IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE NOVELL, INC. SHAREHOLDER LITIGATION	: :	Consolidated C.A. No. 6032-VCN

MEMORANDUM OPINION

Date Submitted: June 5, 2014
Date Decided: November 25, 2014

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NOBLE, Vice Chancellor

Plaintiffs, former shareholders of a corporation that completed a merger and a patent sale in April 2011, allege that director Defendants acted in bad faith by treating bidders differently for reasons other than pursuit of the best interests of the corporation and its stockholders. Defendants have moved for summary judgment on the bad faith claims, contending that there is no genuine issue of material fact regarding the reasonableness of their sales process or their motives. For the reasons that follow, Defendants' motion for summary judgment is granted.

I. BACKGROUND[1]

A. *The Parties*

Plaintiffs Oklahoma Firefighters Pension and Retirement System, Louisiana Municipal Police Employees' Retirement System, Operating Engineers Construction Industry and Miscellaneous Pension Fund, and Robert Norman (collectively, the "Plaintiffs"), former shareholders of Novell, Inc. ("Novell"), brought this class action against the members of Novell's board of directors (collectively, the "Board" or the "Defendants") involved in the transaction at issue

[1] The Court reviewed the basic facts in an earlier memorandum opinion. *See In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 (Del. Ch. Jan. 3, 2013). This section focuses on the transaction process and includes facts that have come to light during discovery.

in this litigation (the "Merger").[2] The Complaint challenged the independence of two of the nine directors, Ronald W. Hovsepian ("Hovsepian") and Gary G. Greenfield ("Greenfield").[3] Hovsepian was Novell's President and Chief Executive Officer from 2006 until the Merger closed.[4] Greenfield had ties to key, indirect investors in Attachmate Corporation ("Attachmate"), the acquiror.[5] On the motion to dismiss, the Court dismissed allegations related to Hovsepian[6] but left open the possibility that the Board had acted in bad faith by allowing Greenfield "to influence impermissibly the [sales] process."[7]

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[2] Second Am. Verified Consolidated Class Action Complaint (the "Complaint" or "Compl.") ¶¶ 15-18. The Defendants are Albert Aiello, Jr., Fred Corrado, Richard L. Crandall, Gary G. Greenfield, Judith Hamilton, Ronald W. Hovsepian, Patrick S. Jones, Richard L. Nolan, and John W. Poduska, Sr. Compl. ¶¶ 21-29. This Court dismissed Plaintiffs' claims against Attachmate Corporation and Elliott Associates LP (and its affiliates and associates) in an earlier proceeding. *See In re Novell*, 2013 WL 322560, at *17-18.

[3] *In re Novell*, 2013 WL 322560, at *11.

[4] Compl. ¶ 26.

[5] Specifically, Greenfield was or had been an officer and director of a company owned by Francisco Partners and Golden Gate Capital, a passive investor in private equity funds managed by Francisco Partners, and an Operating Partner of Francisco Partners Management, LLC. Aff. of Gary G. Greenfield in Supp. of Novell Defs.' Mot. for Summ. J. ("Greenfield Aff.") ¶¶ 4-6.

[6] *See In re Novell*, 2013 WL 322560, at *11-12 ("Plaintiffs do not allege that Hovsepian exerted any undue influence over any of the seven other independent and disinterested members of the Board . . . . Further, the possibility of receiving change-in-control benefits pursuant to pre-existing employment agreements does not create a disqualifying interest as a matter of law.").

[7] *See id.* at *10-11 ("Perhaps there is no breach of fiduciary duty here, but it is 'reasonably conceivable' based on the pleadings. These specific allegations cannot readily be separated from other claims of favorable treatment of Attachmate.").

Before the Merger, Novell was a Delaware corporation that "develop[ed], [sold] and install[ed] enterprise-quality software that [was] positioned in the operating systems and infrastructure software layers of the information technology industry."[8] Plaintiffs held Novell stock until Novell became a wholly owned subsidiary of Attachmate through the Merger.[9] Attachmate, during the acquisition process, was a Washington corporation that "enable[d] IT organizations to extend mission critical services."[10] Attachmate's "principal stockholders" were investment funds affiliated with Francisco Partners, LP ("Francisco Partners"), Golden Gate Private Equity, Inc. ("Golden Gate"), and Thoma Bravo, LLC.[11]

B. *Solicitation and Early Bids*

In late 2009, Symphony Technology Group ("Symphony") became interested in acquiring Novell.[12] Symphony spoke with Novell's former employees, customers, and partners, as well as a key shareholder,[13] and the head of

[8] Aff. of Cliff C. Gardner in Supp. of Novell Defs.' Mot. for Summ. J. ("Gardner Aff.") Ex. 1 ("Proxy"), at 2.
[9] Compl. ¶¶ 15-18.
[10] Proxy 2.
[11] Proxy 2. For convenience, the Court uses "Attachmate" to refer to both Attachmate Corporation and its supporting entities (Francisco Partners and Golden Gate), that vied for Novell.
[12] App. in Supp. of Pls.' Mem. of Law in Opp'n to Novell Defs.' Mot. for Summ. J. ("Pls.' App.") Ex. 1 ("Bala Dep."), at 34. Marc Bala was involved in the deal process on behalf of Symphony. At the time of his September 2013 deposition, he was a managing director on Symphony's investment team. *Id.* at 14-15.
[13] *Id.* at 35-37.

Symphony's investment team, Bill Chisholm ("Chisholm"), asked Greenfield to introduce him to Hovsepian in February 2010.[14] Chisholm attempted to set up a meeting with Hovsepian, during which he planned to express Symphony's interest in Novell.[15] However, on March 2, 2010, Novell received an unsolicited proposal from Elliott Associates LP and associated parties (collectively, "Elliott") to acquire Novell for $5.75 per share in cash.[16] Elliott, a private investment fund, had acquired a 7.1% stake in Novell's common stock and an additional 1.4% stake through derivative agreements by that time. In a March 20 press release, issued after consultation with J.P. Morgan, its financial advisor, and outside special counsel, the Board rejected the proposal as inadequate.[17] The press release also announced that Novell was exploring strategic alternatives to enhance stockholder value. Yet while Symphony had met with J.P. Morgan on March 18 and expressed interest in acquiring Novell,[18] it was only contacted as a potential bidder on

[14] *Id.* at 40-41.
[15] *See* Pls.' App. Ex. 7 (email correspondence regarding scheduling).
[16] Proxy 30.
[17] Proxy 30-31.
[18] *See* Bala Dep. 64-65; Pls.' App. Ex. 8.

March 24.[19] From March to August, J.P. Morgan contacted approximately fifty-two potential buyers, both strategic and financial, for Novell.[20]

Novell began to send out draft non-disclosure agreements ("NDA") through J.P. Morgan in late March.[21] Attachmate received a draft NDA on March 30,[22] and Symphony received a draft NDA on April 13.[23] As of an April 2010 update from J.P. Morgan to the Board, Symphony was the only bidder not to have received a draft NDA.[24] Around May 3, before Symphony had executed its NDA, the Board added provisions requiring Symphony to disclose communications with former Novell employees and restricting future communication.[25] The Board required

[19] *See* Aff. of Cliff C. Gardner in Supp. of Novell Defs.' Reply Br. in Further Supp. of their Mot. for Summ. J. ("Reply Gardner Aff.") Ex. 27, at JPM_NOVL_0104889; *see also* Pls.' App. Ex. 12, at STG000245 ("Am I getting a call – heard you guys were calling around. Thanks.").
[20] Proxy 31.
[21] Proxy 31.
[22] *See* Pls.' App. Ex. 14.
[23] *See id.* Ex. 19.
[24] *See id.* Ex. 16. Symphony made multiple requests for an NDA, *see id.* Ex. 17 (April 2 email); Ex. 18 (April 8 emails), and speculates that it received one only after "Elliott had a discussion with either the board or the bankers about [Symphony's] credibility as a buyer." Bala Dep. 86.
[25] *See* Bala Dep. 108-11 (discussing the provisions and Chisholm's email complaining about the provisions); Pls.' App. Ex. 25 (May 10 letter agreement). Plaintiffs also complain that the Board required disclosure of potential equity sources, prohibited communication with those sources without prior consent, *see* Bala Dep. 78-81, 114, 130-31, and restricted partnership with others. *See id.* 116-17, 122-24.

such commitment through the NDA "from that day on" due to concerns about disclosure of confidential information by "unfriendly" parties, "particularly ex-executives."[26] On April 20, J.P. Morgan began sending NDA signatories a confidential information supplement and a process letter asking for preliminary proposals by May 19.[27]

Early in the sales process, the Board decided that its best chance at closing a favorable deal was through a sale of the entire company to a strategic buyer.[28] Accordingly, the Board refused Symphony's request to partner with at least one strategic bidder due to concerns about limiting competition.[29] On the other hand, the Board allowed other financial bidders to partner with "primary" strategic bidders[30] and allowed Attachmate to partner with Francisco Partners and Golden Gate.[31] While the Board rejected Symphony's request to work with Elliott,[32] the

[26] Reply Gardner Aff. Ex. 18 ("Crandall Dep."), at 94-95.
[27] Proxy 32.
[28] Aff. of Richard L. Crandall in Supp. of Novell Defs.' Mot. for Summ. J. ("Crandall Aff.") ¶¶ 15-16.
[29] *Id.* ¶ 15. The Board was concerned that Symphony wanted to partner with multiple bidders and later negotiate a separate sale of part of Novell. *Id.*
[30] The financial buyers that were allowed to partner joined forces with at least one strategic buyer identified as a "primary buyer." *See* Pls.' App. Ex. 24, at 2. Nonetheless, there is evidence to suggest that Francisco Partners and Golden Gate used Attachmate as a bidding vehicle. *See* Reply Gardner Aff. Ex. 29 ("Golob Dep."), at 53-56.
[31] Proxy 32.
[32] *See* Pls.' App. Ex. 26, at STG001980 ("[T]he lawyers keep crossing out [E]lliott as someone we can speak with . . . .").

Board later allowed Attachmate to discuss financing with Elliott.[33] Elliott did not execute an NDA until shortly after Attachmate asked to communicate with Elliott.[34]

As the potential buyers prepared their bids, a number encountered delays in Novell's responses to their due diligence requests.[35] Nonetheless, the initial proposals ranged from $5.50 to $7.50 per share, with Attachmate offering between $6.50 and $7.25 per share.[36] On August 11, the Board asked Attachmate and Symphony to submit their "best and final offer" by August 16 for (i) all of Novell ("WholeCo") and (ii) Novell excluding its open platform solutions business ("OPS," and "WholeCo" without OPS, "RemainCo").[37] Attachmate offered $5.10 per share for WholeCo and $4.50 per share for RemainCo;[38] Symphony offered $4.56 per share for RemainCo only.[39]

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[33] *See* Proxy 34.
[34] *See* Proxy 34.
[35] *See, e.g.*, Golob Dep. 129 ("[The sellers] were not applying the same level of urgency to their own diligence requests – responses to our diligence requests."). At the time of his November 2013 deposition, David Golob was a partner in Francisco Partners. *Id.* at 20-21.
[36] Proxy 32.
[37] Gardner Aff. Ex. 2, at 1 (letter to Symphony); Ex. 3, at 1 (letter to Attachmate).
[38] *Id.* Ex. 4, at JPM_NOVL_0118840-41.
[39] *Id.* Ex. 5, at 1.

C. *The Bid for OPS and Attachmate's Initial Exclusivity Period*

On August 20, Party B proposed to arrange a consortium to purchase OPS and to purchase certain patents and patent applications (the "Select Patents") itself for a total price between $525 and $575 million.[40] The Board discussed the development at an August 24 meeting and, after hearing from legal and financial counsel, decided to consider a sale of OPS to one bidder and RemainCo to another bidder.[41] In the next round of bidding, Attachmate bid $5.10 per share for WholeCo and $4.80 per share for RemainCo, and Symphony bid $4.86 per share for RemainCo only.[42] Then, on August 31, the Board asked Symphony and Attachmate to confirm or revise, by September 1, their bids for RemainCo, excluding the Select Patents.[43] Attachmate promptly confirmed its $4.80 bid, and Symphony did not.[44] After Board meetings on September 2 and 3, both with J.P.

[40] Proxy 35. Alternatively, it proposed to acquire a certain percentage of Novell's outstanding common stock.
[41] Proxy 35-36.
[42] Crandall Aff. ¶ 20.
[43] Proxy 36. The Proxy refers to Symphony as "Party C."
[44] Proxy 37. The parties disagree over whether Symphony "withdrew" at that point. Defendants emphasize that Symphony failed to confirm or revise its bid, and Board meeting notes refer to Symphony's withdrawal. *See* Crandall Aff. Ex. K, at 3 ("Mr. Lett provided an update regarding discussions between JP Morgan and Partner S, in relation to Partner S's recent withdrawal from the process, reporting on Partner S's . . . suggestion that it might be interested in re-engaging at a lower valuation . . . ."). Plaintiffs point to a September 1 email from Symphony's founder asking for more time, *id.* Ex. I ("Hopefully your BOD recognizes the complexity of the task at hand and will agree to our request for an extension till tomorrow evening."), and a September 3 email about amending

Morgan representatives present, Novell entered into an exclusivity agreement with Attachmate, running to September 27, for the sale of RemainCo.[45]

D. *The Microsoft Offer and Renewed Exclusivity*

In mid-October, Party B decided to terminate negotiations for OPS and the Select Patents,[46] and Novell began to search for other bidders.[47] In the meantime, the Board asked Greenfield to inquire about Attachmate's willingness to acquire WholeCo.[48] Greenfield reportedly "indicated [to Attachmate] that 5.10 would be very difficult, that 5.25 might get it done, and that he thought 5.50 would get it done in his view,"[49] and Attachmate offered $5.25 per share for WholeCo on October 28.[50] Greenfield made multiple attempts to encourage Attachmate, allegedly culminating in this "tip."[51] Furthermore, Novell continued to renew its

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Symphony's NDA, Pls.' App. Ex. 36, along with other evidence of continued engagement. Either way, the Board did not receive another proposal from Symphony until October 28. Proxy 37.

[45] Proxy 37.

[46] Crandall Aff. ¶ 29.

[47] Proxy 39.

[48] Greenfield Aff. ¶ 15.

[49] Pls.' App. Ex. 38, at ATTACHMATE620552 ("Gary Greenfield call notes" email).

[50] Proxy 40.

[51] Plaintiffs specifically take issue with (1) communication over drinks about the bidding process on April 28 and (2) communication about deal structure and bid price on October 19. *See* Pls.' Mem. of Law in Opp'n to Novell Defs.' Mot. for Summ. J. ("Pls.' Opp'n Mem.") 18-20.

exclusivity arrangement with Attachmate.[52] Although Novell had not kept Symphony similarly informed, Symphony made an unsolicited proposal to purchase all of Novell for $5.75 per share on October 28.[53] The next day, Microsoft Corporation ("Microsoft") followed up on an earlier letter with a non-binding letter of intent to purchase, with others, certain listed patents and applications (the "Listed Patents") for $450 million.[54]

When the Board met on October 29, it discussed Symphony's proposal, Microsoft's proposal, and Attachmate's continued engagement.[55] Notes from the meeting indicate that after advice from J.P. Morgan and legal counsel:

> The Board further discussed the possibility of considering a transaction with Partner S, and observed that there is considerable incremental execution and timing risk given the mature stage of a transaction with Partner A relative to Partner S. Mr. Crandall shared his conviction, based on prior conversations with principals of Partner A, that if the Corporation were to inform Partner A that it is interested in conducting discussions with a third party about a potential acquisition, Partner A would be likely to withdraw from the process. Mr. Crandall suggested that a favorable outcome would be to determine the value that Partner A would be prepared to pay for the

[52] Novell granted extensions of the original period on September 27 and October 8. Proxy 38-39. Novell entered into a new exclusivity agreement with Attachmate on October 15 and extended that agreement on October 25. Proxy 39-40.
[53] Crandall Aff. ¶ 30 & Ex. L, at 1 (email from Symphony to Novell).
[54] *Id.* ¶ 31 & Ex. M (non-binding letters of intent from Microsoft). On October 21, Microsoft had submitted a non-binding letter of intent to license the Select Patents or to license and acquire, with others, those patents. Gardner Aff. Ex. 10. "The Listed Patents were based substantially on the Select Patents." Crandall Aff. ¶ 31. The use of these two defined terms may be somewhat inconsistent, but that is not consequential here.
[55] Crandall Aff. ¶¶ 32-33.

> entire Corporation exclusive of the Select Patents prior to the time that exclusivity expires . . . .[56]

After the meeting, Novell representatives proposed that Attachmate make a bid for Novell presuming that Microsoft would purchase the Listed Patents.[57] On November 1, Attachmate submitted a revised bid of $6.10 per share in cash, assuming Microsoft's payment of at least $450 million.[58] The Board met again to discuss all of these developments. At the close of the meeting, the Board resolved to authorize management to renew Attachmate's exclusivity agreement, set to expire that day.[59] The Board neither informed Symphony of the Microsoft offer nor responded to Symphony's October 28 bid.[60]

E. *Merger Consummation and Subsequent Litigation*

Negotiations between the Board and Attachmate continued until November 21, when the Board voted to approve the Merger agreement. The Board announced on November 22 that Attachmate would acquire Novell for $6.10 per share, a price approximately 28% higher than the closing price of Novell's

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[56] *Id.* Ex. N, at 5. Concerns with pursuing Symphony's proposal included "the level of uncertainty, financing contingencies, the likelihood of price re-negotiation following due diligence, and impact on timing of consummation." *Id.* at 4.
[57] Crandall Aff. ¶ 34.
[58] Pls.' App. Ex. 46, at NOV 00002459.
[59] Minutes from the November 1 meeting note that "[t]here is substantial risk that the Corporation could not be sold if the Corporation further narrows its possibilities by taking a risk with Partner S." Crandall Aff. Ex. P, at 5.
[60] Bala Dep. 171-72.

common stock when the initial Elliott proposal was made.[61] Over 99% of the shares voting approved,[62] and the Merger closed on April 27, 2011.[63]

The first complaints were filed in November 2010, and the Complaint was filed on August 18, 2011. On the motion to dismiss, this Court dismissed the Complaint, except for the portion alleging bad faith by the Board, intertwined with allegations about Greenfield's specific involvement in the sales process.[64] Defendants have now moved for summary judgment.

II. CONTENTIONS

Plaintiffs' surviving claims essentially allege that the Board acted in bad faith by engaging in "a pattern of . . . discrimination of Symphony" in the Merger process.[65] Plaintiffs specifically complain about (i) delayed notification of the bidding process to Symphony despite its early expression of interest; (ii) Novell's refusal to provide Symphony with a draft NDA for weeks after other bidders received draft NDAs; (iii) restrictive provisions in Symphony's NDA; (iv) Novell's lack of cooperation with due diligence requests; (v) Symphony's inability to partner with any strategic bidder or Elliott; (vi) the Board's alleged decision to not inform Symphony of Party B's proposal to acquire OPS and the Select Patents;

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[61] Proxy 44.
[62] Crandall Aff. ¶ 7.
[63] *Id.* ¶ 8. The sale of the intellectual property assets to Microsoft also closed on April 27, 2011.
[64] *See In re Novell*, 2013 WL 322560, at *11, *18.
[65] Pls.' Opp'n Mem. 30.

(vii) the Board's alleged rush to grant Attachmate exclusivity without giving Symphony time to raise its bid; (viii) multiple extensions of Attachmate's exclusivity periods; (ix) the Board's decision to inform only Attachmate of Microsoft's proposal to buy certain intellectual property assets; (x) the lack of response to Symphony's October 28 offer; and (xi) Greenfield's disclosure of information—particularly regarding deal price—to Attachmate. Although Plaintiffs take issue with numerous aspects of the Board's conduct, the dispute is limited to "the claims of paragraph 158(a) of Count I of the Amended Complaint related to the favoring of Attachmate over other bidders."[66]

Defendants have moved for summary judgment on Plaintiffs' bad faith claims. They argue that Plaintiffs have not presented facts that permit an inference that the Board acted with any improper motive and that, ultimately, the Board ran an active sales process in which it made reasonable decisions in pursuit of the best interests of the corporation and its shareholders. To the extent that the Board made any mistakes, Defendants contend that there can be no liability for violations of the

[66] *In re Novell*, 2013 WL 322560, at *18. This portion of the Complaint alleges that the members of the Board breached their duties by "[c]onducting an improper and opaque sales process, which resulted in the Individual Defendants' failure to maximize shareholder value with respect to the Acquisition and Patent Sale." Compl. ¶ 158(a). Discovery, too, was limited to information relevant to this surviving portion of the Complaint. The parties' arguments have coalesced around allegations of bad faith.

duty of care (and therefore no issue for trial) because of the Section 102(b)(7) provision in Novell's Certificate of Incorporation.[67]

III. ANALYSIS

A. *The Summary Judgment Standard*

Pursuant to Court of Chancery Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[68] The Court views the facts "in the light most favorable to the non-moving party," and the moving party bears the burden of demonstrating that there is no genuine issue of material fact.[69] Once the moving party meets its initial evidentiary burden, however, "the nonmoving party must set forth specific facts showing that there is a genuine issue for trial" to survive the motion for summary judgment.[70] Well-pleaded claims involving bad faith and state of mind raise issues of fact.[71]

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[67] *See In re Novell*, 2013 WL 322560, at *7 ("Novell's Certificate of Incorporation contains a provision exculpating the Board from monetary liability for breach of the duty of care.").
[68] Ct. Ch. R. 56(c).
[69] *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *5 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE).
[70] *Id.* (citing Ct. Ch. R. 56(e)).
[71] *See, e.g.*, *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208-09 (Del. 1993) ("[A] fairly pleaded claim of good

B. *The Standard of Review and Good Faith*

Depending on the facts and circumstances of the case, this Court chooses among three standards to review director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness.[72] In general, the business judgment rule applies when a board was independent and disinterested in making a business decision, enhanced scrutiny applies when there was an "omnipresent specter"[73] of improper interests due to the nature of the situation, and entire fairness applies when actual conflicts of interest tainted a board's decision-making. A sale of a company, such as the situation analyzed in *Revlon*, is a context that raises an omnipresent specter of improper motives.[74] Here, Plaintiffs complain about the Board's conduct in the sale of Novell, a context that makes the business judgment rule inappropriate. Seven of the nine Novell directors were independent and disinterested, which makes entire fairness inapt. Thus, the Court applies the enhanced scrutiny standard of review.

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faith/bad faith raises essentially a question of fact which generally cannot be resolved . . . without first granting an adequate opportunity for discovery."); *Scott v. Bosari*, 1994 WL 682615, at *8 (Del. Super. Oct. 26, 1994) ("When state of mind or 'consciousness and conscience' is involved, credibility-a jury determination-is often central to the case.").

[72] *See Chen v. Howard-Anderson*, 87 A.3d 648, 666-69 (Del. Ch. 2014).

[73] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

[74] *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986). *See generally* J. Travis Laster, Revlon *Is A Standard of Review: Why It's True and What It Means*, 19 Fordham J. Corp. & Fin. L. 5, 11-18 (2013).

Under enhanced scrutiny, defendants bear the initial burden of showing that their decision-making process and actions were reasonable.[75] Specifically, target company directors engaged in a merger process must show "that they act[ed] reasonably to seek the transaction offering the best value reasonably available to the stockholders."[76] For example, favoring a bidder is not unreasonable per se. Rather, "any favoritism [directors] display toward particular bidders must be justified solely by reference to the objective of maximizing the price the stockholders receive for their shares."[77] The Court looks not only to the reasonableness of directors' actions, but also to directors' true motives.[78]

An analysis of motives is also key to determining whether a fiduciary acted in bad faith. Directors of a corporation owe fiduciary duties of loyalty and care,[79] and Delaware law presumes that the business decisions of a disinterested, independent board are made in good faith.[80] Under 8 *Del. C.* § 102(b)(7), a corporation's certificate of incorporation may include a "provision eliminating or

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[75] *Chen*, 87 A.3d at 672-73.
[76] *Id.* at 672 (alterations in original) (internal quotation marks omitted).
[77] *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 64 (Del. Ch. 2007).
[78] *See In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010) ("[T]he court seeks to assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and to thereby smoke out mere pretextual justifications for improperly motivated decisions.").
[79] *Wayne Cnty. Empls.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *10 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010) (TABLE).
[80] *White v. Panic*, 783 A.2d 543, 552 (Del. 2001).

limiting the personal liability of a director to the corporation or its stockholders for monetary damages" for breaches of the duty of care, but not for breaches of the duty of loyalty or bad faith acts.[81] However, a claim for failure to act in good faith often is not easily categorized. The difference between a duty of care violation (to which Section 102(b)(7)'s protection applies) and a failure to act in good faith (to which the protection does not)[82] is that a bad faith act "is qualitatively more culpable than gross negligence."[83]

A failure to act in good faith involves "fiduciary conduct motivated by an actual intent to do harm"[84] or "a conscious disregard for one's responsibilities."[85] Prominent examples include when a fiduciary "intentionally acts with a purpose other than that of advancing the best interests of the corporation, . . . acts . . . to violate applicable positive law, or . . . fails to act in the face of a known duty to act."[86] In a sales process, disinterested and independent directors violate the duty of loyalty through a failure to act only if they "utterly failed to attempt to obtain

[81] 8 *Del. C.* § 102(b)(7).
[82] To be precise, failure to act in good faith can lead to liability, indirectly, by qualifying as a breach of the duty of loyalty or changing a standard of review. *See* 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.17 (3d ed. 2014) (citing *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006)).
[83] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66 (Del. 2006).
[84] *Id.* at 64.
[85] *Id.* at 66.
[86] *Id.* at 67 (internal quotation marks omitted).

the best sale price."[87] Yet even if a director does not act in bad faith by breaching her duty of loyalty outright, she can still be found to have acted in bad faith if "personal interests short of pure self-dealing have influenced [her]."[88]

This is not a dispute about conduct taken with actual intent to harm Novell, a violation of positive law, or an utter failure to act. The analysis here centers on whether the Board acted upon some other motive than of advancing the corporation's best interests.[89] Plaintiffs asserting bad faith claims under an enhanced scrutiny standard of review "can defeat summary judgment by citing evidence which . . . supports an inference that the directors made decisions that fell outside the range of reasonableness for reasons other than the pursuit of the best value reasonably available."[90] While the Court will view the evidence in the light most favorable to Plaintiffs and draw reasonable inferences, "speculation about motives is not enough."[91]

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[87] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009).

[88] *In re Dollar Thrifty*, 14 A.3d at 598. For example, a director can be motivated by "hatred, lust, envy, revenge, . . . shame or pride." *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989).

[89] Plaintiffs have not presented facts to establish a typical duty of loyalty claim. Whether Defendants violated their duty of care is less clear but inconsequential in the current context. The narrow issue remaining after the motion to dismiss stage is whether Defendants were influenced by some improper motive such that they acted in bad faith—outside of the protection of Novell's Section 102(b)(7) exculpatory provision.

[90] *Chen*, 87 A.3d at 685.

[91] *Id*.

C. *Did the Board Fail to Act in Good Faith During the Merger Process?*

Plaintiffs allege that several Board actions during the sales process fell outside of the range of reasonableness. They complain about Novell's unresponsiveness to Symphony's initial expression of interest, requests for a draft NDA, diligence requests, and an unsolicited October 28 proposal; restrictive NDA provisions; unfair teaming restrictions; Novell's failure to inform Symphony about partial company and patent acquisition proposals; strict deadlines for Symphony despite multiple renewals of Attachmate's exclusivity period; and Greenfield's communications with Attachmate. Plaintiffs also contend that, viewing all of these actions holistically, there could be no explanation other than the Board's desire to help its "favored bidder, Attachmate."[92] They make analogies to a securities fraud case[93] and a demand futility case[94] for the proposition that circumstantial evidence viewed as a whole can establish the requisite issues of material fact for trial.[95]

[92] *See* Pls.' Opp'n Mem. 4.
[93] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007) ("The inquiry is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.").
[94] *See Cal. Pub. Empls.' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) ("On these facts, . . . none of the allegations stands alone 'without more.' Taken together, they give this Court reason to doubt that [director] Mandigo is disinterested and independent.").
[95] Pls.' Opp'n Mem. 30.

At this stage, there are very few disputed facts, and the Court is asked to find bad faith by drawing inferences. Some facts seem troubling. The Board's failure to provide Symphony with a draft NDA for a few weeks despite repeated requests and delivery to all of the other bidders, for example, is one fact that might not appear consistent with the best interests of the corporation and its shareholders. Furthermore, Plaintiffs have identified several actions that put Symphony at a disadvantage to Attachmate, if not other bidders. However, an analysis of a bad faith claim (especially in the enhanced scrutiny context) does not limit itself to the overt actions of directors. To survive the motion for summary judgment, given the circumstances of this case, Plaintiffs must support their claims not only with evidence showing that the Board's actions were unreasonable but also with evidence that the board members were motivated by some improper purpose that makes their conduct culpable.

Given the facts in the record, the Court is content that Novell's failure to respond more quickly to Symphony's various requests, its teaming prohibitions, and its unrelenting bidding schedule stemmed from a decision that selling the whole company to a strategic buyer—and Attachmate in particular—would maximize value for shareholders. The Board may have adapted its strategy to deal with subsequent developments, such as patent purchase offers, but nothing about its responses was unreasonable under enhanced scrutiny. The NDA language

reasonably addresses confidentiality and other concerns. Notably, Novell *did* inform Symphony about the Party B proposal. And when Attachmate confirmed its bid on September 1, Symphony suggested that it might decrease its price and chose (albeit temporarily) not to submit another offer. Granting exclusivity, failing to engage with Symphony during the periods of exclusivity with Attachmate, and extending that exclusivity were reasonable decisions in light of concerns that a merger with Attachmate, though at a lower price, was more certain to close.

Finally, Greenfield and other members of the Board state that Greenfield communicated with Attachmate to increase Attachmate's bid price and close the deal. Greenfield discusses his communications and motivation at length in his March 1, 2013 affidavit. He states that he acted "to enhance Novell stockholder value, including by convincing the Attachmate Group to increase its proposed purchase price."[96] Defendants have also offered evidence that the other directors approved of Greenfield's efforts to engage Attachmate.[97] On the motion to dismiss, the Court left open the question of whether the Board breached its fiduciary duties by allowing Greenfield to taint the process. While Greenfield's

[96] Greenfield Aff. ¶ 22.

[97] *See, e.g.*, Crandall Aff. ¶¶ 42-45 ("At a September 21, 2010 meeting, the Board discussed [Greenfield's and Attachmate's] relationships, and determined . . . , with Mr. Greenfield not present, that his continued participation in the process would be beneficial and enhance the ability of the Board to consider and pursue Novell's and the stockholder's [sic] best interests."); Greenfield Aff. Ex. E, at 3 ("Mr. Crandall noted that, upon his request, Mr. Greenfield has agreed to serve as a channel to Partner A's financiers in order to ascertain Partner A's level of interest.").

connections to certain of Attachmate's shareholders might be cause for concern, Plaintiffs have not offered facts to contradict Defendants' evidence of reasonable decisions or to show that Greenfield's interests overpowered the judgment of the seven other independent, disinterested directors.

Although the record shows that Attachmate had advantages that Symphony did not, affidavits, depositions,[98] and contemporaneous Board minutes indicate concern with Symphony's willingness to follow through and Board deliberation with input from professional advisors. Delaware law does not require a board to treat all bidders equally, and Defendants have presented unrebutted evidence demonstrating that their actions during the sales process were at least within the realm of reasonableness. Here there was a board that met no fewer than twenty-five times from the day it announced it was exploring strategic options until the day it signed the Merger agreement with Attachmate.[99] The record shows that the Board repeatedly sought and considered advice from legal and financial advisors whose competence has not been questioned.[100]

Perhaps most importantly, Plaintiffs have not supplied a factual basis for concluding that the Board acted with improper motives. Plaintiffs have not

[98] *See, e.g.*, Crandall Dep. 40, 171.
[99] *See* Proxy 31-44 (describing the meetings).
[100] *See, e.g.*, Gardner Aff. Ex. 6 (Aug. 24 minutes); Ex. 7 (Sept. 3 minutes); Crandall Aff. Ex. K (Sept. 2 minutes); Ex. N (Oct. 29 minutes); Ex. P (Nov. 1 minutes); Ex. Q (Sept. 21 minutes). Under 8 *Del. C.* § 141(e), a board may rely "in good faith" on professional advice from experts it selects with "reasonable care."

provided evidence of—or even alleged—material conflicts held by a majority of the members of the Board,[101] any members who could have dominated the sales process,[102] or the professional advisors upon which the Board relied.[103] Nor have Plaintiffs offered evidence showing the influence of other improper motives. The Court acknowledges that when questionable conduct occurs, plaintiffs do not always have access to evidence to prove bad faith. Nonetheless, Plaintiffs had an opportunity to engage in discovery that, while limited, allowed them to address the topic of the Board's conduct and motives during the sales process. It is not the Court's job to second-guess decisions made by a majority independent Board which show that its decision-making process and actions were reasonable, though perhaps imperfect. And, because Plaintiffs do not present facts to question the motives of a majority of the Board's members, there is no genuine issue of material fact for trial that the Board acted in bad faith. Even assuming that the Board made mistakes in the sales process, such mistakes were—at most—breaches of the duty of care, and Novell's Section 102(b)(7) provision precludes monetary liability, the only practicable remedy remaining after the Merger closed.

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[101] *See In re Novell*, 2013 WL 322560, at *7 ("[O]n the basis of the Amended Complaint, a majority of the Board was disinterested and independent.").
[102] *See id.* at *11 ("The Amended Complaint does not allege that either Hovsepian or Greenfield dominated or controlled the remaining disinterested and independent directors.").
[103] *See id.* at *12 ("[T]he Amended Complaint does not adequately allege that the Board violated its fiduciary duties when it relied upon J.P. Morgan's work.").

IV. CONCLUSION

For the reasons stated above, no genuine issue of material fact exists with respect to Plaintiffs' allegations that the Board acted in bad faith, and the Defendants are entitled to judgment as a matter of law.

An implementing order will be entered.