination by Rosenschein or the Redpoint Directors and the Court therefore omits some unnecessary detail.
[59] Zeldin Aff., Ex. 41.

interest in a deal with AFCV in a series of three emails sent on January 5,[60] January 13,[61] and January 15[62] (the "Shelffo Emails"). These emails indicate that the Company put negotiations on hold until AFCV could demonstrate that it could fund the transaction.

Rosenschein provided revised forecasts to the Board on January 19, 2011 while informing them of the "intense" interactions between the parties, the "5-day hiatus" in negotiations, and updating them on remaining significant business

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[60] Zeldin Aff., Ex 40. On January 5, Shelffo wrote to Rosenschein, Beasley, Dyal, and Segall that a recent conversation with a Summit team member had resulted in certain assurances being made to Shelffo. However, she "told him that our concerns are both around certainty and timing, and shared [her] view that time is not a friend to this deal with continued outperformance and a looming q4 earnings call." The Summit representative assured her that his firm was "entirely committed to getting this done."

[61] Zeldin Aff., Ex. 43. UBS continued to negotiate with Summit's representative on behalf of Answers. Shelffo emailed Rosenschein, Beasley, Dyal, and Segall on January 13, 2011 that she "[j]ust got off a rather heated call with [AFCV's financial advisor]. The upshot is that they still don't have financing papers to provide us." Shelffo informed AFCV's financial advisor:

> [H]e and his client have lost all credibility with us, that patience on our side of the table was dwindling, that there was general skepticism after almost a month of excuses about whether they could actually come up with the funding and that with every day that passed with the stock price rising and the company outperforming made it less and less likely that our board would be interested in a deal anywhere near the price vicinity discussed. I asked him to communicate to his client that we are pencils down and have no interest in spending another penny pursuing this transaction until they demonstrate an ability to fund the transaction.

[62] Zeldin Aff., Ex. 44. Shelffo emailed Rosenschein, Beasley, Dyal, and Segall to explain that a Summit representative provided her a more detailed update in which he further confirmed Summit's commitment and expressed certain frustrations with its financial advisor. Shelffo maintained a hard line and told him that a particular deal term was "not our only business issue, that there are still a handful to work through in our view but that we were not prepared to commit any more resources to their deal until they prove they can finance it." She also "reiterated to him that time has been no friend to this deal as the stock price has increased and the company has continued to outperform."

issues.[63] He also informed the Board that the forecasts would be shared with AFCV later that week, which Shelffo began coordinating that same day.[64]

E. *Answers and AFCV Finalize a Price*

On January 25, 2011, Rosenschein again updated the Board to describe a meeting held the day before among Answers, AFCV, Summit, and their respective financial advisors. He explained that the "price discussion" was being saved for last but was expected that week.[65] Thereafter, the Financing Committee resumed its activities in a series of meetings on January 26 and 27. On January 26, the Financing Committee considered arguments in favor of increasing the share price beyond the pending offer of $10.25 per share.[66] Shelffo was in attendance and stated that UBS foreshadowed such arguments to AFCV's advisors and that they were resistant to a price increase.[67] Thus, Shelffo suggested a price increase between $0.25 and $0.75 per share. The Financing Committee agreed that Beasley should contact one of Summit's representatives to see if the price could be raised and to report back as soon as possible.[68]

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[63] Zeldin Aff., Ex. 45.
[64] *Id.*
[65] Zeldin Aff., Ex. 47.
[66] Wagner Aff., Ex. 19.
[67] *Id.* (AFCV's advisors argued that "the Company's RPMs current situation may pose a challenge; that [AFCV] viewed the Company's 2011 projections as quite aggressive; that [AFCV] had not incorporated any deal-related management bonuses in previous price discussions; and that the Company's exposure under [a separate] issue could justify a downward price adjustment.").
[68] *Id.*

According to the minutes of the January 27 Financing Committee meeting, Beasley contacted the Summit representative and Summit rejected his efforts to increase the sale price.[69] The Financing Committee agreed that UBS should make one last attempt at a price increase, although it believed that it was in the interest of Answers and its shareholders to accept the transaction at a price of $10.25 per share.[70]

On January 28, Rosenschein emailed the Board to set up a "tentative 90-minute general board meeting."[71] On February 1, apparently during a family vacation, Rosenschein emailed the Board to explain that he and Karandish had discussed the sale price and completing the deal that morning. Karandish consulted with AFCV's board and contacted Rosenschein to extend an offer of $10.50 per share "and not a penny more," if Answers signed that day.[72]

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[69] Wagner Aff., Ex. 20. A later document suggests that Beasley proposed an increase of $0.45 per share, although that document does not indicate whether other bargaining positions were taken. *See* Zeldin Aff., Ex. 53. In that document, Summit's representative wrote to Beasley and Dyal explaining its reasons for standing by the current price. He continued:

> The headline is that, based on our diligence, we are worse off (in terms of liabilities we are assuming and in terms of lower NOLs than UBS asked to pay for) by approximately $10 million. That equates to roughly $0.84 per share in purchase price. Despite our diligence findings, we are prepared to remain at a share price of $10.25 per share, which effectively raises our price by more than the $0.45 per share you proposed. For sake of clarify, we are not prepared to increase our price beyond $10.25 per share.

[70] Wagner Aff., Ex. 20. Shelffo also suggested at this meeting that Answers convene a Board meeting, at which UBS could share its fairness opinion. *Id.*

[71] Zeldin Aff., Ex. 50.

[72] Zeldin Aff., Ex. 54.

Rosenschein answered that a meeting on February 1 was impossible, but that he would "recommend this deal at this price to our board Wed afternoon [February 2]."[73]

F. *Answers Approves the AFCV Transaction*

On February 2, 2011, the Board convened telephonically to consider the AFCV offer. Rosenschein introduced the transaction and reviewed its history, including UBS's failed search for another suitor.[74] The Board heard presentations from its general counsel and outside counsel.[75] UBS described the market check, considered financial metrics, evaluated comparables, reviewed the terms of its engagement with Answers, and opined that the transaction was fair from a financial perspective.[76] The Company's CFO delivered management's analysis and considered certain pros and cons to the deal.[77]

Rosenschein also weighed the pros and cons of the deal with the Board in the context of the Company's plans and business environment. Rosenschein explained that the Company's stock price had been increasing in recent weeks, that the Q&A space was "hot" and had potential, and that site traffic had been encouraging. He described ongoing projects, for example, developing a direct

[73] *Id.* Rosenschein also wrote that "[t]his is a big decision, requiring full board review of pros and cons." *Id.*
[74] Wagner Aff., Ex. 21 at 1.
[75] *Id* at 2-4. General counsel discussed the deal terms and conditions; outside counsel's presentation is redacted.
[76] *Id.* at 5-6.
[77] *Id.* at 7.

advertising sales force, attempts to increase the quality of content, and other initiatives. He also described certain risks, such as the execution risk of the Company's upcoming initiatives and the fact that it was experiencing declining RPMs.[78]

Rosenschein also addressed the Company's dependence on Google and the possibility that Google might begin to compete with it. He said that Google provided "90% of the Company's traffic and three quarters of its revenues" and that "[c]hanges that might be made by Google were outside the Company's control and could have a major adverse impact on the Company."[79] He also added that competition in the Q&A space was increasing, and in particular that Google had recently purchased a Q&A website and that Facebook had recently added a questions feature.

The Board then engaged in general discussion and asked questions, such as whether AFCV might increase its offer and whether other potential acquirers who were not canvassed might still come forward. Shelffo responded that $10.50 appeared to be "as high as [AFCV] was prepared to go" and there was no indication of AFCV holding back on price.[80] Shelffo also said she was unaware of any "dark horse" and, based on UBS's market check, it was unlikely that a topping

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 8.

bid would be forthcoming.[81] The Board weighed the pros and cons and voted unanimously to approve the transaction. The four disinterested directors each testified that he believed the transaction was fair and that he would not have voted for it if he believed otherwise.[82] That same day, Answers and AFCV signed a merger agreement.[83] A shareholder meeting to consider the proposed transaction was scheduled for April 12, 2011.

G. *Post-Transaction Developments*

Several complaints challenging the transaction were filed in this Court and were consolidated. Plaintiffs moved for a preliminary injunction on March 26, 2011 to prevent a shareholder vote. Also in March, Answers released the Fourth Quarter Results.[84] On April 11, 2011, after expedited discovery, this Court denied Plaintiffs' motion.[85] No topping bids were received by the Company except for the Greenspan offer, discussed below.[86]

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[81] *Id.*
[82] *See* Tebbe Tr. 203-04; Kramer Tr. 143-47; Sternlicht Tr. 123-27; Segall Tr. 163.
[83] *See* Proxy, Annex A. The agreement contained certain deal protections. These provisions included a "no shop" clause, a "no talk" provision, a matching rights provision, a termination fee plus expense reimbursement worth approximately 4.4% of the merger's equity value, and a force-the-vote provision. *In re Answers Corp. S'holders Litig. (Answers I)*, 2011 WL 1366780, at *8 n.50 (Del. Ch. Apr. 11, 2011). The merger agreement also permitted the Board to terminate the agreement if it received a superior proposal. Proxy at 67-68. Because an earlier decision held that they were not "inherently unreasonable," they are not discussed in great detail. *See infra* note 93 and accompanying text.
[84] Wagner Aff., Ex. 29.
[85] *Answers I*, 2011 WL 1366780 at *9-*10.
[86] Rosenschein Tr. 242. A topping bid could have been made for $0.40 cents above the sale price. *Id.*

On April 9, 2011, Brad Greenspan, an individual not otherwise associated with the parties, sent Rosenschein a letter stating he would pay $13.50 per share and offered Rosenschein a continued role with Answers after an acquisition. The Board considered and rejected the offer after concluding it was not made in good faith. Apparently Greenspan, in other concurrent litigation, indicated he was suffering financial hardships which demonstrated the frivolity of his offer.[87] The Court denied Plaintiffs the ten-day adjournment of the shareholder vote they sought in response to Greenspan's offer on April 13, 2011.[88] On April 14, 2011, a majority of the Company's stockholders approved the merger.[89]

Defendants moved to dismiss Plaintiffs' complaint on September 7, 2011. The Court considered Plaintiffs' two causes of actions: the first for breach of the fiduciary duties of care, loyalty, and good faith by the Board due to 1) a fatally flawed sales process, 2) unreasonable deal protection measures, 3) using the merger to extract certain benefits for itself, and 4) issuing materially misleading

[87] Wagner Aff., Exs. 33 ¶ 21 (describing inability to pay court sanctions or for cross-country flight for Greenspan and attorney to attend deposition), 34 ¶ 5 (describing failure to pay phone bill which resulted in termination of service).

[88] *In re Answers Corp. S'holders Litig. (Answers II)*, 2011 WL 1562518 (Del. Ch. Apr. 13, 2011).

[89] Wagner Aff., Ex. 4 at 2.

proxy materials.[90] The second cause of action was asserted against the Buyout Group for aiding and abetting the Board's breaches of fiduciary duties.

Plaintiffs' claim alleging materially misleading proxy materials was dismissed as abandoned.[91] The Court held that Plaintiffs' breach of fiduciary duty claims survived based upon the duty of loyalty claims arising from the alleged potential conflicts and domination of Beasley, Dyal, and Rosenschein and the alleged bad faith by the Board's four other directors.[92] The Court held that the deal protection measures and certain benefits were not "inherently unreasonable, individually or collectively."[93] However, the Court permitted the claims to survive because they "allege[] a continuation of the breach of duty of loyalty" and thus if a breach of fiduciary duty was found "then the fact that the Board received benefits from the Merger that it had locked up might increase the Plaintiffs' recovery."[94] Plaintiffs' second claim against the Buyout Group also survived the motion to dismiss.[95]

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[90] *In re Answers Corp. S'holders Litig. (Answers III)*, 2012 WL 1253072, at *4 (Del. Ch. Apr. 11, 2012) (citing Pls.' Second Amended and Supplemental Class Action Compl. ¶¶ 87, 97-98, 104-05, 112-13).
[91] *Answers III*, at *8.
[92] *Id.* at *7-*8. Plaintiffs' duty of care claim could not survive the exculpatory provision in the Company's charter.
[93] *Id.* at *8.
[94] *Id.*
[95] *Id.* at *9-*10. A motion for reargument was filed after *Answers III* and was denied. *In re Answers Corp. S'holders Litig. (Answers IV)*, 2012 WL 3045678 (Del. Ch. July 19, 2012).

III. CONTENTIONS

Plaintiffs' surviving claims are therefore that Rosenschein, Beasley, and Dyal were conflicted and controlled the negotiation process. Plaintiffs also claim the Board breached its fiduciary duties by acting in bad faith to sell Answers before its rising stock price would exceed AFCV's offer through 1) purposefully engaging in a limited shopping process, 2) utterly failing to act in the interest of the Company's public shareholders after circumstances had changed to indicate the offer price was too low, and 3) exerting willful blindness to ignore alternatives to the transaction.[96] Plaintiffs have not alleged that UBS, the Board's financial advisor, was conflicted.[97] Finally, Plaintiffs allege that the Buyout Group received confidential information from the Board which it used to engineer a transaction that benefited the Buyout Group and certain members of the Board at the expense of the Company's shareholders.[98]

Defendants argue, in separate motions filed by the Director Defendants and the Buyout Group, that the record demonstrates their burden has been met under the summary judgment standard to show that no genuine issue of material fact

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[96] AB at 33. Plaintiffs also claim the fairness opinion was flawed. Because the evidence presented concerning the market check demonstrates that it was valid, the Court need not consider this claim as discussed further herein.

[97] *Answers I*, at *5 (concluding, after considering claims about the Board's ability to rely on UBS's fairness opinion, that "UBS's independence and qualifications are not seriously challenged here . . . .").

[98] AB at 59.

remains on Plaintiffs' claims and that Plaintiffs' claims are meritless. Plaintiffs argue that triable issues of fact remain for all of their arguments.

IV. ANALYSIS

Because a disinterested Board majority approved the transaction, Plaintiffs must rely on claims that the Board acted in bad faith or that it was controlled by an interested party to survive these motions for summary judgment. The Court resolves the issues in reverse order, and concludes that there are no genuine issues of material fact that the Board did not act in bad faith and that the Company's CEO and the Redpoint directors did not control the Board.

A. *The Summary Judgment Standard*

A motion for summary judgment will be granted where the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[99] The moving party bears the initial burden of establishing that no genuine issue of material fact exists and the Court will review all evidence in the light most favorable to the nonmoving party.[100]

If the moving party has supported its motion for summary judgment, then the nonmoving party should provide evidence to establish the existence of a genuine issue of material fact.[101] The nonmoving party may not use mere

[99] Ct. Ch. R. 56(c).
[100] *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).
[101] *See* Ct. Ch. R. 56(e).

assertions or denials to create inferences against the movant. A fact is material if it "might affect the outcome of the suit under the governing law."[102] A genuine issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[103]

B. *Did the Board Act in Bad Faith?*

Delaware law imposes on directors, as the managers of a corporation, fiduciary duties to protect the interests of the corporation and its shareholders. The duty of care and the duty of loyalty apply in a change of control transaction and, in that context, require that the board "perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[104] "[T]here is no single blueprint that a board must follow to fulfill its [*Revlon*] duties."[105] The Court generally grants boards latitude to determine how to conduct an appropriate sale process. Thus, a board may reasonably prefer "a discreet approach relying upon targeted marketing by an investment bank" to conducting a public auction.[106] Prior decisions also support some leeway in determining which potential acquirers

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[102] *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009) (citations omitted).
[103] *Id.*
[104] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citing *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182-183 (Del. 1986)).
[105] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).
[106] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000).

to target.[107] Finally, a plaintiff's inability to explain a Board's motivation to act in bad faith may also be relevant in analyzing bad faith claims.[108]

The contours of bad faith were considered in the context of a change of control transaction in *Lyondell*.[109] There, the Supreme Court confirmed that bad faith may be found where a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[110] The Supreme Court further held that:

> there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties. Thus, the directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of their duties. More importantly, there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties.[111]

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[107] *See Miramar Firefighters Pension Fund v. AboveNet, Inc.*, 2013 WL 4033905, at *7 n.62 (Del. Ch. July 31, 2013) ("The Board's initial decision to pursue only financial buyers is not conduct that is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'" (citations omitted)); *see also In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *7 (Del. Ch. Mar. 4, 2011) ("The Board made a reasonable judgment [to pursue communications with three companies and gather information on a fourth without a public auction from among a list of 11 potential acquirers] that many of those companies listed did not have the financial ability to complete such a large transaction and that others were competitors that might improperly use any information received from Atheros in the event it remained a stand-alone company.").

[108] *See In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) ("Because the Complaint [alleging disinterested directors breached their duty of loyalty in approving a merger transaction] fails to plead any rational motive for the directors to do anything other than attempt to maximize the sale value of Morton's, it fails."); *Miramar Firefighters*, 2013 WL 4033905, at *7 ("Miramar provides *no reason* why the disinterested and independent AboveNet Directors . . . would engage in such a scheme." (alteration in original)).

[109] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

[110] *Id.* at 243 (citations omitted).

[111] *Id.*

The Supreme Court continued:

> Directors' decisions must be reasonable, not perfect. "In the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties." The trial court denied summary judgment because the Lyondell directors' "unexplained inaction" prevented the court from determining that they had acted in good faith. But, if the directors failed to do all that they should have under the circumstances, they breached their duty of care.[112]

The Supreme Court thus determined that an inquiry in such a context should be based upon "whether [the] directors utterly failed to attempt to obtain the best sale price."[113]

The Court concludes there is no genuine issue of material fact concerning the Board's compliance with its fiduciary duties. It is undisputed that four of the seven directors, a majority of the Board, are disinterested.[114] The Plaintiffs must show that the four otherwise independent Board members were controlled by interested parties or rely on a claim of bad faith to demonstrate that the Board breached its fiduciary duties.

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[112] *Id.* (alterations in original) (citations omitted).

[113] *Id.* at 244.

[114] *Answers I*, at *3 ("Plaintiffs have not challenged the independence or disinterestedness of four directors on the seven member board," and thus "the process and the Proposed Transaction have been approved by a disinterested and independent board."); *Answers IV*, at *1 n.4 ("The Court did not, and does not, question that Sternlicht, Segall, Tebbe, and Kramer are independent and disinterested.").

Defendants establish that the Board did not abdicate its duties or act in bad faith. Defendants provide evidence demonstrating that Answers fielded a variety of unsolicited offers and that the Board, during multiple meetings in 2010, considered a variety of transactions, among them the AFCV acquisition.[115] Despite discussions with at least seven other possible acquirers, no potential acquirer, other than AFCV, ultimately made an offer. The Board, when fully constituted and when acting through its Financing Committee, rejected AFCV's requests for exclusivity a number of times to preserve its opportunity to identify and negotiate with other purchasers,[116] rejected several offers as inadequate,[117] and explored the possibility of increasing the price obtained until the deal was approved.[118] The Board's financial representative also advised the Board about the relative merits of pursuing a different sales process and advised it, during the Board's final consideration of its options, that additional bidders were unlikely to come forward. Defendants' evidence is consistent with a board's attempt to comply with its fiduciary duties and to obtain the best price it could.

Moreover, the Board, through its financial advisor, performed a market check. Although the exact timing of the check is uncertain on this record, Delaware law is clear that no specific steps are prescribed. Thus, although Shelffo

[115] *See* notes 15, 16, 37, 43, 44, 45, 50 and accompanying text.
[116] *See supra* text accompanying notes 32-35.
[117] *See supra* text accompanying notes 27 & 32.
[118] *See supra* text accompanying notes 66, 70 & 80.

may have begun canvassing ten strategic buyers in November, before the Board's formal authorization, and although the record is not precise as to when the three interested strategic purchasers abandoned interest, it is clear that those efforts were attempts to comply with the Board's fiduciary duties.

Furthermore, management's earlier discussions with other financial buyers in 2010, even if not a part of the market check led by UBS, also provided the Board with additional information concerning potential acquirer interest. Similarly, there is evidence that the Board never asked UBS to terminate the check,[119] but that it did ask its financial advisor whether additional canvassing would be likely to result in a higher offer.[120] Finally, the disinterested Board members all believed the AFCV offer to be the best available offer for the shareholders.[121]

Thus, Plaintiffs' objections here concern the length of the check and the decision to pursue only ten strategic acquirers instead of a larger number of strategic and financial advisors. *Lyondell* counsels that there is a vast difference between a flawed, inadequate effort to carry out fiduciary duties and a conscious disregard for them. The Board did not consciously disregard those duties, even if

[119] *See supra* text accompanying notes 47 & 48.
[120] *See supra* text accompanying note 81.
[121] *See supra* text accompanying note 82.

Plaintiffs have suggested several ways in which the Board's efforts could have been more robust.

The evidence Plaintiffs forward, when interpreted in the light most favorable to them, supports their argument that the market check lasted only slightly longer than two weeks during the holiday season and focused only on strategic, rather than financial, buyers.[122] However, even this limited market check does not constitute a complete abandonment of fiduciary duty and thus is sufficient to survive a bad faith abandonment of duty claim.

Plaintiffs also argue that the Board failed to respond appropriately to the Fourth Quarter Results reported at the December 23 Board meeting. They argue that the Board knew it was undercutting the true value of the Company because it rushed the deal,[123] the Shelffo Emails demonstrate a desire to hide the Company's financial strength from the public while the Board finalized the deal,[124] and Segall's email stated that AFCV's offer of $10.25 could be as much as $1.50 lower than the value of Answers. They also argue that the only reason the deal was not finalized sooner was because of the Buyout Group's inability to obtain financing,

[122] AB at 44-47 (arguing that the market check began on December 8 because that was the date the Board formally initiated it and that the check must have stopped on December 23, because the Proxy and individual Board members could not recall specific acts related to the check that occurred after that date).

[123] The primary piece of evidence Plaintiffs offer here is a single quote by Kramer that the process was "accelerated" which he later denied. Kramer Tr. at 144, 156.

[124] AB at 47-49.

and then question the sincerity of the Board's concern about the Company's dependence on Google.[125]

These arguments and the evidence nominally supporting them fail to create a material issue of fact regarding the Board's bad faith because the Board had plausible business concerns about the stability and future success of the Company. The Board, prior to approving the merger, reviewed the business challenges that the Company faced. It was particularly concerned about the Company's dependence on Google for both its traffic and ad revenue when considered alongside the reality that Google had complete autonomy to alter its algorithms without any consultation with the Company. Tebbe explained that "our business was literally at the whim of the Google algorithm . . . . every day we woke up and feared that Google's going to change its algorithm and kill our traffic."[126] Thus, in his view, the Company "lived and died by Google's decisions."[127] Steinberg expressed similar concerns: "Our entire business model was dependent on Google. And it wasn't like Google, you know, told us before they made changes. You just woke up one morning and found they did."[128]

Furthermore, the enterprise upon which Answers was dependent, Google, appeared to be positioning itself to become a competitor. The Board appropriately

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[125] AB at 49-51.
[126] Tebbe Tr. 108, 154.
[127] *Id.* 147.
[128] Steinberg Tr. 134-35.

considered the threat to the Company posed by its primary source of revenue and traffic seeking to enter the same space it occupied. The Board also considered what might have appeared to be lesser threats: that the Q&A space was heating up and that Facebook may have been positioning itself to offer services similar to those offered by the Company. After weighing such business risks, the Board was entitled to make a determination that selling the Company was in the best interest of the shareholders without a judicial second-guessing of its decision.

The Board also responded to the Fourth Quarter Results with efforts which, whether imperfect or not, did not exhibit a conscious disregard for its duties. When the Board was informed of the results, it indicated its concern about the Company's dependence on Google and was cognizant that its strong results did not guarantee improved (or sustained) results in future quarters. Management stated that it would prepare an updated forecast which the Board would need to review before approving any transaction with AFCV. UBS also committed to reviewing the changes to projections with AFCV and other potential acquirers and efforts were made to increase the merger consideration based on such improved results.

Plaintiffs' arguments also ignore the fact that the Fourth Quarter Results were provided to AFCV and that the bidder did in fact increase its offer price. The Board did not act in bad faith merely because AFCV argued its diligence revealed further offsetting liabilities or because the increased forecasts only yielded an

additional $0.25 per share. Plaintiffs' arguments also ignore that the Company released the updated financials to the public in March after the transaction was signed and again failed to generate a good faith topping bid.

Moreover, Plaintiffs' proffered evidence does not create a genuine issue of material fact. Evidence based upon a few isolated quotes stating the deal was accelerated or reflecting one director's belief, or perhaps mere bargaining position, of the Company's value does not state a claim for bad faith in this context. Such considerations are within the purview of a disinterested Board in assessing whether to pursue the proverbial bird in the hand over the one in the bush; particularly here, because no allegations have been made concerning the Board's motives for favoring AFCV as a bidder or presenting some other motive for failing to maximize shareholder value.[129]

Plaintiffs next assert that the four otherwise independent directors were deliberately uninformed and identify segments of the Board member's deposition transcripts in which individual Board members were confused about particular details of the transaction and could not recall certain activities of management.[130]

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[129] *See Koehler v. Netspend Hldgs., Inc.*, 2013 WL 2181518, at *12 (Del. Ch. May 21, 2013) ("Plaintiff provides no explanation of 'why the disinterested and independent directors would disregard their fiduciary duties' in order to advance [the CEO]'s interests." (citing *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *10 (Del. Ch. Jan. 31, 2013))).

[130] AB at 52-56. Although Plaintiffs assert that the four disinterested directors were intentionally uninformed, these are assertions that are unsupported by plausible evidence. Plaintiffs never direct the Court to evidence exhibiting any intent to remain uninformed and the evidence they do supply is the sort that, at most, might be cognizable under a duty of care claim.

Plaintiffs also emphasize how busy certain directors were during this period. Such arguments focus on the care with which the Board executed its duties and do not sustain the bad faith claim before the Court.[131]

Finally, Plaintiffs fail to advance a persuasive reason why the Board favored AFCV or consciously abdicated its fiduciary duties. Plaintiffs never explain what motivated the four disinterested directors to abandon their fiduciary duties or to favor the allegedly conflicted directors and only allege that Rosenschein and the Redpoint directors had improper motivations. In contrast, Defendants provide evidence that all of the disinterested directors believed the AFCV transaction was fair and would not have approved a transaction they believed was unfair to the Company's shareholders.[132]

In sum, there is evidence of a disinterested Board focused on attaining the highest value it could, and that evidence does not suffer from a disputed material fact. At the motion to dismiss stage, there may have been reason to be concerned about the Board's fiduciary duties if the Board lacked any justification for its decision to sell the Company while its performance appeared to be improving dramatically. However, Defendants have resolved those doubts by demonstrating

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[131] Plaintiffs also argue that $10.50 price was based on inadequate analysis and a flawed fairness opinion and that a Board cannot rely on a flawed fairness opinion as a substitute to a market check. AB at 56-58. The Court need not address this argument because a market check was performed. There is no allegation that the Board was aware of any material shortcomings in the analysis.

[132] *See supra* text accompanying note 82.

the Board's concerns about the Google threat and the uncertainty surrounding the Company's future profitability. Although Plaintiffs identify a variety of ways in which they believe the process could have been better conducted, they offer no evidence of that extreme set of facts required to show that the board utterly failed to attempt to comply with its duties. Because the otherwise disinterested Board could nonetheless fail to be independent, the Court next considers whether Rosenschein or the Redpoint directors controlled the Board.

C. *Did Rosenschein Control the Board?*

A director lacks independence when she is beholden to a controlling party or so under the controller's influence that her discretion is sterilized.[133] Thus, control may be found when there is "a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[134] Conversely, independence means "a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[135]

[133] *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002) (citing *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).
[134] *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 816 (Del.1984)).
[135] *Aronson*, 473 A.2d at 816.

Plaintiffs argue primarily that Rosenschein was conflicted,[136] but they do not explain how Rosenschein dominated the Board.[137] Though the Court may be skeptical about Rosenschein's alleged conflict, it need not reach the issue because no genuine issue of material fact is present regarding his control of the Board. Plaintiffs appear to argue that the Board's approval of the transaction was corporate conduct undertaken to support Rosenschein's wish to sell the Company and thus the Board was dominated. Rosenschein needed such a transaction, Plaintiffs assert, because he knew the Redpoint directors intended to replace him and AFCV might allow him to stay on as CEO. However, Plaintiffs' mere invocation of the phrase "dominated and controlled" cannot alone create such an issue of disputed fact.[138]

Plaintiffs' theory suffers from several deficiencies. First, they offer no evidence that Rosenschein knew he would be fired. Second, they offer no evidence that he had a deal lined up with AFCV and in fact, Rosenschein was not

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[136] AB at 15, 43-44. Although the section labeled "The Merger Negotiations Were Led by the Conflicted Directors" mentions Rosenschein a few times, that section primarily argues that Beasley and Dyal took over the negotiations and the Board failed to supervise the sale process. *See* AB 16-21.

[137] Plaintiffs so zealously argue about purported Rosenschein's conflict, that they neglect to explain how he dominated the Board. The Court attempts to reconstruct what it understands Plaintiffs to have intended to argue based upon the factual narrative of Plaintiffs' brief.

[138] *Orman*, 794 A.2d at 24 (citing *Aronson v. Lewis,* 473 A.2d 805, 816 (Del.1984)) ("The shorthand shibboleth of 'dominated and controlled directors' is insufficient.").

hired by AFCV after the transaction.[139] Third, as discussed above, Plaintiffs never offer a persuasive theory as to why the otherwise disinterested Board members decided to abdicate their duties and favor Rosenschein. Fourth, Plaintiffs never direct the Court to specific evidence of an occasion when the Board acquiesced in Rosenschein's desires or Rosenschein attempted to impose his will upon it. Finally, the Board's decision to sell the Company is supported by other reasons cognizable under the business judgment rule, including the Board's apprehension that Google would soon compete directly against the Company and its recognition that, although the Company had benefited from a recent uptick in revenues, future results were uncertain.

The evidence Defendants provide, such as the Board meeting minutes, demonstrates a Board appropriately balancing business risks and attempting to comply with its fiduciary duties. Because Plaintiffs' arguments suffer from the problems identified above, no genuine issue of material fact is present and Defendants are entitled to summary judgment on the claim that Rosenchein somehow dominated these four directors.[140]

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[139] *See* Steinberg Tr. 152-53 ("All of senior management, with the exception of one member [in-house counsel], were let go in July . . . .").

[140] A corollary of Plaintiffs' failure to explain the nature of Rosenschein's domination of the Board is that they never argue he controlled, manipulated, or otherwise failed to provide information which the Board needed. None of the evidence Plaintiffs provide causes the Court to question whether disputed issues of fact exist in this regard as well.

D. *Did Beasley and Dyal Control the Board?*

Similarly, the Court does not need to determine whether Beasley and Dyal were conflicted because of the scant evidence offered by Plaintiffs regarding the Redpoint directors' ability to dominate the Board. Defendants' evidence indicates that Rosenschein and UBS served as the primary negotiators leading the Company through discussions with AFCV. The Board meeting minutes in December and February also portray a Board that deliberated without any undue interference. Plaintiffs contend a triable issue of fact exists because the Redpoint representatives held two meetings with Summit or AFCV without other Company representatives and because Beasley unsuccessfully attempted to increase the merger consideration. However, Plaintiffs do not demonstrate any specific acts of control. Moreover, there is no showing of any harm that could have resulted from these meetings.

Plaintiffs next argue that triable issues of fact exist because a series of emails include certain directors, but not others. These emails are not evidence of domination. Most of the cited emails are among Shelffo, Rosenschein, Beasley, Dyal, and Segall.[141] The emails provide updates about the AFCV negotiations or are side comments about those updates to a smaller group of recipients. That some

[141] Zeldin Aff., Exs. 26, 40, 43, 44. Plaintiffs also direct the Court to an email from Segall to Shelffo and Beasley and another email from Segall to Beasley and Dyal. Zeldin Aff., Exs. 24, 22.

directors were included in these emails simply reflects the reality that certain directors may have been more involved in the minutia of the transaction and others may have reviewed it at a higher level.

Plaintiffs also point to two emails in a side conversation between Redpoint representatives and Summit.[142] In the second email, a Summit representative explained why the deal price should be lowered based on Summit's additional diligence findings and then questioned if the "price you negotiated with us" would be honored.[143] The representative's use of "you," when read in the context of the email, refers to Beasley and Dyal as representatives of the Company and does not support a reasonable inference that Dyal or Beasley had a pre-cooked deal with Summit. However, even if these two had made a deal with Summit, there is no evidence that Dyal or Beasley had any ability to, or attempted to, force such a deal on the Board. On the contrary, the record demonstrates otherwise and ample evidence is present that the Company's representatives led the negotiation process, used reasonable efforts to attempt to increase the sale price, and that there was no pressure applied by Dyal or Beasley during the Board's well-documented deliberations.

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[142] Zeldin Aff., Exs. 52, 53. In the first email, Dyal explicitly disclaimed the need for Dyal and Beasley to participate in a call in which AFCV would explain why it would not raise its offer price.

[143] Zeldin Aff., Ex. 53.

Defendants' evidence establishes that the Board did not act in bad faith in complying with its fiduciary duties and that Rosenschein, Beasley, and Dyal did not dominate the Board. The evidence that Plaintiffs have forwarded to rebut Defendants' showing does not demonstrate a genuine issue of material fact upon which Plaintiffs could state a claim. Thus, the Director Defendants' motion for summary judgment is granted.

E. *Did the Buyout Group Aid and Abet a Breach of Fiduciary Duty?*

An aiding and abetting a breach of fiduciary duty claim requires a plaintiff to prove: (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.[144] Plaintiffs argue that genuine issues of material fact are present regarding whether the Buyout Group aided and abetted the Director Defendants' breach of fiduciary duty by knowingly participating in the breach and whether the Buyout Group received confidential information from the Board.

Plaintiffs argue the Buyout Group knowingly participated in the breach because the Shelffo Emails state that "time is not a friend to this deal" and that a Summit representative sought to speak with Redpoint. This evidence cannot reasonably be interpreted as evidence of knowing participation. The Redpoint

[144] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

directors informed the Summit representative that they had no need to speak directly about the issues the representative raised and that other Company representatives could follow up on Summit's concerns. Shelffo, in her emails, states that the Board may call off the deal because of concerns about AFCV's ability to finance the deal. Neither of these communications can reasonably be interpreted as evidence of a plan to breach or to induce a breach.

Next, Plaintiffs argue that the Buyout Group received confidential information from the Board because Shelffo indicated that the Buyout Group "pushed" for the market check to be completed in two weeks, because AFCV added $0.25 to the share price to expedite the deal, and because Beasley contacted Summit in January to try to raise the price. Plaintiffs argue that all of these circumstances indicate that the Buyout Group received confidential information in order to engineer a deal to buy the Company at the cheapest price possible.

Plaintiffs essentially invite the Court to interpret certain negotiations as evidence that confidential communication was elsewhere being exchanged. The Court declines to do so. The evidence Plaintiffs cite demonstrates that even arm's length negotiators need to email one another to complete a deal and that sometimes they offer suggestions on how to expedite the deal, which the opposing party may accept or reject. Plaintiffs provide no evidence indicating that confidential information was exchanged and are thus left only with their assertions that a

conspiracy must have existed between the Buyout Group and the Board. Such assertions cannot create a genuine issue of material fact.

Because Defendants present evidence of arm's length negotiations between the parties and Plaintiffs provide no evidence which can reasonably be interpreted to demonstrate knowing participation in a breach or the exchange of confidential communication and because no underlying breach of fiduciary duty is present, the Court grants the Buyout Group's motion for summary judgment.

V. CONCLUSION

For the reasons stated above, no genuine issue of material fact exists that the Director Defendants did not act in bad faith and that Rosenschein, Beasley, and Dyal did not control the Board. The transaction was approved by an independent and disinterested majority of the Board which did not act in bad faith. The Director Defendants' motion for summary judgment is therefore granted. Because there is no dispute of material fact as to whether the Buyout Group aided and abetted any breach of fiduciary duty, its motion for summary judgment is also granted.

An implementing order will be entered.