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July 19, 2012

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Re: In re Answers Corporation Shareholder Litigation

Consolidated C.A. No. 6170-VCN Date Submitted: July 18, 2012

Dear Counsel:

The Defendants have moved, pursuant to Court of Chancery Rule 59(f), for reargument of the Court's Memorandum Opinion denying, in part, their motions to

dismiss the Complaint.¹ For the following reasons, the Defendants' motions are denied.

* * *

"Under Rule 59(f), a motion for reargument may be granted if the moving party demonstrates that 'the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law." "This standard is a highly flexible one, permitting reargument if it can be shown that the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision."

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Answers and the Board (the "Answers Defendants") claim that "the Court misapprehended the factual allegations of the . . . Complaint when the Court held that the pleading adequately alleged bad faith on the part of the four indisputably

¹ The Memorandum Opinion (or "Mem. Op.") is styled as *In re Answers Corp. Shareholders Litigation*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012). The relevant background facts are set forth in the Memorandum Opinion and will not be reprised here. In addition, defined terms from the Memorandum Opinion are used here for convenience.

² Ravenswood Inv. Co., L.P. v. Winmill, 2011 WL 6224534, at *3 (Del. Ch. Nov. 30, 2011) (quoting Fisk Ventures, LLC v. Segal, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008)).

³ Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc., 2008 WL 2133417, at *1 (Del. Ch. May 21, 2008) (citing Blank v. Belzberg, 2003 WL 21788086, at *1 (Del. Ch. July 24, 2003)).

Defendants' principal argument in support of that claim is that "the Complaint nowhere pleads that the disinterested directors ended the sales process quickly to help Rosenschein, Beasley, and Dyal achieve their self-interested goals." According to the Answers Defendants, disinterested directors can only act in bad faith when they are aware of a self-dealing action by a person owing a fiduciary duty and they act to further that self-dealing action.

* * *

The Answers Defendants' interpretation of bad faith is unduly narrow.

Bad faith can be the result of "any emotion [that] may cause a director to [intentionally] place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust,

⁴ The Answers Defs.' Mot. for Reargument ("Motion for Reargument" or "Mot. for Reargument") ¶ 2. The Buyout Group expressly joined in the Motion for Reargument. *See* AFCV Hldgs., LLC, A-Team Acquisition Sub, Inc. and Summit Partners Joinder to the Mot. for Reargument filed by the Answers Defs.

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The Court did not, and does not, question that Sternlicht, Segall, Tebbe, and Kramer are independent and disinterested.

⁵ Mot. for Reargument ¶ 5.

⁶ See id. at ¶ 5 ("Even if accepted as true, the language quoted by the Court does not allege or even suggest that the disinterested directors were aware of the purportedly self-interested motivations of Rosenschein, Beasley and Dyal – that is, Rosenschein's supposed desire to retain his position as CEO, and Beasley and Dyal's supposed desire to obtain liquidity for Redpoint's investment – or that the disinterested directors acted as they did to further those or any other allegedly improper goals. Nor do plaintiffs allege such facts elsewhere in the Complaint. That critical allegation is missing.").

envy, revenge, . . . shame or pride." Sloth could certainly be an appropriate addition to that incomplete list if it constitutes a systematic or sustained shirking of duty.

Moreover, *Lyondell Chemical Co. v. Ryan*⁸ leaves this interpretation of bad faith intact. In *Lyondell*, our Supreme Court determined that a claim that the Lyondell board had acted in bad faith failed on summary judgment when the board entered into a merger agreement at a price representing a significant premium to the premerger share price, "no other acquiror expressed interest during the four months between the merger announcement and the stockholder vote," and the board had "reason to believe that no other bidders would emerge. . . ." The Supreme Court explained that, in the change of control context, whether disinterested directors act in bad faith does not depend on whether they did "everything that they (arguably) should have done to obtain the best sale price, . . . [instead the question is: Did]

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⁷ In re Walt Disney Co. Deriv. Litig., 907 A.2d 693, 754 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006) (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)) (other citations omitted) (additions and omission in original). See also In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 971 (Del. Ch. 1996) ("[A] sustained or systematic failure of the board to exercise oversight-such as an utter failure to attempt to assure a reasonable information and reporting system exists-will establish the lack of good faith that is a necessary condition to liability."); Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121 (Del. Ch. 1990) ("Fiduciaries who are subjectively operating selflessly might be pursuing a purpose that a court will rule is inequitable.").

⁸ 970 A.2d 235 (Del. 2009).

⁹ *Id.* at 241.

¹⁰ *Id*.

July 19, 2012 Page 5

those directors utterly fail to obtain the best sale price." On the facts of Lyondell, the Supreme Court answered that question in the negative, but the Court recognized that disinterested directors do act in bad faith in breach of their duty of loyalty "if they knowingly and completely fail[] to undertake their responsibilities "12

Under Revlon v. MacAndrews & Forbes Holdings, Inc., 13 when Sternlicht, Segall, Tebbe, and Kramer agreed to undertake a change of control transaction, they were required to engage in a process that was aimed at obtaining for Answers' shareholders the highest value reasonably available for their shares, regardless of where that value came from. As stated in the Memorandum Opinion, "the Complaint alleges that Sternlicht, Segall, Tebbe, and Kramer agreed to manipulate the sales process to enable the Board to enter quickly into the Merger Agreement before Answers' public shareholders appreciated the Company's favorable

¹³ 506 A.2d 173 (Del. 1986).

¹¹ Id. at 244 (citing Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006)).

¹² Id. at 243-44. See also In re Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (Del. 2006) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.") (quoting *Disney*, 907 A.2d at 755).

Consolidated C.A. No. 6170-VCN

July 19, 2012

Page 6

prospects."¹⁴ The Court also set forth in the Memorandum Opinion that "[t]he

Complaint . . . alleges that UBS told the Board that time is not a friend to this deal

with continued out performance and a looming q4 earnings call, and that, in

response, the Board sped up the sales process." Those are allegations that

Sternlicht, Segall, Tebbe, and Kramer completely failed even to seek the highest

value reasonably available for Answers' shareholders. They allegedly agreed to

undertake a process that was aimed at consummating the Merger regardless of the

actual value that the market would provide to Answers' shareholders.

The Answers Defendants correctly explain that there is "a presumption that

in making a business decision the directors of a corporation acted on an informed

basis, in good faith and in the honest belief that the action taken was in the best

interests of the company." ¹⁶ To rebut that presumption on a motion to dismiss, the

Plaintiffs must plead facts which suggest that Sternlicht, Segall, Tebbe, and

Kramer acted "for some purpose other than a genuine attempt to advance corporate

¹⁶ Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

<sup>Mem. Op., 2012 WL 1253072, at *8.
Id. at *3 (citation and internal quotations omitted).</sup>

welfare or [that] is known to constitute a violation of applicable positive law."¹⁷ That is difficult to do, but the Plaintiffs have done it.

This case is not typical. The facts alleged in the Complaint show that the Board was considering a deal with AFCV at a certain price when the Board learned that Answers' earnings had dramatically increased. The Board thought that when those earnings were made public, the market would likely value Answers at a higher price than AFCV was offering. Answers' own investment banker stated: "time is not a friend to this deal with continued out performance and a looming q4 earnings call." So what did the Board do? It sped up the sales process so that the deal with AFCV would be accomplished before the market price for Answers stock could rise above AFCV's offer price. Those are unique facts. Most cases do not involve a company's board speeding up a sales process to get a deal done because the company's investment advisor had told the board that, with a failure to act

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¹⁷ McGowan v. Ferro, 859 A.2d 1012, 1031 (Del. Ch. 2004). See also In re Lear Crop. S'holder Litig., 967 A.2d 640, 652 (Del. Ch. 2008) ("[B]ecause the plaintiffs concede that eight of the eleven Lear directors were independent, the plaintiffs must plead facts supporting an inference that the Lear board, despite having no financial motive to injure Lear or its stockholders, acted in bad faith to approve the Revised Merger Agreement. Such a claim cannot rest on facts that simply support the notion that the directors made an unreasonable or even grossly unreasonable judgment. Rather, it must rest on facts that support a fair inference that the directors consciously acted in a manner contrary to the interests of Lear and its stockholders.").

Consolidated C.A. No. 6170-VCN

July 19, 2012

Page 8

quickly, the market will learn the company is worth more than the deal price and

the deal will be scuttled. This is not a case in which plaintiffs have made a bare

allegation that a board "failed to maximize value." The well-pled facts of the

Complaint suggest that the Board was purposefully trying to do something other

than obtain the best price reasonably available for Answers' shareholders in a sale

of the Company. 19

The Complaint does not merely allege that the price of Answers' stock could

go up or that Answers' stock price was going to go up, and that the Board failed to

recognize that fact. The Complaint alleges that Sternlicht, Segall, Tebbe, and

Kramer purposefully entered into a transaction so that another option, offering

Answers' shareholders more value, would not emerge. Specifically, the Complaint

alleges that Sternlicht, Segall, Tebbe, and Kramer expected, based on information

provided by Answers' financial advisor, that Answers' stock price was, in the

immediate future, going to rise above AFCV's offer price, and that because they

had that expectation they agreed to speed up the sales process and quickly entered

¹⁹ The well-pled facts of the Complaint also suggest that the Board accelerated the sales process so that, before announcement of the Merger, Answers' shareholders would not learn of an earnings report that the Board anticipated would cause Answers' stock price to rise above AFCV's offer price. That, in and of itself, may also constitute a non-exculpated breach of fiduciary duty.

In re Answers Corporation Shareholder Litigation Consolidated C.A. No. 6170-VCN

July 19, 2012

Page 9

into the Merger Agreement. That is an allegation that those directors "knowingly and completely failed to undertake" their duty, in the change of control context, to seek the highest value reasonably available for Answers' shareholders. In the *Revlon* context, directors "advance the corporate welfare" by trying to get the best price reasonably available for the corporation's shareholders. The Complaint alleges that Sternlicht, Segall, Tebbe, and Kramer were trying to do something else—they were allegedly trying to get the Merger done at all costs—and there are facts in the Complaint that support that allegation.²¹

The Court has already recognized that "[t]he Plaintiffs have not offered any particularly persuasive explanation as to why Sternlicht, Segall, Tebbe, and Kramer agreed to manipulate the sales process." Moreover, the Court questioned whether "an explanation will emerge because disinterested and independent

²⁰ Lyondell, 970 A.2d at 243-44. If the facts are as alleged in the Complaint, then this case does not present a question of "whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price." *Id.* at 244. To the contrary, this will be a case where disinterested and independent directors "utterly failed to obtain the best sale price." *Id.* (citing *Stone*, 911 A.2d at 369).

UBS told the Board that "time is not a friend to this deal with continued out performance and a looming q4 earnings call," Compl. ¶ 58, and in response, the Board sped up the sales process. This is not a question of due care; it is the sum of allegations that conceivably could lead to the conclusion that the four directors knowingly were not acting in the best interests of Answers and its shareholders.

²² Mem. Op., 2012 WL 1253072, at *8 n.48.

Consolidated C.A. No. 6170-VCN

July 19, 2012

Page 10

directors do not usually act in bad faith."²³ Perhaps the explanation will be that the disinterested and independent directors were not actually independent and they kowtowed to the whims of Rosenschein, Beasley, and Dyal, or perhaps the explanation will be that the allegations in the Complaint are incorrect and the disinterested and independent directors did not believe that the price of Answers' stock would rise (or stay) above AFCV's offer price.²⁴ If, however, the facts are as alleged in the Complaint, and Sternlicht, Segall, Tebbe, and Kramer simply chose to run a sales process that was not aimed at getting Answers' shareholders the best price reasonably available for their stock, then those directors may be liable for acting in bad faith in breach of their fiduciary duty of loyalty. Directors can act in bad faith in breach their duty of loyalty even if there is no whiff of self-dealing from their actions. As the Court has already pointed out, that does not happen often, but when a complaint pleads non-conclusory facts that it has happened, then that complaint has stated a claim sufficient to survive a motion to dismiss. On that basis, the Defendants' motions for reargument are denied in their entirety.

 $^{^{23}}$ *Id*

The independent directors might also be able to show that they did not act in bad faith by showing that they thought any rise in Answers' stock would be short-lived, and thus, that Answers' stockholders, as a whole, would be better off with the consideration from the Merger than they would have been with Answers stock.

Page 11

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In the interest of completeness, however, the Court will briefly address the two other arguments that the Answers Defendants make in support of their motions. The Answers Defendants argue that "any allegation that the disinterested directors consciously manipulated the sales process to benefit Rosenschein, Beasley and Dyal . . . is at odds with the theory of liability advanced in the Complaint and in plaintiffs' brief."25 This argument about inconsistent pleading is premised on an unduly circumscribed reading of the Complaint. Namely, that the Complaint alleged "that the disinterested directors consciously manipulated the sales process to benefit Rosenschein, Beasley and Dyal."26 As explained above, the theory alleged in the Complaint is simply that Sternlicht, Segall, Tebbe, and Kramer completely failed to seek the highest value reasonably available, not that they acted to benefit anyone.²⁷ Thus, to the extent the Complaint may be read to allege that Sternlicht, Segall, Tebbe, and Kramer "abdicated their duties by failing

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²⁵ Mot. for Reargument \P 6.

²⁶ *Id.* (emphasis added).

²⁷ Perhaps more accurately, the Complaint may be read to allege that the four directors expedited the process so that Answers' shareholders would not shortly learn what those directors viewed as an inevitable truth: namely, that the market would give a higher value to Answers' stock than did the Buyout Group.

to keep sufficiently informed," those allegations, even without necessarily stating a viable cause of action, are consistent with a complete failure to attempt to comply with the requirements of *Revlon*. Moreover, a complaint is not required to be consistent. A party may plead claims in the alternative.²⁸

The Answers Defendants also argue that

[t]he Court read the Complaint to allege that the directors "manipulated" the sales process – a term that is nowhere used in the Complaint – but the only "manipulation" cited in the [Memorandum] Opinion is the directors' alleged agreement to "expedite the sales process" by conducting a purportedly "quick" market check rather than a more lengthy search for alternative purchasers. As a matter of law, that business judgment is insufficient to establish that the directors consciously disregarded their duties.²⁹

The Answers Defendants are incorrect about what the Court termed "manipulation." The "manipulation" discussed in the Memorandum Opinion was that Sternlicht, Segall, Tebbe, and Kramer agreed to expedite the sales process "so that the Board would enter into the Merger Agreement *before the market price for*

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²⁸ See Ct. Ch. R. 8(e)(2) ("A party may set forth 2 or more statements of a claim or defense alternately or hypothetically, either in 1 count or defense or in separate counts or defenses. When 2 or more statements are made in the alternative and 1 of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of 1 or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency.").

²⁹ Mot. for Reargument ¶ 7.

Consolidated C.A. No. 6170-VCN

July 19, 2012

Page 13

Answers' stock rose above AFCV's offer price." The Answers Defendants may

be correct that expediting a sales process through a quick purported market check

is not manipulation, but expediting a sales process through a quick purported

market check for the purpose of entering into a transaction quickly so that an

expected option offering shareholders more value will not emerge is manipulation.

* * *

As determined in the Memorandum Opinion, the Complaint adequately

alleges that Sternlicht, Segall, Tebbe, and Kramer acted in bad faith in breach of

their duty of loyalty by knowingly and completely failing to attempt to obtain the

highest value reasonably available for Answers' shareholders. Therefore, the

Defendants' motions for reargument are denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Re

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³⁰ Mem. Op., 2012 WL 1253072, at *8 (emphasis added).