IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRENDA KOEHLER, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 8373-VCG*
NETSPEND HOLDINGS INC., DANIEL R. HENRY, ANDREW W. ADAMS, THOMAS A. MCCULLOUGH, DANIEL M. SCHLEY, ALEXANDER R. CASTALDI, FRANCISCO J. RODRIGUEZ, ANN HUNTRESS LAMONT, STEPHEN A. VOGEL, GENERAL MERGER SUB, INC. and TOTAL SYSTEMS SERVICES, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: May 10, 2013
Date Decided: May 21, 2013

Seth D. Ridgrodsky, Brian D. Long, and Gina M. Serra, of RIDGRODSKY & LONG, P.A., Wilmington, Delaware; OF COUNSEL: Donald J. Enright, of LEVI & KORSKINSKY, LLP, Washington, District of Columbia, Attorneys for the Plaintiff.

Stephen C. Norman and Christopher N. Kelly, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: David B. Hennes and Adam M. Harris, of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, LLP, New York, New York, Attorneys for Defendants NetSpend Holdings, Inc., Daniel R. Henry, Andrew W. Adams, Thomas A. McCullough, Daniel M. Schley, Alexander R. Castaldi, Francisco J. Rodriguez, Ann Huntress Lamont, and Stephen A. Vogel.

William M. Lafferty and Ryan D. Stottmann, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: M. Robert Thornton, Jonathan R. Chally and Benjamin Lee, of KING & SPALDING LLP, Atlanta, Georgia, Attorneys for Defendants Total System Services, Inc. and General Merger Sub Inc.

GLASSCOCK, Vice Chancellor

I. SUMMARY

The Plaintiff, a stockholder in NetSpend Holdings Inc., asks me to preliminarily enjoin an acquisition of that corporation by Total System Services, Inc., scheduled to close on Friday, May 31, 2013. The Plaintiff has demonstrated that a reasonable likelihood exists that the sales process undertaken by the NetSpend Board—which included lack of a pre-agreement market canvass, negotiation with a single potential purchaser, reliance on a weak fairness opinion, agreement to forgo a post-agreement market check, and agreement to deal-protection devices including, most significantly, a don't-ask-don't-waive provision—was not designed to produce the best price for the stockholders. However, because the injunction requested presents a possibility that the stockholders will lose their chance to receive a substantial premium over market for their shares from Total System Services, and because no other potential bidders have appeared, I find that the Plaintiff has failed to demonstrate that the equities of the matter favor injunctive relief. Therefore, the Plaintiff's request that I enter a preliminary injunction is denied.

II. BACKGROUND FACTS

A. The Parties

Plaintiff Brenda Koehler is a current stockholder of NetSpend Holdings, Inc. ("NetSpend").[1] Defendant NetSpend is a publicly traded, Delaware corporation that provides reloadable prepaid debit cards and financial services to consumers who do not have traditional bank accounts or who rely on alternative financial services.[2] NetSpend's principle offices are located in Austin, Texas.[3]

Defendants Daniel R. Henry, Andrew W. Adams, Thomas A. McCullough, Daniel M. Schley, Alexander R. Castaldi, Francisco J. Rodriguez, Ann Huntress Lamont, and Stephen A. Vogel serve as directors on NetSpend's Board.[4] Collectively, I refer to these Defendants as the "Board" or the "Individual Defendants." Each of the Individual Defendants is an independent director except for Henry, who serves as NetSpend's Chief Executive Officer.[5] Four of the Individual Defendants are affiliated with NetSpend's largest stockholders: Rodriguez and Castaldi are managing directors of JLL Partners Inc., which is the management company associated with JLL Partners Fund IV, L.P. and JLL Partners Fund V, L.P. ("JLL"), NetSpend's largest stockholder, which owns 31.1%

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[1] At oral argument, Plaintiff's counsel represented that Koehler owns only a "couple hundred" shares. *See* Oral Arg. Tr. 32:20-21.

[2] Trans. Aff. of Brian D. Long, Ex. 2, Proxy at 30, Apr. 12, 2013 ("Long Aff.").

[3] *Id.*

[4] Trans. Aff. of Christopher N. Kelly, Ex. 2, May 1, 2013 ("Kelly Aff.").

[5] Long Aff. Ex. 1, Deposition of Daniel Henry 8:4-5, Apr. 5, 2013 ("Henry Dep."). Henry has been NetSpend's CEO since 2008. Henry Dep. 8:6-10. Prior to that, Henry had been retired for one year. Henry Dep. 8:13-14.

of NetSpend stock, through its affiliated funds.[6] Additionally, Adams and Lamont are managing directors of Oak Management Corp., the investment manager of each of the Oak Funds, which owns 16% of NetSpend stock.[7] The remaining three independent directors have considerable business and financial experience.[8]

Defendant Total System Services, Inc. is a Georgia corporation with its principle offices in Columbus, Georgia.[9] Total System provides global payment services to financial and nonfinancial institutions, generally under long-term processing contracts.[10] Total System is the sole stockholder of Defendant General Merger Sub, Inc. ("Sub"), a Delaware corporation created to effectuate Total System's acquisition of NetSpend.[11] For convenience, I refer to Total System both singularly and collectively with Sub as "TSYS."

B. Background on NetSpend

NetSpend was organized in 2004 and operated as a private company until 2010.[12] Prior to becoming a public company, NetSpend had discussed a possible

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[6] Long Aff., Ex. 2, Proxy at 5.
[7] *Id.*
[8] Schley is the former CEO of Foundation Source, Inc., co-founder and managing director of venture capital firm Dolphin Capital Group, and director of Winder Farms, Inc. and Dynamic Confections, Inc. Kelly Aff. Ex. 2, at 1-2. McCullough is the former COO of DST Systems, Inc., former CEO of Garnac Grain Company, and former partner with the consulting firm of Arthur Young & Co. *See id.* at 1. Vogel is the CEO of Grameen America, Inc. and has more than three decades of experience as an executive and operational manager. *See id.* at 2.
[9] Long Aff., Ex. 2, Proxy at 30.
[10] *Id.*
[11] *Id.* at 1.
[12] *Id.* at 31.

sale or merger transaction with several companies including Strategic Co. A, Strategic Co. B, and Strategic Co. C.[13] Negotiations with some of these companies were very advanced before the deals fell through. In 2007, NetSpend had executed a merger agreement with Strategic Co. B when that deal fell apart because the Office of the Comptroller of the Currency blocked the sale.[14] In 2009, NetSpend had negotiated a merger structure with Strategic Co. C before Strategic Co. C changed its mind and withdrew.[15] Later in 2009, NetSpend was in the middle of negotiating a sale to Strategic Co. A when new regulations made the deal unattractive.[16] Ultimately NetSpend remained independent and conducted an IPO in October 2010 at $11.00 per share.[17]

In 2011, the market price for NetSpend stock fell considerably, and bottomed out at $3.90 per share in the third quarter of that year.[18] Believing that the market undervalued NetSpend,[19] the Board conducted two rounds of $25-million stock repurchases in September 2011 and February 2012.[20] Even after these repurchasing programs, the Board believed that the market price of NetSpend stock, then trading in the $7- to $9-per-share range, did not accurately reflect the

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[13] Long Aff. Ex. 3, Deposition of Daniel M. Schley 16:18-18:11, Apr. 4, 2013 ("Schley Dep.").
[14] Henry Dep. 10:17-12:9. At the time, NetSpend was still a private company, and the price was $10.00 per share. *Id.* at 11:18-22.
[15] *Id.* at 37:6-14.
[16] *Id.* at 50:2-15.
[17] Long Aff., Ex. 2, Proxy at 31.
[18] Kelly Aff. Ex. 4.
[19] Long Aff. Ex. 2, Proxy at 34; Henry Dep. 23:13-25.
[20] Long Aff., Ex. 2, Proxy at 31.

Company's long-term potential value.[21] As a result, the Board explored several possibilities for enhancing stockholder value, including additional stock repurchases, a self-tender offer, or a possible sale of the Company.[22] The Board concluded that selling the Company at that time, in early 2012, would not realize the full value of NetSpend's potential for the stockholders due to NetSpend's low stock price.[23] As a result, the Board determined that it was in the stockholders' best interest to maintain NetSpend as an independent, publicly owned entity.[24]

Throughout 2011 and 2012, NetSpend was contacted by multiple entities that wanted to gauge NetSpend's interest in an M&A transaction. In 2011, Strategic Co. E approached NetSpend to discuss a possible acquisition, but Strategic Co. E declined to make a bid.[25] In 2012 four companies contacted NetSpend to discuss an M&A transaction. First, Henry had a dinner, set by an investment banker, with an executive from Strategic Co. F to discuss Strategic Co. F's interest in acquiring NetSpend.[26] Strategic Co. F likewise declined to submit a proposal for NetSpend.[27] Second, NetSpend's CFO received a call from Strategic Co. G to discuss whether NetSpend was for sale.[28] Strategic Co. G never made a

[21] Long Aff., Ex. 2, Proxy at 31.
[22] *Id.*
[23] *Id.* at 31-32.
[24] *Id.*
[25] Henry Dep. 50:19-51:23.
[26] *Id.* at 52:3-9.
[27] *Id.* at 52:8-9.
[28] *Id.* at 57:7-59:4.

bid for NetSpend. Third, the NetSpend Board rejected an opportunity to merge, on an equal basis, with a strategic partner, Strategic Co. C.[29] In May 2012, representatives from Strategic Co. C (which had pursued a merger with NetSpend in 2009) expressed renewed interest in pursuing a transaction with NetSpend.[30] Henry discussed merging NetSpend and Strategic Co. C on an equal basis with Strategic Co. C representatives.[31] NetSpend decided not to pursue a merger of equals with Strategic Co. C for several reasons, including NetSpend's belief that NetSpend stock was undervalued while Strategic Co. C's stock was overvalued.[32] Under the informal merger proposal, NetSpend stockholders would receive Strategic Co. C stock in exchange for their shares at little to no premium over NetSpend's market price.[33] NetSpend's directors also viewed a merger with Strategic Co. C as risky because Strategic Co. C had lost a significant percentage of its leadership team; Strategic Co. C's stock was falling; and Strategic Co. C had 70% of its revenues coming from a single, thus terminable, source, Walmart.[34] Henry informed Strategic Co. C that NetSpend had decided to continue as a stand-

[29] *Id.* at 35:8-39:18, 42:2-10.
[30] Schley Dep. 22:45-25; Long Aff., Ex. 2, Proxy at 32.
[31] *Id.*
[32] Henry Dep. 42:23:43:17; Schley Dep. 25:2-25.
[33] Long Aff., Ex. 2, Proxy at 32.
[34] Schley Dep. 25:17-25; Henry Dep. 42:16-44:3.

alone entity.[35] Finally, NetSpend received an inquiry from TSYS, which I discuss below.

C. NetSpend Explores Aiding its Largest Stockholders in Selling their Shares

Around the same time that the Board was considering the above strategic alternatives to maximize the stock price, NetSpend's two largest stockholders, Oak Fund and JLL, expressed an interest in disposing of their stock in the Company.[36] In early 2012, JLL owned approximately 31% of NetSpend's stock and held two NetSpend Board seats, filled by Rodriguez and Castaldi.[37] Oak Fund owned more than 30% of the Company before distributing much of its stake in NetSpend to Oak Fund's investors, retaining a 16% interest and two Board seats, filled by Adams and Lamont.[38]

In late August and early September 2012, JLL advised NetSpend's Board that it was interested in selling all or a significant portion of its interest in NetSpend.[39] Fearful that JLL's sale of twenty million shares on the open market

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[35] Long Aff., Ex. 2, Proxy at 32.
[36] *Id.*
[37] Schley Dep. 30:10-31:6; Henry Dep. 28:1-4.
[38] In early 2012, Oak Fund was NetSpend's largest stockholder, owning more than 33 million shares. *Id.* at 29:21-30:5. In February 2012, Oak Fund distributed eleven million of its NetSpend shares to Oak Fund's investors. Oak Fund retained approximately 32% of NetSpend's stock and controlled two board seats, filled by Lamont and Adams. Schley Dep. 32:14-17, 33:7; Long Aff. Ex. 2, Proxy at 32. In August 2012, Oak Fund distributed an additional eleven million NetSpend shares to Oak Fund's investors, reducing Oak Fund's stake in NetSpend to approximately 16%. *Id.*
[38] Schley Dep. 30:10-31:6.
[39] *Id.*

would depress NetSpend's stock price, the Board decided to assist JLL in privately selling its securities to a single buyer.[40] To accomplish this end, the Board authorized Henry to provide financial projections to two private equity firms that had expressed an interest in acquiring JLL's stake in NetSpend.[41] In granting this authorization to Henry, the Board gave the express instruction that the entire company was not for sale.[42]

Around the same time, NetSpend was interested in extending one of its most important service contracts with a company called ACE Cash Express, Inc. ("ACE"), which is, conveniently, controlled by JLL.[43] ACE is NetSpend's largest distributor, and revenues generated from cardholders acquired at ACE locations represent more than one-third of NetSpend's revenues.[44] NetSpend leveraged JLL's desire to dispose of its NetSpend stock as an opportunity to negotiate an extension of the ACE contract.[45] In NetSpend's words, Henry informed JLL that "the Company's efforts to facilitate a sale of the stock owned by the JLL Funds would be conditioned upon an extension of the term of the Company's existing services agreement with ACE . . . ."[46]

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[40] Schley Dep. 41:10-44:16.
[41] Long Aff., Ex. 2, Proxy at 32.
[42] *Id.*
[43] *Id.* at 6, 33.
[44] Schley Dep. 33:13-34:7 (describing the relationship between ACE and NetSpend); Long Aff., Ex. 2, Proxy at 6. JLL owns 97% of ACE. *Id.*
[45] Henry Dep. 65:5-23; Schley Dep. 75:18-76:7.
[46] Long Aff., Ex. 2, Proxy at 33.

In November 2012, NetSpend's independent directors met with representatives from the two private equity firms, Private Equity A and Private Equity B.[47] Private Equity A and Private Equity B then executed confidentiality agreements with NetSpend which contain standstill agreements.[48] These standstill agreements prevent Private Equity A and Private Equity B from seeking to acquire or merge with NetSpend for a one- or two-year period following the agreements.[49] The standstill agreements also contain a clause colloquially known as a "don't-ask-don't-waive" clause which prevents the contracting party from "directly or indirectly request[ing] that Netspend [sic] or any of its Representatives . . . amend or waive any provision of this agreement (including this sentence) or otherwise consent to any action inconsistent with [the standstill agreement]."[50] Neither standstill agreement terminates upon the announcement of another transaction.[51] Pursuant to these confidentiality agreements, NetSpend provided non-public information to Private Equity A and Private Equity B.[52]

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[47] *Id.* at 32-33; Long Aff., Ex. 4; Long Aff., Ex. 5.

[48] Long Aff., Ex. 2, Proxy at 33; Long Aff., Ex. 4; Long Aff., Ex. 5.

[49] Long Aff., Ex. 4, Private Equity B Conf. Ag. ¶ 7 (preventing Private Equity B from seeking to acquire or merge with NetSpend for a two-year period); Long Aff., Ex. 5, Private Equity A Conf. Ag. ¶ 7 (preventing Private Equity A from seeking to acquire or merge with NetSpend for a one-year period).

[50] Long Aff., Ex. 4, Private Equity B Conf. Ag. ¶ 7; Long Aff., Ex. 5, Private Equity A Conf. Ag. ¶ 7.

[51] Long Aff., Ex. 4, Private Equity B Conf. Ag. ¶ 7; Long Aff., Ex. 5, Private Equity A Conf. Ag. ¶ 7.

[52] Long Aff., Ex. 2, Proxy at 33.

D. NetSpend Simultaneously Begins Negotiations with TSYS

Contemporaneous with NetSpend's efforts to aid JLL in selling its shares, NetSpend began exploring a possible sale of the Company to TSYS.[53] Henry had previously met with TSYS's President and COO, Troy Woods, in June 2012. During that meeting, Henry responded to a "general inquiry" from Mr. Woods by telling him that the Company was not for sale.[54] Woods requested that Henry inform him if anything changed.[55]

Several months later, in late September or early October 2012, Woods called Henry to express TSYS's interest in acquiring NetSpend in a negotiated transaction.[56] Henry informed the NetSpend Board of TSYS's interest, and the Board met to discuss a possible transaction with TSYS.[57] On October 30, 2012, the Board decided that, "although no decision to seek a sale of the Company had been made," entertaining negotiations with TSYS might result in an attractive opportunity for NetSpend stockholders.[58] The Board instructed NetSpend management to meet with representatives from TSYS and begin negotiations. According to Henry, it was understood that he would continue facilitating a sale of

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[53] TSYS reached out to Henry in late September or early October 2012 to discuss a possible purchase of NetSpend. *Id.* The NetSpend directors decided to explore the possible sale on October 30, 2012. *Id.*

[54] *Id.* at 32.

[55] *Id.*

[56] *Id.* at 33.

[57] *Id.*

[58] *Id.*

JLL's stake in the Company (to Private Equity A or Private Equity B) while the Board explored a sale of the Company to TSYS.[59] Because NetSpend had gone through three advanced failed attempts to sell itself before (with Strategic Co. A, Strategic Co. B, and Strategic Co. C), each of which disrupted the everyday operations of the Company, the NetSpend directors were hesitant to engage in a sale process that they had no assurance would pan out.[60]

In mid-November, NetSpend executed a confidentiality agreement with TSYS, and NetSpend provided forward-looking business projections to TSYS.[61] Shortly after, in late November, Private Equity A indicated that it was interested in purchasing JLL's 20% stake in the Company for $12.00 per share. A few days later, on December 3, 2012, NetSpend received a letter from TSYS indicating that TSYS was interested in conducting an all-cash tender offer for 100% of NetSpend shares for $14.50 per share (the "Indication of Interest" or "IOI").[62] NetSpend's stock closed at $11.65 on the last trading day prior to NetSpend's receipt of the IOI.[63] TSYS's $14.50 IOI was conditioned on satisfactory due diligence and

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[59] Henry Dep. 82:21-83:3.

[60] *See id.* at 83:9-84:12 ("[U]nderstand, failed acquisition from [Strategic Co. B] in 2008, okay. A lot of time and energy spent with [Strategic Co. C] in 2009 that went nowhere. Lots of time and energy spent with [Strategic Co. A] in 2010 that went nowhere. . . . So, keep in mind, the terms of the mindset of the board, the company is not for sale. And although TSYS certainly has balance sheets to pay up for the business, a lot of water has got to pass under the bridge before we can be sure that this is something we need to take seriously.").

[61] Long Aff., Ex. 2, Proxy at 33.

[62] *Id.*

[63] *Id.*

executing retention agreements with some members of NetSpend senior management.[64] The parties held off discussing the specific terms of such retention agreements until after the merger agreement was solidified, but NetSpend expected that the CEO, CFO, and COO would each be retained.[65]

E. NetSpend Begins Negotiating Exclusively with TSYS

In its IOI, TSYS requested a six-week exclusivity period to complete its due diligence and execute a mutually agreeable agreement with NetSpend.[66] The day after receiving the IOI, NetSpend's Board met telephonically with members of management and NetSpend's outside legal counsel.[67] The Board decided to forgo deciding whether to grant exclusivity to TSYS until the Board had engaged a financial advisor. Given the higher offer on the table, JLL's designated directors indicated that JLL was no longer interested in selling its shares to Private Equity A, which had indicated it would buy the shares for $12.00 per share.[68] Subsequently, NetSpend terminated its discussions with Private Equity A and Private Equity B.[69]

On December 7, the Board retained the services of Bank of America Merrill Lynch ("BofA") to act as NetSpend's financial advisor and Fried, Frank, Harris, Shriver & Jacobson LLP to act as its legal counsel in connection with the

[64] *Id.*
[65] Schley Dep. 132:13-22.
[66] Long Aff., Ex. 2, Proxy at 33.
[67] *Id.* at 34.
[68] *Id.*; Henry Dep. 124:7-10.
[69] Long Aff., Ex. 2, Proxy at 34.

transaction.[70] With the help of its advisors, the NetSpend Board evaluated the IOI alongside NetSpend's standalone business prospects and the possibility that other parties might be interested in acquiring the Company.[71] BofA had prepared a list of nine potential purchasers for the Company and presented it to the Board at the December 7 meeting.[72] The Board discussed the companies on BofA's list, and several of them were discounted as unlikely to bid on NetSpend.[73] The Board decided not to grant exclusivity to TSYS; however, the Board also declined to contact any other potential acquirers of the Company "because of the risk of leaks and rumors regarding a potential sale of the Company . . . ."[74] Two of NetSpend's directors later acknowledged that the risk of leaks is present in any negotiated merger transaction, and NetSpend is not unique in that regard.[75]

NetSpend's explanation for not contacting other potential bidders is that NetSpend was "not for sale" at that point.[76] Schley, the lead independent director, had told some of the companies on BofA's list that NetSpend was not for sale.[77] NetSpend reinforced its stance that it was not for sale when dealing with TSYS: in its response to TSYS's IOI, NetSpend clarified that it had *not* put itself up for sale.

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70 *Id.*
71 *Id.*
72 Long Aff., Ex. 9, Deposition of Matthew Sharnoff Dep. 57:4-58:9 ("Sharnoff Dep.").
73 Henry Dep. 117:15-121-25.
74 Long Aff., Ex. 2, Proxy at 34; Sharnoff Dep. 60:20-62:11.
75 *See* Schley Dep. 113:24-114:18.
76 *See* Sharnoff Dep. 62:5-15.
77 Schley Dep. 84:10-86:14.

Instead, NetSpend indicated that, while it was willing to discuss a transaction with TSYS, "convincing the Board to depart from the Company's existing business strategy would require a substantial improvement in TSYS' proposed price."[78] Therefore, it appears that NetSpend's position was that it could be for sale, given a high enough offer. After December 7, negotiations between TSYS and NetSpend moved quickly. Within three weeks, NetSpend had provided TSYS with a draft merger agreement.[79]

F. NetSpend Considers Seeking Out Competing Bids

Around this time, NetSpend appears to have begun considering whether it had legal obligations to seek other bidders for the Company. For example, on December 27, NetSpend provided notice to Strategic Co. D that NetSpend was considering "a change of control transaction on an expedited basis."[80] This notice was provided pursuant to a commercial contract, under which NetSpend was obligated to notify Strategic Co. D if NetSpend was considering selling itself. Beyond NetSpend's contractual obligations, BofA believed that Strategic Co. D could be a credible purchaser of NetSpend due to its size, financial capacity, and strategic interests.[81] As a result, NetSpend contacted Strategic Co. D on the 27th

[78] Long Aff., Ex. 2, Proxy at 34.
[79] *Id.*
[80] *Id.* at 35.
[81] Sharnoff Dep 99:22-100:5.

through several channels of communication.[82] However, Strategic Co. D "never indicated interest in a possible transaction with the Company."[83] NetSpend took Strategic Co. D's silence as evidence of the marketplace's lack of interest in NetSpend, in general.[84]

A second example of NetSpend's desire to seek out other bidders is the Board's (unsuccessful) effort to obtain a go-shop provision in the merger agreement. The first draft merger agreement contained a "go-shop" provision permitting NetSpend's Board to actively solicit other bidders for the Company following the execution of a merger agreement.[85] According to Henry, NetSpend included the go-shop because the directors felt that a go-shop was "standard" in a merger agreement.[86] On December 31, 2012, NetSpend's legal advisors discussed the draft merger agreement with TSYS's legal counsel, King & Spaulding.[87] King & Spaulding indicated that TSYS was unwilling to accept an agreement with a go-shop provision.[88] King & Spaulding also indicated that TSYS would require

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[82] *Id.* at 100:5-10; Henry Dep. 152:14-19.
[83] Long Aff., Ex. 2, Proxy at 35. *See also* Sharnoff Dep. 100:11-15; Henry Dep. 154:7.
[84] *See* Sharnoff Dep. 99:15-100:15, 101:25-102:6 ("The Board, not us, determined at that point in time they would not reach out to other potentially interested parties based on those relevant points and the data point that we contacted the party, that was deemed credible, [and] they had no interest.").
[85] Long Aff., Ex. 2, Proxy at 34.
[86] Henry Dep. 150:9-14.
[87] Long Aff., Ex. 2, Proxy at 35.
[88] *Id.*

voting agreements in support of any transaction from JLL, Oak Funds, and possibly other parties.[89]

On January 3, Henry spoke with Woods on the phone regarding the proposed transaction. According to Henry, for the first time, Woods seemed to feel pressure to get a deal done.[90] During this conversation, according to Henry, Woods said "if your expectations are $17 or more, we could just put pencils down, send the lawyers home, and we're done."[91] Henry took this sentence as a "goalpost" which guided the NetSpend Board to push TSYS to a higher price.[92] A few days later, TSYS submitted a revised IOI to acquire the Company for $15.25 per share in cash, a $.75 increase over its first IOI.[93]

G. NetSpend Counter-Offers and Pushes for a Go-Shop Clause

The NetSpend Board met telephonically on January 6 to consider the revised IOI. Acting under the assumption that TSYS would not pay $17.00 per share, the Board instructed management that it would be willing to accept $16.75 per share, including a go-shop clause, "as a negotiating strategy intended to elicit a higher price from TSYS."[94] As Henry saw the situation, by continuously saying it was "not for sale," NetSpend had forced TSYS to negotiate with itself up until that

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[89] *Id.*
[90] Henry Dep. 156:8-14.
[91] *Id.* at 156:15-18.
[92] *Id.* at 156:19-24.
[93] Long Aff., Ex. 2, Proxy at 35.
[94] *Id.* *See* Henry Dep. 161:4-18.

point.[95] In making a counter-offer at $16.75, the Board did not conduct any analysis of whether that price was fair to the stockholders before making the offer.[96]

At the January 6 meeting, the Board also considered whether to contact other potential purchasers of the Company.[97] The Board determined, once again, that it would not contact other potential bidders. The reasons given for this decision, as described in the proxy, are the following: (1) the possible adverse effect of a leak of information regarding the sale on customers and employee morale; (2) Strategic Co. D's lack of response after notice that NetSpend was in play, taken as a proxy for general market indifference; (3) the possible loss of negotiating leverage if no other bidders emerged to compete with TSYS; (4) a recommendation from BofA that a financial bidder was unlikely to match TSYS's offer; (5) the Board could always accept a higher offer notwithstanding a termination fee and no-shop clause; and (6) the Board believed that other strategic buyers would not be deterred from making a competing offer, notwithstanding the termination fee and no-shop clause.[98] Thus, for these reasons, the Board declined to contact other potential bidders.

[95] *Id.* at 161:8-18.
[96] *Id.* at 168:23-169:5.
[97] Long Aff., Ex. 2, Proxy at 35.
[98] *Id.*

On January 7, Henry communicated NetSpend's $16.75 proposal to Woods, TSYS's CEO. Woods responded to this information by drawing a fairly hard line in the negotiations: he indicated that he was unwilling to pay $16.75 and was unwilling to agree to any go-shop clause.[99] In lieu of the go-shop clause, Woods suggested that NetSpend shop the Company around to other potential bidders while TSYS completed its due diligence.[100] Instead of taking Woods's advice, the Board stood by its decision not to contact other potential buyers. Henry explained the Board's decision as the following: "[I]f you know that running an auction process isn't going to produce any serious bona fide bidders, then you don't go out and run an auction. You stick with what we've been saying . . . I ain't selling. So if you want it, you got to pay for it."[101] NetSpend communicated the Board's determination not to solicit competing bids to TSYS on January 8, 2013.[102] Despite that knowledge, TSYS circulated a revised draft of the merger agreement to NetSpend, with the go-shop clause removed, on the same day, January 8.[103]

H. TSYS Imposes Additional Conditions on the Proposed Transaction

On January 18, TSYS submitted a revised written proposal to NetSpend which increased the offer price to $15.40 per share in cash, subject to several

[99] *Id.*
[100] *Id.*
[101] Henry Dep. 166:19-9.
[102] Long Aff., Ex. 2, Proxy at 35.
[103] *Id.*

conditions.[104] Though some of the conditions had previously been discussed with NetSpend, including retention agreements for certain employees and voting agreements with JLL and Oak Funds, some of the conditions were new. In particular, TSYS reiterated that it would not enter into any merger agreement with a go-shop clause.[105] Additionally, TSYS conditioned its offer on an extension of the ACE contract for a five-year period.[106]

JLL's representatives on NetSpend's Board strongly opposed any extension of the ACE contract.[107] It appears that the JLL directors were concerned that TSYS would use JLL's long-held desire to liquidate its stock in NetSpend to extract an extension in the ACE contract on terms unfavorable to JLL (ACE's 97% owner).[108] The NetSpend Board thus responded to TSYS that it was unwilling to proceed with a transaction at \$15.40 and "strongly preferred to avoid seeking an extension of the ACE contract."[109] Woods responded to this offer with another take-it-or-leave-it position:

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[104] *Id.* at 36-37.
[105] *Id.* at 36.
[106] *Id.* at 37. Henry exited the negotiations at this point due to frustration with how the negotiation was proceeding. Henry Dep. 179:17-21.
[107] Long Aff., Ex. 2, Proxy at 37.
[108] *See id.* ("During the meeting, directors affiliated with the JLL Funds expressed strong opposition to seeking an extension of the agreement with ACE as part of a transaction with TSYS and stated that the JLL Funds were not seeking any arrangements or consideration other than the same price per share that would be paid to all stockholders in a merger."); Schley Dep. 134:9-17.
[109] Long Aff., Ex. 2, Proxy at 37.

> Woods communicated . . . that TSYS was willing to proceed with a transaction only if there were a five year extension of [the ACE agreement], that it did not believe that a further increase in price was warranted, that a "go shop" provision in a merger agreement was unacceptable, and that the timing of entering into a binding merger agreement was likely to be in early February.[110]

Following this communication, it appears that the NetSpend directors conceded to most of TSYS's demands. The JLL directors agreed to negotiate a possible extension of the ACE agreement, only because doing so was a condition to completing a transaction with TSYS.[111] The NetSpend Board appears to have dropped the issue of the go-shop. Instead, the Board determined it would be willing to proceed with a transaction at a price of $16 per share with a no-shop clause and 3% termination fee.[112] This offer was communicated to TSYS.

The parties presented multiple additional counter-offers before finally agreeing on the final key terms of the deal package on January 26.[113] The final package of terms consisted of the following: (1) a price of $16.00 per share in cash; (2) a no-shop provision; (3) a 3.9% termination fee, amounting to approximately $53 million; (4) a 1.9% "security breach threshold;"[114] and (5) a

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[110] *Id.*
[111] *Id.* NetSpend's disinterested directors set up a Special Committee to negotiate the extension with ACE. *Id.* at 39.
[112] *Id.* at 37-38.
[113] The various offers were fairly similar but fluctuated with respect to several different levers in the negotiation: price, termination fee percentage, length of the ACE extension, and percentage of a security breach threshold. *See id.* at 38-39.
[114] The relevant "security breach threshold" was one of the material terms of the agreement, tied to the merger consideration, under which TSYS can terminate the agreement if there is a loss

targeted announcement date in early February.[115] Contemporaneously, the parties were negotiating the various agreements required as conditions to the merger agreement, including the employee-retention agreements, the JLL and Oak Funds voting agreements, and the agreement to extend the ACE contract.[116] TSYS presented drafts of the employee-retention agreements on February 2 and 3.[117] These agreements were targeted towards NetSpend's CEO (Henry), COO, Executive Vice President of Online Business Development, and Executive Vice President of Information Technology.[118]

I. The Execution and Announcement of the Merger Agreement

On February 5, the Board met by teleconference to review recent developments and discuss the various pieces of the transaction. Regarding price, BofA indicated that it would be prepared to deliver a fairness opinion in connection with the execution of a merger agreement, barring any unforeseen changes in the terms of the transaction.[119] Regarding legal issues, Fried Frank reviewed the terms of the proposed merger agreement for the Board members. The Board also reviewed the terms of the JLL and Oak Funds voting agreements,

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arising from unauthorized use or access to NetSpend systems which has resulted in, or is reasonably expected to result in, a loss exceeding $25.6 million. See Kelly Aff., Ex. 1, Proxy at A-29 (Merger Agreement Section 3.22(b)).

[115] *Id.* at 39.

[116] *See id.* at 38-40.

[117] *Id.* at 40.

[118] *Id.*

[119] *Id.*

including provisions allowing for those voting agreements to terminate if the Company terminated the merger agreement to accept a superior transaction.[120] The Board reviewed the interests of management in the transaction including stock options, restricted stock awards, employment agreements, stock ownership, and change of control provisions in equity plans.[121] The Board reviewed JLL's interest in the transaction, stemming from its stock ownership and its ownership of ACE.[122] Finally, the Board reviewed information related to other parties that may have an interest in acquiring NetSpend and considered whether the package of deal-protections would deter such parties from making a competing offer for the Company.[123] Taking the above into account, the NetSpend Board unanimously approved the merger agreement and the voting agreement, subject to the resolution of certain open issues, and resolved to recommend the transaction to NetSpend's stockholders for an affirmative vote.[124]

For the next two weeks, the parties continued to work toward resolving the open issues of the merger agreement.[125] During this time period, Henry felt relieved because "for all intents and purposes, the deal was done and agreed."[126]

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120 *Id.*
121 *Id.* at 40-41.
122 *Id.* at 41.
123 *Id.*
124 *Id.*
125 *Id.*
126 Henry Dep. 186:22-25.

Henry was satisfied because he felt that NetSpend had pushed TSYS "very, very hard . . . ."[127]

Any lingering issues in the transaction were resolved to the satisfaction of both parties by February 19.[128] On that day, the Board met to review the changes to the merger agreement since February 5, and BofA presented its fairness opinion to the Board.[129] At the end of this meeting, the Board unanimously voted to affirm its approval of the transaction.[130] The parties executed the merger agreement and related agreements on February 19, 2013 (the "Merger Agreement") and issued a joint press release announcing the Merger Agreement on that date.[131] Shortly thereafter, two stockholder derivative actions were filed challenging the transaction: this action and another action pending in Texas. Originally, the parties anticipated a closing date in April, which was later pushed back to May.

NetSpend has not received any indications of interest since the sale was announced.[132] Rather, Henry asserts that he received several phone calls congratulating NetSpend on a "great result."[133] In particular, Private Equity A called Henry to congratulate him and say "There's no way that [Private Equity A]

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[127] *Id.* at 187:25-188:2.
[128] Long Aff., Ex. 2, Proxy at 41.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Henry Dep. 195:2-3.
[133] *Id.* at 194:11-21.

could have ever gotten to $16. What a great result for you and your shareholders."[134]

J. The Terms of the Merger Agreement

Currently, Sub is a wholly owned subsidiary of Total Systems. Upon completion of the merger, NetSpend will merge with Sub, and NetSpend will be the surviving entity.[135] At that point, NetSpend will be a wholly owned subsidiary of Total Systems and, following delisting, will no longer be subject to reporting requirements under the federal securities laws.[136]

1. <u>$16.00 Price</u>

The agreed to price is $16.00 per share, which represents a 45% premium over NetSpend's stock price one week before the deal.[137] NetSpend released favorable earnings on the 13th of February, and the NetSpend stock price increased. The premium was cut considerably as a result, to 25%.[138] The total value of the transaction is approximately $1.4 billion. BofA prepared a fairness opinion that opines that the transaction is fair based on several analyses, including a discounted cash flow analysis (DCF), a comparable companies analysis, and a comparable transactions analysis (the "Fairness Opinion"). Of the analyses in the Fairness

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[134] *Id.*
[135] Long Aff., Ex. 2, Proxy at 77.
[136] *Id.* at 119.
[137] Long Aff., Ex. 16, at 3.
[138] *See* Schley Dep. 146:9-147:17; Long Aff., Ex. 16, at 3. The merger price represented a 69% premium over the 52-week average. *Id.*

Opinion, the $16.00 price was below one of the valuations, the DCF. The range of acceptable prices under the DCF was $19.22 to $25.52.[139]

2. Deal Protection Devices

The deal-protection devices protecting the deal consist of a $52.6 million Termination Fee, representing 3.9% of the deal value; a no-shop clause; matching rights; and voting agreements with JLL and Oak Funds which lock up approximately 40% of the stock. The no-shop clause has a fiduciary out for a superior offer.[140] The voting agreements do not terminate if the Board withdraws its recommendation in favor of the Merger Agreement or if the Board endorses a competing offer.[141] Rather, the voting agreements only terminate if the Board terminates the TSYS Merger Agreement.[142] Finally, the Merger Agreement prevents NetSpend from waiving any standstill agreement to which NetSpend is a party without TSYS's consent.[143] This includes the standstill agreements (including the don't-ask-don't-waive clauses) entered into with Private Equity A and Private Equity B.

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[139] Pl.'s Op. Br. Ex. 16, at 12.
[140] Long Aff., Ex. 2, Proxy at 97.
[141] Long Aff. Ex. 2, Proxy at D-3.
[142] *Id.*
[143] Long. Aff., Ex. 2, Proxy at A-56.

III. ANALYSIS

A. Preliminary Injunction Standard

To justify the imposition of a preliminary injunction, an extraordinary remedy, the plaintiff must demonstrate: (1) a reasonable probability of success on the merits; (2) that absent injunctive relief, immediate and irreparable harm will result; and (3) that the balance of the parties' harms tips the scale in favor of injunctive relief.[144] In a case challenging a merger or acquisition, in order to justify injunctive relief, where no competing bidder has emerged "despite relatively mild deal protection devices, the plaintiff's showing of a reasonable likelihood of success must be particularly strong."[145]

B. Likelihood of Success on the Merits

1. <u>The Disclosure Claims</u>

Once stockholder action has been requested, Delaware law requires directors to provide all information that is material to the action being requested and "to provide a balanced, truthful account of all matters disclosed in the communications with shareholders."[146] A disclosure is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable

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[144] *In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124 at *4 (Del. Ch. May 9, 2013).
[145] *Id.* (quoting *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 954 A.3d 319, 331 (Del. Ch. 2008)).
[146] *Id.* at *8 (quoting *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999)).

investor as having significantly altered the 'total mix' of information made available."[147]

Most of the Plaintiff's disclosure claims have been mooted by NetSpend's supplemental disclosures which have already been distributed to the stockholders. Two claims remain. First, the Plaintiff argues that the Board should supplement its disclosure regarding the difference in how management calculated free cash flows and how BofA calculated free cash flows. Specifically, the Plaintiff asks that I compel the Defendants to disclose a chart, included in the materials prepared by BofA for the Board, that purportedly illustrates this difference. The disclosures, as they currently stand, however, clearly define how each of the free cash flows has been calculated.[148] The Plaintiff complains that, despite the clearly expressed definitions, stockholders "are left to determine for themselves exactly what the difference is between the two calculations . . . ."[149] In other words, stockholders must juxtapose the two methodologies themselves, rather than consult the proposed chart. This is not a material deficiency in the proxy. All material information has been disclosed.

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[147] *Id.* (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

[148] *Compare* Kelly Aff., Ex. 1, Proxy at 55 (defining NetSpend's calculation of free cash flows as "net income plus depreciation and amortization, plus stock compensation expense, less capital expenditures, less the amount of any increase or plus the amount of any decrease in net working capital."), *with id.* at 60 (defining BofA's calculation of free cash flows as "earnings before interest and tax, less taxes, plus depreciation and amortization, less capital expenditures, less the amount of any increase or plus the amount of any decrease in working capital, less stock-based compensation expense.").

[149] Pl.'s Reply Br. 19.

Second, the Plaintiff points out that BofA prepared two DCF analyses for the Board, the second of which indicated significantly lower implied values for the Company. Only the latter was disclosed. The first of these analyses, according to the Plaintiff, must be disclosed to the stockholders.[150] I note that the Plaintiff failed to raise this argument in its Opening Brief, and ordinarily such an argument would be considered waived.[151] To the extent that I consider this claim, it is without merit. At oral argument the Defendant was given its first opportunity to respond. The Defendant pointed out that the difference between the two DCFs was caused by a computer glitch or spreadsheet error which artificially inflated the first DCF. The Plaintiff conceded that the first DCF may not be reliable.[152] I find that the first DCF is not material and need not be disclosed.

Based on the foregoing, I find that the Plaintiff has failed to meet her burden for the disclosure claims of proving a likelihood of success on the merits at trial.

2. The Plaintiff's *Revlon* Claims

When a board decides to enter into a transaction that involves the sale of the company in a change of control transaction, the directors of the company have a

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[150] *Id.* at 20-21.

[151] At oral argument, Plaintiffs' counsel explained that he failed to raise the argument because he had mistakenly believed that the difference between the two DCF values was the result of the different definitions of free cash flows.

[152] Oral Arg. Tr. 103:24-104:13 ("Given that [the first DCF] appears to have been based on at least in part an error, I do think his point is well taken that it may not be reliable and should be treated accordingly.").

duty to secure the best value reasonably attainable for the stockholders.[153] This duty, announced in *Revlon*, is not an independent duty, but rather a restatement of directors' duties of loyalty and care.[154] To accomplish a sale-of-control transaction, as in any other transaction, directors have a duty to act in a fully informed manner, and in good faith, to obtain the best deal available.[155] Directors need not follow a particular path to maximize stockholder value, but the directors' path must be a reasonable exercise toward accomplishing that end.[156]

Rather than changing the duties directors owe to stockholders, *Revlon* changes the level of scrutiny under which this Court reviews change-of-control transactions.[157] Enhanced scrutiny under *Revlon* is a test of reasonableness, which is "more searching than rationality review . . . ."[158] Reasonableness requires that

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[153] *Plains*, 2013 WL 1909124, at *4; *Revlon v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 184 n.16 (Del. 1986).

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

[155] *See In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595-96 (Del. Ch. 2010).

[156] *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *16 (Del. Ch. May 24, 2011)(citing *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) and *In re J.P. Stevens & Co. S'holders Litig.*, 542 A.2d 770, 781-82 n.6 (Del. Ch. 1988)).

[157] *See Dollar Thrifty*, 14 A.3d at 595 ("[T]he level of judicial scrutiny under *Revlon* is more exacting than the deferential rationality standard applicable to run-of-the-mill decisions governed by the business judgment rule . . . .").

[158] *See id.* at 595-96 (quoting *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007)). To comply with his or her duties under *Revlon*, a bench judge must do more than examine board actions under the deferential rationality standard of the business judgment rule. Instead, the judge must apply his or her independent judgment to the actions of the board and determine whether the sales process is reasonably designed to maximize price. This enhanced scrutiny is in recognition of the fact that the board's focus, once it has decided to sell, is limited: it must focus not on its own business strategy, but only on best price. Inserting the judgment of a law-trained judge into the purview of the elected and independent directors is neither cost- nor risk-free, however. Bench judges must be mindful of their limited role; to ensure that the process chosen by the board is reasonable. So long as the actions of the board are

the board be informed and that it construct a sales process to maximize value in light of that information.[159] *Revlon*'s enhanced scrutiny is a "middle ground" between deference to the board under the business judgment rule and skepticism toward the board under entire fairness review.[160] Under this middle-ground review, the directors have the burden of proving that they were fully informed and acted reasonably.[161] Still, *Revlon* requires only a reasonable decision, not a perfect decision.[162] *Revlon*'s reasonableness test also requires the Court to scrutinize the board's true intentions to determine if the board is acting with the best interests of the stockholders in mind.[163]

Here, the NetSpend Board has agreed to sell the Company in an all-cash, negotiated tender offer. If the transaction closes, TSYS will own 100% of NetSpend. This is a change-in-control transaction, and *Revlon* duties apply. The NetSpend directors ultimately have the burden of proving that they acted reasonably and engaged in an adequate process.[164] The Plaintiff argues that NetSpend's Board breached its fiduciary duties of loyalty and care under *Revlon*

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reasonably related to the maximizing price, its duties under *Revlon* are satisfied. There is no single process that is required, and within the reasonable range the board must apply its business judgment to achieve value. I must not disturb the process chosen, so long as it is reasonably designed, to impose some "better" process.

[159] *See Plains*, 2013 WL 1909124, at *4.

[160] *Dollar Thrifty*, 14 A.3d at 596.

[161] *QVC*, 637 A.3d at 45.

[162] *Plains*, 2013 WL 1909124, at *4.

[163] *Id.* at 599.

[164] At this stage, the Plaintiff's burden is to show that it is reasonably likely that she will prevail in a trial on the merits.

by (1) allowing JLL and Oak Fund's desire to liquidate to trump the Board's duty to obtain the highest price reasonably available to the stockholders, (2) allowing "conflicted management" to control the negotiations with TSYS, (3) engaging in a flawed sale process by failing to conduct any sort of market check against TSYS's offer, (4) retaining the don't-ask-don't-waive clauses in the standstill agreements with Private Equity A and Private Equity B, and (5) relying on a weak fairness opinion to justify its acceptance of the merger price.[165] I discuss each of those arguments below.

a. Board Motivations

Revlon requires the Court to look to the directors' true intentions to determine if the directors have been motivated by the appropriate desires: i.e., to achieve the highest price reasonably available to the stockholders.[166] Of NetSpend's eight directors, only one, Henry, is a member of management. The other seven are unaffiliated with the Company. Four of NetSpend's directors are affiliated with NetSpend's largest stockholders, JLL and Oak Funds. This stock ownership is not a source of conflict, but rather an indication that the Oak Funds- and JLL-appointed directors' interests are aligned with the interests of the stockholders generally.

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[165] *See* Pl.'s Op. Br. 22-23.
[166] *Dollar Thrifty*, 14 A.3d at 598-99.

The Plaintiff argues that the Board allowed the interests of JLL and Oak Funds to supersede the interests of the other stockholders.[167] In particular, the Plaintiff argues that JLL wanted to liquidate its shares quickly and that the Board accommodated JLL's desire to liquidate by forgoing a more expansive auction process.[168] Yet this assertion is contradicted by the record. Though JLL was originally interested in selling its shares by the end of 2012 for tax reasons, JLL abandoned this plan once TSYS's higher offer was on the table. Because negotiations with TSYS did not begin until December 2012, it would have been clear to JLL that NetSpend would not accomplish a sale to TSYS by the end of 2012. Thus, JLL elected to take the higher stock price at the risk of facing a higher tax rate in 2013. Contrary to the Plaintiff's arguments, these facts confirm that JLL was focused on achieving the highest price possible rather than liquidating its interests at a fire-sale price. Furthermore, though Oak Funds had communicated to the Board that it may be interested in liquidating its shares, it had already distributed most of its shares to its investors. Thus, Oak Funds accomplished its desire to divest the shares without any action of the NetSpend Board.

The only director who was even arguably conflicted was Henry, NetSpend's CEO. That conflict proves illusory as well. The Plaintiff argues that Henry was

[167] Pl.'s Reply Br. 16-17.
[168] *Id.*

motivated by his desire to "do a deal, cash out, and get back to retirement."[169] This argument is somewhat strained because Henry is neither cashing out nor retiring as a result of this transaction. The Plaintiff's argument stands traditional arguments involving conflicted management on their head. Generally, plaintiffs argue that managers are conflicted because the manager has an entrenchment motive in remaining at the helm of the company; that was the Plaintiff's argument in her Amended Complaint.[170] Now, the Plaintiff shifts her ground; she argues that Henry was motivated by a desire to *separate* himself from NetSpend. The sole source for this theory is found in one sentence from Henry's deposition in which he said that "regardless of what price TSYS would pay for the business, the best financial result" for Henry would be Henry's termination.[171] In making this statement, it appears that Henry was attempting to rebut the allegations in the Amended Complaint that Henry was motivated by a desire to stay on as NetSpend's CEO. After he had successfully rebutted that allegation, the Plaintiff latched on to Henry's statement for the proposition that Henry was openly trying to cash out his interest for a sub-optimal price.[172] The only weight I take away from Henry's statement, however, is that Henry's interests were aligned with those of

[169] Pl.'s Op. Br. 23.
[170] Am. Compl. ¶ 48.
[171] *See* Pl.'s Reply Br. 17-18 (quoting Henry Dep. 137:21-138:6).
[172] *See id.*

the other stockholders in achieving the highest price possible.[173] In fact, Henry owned performance-based options which would have vested at $16.75 per share, all of which will be forfeited in connection with the transaction. That suggests that Henry had an incentive to push the price to $16.75 per share if at all possible.

Taking the above into account, it is likely that Henry's motivations were aligned with the stockholders' interests. However, even if Henry were conflicted, he is only one director out of eight, and the majority of the directors were motivated by achieving the highest price reasonably available for the stockholders. The Plaintiff provides no explanation of "why the disinterested and independent directors would disregard their fiduciary duties" in order to advance Henry's interests.[174] As a result, I find it likely that the Board will prove at trial that its true motivation was to achieve the highest price reasonably available to the stockholders. I now turn to the reasonableness of the Board's process.

b. The Adequacy of the Board's Process

The Plaintiff argues that the Board breached its duties of care by: (1) allowing Henry to negotiate with TSYS on behalf of NetSpend, (2) deciding not to seek alternative bidders, (3) relying on a weak fairness opinion from BofA, (4)

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[173] At oral argument, the Plaintiff argued that Henry's interests were not truly aligned with the stockholders because Henry stood to make almost $20 million from the deal and thus would become so rich that the marginal utility of receiving $16.50 or $17.00 per share instead of $16.00 per share would be lost on Henry. That argument is unpersuasive and contrary to human nature.

[174] *See In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *10 (Del. Ch. Jan. 31, 2013).

agreeing to unreasonable deal-protections, and (5) retaining the don't-ask-don't-waive clauses in the standstill agreements with Private Equity A and Private Equity B.[175]

I find that, in forgoing a pre-Agreement market check, and relying on an ambiguous fairness opinion, the Board had to be particularly scrupulous in ensuring a process to adequately inform itself that it had achieved the best price. Instead, the Board agreed to deal-protection devices which included a no-shop clause and which provided that don't-ask-don't-waive provisions already in place would continue, preventing the Board from learning whether Private Equity A and Private Equity B were interested in bidding. These entities had just completed due diligence, and, in Private Equity B's case, had bid for a substantial minority position in NetSpend. In light of these circumstances, for the reasons explained below, I cannot find that the Board was sufficiently informed to create a process to ensure best price.

i. The Board Acted Reasonably in Allowing Henry to Negotiate with TSYS.

I can easily dispense with the argument that the Board breached its fiduciary duties by allowing Henry to lead the negotiation. As I explained above, Henry's interests appear to have been aligned with the interests of the stockholders at all times. Henry neither had a strong desire to stay on with as NetSpend's CEO—as is

[175] Pl.'s Op. Br. 22-25; Pl.'s Reply Br. 5-12.

evidenced by his acknowledgment that a best-case scenario for him involved cashing out—nor did he strongly desire to cash out and separate himself from NetSpend completely—as is evidenced by his continuing employment with NetSpend post-transaction. To remove any appearance of conflict, the Board instructed Henry not to discuss management's retention agreements until after the material aspects of the transaction had been ironed out.[176] Furthermore, even if Henry was interested, the Board was heavily involved in the negotiation process: there is no evidence of Henry dealing directly with TSYS without the Board's authority or knowledge. Rather, the Board met regularly and often to discuss NetSpend's negotiation strategy, and Henry communicated often with NetSpend's lead independent director, Schley. Based on these facts, I find it likely that the Defendants will meet their burden of proving that their actions were reasonable at trial.[177]

ii. The Board's Decision to Conduct a Single-Bidder Process was not Unreasonable Per Se.

Under *Revlon*, if a board is considering selling the company and there is only one offer on the table, the general rule is that the board must canvass the market to determine if higher bids may be elicited, since the board "has no reliable

[176] *See* Def.'s Ans. Br. Ex. 19.
[177] *See Smurfit-Stone*, 2011 WL 2028076, at *22; *In re OPENLANE, Inc.*, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011).

grounds upon which to judge [the offer's] adequacy. . . ."[178] However, a board my dispense with a market check where "the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction . . . ."[179] Our Supreme Court has counseled that the circumstances in which a market check will not be required are "limited," and the reliance on the advice of investment bankers is "a pale substitute" for a market check.[180] The reason that a market check is often required is that it is a reliable method of satisfying "the need for adequate information . . . central to [a board's] enlightened evaluation of a transaction . . . ."[181] To support a finding that a board acted reasonably in contracting with one bidder without conducting a market check, "[i]t must be clear that the board had sufficient knowledge of relevant markets to form the basis for its belief that it acted in the best interests of the shareholders."[182]

The issue here is whether the NetSpend Board had sufficient knowledge of the relevant markets, and a body of reliable evidence, to agree to this transaction without conducting any type of market check. In analyzing this issue, I find it helpful to consult past cases in which directors have demonstrated sufficient knowledge to permissibly bypass a market check. For example, in *Barkan*, the

[178] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989).
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 1288.

defendants proffered evidence that the market was aware that Amsted (the target corporation) was a likely target for an MBO for almost a year before the transaction closed.[183] Despite this knowledge in the marketplace, no competing bids emerged.[184] This extended period, in which the market was aware that Amsted would be an acquisition target yet no one bid, was supportive of the board's decision to proceed with an MBO.[185] Additionally, the Amsted board knew of tax advantages, unique to the MBO, which the board believed would allow management to complete a transaction at a price considerably higher than that of any outsider.[186] Based on these circumstances, the *Barkan* Court held that the board had sufficient knowledge of the marketplace to agree to a transaction despite the absence of a market check.

In *Smurfit-Stone*, Vice Chancellor Parsons held that the board of Smurfit-Stone acted reasonably in accepting a bid from Rock-Tenn despite neglecting to conduct a market check.[187] Vice Chancellor Parsons noted that Smurfit-Stone had recently emerged from a year-and-a-half long bankruptcy, during which it received some indications of interest but no concrete bids for the company.[188] Following bankruptcy, the relevant market was aware that the Company was likely a takeover

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[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Smurfit-Stone*, 2011 WL 2023076, at *18-19.
[188] *Id.*

target, yet no higher bids had emerged.[189] Furthermore, a competing company that had bid on the company previously declined to present a higher offer when the Smurfit-Stone board invited it to do so.[190] Finally, the Smurfit-Stone board knew that there were few strategic partners likely to be interested in the company.[191] The combination of these circumstances was enough for the Court to find that the board had sufficient information to conclude that a market check was not worth the risks of jeopardizing the transaction with Rock-Tenn.[192]

Finally, in *Plains Exploration & Production Co. Stockholder Litigation*, Vice Chancellor Noble recently upheld a board's decision to proceed with a merger without a market check.[193] In *Plains*, the board was focused on maintaining Plains as a stand-alone entity if a negotiated deal with Freeport did not go through.[194] Vice Chancellor Noble noted that the directors on the Plains board were experienced in the oil and gas industry, and their relevant expertise supported a reasonable inference that the directors were informed and competent to make an appropriate decision.[195] Furthermore, the combination of mild deal-protection devices (including a non-solicitation clause with a fiduciary out for superior

[189] *Id.* at *19.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *See* 2013 WL 1909124 (Del. Ch. May 9, 2013).
[194] *Id.* at 15 ("[T]hey were focused on completing a deal with Freeport or going forward as a stand-alone company.").
[195] *Id.* at 16.

proposals) and a five-month lag in time between the announcement of the merger and the merger's closing had created a de facto market check.[196] Vice Chancellor Noble noted that "as long as the Board retained 'significant flexibility to deal with any later-emerging bidder and ensured that the market would have a healthy period of time to digest the proposed transaction,' [if] no other bidder emerged, the Board could be assured that it had obtained the best transaction reasonably attainable."[197] Despite the market knowing about the sale for five months, no competing offers had emerged for Plains.[198] Under those circumstances, Vice Chancellor Noble held that the plaintiffs had not established that the board's failure to undertake a market check raised a reasonable likelihood that the plaintiff's claim would be successful on the merits.[199]

Here, NetSpend's directors are sophisticated professionals with extensive business and financial expertise.[200] I am satisfied that the directors understood the financial side of the deal. The directors hired highly regarded financial advisors to value the Company and provide unbiased advice.[201] The record demonstrates that

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[196] *Id.*
[197] *Id.* at 15 (citing *In re Pennaco Energy, Inc.*, 787 A.2d 691, 707 (Del. Ch. 2001)).
[198] *Id.* at 16-17.
[199] *Id.* at 17-18.
[200] *See supra* note 8 and accompanying text (describing the qualifications of three of the independent directors). The other four independent directors were each managing directors of private equity firms.
[201] Although relying on financial advisors is considered a "pale substitute" for a market check, I analyze the Board's knowledge of the relevant markets with this backdrop in mind. *See Barkan*, 567 A.2d at 1287.

the Board was well-informed about the process of selling the Company. Before 2012, the Board had engaged in prolonged negotiations with other merger partners/acquirers three times previously and conducted an IPO; throughout those processes, the Board would have engaged valuing the Company several times.

After reviewing a list of potential acquirers provided by BofA, the NetSpend Board made a deliberate decision to conduct a single-bidder sale of the Company. The NetSpend Board had previously witnessed three advanced acquisition transactions collapse in the preceding five years. Based on the negative consequences that accompanied these failed deals,[202] the Board was hesitant to enter into negotiations with another bidder. As a result, the Board consciously adopted the strategy of telling would-be acquirers that it was "not for sale," while intimating that it *could* be for sale for a high enough offer. This strategy was designed to dissuade low-ball or non-serious offerors from disrupting NetSpend's ordinary business strategy.[203] TSYS is the only offeror who ever followed up after receiving this tepid response; several other would-be acquirers were content to look elsewhere for an acquisition target.[204] Even after TSYS sent NetSpend the

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[202] During the period NetSpend was negotiating with Strategic Co. B, NetSpend signed few new contracts. NetSpend also experienced employee-retention issues. *See* Henry Dep. 46:9-18.
[203] *See* Henry Dep. 46-48.
[204] NetSpend's other potential acquirers included Strategic Co. E, Strategic Co. F, and Strategic Co. G.

IOI, NetSpend persisted in telling TSYS that it was not for sale.[205] The record indicates that this "not for sale" tactic was a deliberate strategy to maximize stockholder value: it allowed NetSpend to focus on maintaining the business in the ordinary course while forcing TSYS to bid against itself.[206] The Board decided that conducting a market check would have undercut its strategy of projecting to the public that it was a thriving company that did not need to sell itself.[207] I find that this strategy, under the facts and for the reasons discussed below, is within the range of actions a reasonable board could take to maximize stockholder value.

In 2012, the Board had several indicia as to how the market valued NetSpend. First, NetSpend's stock price was hovering around $8.00 per share, even after NetSpend had conducted share repurchases in an attempt to boost what the Board believed to be a stock price unreflective of true value. Second, when JLL sought to sell its 31.1% stake in NetSpend, Private Equity A bid $12.00 per share, and JLL seemed willing to accept that price. Private Equity B declined to bid on JLL's stake. Third, Strategic Co. C's proposal to merge the two companies as equals would have provided no premium to NetSpend's stockholders. Fourth, NetSpend had provided its "not for sale" spiel to multiple alternative bidders

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[205] According to Henry, he believed that the board "didn't sell NetSpend. TSYS acquired it, or is in the process of acquiring it." Henry Dep. 163:23-165:2.
[206] *See* Henry Dep. 161:11-18.
[207] *See id.* at 163:23-165:2 ("[W]hen we looked at . . . what is the best way to get the highest and best price for NetSpend shareholders. Well, telling TSYS the company is not for sale. . . . And then all of a sudden saying, okay, we're going to try to go and sell the company. One, we just lost all credibility with TSYS in terms of our position that the company is not for sale.").

(Strategic Co. E, Strategic Co. F, and Strategic Co. G), and none of them was willing to make an offer. Finally, Strategic Co. D chose not to make an offer for NetSpend, even though Strategic Co. D had previously contracted for NetSpend to provide notice to Strategic Co. D if NetSpend was contemplating a sale. Each of these circumstances provided an additional level of context and knowledge of the relevant market to allow the Board to reasonably determine that a single-bidder process was in the best interest of the Company.

To summarize my findings above, at trial the Board is likely to show that its initial decision to engage in a single-bidder process was reasonable. That is not the end of my analysis, however. Where a board decides to forgo a market check and focus on a single bidder, that decision must inform its actions regarding the sale going forward, which in toto must produce a process reasonably designed to maximize price. Thus, my review of the remainder of the sale process, including the reliance on BofA's Fairness Opinion, and the deal-protection devices, including the don't-ask-don't-waive clauses, will assess whether the Board's actions were reasonable in light of the Board's awareness that it had no external market check.[208]

[208] *See Pennaco*, 787 A.2d at 707 (stating that in single-bidder sale, strong deal protections may push the board's actions out of the range of reasonableness).

iii. The Board's Reliance on BofA's Fairness Opinion

The Plaintiff argues that the Directors acted unreasonably in relying on an unreliable Fairness Opinion to approve the Merger Agreement.[209] The Defendants rely on the exculpatory provisions of Section 141(e).[210] Both arguments are somewhat misplaced. The Plaintiff need not show that the Board's reliance on the Fairness Opinion was *itself* a breach of fiduciary duty; it must demonstrate, however, that the totality of the process through which the Board attempted to maximize price was unreasonable.[211] The evidence confirms that the Fairness

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[209] At oral argument, when I asked the Defendant to rebut the Plaintiff's argument that the BofA Fairness Opinion was unreliable, the Defendant pointed me to Vice Chancellor Noble's recent *BJ's* opinion. Oral Arg. Tr. 67-68. That case, unlike this case, however, was decided at the motion to dismiss stage, involving a claim of breach of the directors' duty of loyalty. *See In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *12. As a result, the plaintiff was charged with pleading facts that showed that the directors *knew* that the fairness opinion was unreliable and purported to rely on it nonetheless. *BJ's* at *12, *12 n.107. This case is distinguishable, since here the utility of the examination of the Fairness Opinion is only in context of the reasonableness of the Board's sales process.

[210] 8 *Del. C.* § 141(e) ("A member of the board of directors . . . shall, in the performance of such member's duties, be fully protected in relying in good faith . . . upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.").

[211] I do not find that the directors' reliance on the Fairness Opinion was itself a breach of fiduciary duty. Directors relying in good faith on experts are "fully protected" from liability under § 141(e). I do find that the Directors' reliance on a weak fairness opinion is context for the Board's other decisions, and pushes those decisions farther towards the limits of the range of reasonableness. *See Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *23 (Del. Ch. July 29, 2008) ("When control of the corporation is at stake . . . directors of a Delaware corporation are expected to take *context-appropriate steps* to assure themselves and, thus, their shareholders that the price to be paid is the 'best price reasonably available.'") (emphasis added), *rev'd on other grounds by Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009) (reversing trial court findings on the directors' bad faith).

Opinion was, in fact, weak.[212] The relative weakness of the Fairness Opinion does not demonstrate that the price is unfair; instead, it indicates that the Fairness Opinion is a poor substitute for a market check.

The Fairness Opinion was based on several valuations of the Company. First, two of the valuations were based on the price of NetSpend's stock. These valuations support the fairness determination, because of the premium of the TSYS offer over stock price. NetSpend's stock price has been quite volatile since NetSpend went public in 2010, initially reaching a high around $16.00 and then bottoming out at $3.90 in 2011.[213] The NetSpend Board has expressed its views that it believed the market undervalued NetSpend considerably: that was the Board's justification for the stock repurchases. Therefore, the Board has acknowledged that NetSpend's stock price is not a good indicator of its value.

Next, the Fairness Opinion relies on analysis of comparable companies and transactions. The comparable companies used in the *Selected Publicly Traded Companies Analysis*, however, were dissimilar to NetSpend, which greatly reduces their utility.[214] BofA's lead banker on the deal, Matthew Sharnoff, testified that 14

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[212] *See In re Vitalink Commcn's Corp. S'holders Litig.*, 1991 WL 238816, at *1328-32 (Del. Ch. Nov. 8, 1991) (reviewing a DCF and two comparables-based analyses to determine if a fairness opinion was "reliable").

[213] Kelly Aff. Ex. 4.

[214] *See In re Radiology Assocs., Inc.*, 611 A.2d 485, 490 (Del. Ch. 1991)("The utility of the comparable company approach depends on the similarity between the company the court is valuing and the companies used for comparison. At some point, the differences become so large that the use of the comparable company method becomes meaningless for valuation purposes.").

of the 15 comparables used in the *Selected Publicly Traded Companies Analysis* were dissimilar to NetSpend.[215] Similarly, as the Board itself noted in the proxy, most of the comparables selected for the *Selected Precedent Transaction Analysis* are quite old, predating the financial crisis, and the target businesses of the comparables were not particularly similar to NetSpend's.[216] Therefore, neither the *Selected Publicly Traded Companies Analysis* nor the *Selected Precedent Transaction Analysis* is a strong indication of NetSpend's value.

Finally, the DCF analysis 1) indicates that the TSYS offer was grossly inadequate and 2) was based on financial projections that were outside the range of management's customary projections. With respect to the first factor, the $16.00-per-share merger price is 20% below the *bottom* range of values implied by the DCF. The presence of the anomalous DCF valuation makes the Fairness Opinion a less reliable substitute for a market check. In fact, the Defendants are reduced to arguing that the DCF valuation is unreliable here, because NetSpend Management usually prepares projections no further out than three years, making the five-year DCF of the Fairness Opinion speculative.[217]

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[215] Sharnoff Dep. 110-19.

[216] *See* Long Aff. Ex. 2, Proxy at 50.

[217] Henry Dep. 198-200 ("I also take into account using my experience of finance and realize that a discounted cash flow method really has no commercial reality in terms of valuing a business, especially like one of NetSpend where you take five years of forecasted cash flows and discount them back at some sort of arbitrary discounted rates and think that's a good prediction of being able to understand how you're going to be able to deal with things such as the next Durbin Amendments or the next 9/11 or the next fiscal cliff that comes around.").

Based on all these factors, this Fairness Opinion is a particularly poor simulacrum of a market check, a fact available to the Board when it approved the Merger.[218]

iv. The Deal Protection Devices

Traditional *Omnicare* claims allege that deal-protection devices impermissibly "lock up" a transaction by being preclusive and/or coercive. Here, the Plaintiff concedes that the deal protective devices employed have been found permissible in other merger contexts. The Plaintiff argues, however, that the package of deal-protection devices are unreasonable given that there has been no market check. The deal-protection devices used here are: a no-shop clause, a 3.9% termination fee (valued at $53 million), and matching rights. Additionally, TSYS has entered into voting agreements with JLL and Oak Funds, under which approximately 40% of NetSpend stock has been committed to vote in favor of the merger, so long as the Board does not terminate the Merger Agreement. The Plaintiff has conceded that this package of devices are relatively mild and could be considered reasonable under different circumstances.[219] The Plaintiff takes issue, however, with the use of these devices to protect a deal that lacked the benefit of a

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[218] *See Barkan*, 567 A.2d at 1287 (holding that reliance on a fairness opinion is a "pale substitute" for a market check).

[219] *See* Pl.'s Op. Br. 31 ("While these deal protections might be reasonable under other circumstances, they are unreasonable here, due to, among other things, the complete lack of any pre-signing market check or auction process and the absence of any post-signing go-shop period.").

market check.[220] Because NetSpend never solicited competing offers, the Plaintiff argues, these deal protections are too strong to protect a deal borne of a flawed sales process.[221]

(a) The Matching Rights, Termination Fee, and Voting Agreements

Concerns raised by the Plaintiff that the voting agreements impermissibly lock up the deal are alleviated by the fiduciary-out clause of the Merger Agreement. The Merger Agreement allows the Board to engage in negotiations with a competing bidder, and withdraw its recommendation in favor of the TSYS merger, if the Board subjectively believes that the competing offer represents a "Superior Proposal" to the TSYS deal.[222] Therefore, if another entity has interest in bidding for NetSpend, the Board has the ability to seriously consider such an offer. The market is on notice that Delaware courts will not uphold deal-protection devices to the exclusion of a superior offer.[223] Therefore, although the voting agreements appear to lock up approximately 40% of the stock in favor of the TSYS transaction, they are saved by the fiduciary-out clause. Specifically, the voting agreements terminate upon the Board's termination of the Merger Agreement. I

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[220] *Id.*
[221] *Id.*
[222] Long Aff. Ex. 2, Proxy Ex. A, Merger Agreement § 6.3.
[223] *See Barkan*, 567 A.2d at 1287 ("Because potential bidders know that a [poison] pill may not be used to entrench management or to unfairly favor one bidder over another, they have no reason to refrain from bidding if they believe that they can make a profitable offer for control of the corporation.").

note that half of the directors of NetSpend are associated with the entities subject to the voting agreements, thus aligning the interest of the Board and the stockholders subject to the voting agreements. The agreements pose no credible barrier to the emergence of a superior offer.

Thus, if another entity had been interested in bidding for NetSpend, the only things stopping that potential bidder would be the matching rights and the need to pay the termination fee, $53 million. In the context of a $1.4 billion deal, that amount is within the range of termination fees held to be reasonable in the past.[224] I am confident that these deal protections would not deter a serious suitor.

(b) The No-Shop Clause

The record is clear that NetSpend repeatedly asked for a go-shop, but TSYS refused to accommodate the request. Faced with this knowledge—that they could either allow TSYS to walk, or they could attempt to use the lack of a go-shop as a bargaining chip—the Board chose to bargain. The Board only agreed to the no-shop once it had extracted further consideration from TSYS, in the form of a raised price and a lower termination fee.[225] It is not per se unreasonable for a board to forgo a go-shop where it makes an informed decision that such forbearance is part

[224] *See, e.g.*, *Dollar Thrifty*, 14 A.3d at 614 (upholding a 3.5% termination fee); *Answers*, 2011 WL 1366780, at *4 (upholding a 4.4% termination fee).
[225] *See* Long Aff. Ex. 2, Proxy at 141. TSYS raised its bid from $15.40 to $16.00. *Id.*

of a process designed to maximize price.[226] In this instance, however, it is another tool, useful to determine whether that goal—maximum price—has been achieved, that the Board discarded. Notably, the Board anticipated a short period before the deal's consummation; the deal was originally scheduled to close in April.[227] Thus, the Board cannot have intended that a leisurely post-agreement, pre-closing period would provide an adequate alternative to a market check.[228]

(c) The Don't-Ask-Don't-Waive Clauses

The Plaintiff next argues that the don't-ask-don't-waive ("DADW") clauses made the sales process unreasonable. The DADW clauses originate in the standstill sections of the confidentiality agreements NetSpend entered into with Private Equity A and Private Equity B. The standstill provisions expressly prevent Private Equity A and Private Equity B from attempting to acquire NetSpend (as a whole) for a one- or two-year period. The DADW clauses prevent either Private Equity A or Private Equity B from asking NetSpend for a waiver of the standstill agreement. The standstill agreements were entered into in November 2012, before TSYS submitted its first offer for NetSpend. At that point, NetSpend was "not for sale," and the standstill agreements were consistent with the Board's plans. The agreements contained no sunset provision, however; they persist despite the

[226] *See Barkan*, 567 A.2d at 1288.
[227] *See* Pl.'s Mot. to Expedite ¶ 5 ("The stockholder vote on the Proposed Transaction is currently anticipated to be held April 22, 2013.").
[228] *Compare Plains*, 2013 WL 1909124, at *6 (holding that a five-month delay before closing, coupled with mild deal protections, provided for an implied market check).

subsequent decision by the Board to sell the Company. In fact, the standstill agreements were expressly incorporated in the Merger Agreement—they may not be waived without the buyer's consent. The Merger Agreement forbad NetSpend from waiving the DADW provisions that prevent Private Equity A and Private Equity B from expressing any interest in bidding for the Company. Section 6.16 of the Merger Agreement provides that "neither the Company nor any of its Subsidiaries shall amend, modify or waive any provision of any confidentiality agreement relating to an Acquisition Proposal or standstill agreement to which the Company or any of its Subsidiaries is a party."[229] Meanwhile, NetSpend contracted away its opportunity to solicit offers via the no-shop.

Vice Chancellor Laster recently enjoined the effects of similar DADW clauses in *Complete Genomics*, holding that the clauses result in a board willfully blinding itself to the possibility of a competing offer.[230] In this case, the DADW provisions were entered into in connection with the sale of a minority interest only; NetSpend itself was not for sale. Once the Board determined that it was likely that TSYS would acquire NetSpend, however, the Directors' *Revlon* duties applied. In agreeing to continue the vitality of the DADW provisions of the Standstill

[229] Long. Aff., Ex. 2, Proxy at A-56. Though Section 6.16 has a fiduciary out, it is likely ineffective, because the standstill agreements themselves operated to preclude the communication of a superior offer. Without that communication, the Board would have no reason to invoke the fiduciary out and waive the standstills. Therefore, the fiduciary out provided only an illusory benefit.

[230] *See In re Complete Genomics S'holder Litig.*, C.A. No. 7888-VCL, at 14-18 (Del. Ch. Nov. 27, 2012) (TRANSCRIPT).

Agreements, the Board blinded itself to any potential interest from Private Equity A and Private Equity B. These were the only two entities which had recently expressed an interest in acquiring at least a large minority position in NetSpend, and they had recently performed due diligence. Furthermore, Private Equity A had actually made an offer.

Most problematically, it does not appear that the Board even considered whether the standstill agreements should remain in place once the Board began negotiating with TSYS, which would have been the ideal time to waive the DADW clauses.[231] Upon entering into the Merger Agreement, NetSpend lost the right to waive the DADW clauses, because the Merger Agreement requires TSYS's consent before NetSpend waives the DADW clauses.[232] The record suggests that the Board did not consider, or did not understand, the import of the DADW clauses and of their importation into the Merger Agreement. In order to fulfill its fiduciary duty to construct a sales process reasonably designed to maximize value, the action of the Board must be informed, and "logical and reasoned."[233] Nothing in the record indicates that the retention by the Board of the DADW provisions, or in the

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[231] *See* Henry Dep. 169:10-24 (testifying that he did not recall the Board discussing Private Equity A or Private Equity B in January 2013). *See also id.* at 72-77 (testifying that he was not aware of the DADW clauses when the confidentiality agreements were entered into and did not understand their effects at the time); Schley Dep. 46:15-53:5 (testifying that he was aware of the DADW clauses but did not know when they terminated and could not recall whether the Board discussed the clauses terminating upon the announcement of the sale to TSYS).
[232] Oral Arg. Tr. 107-09 (explaining that the DADW clauses had not been waived because TSYS's consent was required before NetSpend had the power to waive the clauses).
[233] *Dollar Thrifty*, 14 A.3d at 898-99.

Board's importation of the provisions in the Merger Agreement, was informed, logical and reasoned.

NetSpend argues that any failure to remove the DADW provisions is *macht nichts*, because NetSpend believes that neither Private Equity A nor Private Equity B is interested in bidding for NetSpend. NetSpend's sanguine confidence is misplaced. NetSpend cannot have known with certainty that those entities are uninterested in NetSpend. It may be true that the likelihood that Private Equity A or Private Equity B will come forward with a competing offer for NetSpend is small. But the fact that Private Equity A offered $12 and Private Equity B declined to bid for a *minority* stake in NetSpend does not necessarily mean that those entities are uninterested in purchasing 100% of NetSpend.[234] In truth, the Board would never know if Private Equity B or Private Equity A was interested in making a bid unless the DADW clauses were removed. Therefore, it seemed appropriate to me, at oral argument, that the DADW clauses be enjoined.[235]

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[234] If NetSpend and TSYS are so certain that waiving the DADW clauses would be a "futile act," why did TSYS insist on incorporating them into the Merger Agreement? If both Private Equity A and Private Equity B are truly uninterested in NetSpend, then TSYS should have no fears of those entities upsetting its acquisition.

[235] As the Chancellor has pointed out, DADW provisions can have value, in that they produce pressures to bid high akin to those achieved in a sealed bid auction. *See In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS, at 225-26 (Del. Ch. Dec. 17, 2012) (TRANSCRIPT). Given that the clauses here are merely an artifact from an earlier Board strategy (to remain an independent entity), and given that they are here employed to lock up a *single bidder sale*, none of that utility can apply here.

In fact, shortly after oral argument, TSYS consented to NetSpend's waiver of the DADW clauses in the standstill agreements.[236] The Defendants have notified Private Equity A and Private Equity B that the clauses have been waived,[237] and that I directed the Defendants to inform me by noon, May 17, 2013 whether either entity expressed an interest in acquiring NetSpend.[238] As of that time, NetSpend had received no indication that either entity has any interest in submitting an offer.[239] The withdrawal of the DADW clauses after oral argument does not affect my analysis of the reasonableness of the process, although it does inform my decision on relief, as described below.

v. The Combination of the Lack of Market Check, Reliance on BofA's Fairness Opinion, and Acquiescence to Strong Deal Protections including the DADW clauses is Unreasonable.

Faced with the particular facts I have described above—the lack of a market check at any stage in this process; the Board's reliance on a weak fairness opinion; the deal protections, including the DADW clauses, which were incorporated into the Merger Agreement; and the lack of an anticipated leisurely post-agreement process which would give other suitors the opportunity to appear—I believe that the Defendants will fail to meet their burden at trial of proving that they acted

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[236] *See* Oral Arg. Tr. 105-12.
[237] *See* Letter to the Court from Stephen C. Norman, Esq. 1, May 10, 2013.
[238] *See* Letter to the Parties from the Court 1, May 16, 2013.
[239] *See* Letter to the Court from Stephen C. Norman, Esq. 1, May 17, 2013.

reasonably to maximize share price. Though several of these facts, alone, are not outside the range of reasonable actions the Board could take, in their aggregate, these facts indicate a process that is unreasonable. In particular, in failing to waive the DADW provisions prior to entering the Merger Agreement, and in agreeing to forgo the right to waive them in the Merger Agreement, without considering or understanding the effect this would have on its duty to act in an informed manner, the Board acted unreasonably. The sale process, reviewed as a whole, was unreasonable.

In contrast, an example of a successful single-bidder sale can be found in *Pennaco*. In that case, the Pennaco board intentionally conducted a single-bidder process similar to the process undertaken here. Then-Vice Chancellor Strine upheld the Pennaco board's sales process as reasonable. In that case, the Pennaco board had bargained hard for loose deal protections to ensure "that an effective post-agreement market check would occur."[240] The board had negotiated to obtain a non-restrictive no-shop clause and to reduce the termination fee from 5% to 3%.[241] Including matching rights, these were the only deal protections.[242] Finally, despite the presence of the loose no-shop clause, Pennaco and its board contacted other potential bidders before the deal closed to see if any other entity was

240 *In re Pennaco Energy, Inc.*, 787 A.2d 691, 707 (Del. Ch. 2001).
241 *Id.* at 702.
242 *Id.* at 702-03.

interested in acquiring Pennaco. Citing *Barkan*, the Court upheld this sales process as reasonable. But, in dicta, the Court noted that in choosing to proceed without a market check, "the validity of the Pennaco board's decision to proceed in the manner it did *would be subject to great skepticism had the board acceded to demands to lock up the transaction from later market competition*."[243] The Court continued: "if the merger agreement with Marathon contained onerous deal protection measures that presented a formidable barrier to the emergence of a superior offer, the Pennaco board's failure to canvass the market earlier might tilt its actions toward the unreasonable."[244] The Court distinguished that "unreasonable" hypothetical from the facts in *Pennaco* where "the Pennaco board was careful to balance its single buyer negotiation strategy by ensuring that an effective post-agreement market check would occur."[245]

Here, I believe the NetSpend Board has manifested the *Pennaco* Court's prophesy of an unreasonable single-bidder process. As I noted above, I believe NetSpend's decision to conduct a single-bidder process was reasonable at the time the decision was made. After taking that decision, however, once the Board had a clear indication that a sale to NetSpend would occur without a formal market check, the Board had a duty to follow a careful sales process to inform itself

[243] *Id.* at 707 (emphasis added).
[244] *Id.*
[245] *Id.*

otherwise that it had achieved the best price. Instead, the combination of the Board's single-bidder strategy, the failure to obtain a go-shop period or otherwise solicit other acquirers post-agreement[246] (including through providing sufficient time, post merger, for a suitor to appear),[247] the reliance on a weak fairness opinion and, in particular, the failure to waive the DADW clauses, resulted in the Board's approving the merger consideration without adequately informing itself of whether $16.00 per share was the highest price it could reasonably attain for the stockholders.

It is this combination of factors which distinguishes the case before me today from *Pennaco*, *Smurfit-Stone*, *Plains*, and other cases in which this Court has found reasonable a sales process in which a corporate board declined to test its estimate of the company's value against the market. As noted above, the challenged merger in *Pennaco* featured loose deal protections, and the board in fact shopped the company before the merger closed. In both *Smurfit-Stone* and *Plains*, the directors were informed by de facto market checks. Furthermore, in none of those cases did the directors preclude likely buyers from entering the bidding process through an illogical use of don't-ask-don't-waive restrictions. The

[246] Other than Strategic Co. D, which NetSpend was required to notify by contract.

[247] In fact, the closing period was subsequently significantly extended, a fact unrelated to the reasonableness of the process, but relevant to the remedy, as I discuss below.

directors had a duty to maximize price through an informed process.[248] The Directors would have the burden of proving that they were fully informed at trial. Given these facts, it is reasonably likely that the Directors would fail to meet that burden.[249]

C. Irreparable Harm and Balance of the Equities

As noted above, the Plaintiff bears the burden of showing that she will suffer irreparable harm in the absence of an injunction and also that the balance of hardships weighs in her favor. This Court has emphasized that the plaintiff's burden of persuasion is difficult to bear,[250] because a preliminary injunction is an "extraordinary remedy" that will only enter if the plaintiff demonstrates "that [an injunction] is urgently necessary, that it will result in comparatively less harm to

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[248] *See Netsmart*, 924 A.2d at 195 n.76 ("[W]hen [the directors] do not possess reliable evidence of the market value of the entity as a whole, the lack of an active sales effort is strongly suggestive of a *Revlon* breach.") (emphasis removed). Under *Revlon*, in general, "there is less tolerance for slack by directors." *Netsmart*, 924 A.2d at 192. The issue of whether the directors are adequately informed is particularly important in cases in which there has been no market canvass, since "[t]he goal of the canvassing requirement is to ensure that a board has adequately informed itself as to whether it is getting the best deal reasonably possible for the shareholders." *In re Vitalink Commc'ns Corp. S'holders Litig.*, 1991 WL 238816, at 1327 (Del. Ch. Nov. 8, 1991). Without that canvass, the directors need reliable and complete information to make an informed decision. *See Barkan*, 567 A.2d at 1278.

[249] Because section 102(b)(7) immunizes directors against liability for breaches of the duty of care, in reality these claims would fall out at trial, since proving breaches of the duty of care would result in no damages for the stockholders. Therefore, trial on these issues is unlikely.

[250] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 839 (Del. Ch. 2011) ("This element [demonstrating that the balance of the hardships favors an injunction] is by far the most difficult.").

the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently."[251]

The Plaintiff here asserts that she will suffer irreparable harm in the absence of an injunction, because the Board's flawed sales process, described above, likely produced an inadequate price.[252] She seeks a postponement of the closing for a sufficient period during which the deal-protection devices would be inoperative, presumably allowing topping bids to emerge. As noted above, all the Plaintiff's disclosure claims are either without merit or have been mooted by agreement of the parties. Accordingly, the Plaintiff's *Revlon* claims are the only basis for potential irreparable harm. The Defendants contend that a simple allegation of inadequate price cannot support a finding of irreparable harm, because the Plaintiff can be adequately compensated through an appraisal action.

This Court has broad discretion when making a determination of whether or not the Plaintiff faces the threat of irreparable harm.[253] I need not find that the threatened injury is entirely "beyond the possibility of repair by money

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[251] *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).
[252] It is interesting to note, although it does not inform this Opinion, that, in Delaware at least, the only stockholder to seek injunctive relief holds, per her counsel, "a couple hundred shares" out of a total of 69,696,288 common shares outstanding. *See* Oral Arg. Tr. 32:20-21. *See also* Kelly Aff., Ex. 1, Schedule 14A, at 1. The mathematics is obvious, but let me make it explicit: assuming "a couple" to mean "two," even if the relief sought could achieve a *25 percent increase in price* (a result which nothing in the record indicates is possible), the return to the Plaintiff would be *$800*. If the deal should come a cropper, and the Plaintiff be relegated to the market price, her loss would be correspondingly minimal.
[253] *T. Rowe Price Recov. Fund, L.P. v. Rubin*, 770 A.2d 536, 557 (Del. Ch. 2000).

compensation."[254] If an alternative legal remedy is not "clearly available and as practical and efficient . . . as the remedy in equity," I may find the threatened harm is irreparable and that it supports injunctive relief.[255] This standard may be satisfied in a case in which damages are especially difficult to calculate.[256]

In the case before me today, I find that these facts suggest that the threatened harm facing the stockholders is irreparable. It is true that the stockholders retain appraisal rights. However, the decision whether to tender or seek appraisal itself involves risk here, in light of the lack of a reliable indication of value and the substantial market premium which the deal provides. Furthermore, money damages arising from the breach itself will be unavailable, because the directors have been exculpated under a § 102(b)(7) provision in the Charter, and in any

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[254] *Id.*

[255] *Id.* (quoting Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 10–2(b)(3), 702 (1998)).

[256] *Sealy Mattress Co. of NJ, Inc. v. Sealy, Inc.*, 532 A.2d 1324, 1341 (Del. Ch. 1987). In the context of merger litigation, this Court has adopted no categorical rule that harm arising from a *Revlon* claim is or is not irreparable; such a determination is made on a case-specific basis. In some instances, the Court has found that the possibility that a stockholder has been deprived of maximum value for his shares is irreparable. *See Del Monte*, 25 A.3d at 838 (Del. Ch. 2011) ("Absent an injunction, the Del Monte stockholders will be deprived forever of the opportunity to receive a pre-vote topping bid in a process free of taint from Barclays' improper activities."). In other instances, the Court has denied injunctive relief because stockholders may obtain monetary damages or relief through an appraisal action. *E.g.*, *Smurfit-Stone*, 2011 WL 2028076, at *26 ("Plaintiffs still may seek money damages as compensation for the Board's alleged breaches of their fiduciary duties. They also may vote against the merger and seek appraisal for their shares under 8 *Del. C.* § 262. Thus, I hold that Plaintiffs have failed to carry their burden to show they face a threat of irreparable harm in the absence of preliminary injunctive relief."), *revised* (May 24, 2011).

event would be exceedingly difficult to calculate.[257] Accordingly, I find that the Plaintiff has met her burden of showing that she faces threatened irreparable harm in the absence of an injunction.

However, this is not the end of my analysis. In addition to demonstrating that she faces irreparable harm in the absence of the injunction, the Plaintiff also bears the burden of showing that the *magnitude* of the harm absent an injunction exceeds the potential harm of an injunction. As then-Vice Chancellor Strine explained in *Netsmart*,

> In . . . cases when a potential Revlon violation occurred but no rival bid is on the table, the denial of injunctive relief is often premised on the imprudence of having the court enjoin the only deal on the table, when the stockholders can make that decision for themselves. The difference in these contexts is not really about the irreparability of the harm threatened to the target stockholders as a theoretical matter, it is really about the different cost-benefit calculus arising from throwing the injunction flag.[258]

In a merger case such as this one, this Court is "particularly reticent . . . to enjoin a transaction that affords stockholders a premium in the absence of a competing offer."[259] Such an injunction may issue only where the Court is confident that (1) the Plaintiff's legal claims are strong, and (2) the risks to the stockholders'

[257] Though the Court in *Smurfit-Stone* declined to find that the presence of a § 102(b)(7) charter provision constituted a basis for finding irreparable harm, 2011 WL 2028076, at *26 n.172, other cases have held that a defense to damages because of § 102(b)(7) can support injunctive relief. *See, e.g.*, *Del Monte*, 25 A.3d at 838 ("Exculpation under Section 102(b)(7) can render empty the promise of post-closing damages.").
[258] *Netsmart*, 924 A.2d at 208.
[259] *Abrons v. Maree*, 911 A.2d 805, 810 (Del. Ch. 2006); *see also Kohls v. Duthie*, 765 A.2d 1274, 1289 (Del. Ch. 2000).

financial interests are small.[260] This Court has, in prior cases, refused to enjoin a premium transaction notwithstanding the fact that plaintiffs had demonstrated likely success on the merits of a claim for breach of fiduciary duty and the threat of irreparable harm.[261]

In the instant case, the Plaintiff has presented little evidence establishing the *magnitude* of the harm that she, and other stockholders, face as a result of the inadequate sales process that the NetSpend directors conducted.[262] I noted in my analysis of the *Revlon* claim that the parties did not provide for a leisurely post-agreement period which could provide a passive market check. As things have played out,[263] however, such a period has occurred, three months have passed, the market presumably has been informed that the Company was for sale during that time, but no suitor has appeared. In fact, NetSpend appears more Rapunzel than Penelope; she must, it seems, let down her hair or go unrequited.[264] The only fact of record concerning alternative bids for NetSpend is that Private Equity A expressed interest in purchasing a minority stake in NetSpend for $12.00 at a time

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[260] *Solash v. Telex Corp.*, 1988 WL 3587, at *13 (Del. Ch. Jan. 19, 1988).

[261] *E.g.*, *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 447 (Del. Ch. 2012) (finding the plaintiff would likely prevail on the merits and that it faced irreparable harm, but declining to provide injunctive relief).

[262] Although, "[a]fter-the-fact inquiries into what might have been had directors tested the market adequately . . . necessarily involve reasoned guesswork." *Netsmart*, 924 A.2d at 207.

[263] The parties contemplated an April closing, but litigation and revising the proxy delayed closing for approximately six weeks.

[264] *Compare* Homer, *The Odyssey*, Butler translation, Book XXI *with* Jacob Grimm and Wilhelm Grimm, *Rapunzel*.

when the Company's stock price was trading between $11.20 and $11.65 per share. If Private Equity A had been interested in pursuing a purchase of the whole company, presumably it would have been willing to pay a control premium. Private Equity A has failed to come forward once informed that the DADW provisions had been lifted, however, as has the other entity so restricted, Private Equity B.

In fact, to establish the quantum of irreparable harm here, the Plaintiff relies solely on the flawed process that the NetSpend Board used throughout the negotiation of the sale as evidence of the value that NetSpend stockholders may lose by accepting the deal with TSYS. It is noteworthy that the Plaintiff points out the flaws in BofA's Fairness Opinion, but offers no competing evidence of value. In my judgment, in light of the failure of any entity—during what turns out to have been a lengthy period between the Agreement and the closing—expressing an interest in the Company, or any other indication that a comparable, let alone superior, offer may emerge, the irreparable harm threatened is small, and the possibility of a benefit arising from delaying the closing and imposing a go-shop correspondingly low.

Though the benefit of the injunction may be low, so too is the risk of harm arising from an injunction, under the facts here, low. The Merger Agreement contains a severability clause which would allow me to postpone the closing date of the Merger without affecting the parties' other bargained-for contractual rights. Because NetSpend could still seek contractual remedies, including specific performance, if TSYS refused to close the Merger after a go-shop imposed by injunction, the risk of harm to stockholders is low. The relevant risk is only that further delay will cause the deal to fall through because of the coincidental occurrence of a material adverse change or security breach, events that would release TSYS from its obligations under the contract.[265] I note that the parties have on two different occasions agreed to postpone the closing date of the merger, once from mid-April to May 22, and again from May 22 to May 31. I see no indication that the parties would be unable to consummate the deal if the merger were further delayed for a reasonable period to perform a market check, absent an unforeseen material change in circumstances.[266]

Any injunction, therefore, would likely be of marginal benefit, but would, *absent* a material adverse change or security breach, likely cause no harm. If, however, a material change *did* occur, causing the deal to fail, the harm resulting from the imposition of injunctive relief could be quite large. Lost would be the stockholders' opportunity to receive a substantial premium over the market value of their shares, an opportunity that might never again present itself. In light of that

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[265] Long Aff. Ex. 2, Proxy at A-10, §§ 3.1, 3.22(b) (providing that TSYS can walk away in the event of a Material Adverse Effect or a Material Security Breach).).

[266] NetSpend's proposed deal with Strategic Co. A fell through in 2009 due to the enactment of the Durbin Amendment. *See* Henry Dep. 50:2-15.

fact, imposition of this risk upon the stockholders would be an act, in the Chancellor's pungent wording, of hubris.[267]

The glaring flaw in the Board's process, the thoughtless incorporation of the DADW provisions in the Merger Agreement, poses little risk of irreparable harm, because the affected entities have shown no interest in acquiring NetSpend once the DADW provisions were withdrawn. In light of this Court's established precedent disfavoring injunctions of premium deals in the absence of an alternative bidder, and in light of the fact that the Plaintiff bears the burden of persuasion in order for an injunction to issue, I find that the balance of the harms weighs against issuing an injunction in this case.

IV. CONCLUSION

Because I find that the Directors are unlikely to meet their burden at trial of proving that they acted reasonably throughout the sale process to TSYS, the Plaintiff has shown a likelihood of success on the merits of her *Revlon* claim.[268] Nonetheless, although the Plaintiff has established a likelihood of some irreparable harm absent an injunction, the Plaintiff has failed to carry her burden of persuasion

[267] *See Netsmart*, 924 A.2d at 208 ("It would be hubristic for me to take a risk of that kind for the Netsmart stockholders, and the plaintiffs have not volunteered to back up their demand with a full bond.").

[268] In holding that the Defendants will likely fail to meet their burden to prove at trial that they engaged in a reasonable *process*, I make no finding with respect to the substance of the Board's recommendation. That is, I make no finding regarding whether $16.00 per share is, in fact, adequate or whether there is another buyer out there who would be willing to pay more than that price. Instead, I find that the process undertaken by the Board was defective.

that the balance of the equities favors enjoining the deal, even for a temporary go-shop period. For that reason, the Plaintiff's Motion for a Preliminary Injunction is denied. An appropriate Order accompanies this Memorandum Opinion.