IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ALLOY, INC. SHAREHOLDER LITIGATION	)))	C.A. No. 5626-VCP

MEMORANDUM OPINION

Submitted: June 6, 2011
Decided: October 13, 2011

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PARSONS, Vice Chancellor.

This case is a class action brought on behalf of the former shareholders of Alloy, Inc. ("Alloy" or the "Company") challenging a going-private transaction (the "Merger") that cashed out the Company's public shareholders for allegedly inadequate consideration. Although the shareholders voted to approve the Merger, two of Alloy's nine directors retained their senior management positions at and received an equity interest in the now privately-held Company. The former shareholders claim that those two directors thus unfairly extracted for themselves an opportunity to share in Alloy's continued growth without offering the same opportunity to the public shareholders. Specifically, they allege that those two directors breached their fiduciary duty of loyalty, that the other seven directors of Alloy were dominated and controlled by the two self-interested directors, and that all nine of the Alloy directors breached their duty of disclosure by omitting material facts in the preliminary proxy statement the Company filed with the SEC in connection with the shareholder vote on the Merger (the "Preliminary Proxy"). In addition, the former shareholders assert a claim for aiding and abetting the Alloy directors' breaches of fiduciary duty against the investor group that now controls Alloy.

This matter is before me on three motions by the various defendants to dismiss the Consolidated Amended Class Action Complaint (the "Complaint") in its entirety pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim on which relief may be granted. Among the considerations relevant to the defendants' motions are the facts that, at this point, the only relief the plaintiffs seek is money damages and Alloy's certificate

of incorporation includes an exculpatory provision in accordance with 8 *Del. C.* § 102(b)(7).

Regarding the alleged breaches of fiduciary duty by the directors in negotiating and approving the Merger, I find that the Complaint fails to state a claim for damages because it does not allege sufficient facts from which one reasonably could infer that a director defendant breached his fiduciary duty of loyalty or did not act in good faith. Similarly, I find that the Complaint fails to allege sufficient facts to support an inference that the alleged disclosure violations were the product of anything other than good faith omissions by the directors who authorized them. Because of the exculpatory provision of Alloy's certificate of incorporation, the Complaint thus fails to state a claim for damages against the Alloy directors for breach of their duty of disclosure. Finally, having determined that the Complaint does not state any claim for breach of fiduciary duty against the directors of Alloy, I also dismiss the claims for aiding and abetting against the defendants who were not affiliated with Alloy.

Therefore, for the reasons stated in this Opinion, I grant the defendants' motions to dismiss in all respects.

I. BACKGROUND

A. The Parties

There are two lead plaintiffs in this class action: the City of Livonia Employees Retirement System and Joshua Teitelbaum (collectively, "Plaintiffs"). Plaintiffs filed this action on behalf of themselves and all other similarly situated Alloy shareholders against

sixteen defendants, including Alloy, the nine members of Alloy's board of directors, and six other business entities involved in the Merger.

Defendant Alloy is a media and marketing company best known for creating entertainment properties such as *Gossip Girl*, *The Sisterhood of the Traveling Pants*, *The Vampire Diaries*, and *Pretty Little Liars*. Alloy is a Delaware corporation with its principal place of business in New York City. Before the Merger, Alloy's common stock was publicly traded on the NASDAQ Global Market.

Defendants Matthew C. Diamond and James K. Johnson, Jr. founded Alloy in 1996 and have been members of Alloy's board of directors since that time. Since 1999, Diamond has served as Alloy's Chief Executive Officer and Chairman of the Board, and Johnson has served as its Chief Operating Officer. Before the Merger, they were Alloy's only employee directors.

Defendants Matthew A. Drapkin, Anthony N. Fiore, Samuel A. Gradess, Peter M. Graham, Jeffrey Jacobowitz, Edward A. Monnier, and Richard E. Perlman were all members of Alloy's board of directors and involved in negotiating and approving the Merger.

Alloy, Diamond, Johnson, Drapkin, Fiore, Gradess, Graham, Jacobowitz, Monnier, and Perlman collectively are referred to herein as the "Alloy Defendants."

Defendant ZelnickMedia LLC ("ZelnickMedia") is a Delaware limited liability company with its principal place of business in New York City. ZelnickMedia wholly owns two Delaware business entities, also located in New York City, that were formed

for the purpose of effecting the Merger: Defendants Alloy Media Holdings, L.L.C. ("Holdings") and Lexington Merger Sub Inc.

Defendant Natixis Caspian Private Equity, LLC is a Delaware limited liability company with its principal place of business in Paris, France.

Defendant Rosemont Solebury Co-Investment Fund, L.P. is a Delaware limited partnership with its principal place of business in New York City.

Defendant GenSpring Family Offices, LLC is a Florida limited liability company with its principal place of business in Palm Beach Gardens, Florida.

ZelnickMedia, Holdings, Lexington Merger Sub Inc., Natixis Caspian Private Equity, LLC, Rosemont Solebury Co-Investment Fund, L.P., and GenSpring Family Offices, LLC collectively are referred to herein as the "Non-Company Defendants."

B. Facts[1]

1. Alloy's business

Alloy is one of the country's largest providers of media and marketing programs, offering advertisers the ability to reach primarily youth and young adult consumers through digital advertising, display boards, direct mail, content production, and educational programming. For example, as of June 2010, Alloy owned, among other properties, (1) various websites that reach an audience of 51 million visitors aged 12 to 24 per month, (2) the recently launched Alloy TV, which delivers original, short-form

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[1] Unless otherwise noted, the facts recited below are drawn from the Complaint and presumed true for purposes of Defendants' motions.

video programming tailored to youth and young adult audiences, and (3) Channel One, an in-school broadcast network reaching nearly six million young people. Also on or about June 7, 2010, Alloy sold its FrontLine in-store marketing division for $36 million so that management could increase their focus on the Company's media and entertainment businesses. Two days later, in a Form 10-Q filed with the SEC, Alloy stated its intent "to continue to expand our Media segment . . . to increase long-term profitability and shareholder value."[2] Approximately one week later, Alloy announced promising financial results for the first quarter of its 2010 fiscal year, including a 15% increase in revenue and a $1.4 million increase in adjusted EBITA compared to the prior year's first quarter.

2. Alloy begins to consider a merger

Perhaps because of its financial success in late 2009, Alloy received an indication of interest from an undisclosed financial buyer ("Bidder A") sometime in the fall of 2009. In response to that indication, on November 16, 2009, the Alloy board formed a special committee to review, evaluate, negotiate, and approve or disapprove any proposals from or agreements with potential acquirors of the Company (the "Special Committee"). Initially, the Special Committee comprised Graham, Gradess, Monnier, and Perlman, with Graham serving as chairman. Because the board contemplated the possibility of a going-private transaction with management maintaining some equity interest and operational role in the surviving entity, the board did not include Diamond and Johnson,

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[2] Consolidated Amended Class Action Complaint ("Compl.") ¶ 34.

Alloy's only inside directors, on the Special Committee. In addition to being directors and principal officers of Alloy, Diamond and Johnson held, collectively, approximately 15% of Alloy's outstanding shares.

The board engaged Kramer, Levin, Naftalis & Frankel LLP as legal counsel to the Special Committee and Macquarie Capital (USA) Inc. ("Macquarie") as financial advisor to *both* the Company and the Special Committee. According to Alloy's Preliminary Proxy, the Special Committee approved the retention of Macquarie because of its reputation and capabilities, its prior experience with Graham, and its lack of any prior relationship with Alloy management.[3] Macquarie then presented the full board with a spectrum of strategic options to consider, including maintaining the status quo, returning capital to stockholders, divesting non-core assets, and pursuing a sale of the Company. Macquarie further identified sixteen potential strategic and financial buyers. The Special Committee concluded, however, that it was unlikely to find a strategic buyer and decided to focus instead on potential management-led going-private transactions with financial

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[3] Alloy, Inc., Preliminary Proxy Statement (Schedule 14A) ("Prelim. Proxy") 16 (July 21, 2010). The allegations in Plaintiffs' Complaint regarding the Special Committee's engagement of Macquarie explicitly refer to Alloy's Preliminary Proxy and characterize the contents of that document. Compl. ¶ 39. Elsewhere in the Complaint, Plaintiffs directly quote from the Preliminary Proxy. Accordingly, the Court takes judicial notice of that public disclosure. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used [on a motion to dismiss]."); *Solomon v. Armstrong*, 747 A.2d 1098, 1122 n.72 (Del. Ch. 1999) (taking judicial notice of facts publicly available in SEC disclosures and documents incorporated by reference into the complaint when considering a motion to dismiss).

buyers. Upon receiving that direction, Macquarie contacted twelve potential financial buyers.

In December 2009, Bidder A informed Macquarie that it was no longer interested in acquiring Alloy. ZM Capital Management, LLC,[4] a potential financial buyer contacted by Macquarie, however, did indicate interest and entered into a nondisclosure agreement with Alloy on December 30, 2009.

3. ZelnickMedia makes an offer

In early 2010, ZelnickMedia attended several introductory and due diligence meetings with Macquarie and Alloy employees, including Diamond and Johnson. One meeting, attended by both Diamond and Johnson, occurred over dinner at the home of ZelnickMedia's founder, Strauss Zelnick. On March 16, 2010, ZelnickMedia made an oral offer to acquire Alloy for $8.75 per share. The following day, ZelnickMedia made a more detailed written offer of $9.00 per share in cash. ZelnickMedia, however, conditioned its offer on, among other things, retention of Alloy's senior management, including Diamond and Johnson.

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[4] The Complaint appears to refer to ZM Capital Management, LLC and ZelnickMedia interchangeably as if they are the same entity. In addition, the Non-Company Defendants note that "Plaintiffs have cited the incorrect entity names for several of the Non-Company Defendants. For example, Plaintiffs sued ZelnickMedia instead of its affiliate, ZM Capital, L.P." Non-Company Defs.' Op. Br. 1 n.1. The Non-Company Defendants, however, have not moved to dismiss any of Plaintiffs' claims on this basis. Moreover, Plaintiffs' possible errors in this regard do not affect the Court's analysis. Therefore, for purposes of Defendants' motions, the Court hereinafter refers to ZM Capital Management, LLC, ZM Capital, L.P., and ZelnickMedia, individually and collectively, as ZelnickMedia.

Also on March 17, Alloy received a letter from a group of dissident shareholders affiliated with Drapkin threatening to wage a proxy contest at the next annual shareholders meeting to elect three persons to the Company's board of directors. The Company assuaged the dissidents by appointing Drapkin and Jacobowitz to the board. Once appointed, Drapkin and Jacobowitz, along with Fiore, were appointed to the Special Committee. Thus, the Special Committee ultimately consisted of all seven of Alloy's outside directors, two of whom were affiliated with shareholders openly critical of management.

Between the middle of March and late June 2010, the Special Committee pursued negotiations with ZelnickMedia in earnest. During that process, ZelnickMedia incrementally increased its bid several times, first to $9.45 per share and ultimately to $9.80 per share, equal to a total acquisition price of $126.5 million. At all times, ZelnickMedia's offer remained all cash but contingent on (1) the retention of senior management, including Diamond and Johnson, and (2) management retaining an equity stake in the surviving entity. Plaintiffs criticize these negotiations with ZelnickMedia, complaining that "no alternatives [were] fully-evaluated."[5] In response, the Alloy Defendants emphasize that, as alleged in the Complaint, Macquarie contacted twelve potential buyers, but only ZelnickMedia submitted a bid.[6]

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5 Compl. ¶ 45.

6 Alloy Defs.' Op. Br. 7 (citing Prelim. Proxy 20-21).

4. The Special Committee recommends, and the board approves, the Merger

By June 23, 2010, the Special Committee and ZelnickMedia had come to terms on the proposed Merger. The relevant terms included: (1) Alloy would become a wholly-owned subsidiary of Holdings (itself wholly owned by ZelnickMedia) in exchange for an all cash payment to Alloy's public shareholders of $9.80 per share; (2) Alloy would continue to employ Diamond and Johnson as CEO and COO, respectively; (3) Diamond and Johnson would exchange a portion of their Alloy shares for, in the aggregate, approximately 15% of the shares of Holdings; and (4) Diamond and Johnson each would be granted an initial profits interest in Holdings representing 3.5% of its fully diluted equity.

Also on June 23, Macquarie provided the Special Committee with its opinion that the terms of the Merger were fair from a financial point of view to Alloy's unaffiliated shareholders.[7] The Special Committee then determined unanimously that the terms of the Merger were fair to Alloy's public shareholders and in the best interests of the Company. On that basis, the Special Committee recommended that the full board approve the Merger. Additionally, the Special Committee recommended that Graham receive a one-time payment of $100,000 for serving as its chairman throughout the negotiations. In turn, the full board unanimously (1) determined that the Merger was fair and in the

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[7] Compl. ¶ 67; Prelim. Proxy 24.

Company's best interests, (2) approved the Merger, and (3) approved the special payment to Graham.[8]

Alloy announced the Merger on June 24, 2010, one week after it had announced its positive first quarter results. The acquisition price of $9.80 per share represented a 14% premium over Alloy's $8.59 closing price on June 23 and, according to Alloy's Preliminary Proxy, a 27% premium over the average closing price for the last thirty days prior to June 23.[9] On June 28, Teitelbaum filed a class action complaint in this Court against the Alloy Defendants and ZelnickMedia, which later was consolidated with this action.[10]

5. Alloy submits the Merger for shareholder approval

On July 21, Alloy filed its Preliminary Proxy with the SEC. The Preliminary Proxy, among other things, detailed the background of the negotiation process, Graham's receipt of the $100,000 payment, Diamond's and Johnson's personal interests in the Merger terms, and Macquarie's financial analysis and valuation of Alloy.[11] It also included Macquarie's written fairness opinion of June 23 as an exhibit.[12] In addition, the

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8 Compl. ¶ 48; Prelim. Proxy 30.

9 Prelim. Proxy 10.

10 Class Action Complaint, Teitelbaum v. Diamond et al., Del. Ch. C.A. No. 5604-VCP.

11 The Complaint alleges numerous deficiencies with Macquarie's fairness opinion. Compl. ¶¶ 69-87. To the extent relevant, I describe the substance of those allegations *infra* in the Analysis section of this Opinion.

12 Prelim. Proxy at B-1 to B-4.

Preliminary Proxy disclosed that Macquarie advised Alloy and the Special Committee despite the existence of at least two potential conflicts of interest. First, according to the Preliminary Proxy, the possibility existed that Macquarie might co-invest with Holdings, and its affiliates might co-invest in affiliates of Holdings in the future.[13] Second, Alloy agreed to pay Macquarie's fees "in the sum of up to $2,350,000, a substantial portion of which is contingent upon completion of the merger."[14]

On July 8, 2010, Plaintiff the City of Livonia Employees Retirement System filed its own class action complaint. On July 26, I consolidated that action with Teitelbaum's earlier class action, and Plaintiffs filed their Consolidated Amended Class Action Complaint on August 9.

At a special meeting held on November 8, 2010, the Alloy shareholders voted to adopt the Merger. The Merger closed on November 9 and Alloy common stock was delisted from the NASDAQ Global Market.[15]

C. Procedural History

On August 9, 2010, when Plaintiffs filed their consolidated Complaint, they also moved for expedited proceedings. Following briefing and oral argument, the Court denied that motion on August 25.

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13 *Id*. ¶ 68; Prelim. Proxy 38.

14 Compl. ¶ 68; Prelim. Proxy 39.

15 Alloy, Inc., Current Report (Form 8-K) 1 (Nov. 9, 2010).

Defendants later filed motions to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. In particular, the Alloy Defendants moved to dismiss Count One of the Complaint for breaches of fiduciary duty, and the Non-Company Defendants moved to dismiss Count Two for aiding and abetting those alleged breaches. In addition, Defendants moved to stay discovery pending resolution of their motions to dismiss. After briefing by the parties, the Court heard oral argument on Defendants' motions. At the argument, the parties advised the Court that they had agreed among themselves to stay discovery pending resolution of the motions to dismiss, thereby mooting the motions to stay. This Opinion constitutes the Court's rulings on Defendants' motions to dismiss.

D. Parties' Contentions

In Count One of their Complaint, Plaintiffs claim that the Alloy Defendants breached their fiduciary duties in two respects. First, they assert that the directors of Alloy breached their fiduciary duties in connection with negotiating and approving the Merger. Specifically, Plaintiffs allege that Defendants Diamond and Johnson were interested in the Merger and "control[led] and dominate[d] the information flow both to Macquarie and to the Special Committee,"[16] thus ensuring consummation of the Merger on terms beneficial to themselves but unfair to the public shareholders of Alloy. Plaintiffs also accuse the directors who served on the Special Committee of breaching their fiduciary duties "by allowing themselves to be subjugated to the wills of Diamond

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[16] Pls.' Ans. Br. 20.

and Johnson,"[17] thus eviscerating any cleansing effect that approval by the putatively independent Special Committee otherwise might have had. I refer to these claims as the "Unfairness Claims."

Second, Plaintiffs allege that the directors breached their duty of disclosure by omitting from the Preliminary Proxy material information concerning the financial analysis and valuation of Alloy performed by Macquarie, the retention of Macquarie, and additional information regarding the "genesis" of the Merger and related transactions. I refer to these claims as the "Disclosure Claims."

As to the Unfairness Claims, there is no dispute that Diamond and Johnson were interested in the Merger.[18] Nevertheless, the Alloy Defendants assert that the Special Committee, in fact, was disinterested and independent and that Plaintiffs make only conclusory allegations to the contrary. Moreover, while conceding for purposes of their motion that Macquarie represented both the Special Committee and the Company, the Alloy Defendants argue that the Complaint fails to allege well-pleaded facts sufficient to support a reasonable inference that either the full board or the Special Committee acted disloyally or in bad faith by relying on Macquarie's fairness opinion. Additionally, the

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17 *Id*. at 23.

18 When the board formed the Special Committee on November 16, 2009, it "determined that Defendants Diamond and Johnson . . . should not serve on any such committee, because they would maintain some equity ownership and management role in the surviving entity." Compl. ¶ 38. Similarly, the Preliminary Proxy affirmatively disclosed that Diamond and Johnson may have "actual or potential conflicts of interest . . . ." *Id.* ¶ 47.

Alloy Defendants contend that Plaintiffs have asserted, at most, a claim for breach of the duty of care, and that Alloy's certificate of incorporation contains a provision under 8 *Del. C.* § 102(b)(7) exculpating its directors from monetary liability for such breaches.[19]

Regarding the Disclosure Claims, the Alloy Defendants argue that none of the alleged omissions were material or otherwise required disclosure, that this Court's holding in *In re Transkaryotic Therapies, Inc*.[20] forecloses the possibility of monetary or injunctive relief, and that Plaintiffs have failed to allege specific facts supporting an inference that the alleged disclosure violations resulted from anything other than good faith omissions exculpated by Alloy's certificate.

In Count Two of their Complaint, Plaintiffs claim that the Non-Company Defendants knowingly participated in, and thereby aided and abetted, the Alloy Defendants' breaches of fiduciary duty. Specifically, Plaintiffs assert that the Non-Company Defendants aided and abetted the alleged breaches "[b]y offering or agreeing to the inducements which caused Defendants Diamond and Johnson to become conflicted"

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[19] Alloy Defs.' Op. Br. Ex. H Art. Tenth. As with the Preliminary Proxy, the Court takes judicial notice of Alloy's certificate of incorporation. *See Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001) ("The Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss . . . .").

[20] 954 A.2d 346, 362 (Del. Ch. 2008).

and in continuing to deal with the allegedly conflicted board thereafter, knowing that "the Alloy Board members . . . had abandoned their duty to the Alloy stockholders."[21]

For their part, the Non-Company Defendants first subscribe to the Alloy Defendants' arguments that the Complaint does not state a claim for breach of fiduciary duty and contend that, therefore, there can be no liability for aiding and abetting. Second, the Non-Company Defendants argue that the Complaint fails to allege sufficient facts regarding the elements of a claim for aiding and abetting to survive a motion to dismiss under Rule 12(b)(6).

II. ANALYSIS

A. Legal Standard on a Motion to Dismiss

Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[22] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under

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21 Pls.' Ans. Br. 29.

22 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, __ A.3d __, 2011 WL 3612992, at *5 (Del. Aug. 19, 2011) (footnote omitted).

> any reasonably conceivable set of circumstances susceptible of proof.[23]

Delaware's reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[24] If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, then the court must deny the motion to dismiss.[25] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[26] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[27]

B. The Unfairness Claims

Corporate directors have "an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."[28] When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties "in the

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23 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

24 *Id.* at *5 & n.13.

25 *Id.* at *6.

26 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

27 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

28 *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (citations omitted).

service of a specific objective: maximizing the sale price of the enterprise."[29] So-called *Revlon* duties are only a specific application of directors' traditional fiduciary duties of care and loyalty in the context of control transactions.[30] In that regard, if the corporation's certificate contains an exculpatory provision pursuant to § 102(b)(7) barring claims for monetary liability against directors for breaches of the duty of care, the complaint must state a nonexculpated claim, *i.e.*, a claim predicated on a breach of the directors' duty of loyalty or bad faith conduct.[31]

A factual showing that, for example, a majority of the board of directors was not both disinterested and independent would provide sufficient support for a claim for breach of loyalty to survive a motion to dismiss.[32] "A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[33] "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous

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29 *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citing, among other cases, *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182–83 (Del. 1986)).

30 *Wayne Cty. Empls.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *10 (Del. Ch. July 24, 2009) (citing *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000)), *aff'd*, 966 A.2d 795 (Del. 2010) (TABLE).

31 *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239-40 (Del. 2009); *Corti*, 2009 WL 2219260, at *10.

32 *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) (citing *In re Lukens S'holders Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999)).

33 *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

considerations or influences,"[34] such as where one director effectively controls another.[35] Moreover, as to any individual director, the disqualifying self-interest or lack of independence must be material, *i.e.*, "reasonably likely to affect the decision-making process of a reasonable person . . . ."[36]

Well-pleaded allegations that the board did not act in good faith also would state a claim for breach of the duty of loyalty sufficient to survive a motion to dismiss.[37] In general, "bad faith will be found if a 'fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'"[38] Alternatively, notwithstanding approval by a majority of disinterested and independent directors, a claim for breach of duty may exist "'where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'"[39]

As stated above, Plaintiffs claim that the directors of Alloy breached their fiduciary duties when negotiating and approving the Merger because Diamond and

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34 *Aronson*, 473 A.2d at 816.

35 *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002).

36 *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993).

37 *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (footnote omitted).

38 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

39 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 981 (Del. Ch. 2000) (quoting *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1247 (Del. 1999)).

Johnson were interested in the transaction, dominated the remaining directors, who collectively comprised the Special Committee, and improperly influenced Macquarie's fairness opinion, thereby infecting the entire transaction process with their conflict of interest. In addition, Plaintiffs allege that the consideration paid to the public shareholders was objectively inadequate. The Alloy Defendants contest Plaintiffs' criticisms of the transaction process and price, arguing that Plaintiffs have not shown that the Special Committee failed to act in a disinterested and independent manner or that either the full board or the Special Committee could not rely on Macquarie's fairness opinion in good faith.

1. Was the Special Committee disinterested and independent?

Plaintiffs' Complaint acknowledges that the Special Committee comprised seven directors, none of whom are officers or employees of Alloy or ZelnickMedia and two of whom, Drapkin and Jacobowitz, are affiliated with large stockholders critical of current management. Nevertheless, Plaintiffs argue that the Complaint supports a reasonable inference that, because Diamond and Johnson were interested in the Merger and attended due diligence meetings, they dominated and controlled the Special Committee. They base that inference on the following allegations: (1) the Special Committee blindly followed Macquarie's recommendation to focus on a going-private transaction and did not evaluate fully alternative transactions; (2) as top executives holding 15% of Alloy's stock, "Diamond and Johnson exercise[d] substantial control over the Board";[40] (3)

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[40] Compl. ¶ 51.

Diamond and Johnson possess the best knowledge and experience regarding Alloy's value, thus precluding other directors from negotiating effectively against them and placing management "in a position to threaten any committee with its abandonment of the Company";[41] (4) the participation of Diamond and Johnson "block[ed] and chill[ed] potential competing offers";[42] (5) Directors Graham and Gradess have long-standing relationships with Diamond and Johnson; and (6) Graham received a special payment of $100,000 for serving as chairman of the Special Committee, thereby rendering him personally interested in the Merger. I address each of these allegations in turn.

First, Plaintiffs' criticism of the Special Committee for not evaluating fully alternative transactions does not implicate director self-interest or lack of independence. Even if supported by well-pleaded facts, such a criticism would state at best a claim for breach of the duty of care.[43] Moreover, and as discussed above, Alloy's certificate exculpates directors from monetary liability for breaches of the duty of care. Therefore, this allegation does not support an inference that the Special Committee acted disloyally or in bad faith, nor does it provide Plaintiffs with any basis for nonmonetary relief under any reasonably conceivable set of circumstances.

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41 *Id*. ¶ 53.

42 *Id*. ¶ 54.

43 *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989) ("In our case law since [*Smith v.*] *Van Gorkom*, [488 A.2d 858 (Del. 1985),] our due care examination has focused on a board's decision-making process. We look for evidence as to whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives.").

Second, Diamond's and Johnson's roles as officers and their collective stock ownership of 15% do not, without specific allegations of domination, create an inference that they controlled the board. In that regard, I note the court's discussion of director independence in *In re J.P. Morgan Chase & Co. Shareholder Litigation*[44] on a motion to dismiss a derivative action for failure to satisfy the demand requirement under Rule 23.1. There, Vice Chancellor Lamb found that a majority of the board was independent from the company's CEO, William Harrison, Jr., because

> [t]he board is dominated by outsiders. . . . Harrison cannot fire any of them. Additionally, Harrison is not a controlling stockholder of JPMC and therefore has no power to oust them as directors through a stockholder vote. *On the contrary, it is the eleven outside directors who collectively have the power to dismiss Harrison and the rest of his management team*. The plaintiffs allege that the defendant directors are beholden to Harrison, but they fail to demonstrate why that is so. . . . Here, Harrison reports to a board of directors that he cannot fire or remove, a fact that appears lost in the allegations that each director, no matter how indirectly, has some external relationship to JPMC.[45]

The relationship of Diamond and Johnson to the seven outside directors of Alloy is essentially equivalent to the relationship between Harrison and the eleven outside directors in the *J.P. Morgan Chase* case: Diamond's and Johnson's collective stock ownership of 15% is inadequate to oust the seven outside directors, and those outside directors collectively have the power to remove Diamond and Johnson from their

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[44] 906 A.2d 808 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006).

[45] *Id.* at 821 (emphasis added).

positions as corporate officers. Absent specific allegations of actual control, the facts Plaintiffs allege cannot support a reasonable inference that Alloy's seven outside directors lacked independence.

Third, the conclusory allegation that Alloy's independent directors simply could not negotiate against management consistent with their fiduciary duties does not reasonably follow from the fact that Diamond and Johnson may have possessed the best knowledge and experience regarding Alloy's value, nor have Plaintiffs cited any authority for that conclusion. Similarly, although a threat by management that they would abandon the Company conceivably could provide a primary and extraneous inducement to other directors to recommend the Merger and undermine their independence, Plaintiffs have not alleged that any such threat occurred here. Rather, they allege only that management was "in a *position* to threaten" the Special Committee.[46] These averments, standing alone, represent nothing but "conclusory allegations unsupported by specific facts" and are not sufficient to state a claim.[47]

Fourth, Plaintiffs allege that Diamond's and Johnson's personal interest in the Merger effectively blocked potential competing offers. Yet, they do not allege any well-pleaded facts that would support an inference that no other offers were made *because* Diamond and Johnson were so interested.

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[46] Compl. ¶ 53 (emphasis added).

[47] *See Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011).

I pause at this point to note that Plaintiffs' remaining allegations refer exclusively to Diamond, Johnson, Graham, and Gradess. In other words, Plaintiffs have alleged that, at most, four of Alloy's nine directors had any interest in the Merger or otherwise lacked independence from those who did. Therefore, Plaintiffs allegations are insufficient to support a reasonable inference that a majority of Alloy's board was interested or lacked independence.[48] Moreover, and in any event, I also find that the allegations challenging Gradess's and Graham's independence and disinterestedness (*i.e.*, Plaintiffs' fifth and sixth allegations identified above) are insufficient to support Plaintiffs' claim for breach of fiduciary duty. Plaintiffs have alleged only that Gradess has known Diamond and Johnson "since their days as ex-patriots in Japan in the early 1990's" and that Graham has been "a long standing board member under Johnson and Diamond . . . ."[49] These allegations of professional and personal relationships do not raise a reasonable inference that Gradess and Graham did not base their decision to approve the Merger on the corporate merits.[50] Moreover, to show that Graham's continued employment as a director or his receipt of the special payment for serving as chairman of the Special Committee evidences a disqualifying interest or lack of independence, Plaintiffs would

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48 *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 n.34 (Del. 1993).

49 Compl. ¶ 52.

50 *See Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000) (finding "long-standing 15-year professional and personal" relationship insufficient to doubt a director's independence).

have to allege that either or both were material to Graham.[51] Regarding the special payment of $100,000, specifically, "allegations of pecuniary self-interest must allow the Court to infer that the interest was of 'a sufficiently material importance, in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties without being influenced by her overriding personal interest.'"[52] The Complaint contains no such allegation of materiality, and the circumstances surrounding the decision to grant that payment to Graham do not support a reasonable inference to that effect.

Thus, Plaintiffs have failed to allege well-pleaded facts sufficient to support a reasonable inference that either a majority of the board or the Special Committee was so interested in the Merger or so lacking in independence from Diamond and Johnson that their negotiation and approval of the Merger constituted a breach of the fiduciary duty of loyalty.

2. Did the board or the Special Committee fail to act in good faith?

As stated above, factual allegations that the board did not act in good faith would state a claim for breach of fiduciary duty sufficient to survive a motion to dismiss.[53] The Complaint, however, alleges numerous instances of conduct by the board and Special

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51 *Cede & Co.*, 634 A.2d at 363.

52 *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021 (Del. Ch. May 4, 2005) (quoting *In re GM Class H S'holders Litig.*, 734 A.2d 611, 617-18 (Del. Ch. 1999)), *aff'd*, 897 A.2d 162 (Del. 2006).

53 *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (citing *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009)).

Committee that militate against a claim that the Alloy directors showed a "'conscious disregard for [their] duties.' . . . More importantly, there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."[54] Accordingly, for Plaintiffs to succeed on a claim that the Alloy directors did not act in good faith, Plaintiffs must show that the decision to approve the Merger was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[55]

Plaintiffs attempt such a showing by characterizing the Merger consideration as inadequate and arguing that the board could not have relied in good faith on Macquarie's fairness opinion to the contrary because Macquarie was conflicted. More specifically, Plaintiffs allege that: Macquarie "represented both Alloy (and thus, Diamond and Johnson) and the Special Committee";[56] Diamond and Johnson worked closely with Macquarie, attending most, if not all, of the due diligence meetings; the Preliminary

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54 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)). For example, the board formed the Special Committee, which negotiated with ZelnickMedia for several months, persuaded ZelnickMedia to increase its bid from $8.75 per share to $9.80, and secured for Alloy's stockholders a control premium above the pre-Merger trading price. Compl. ¶¶ 38, 42, 44, 48. These allegations belie an inference that the Alloy directors consciously disregarded their duties.

55 *Turner*, 846 A.2d at 981 (internal quotation marks and citation omitted).

56 Pls.' Ans. Br. 9; *see also* Compl. ¶ 40 (Macquarie "was representing both Alloy (including Defendants Diamond and Johnson as executives thereof) and the Special Committee.").

Proxy discloses that Macquarie might invest in the Merger;[57] and a "substantial portion" of Macquarie's compensation for rendering its fairness opinion is contingent upon completion of the Merger. Consequently, Plaintiffs argue, Macquarie "skewed its valuation in favor of the Merger."[58]

Plaintiffs' allegations largely miss the mark. As a general matter, a board's receipt of a fairness opinion typically supports a factual inference that the board acted properly when deciding to proceed with a transaction.[59] Nevertheless, "fairness opinions . . . are generally not essential, as a matter of law, to support an informed business judgment."[60]

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57 Specifically, the Preliminary Proxy states that Macquarie might co-invest in Holdings, the wholly-owned subsidiary of ZelnickMedia formed to effect the Merger, and that Macquarie's affiliates might invest in affiliates of Holdings in the future. Compl. ¶¶ 9, 68.

58 Pls.' Ans. Br. 9; *see also* Compl. ¶¶ 68-83.

59 *See, e.g.*, *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 n.55 (Del. Ch. 2000) ("The board's reliance upon an investment banker (whose independence and qualifications are not challenged in the complaint) is another factor weighing against the plaintiffs' ability to state an actionable claim that the defendant directors breached their fiduciary duties by failing to secure the highest value reasonably attainable."); *In re Dairy Mart Convenience Stores, Inc.*, 1999 WL 350473, at *13 (Del. Ch. May 24, 1999) ("[A]n outside financial advisor's opinion on the terms of a transaction generally gives the Court comfort with respect to the reasonableness of the board's action . . . ."); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999) (finding board decision to accept bidder's offer without market check reasonable, in part, because of fairness opinion); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994) (fairness opinion of outside financial advisor among the factors supporting a finding that the transaction was entirely fair).

60 *Turner*, 846 A.2d at 984 (citing *Smith v. Van Gorkom*, 488 A.2d 858, 876 (Del. 1985)); *see also Citron v. Steego Corp.*, 1988 WL 94738, 14 Del. J. Corp. L. 634, 649 (Del. Ch. 1988) ("Where, however, the transaction offered is all cash and the

Receipt of a fairness opinion also supports an inference that a board satisfied its duty of care,[61] but that is less important here because Alloy's certificate waives liability for breaches of care. Based on the facts alleged in Plaintiffs' Complaint, I find that, at most, it might be appropriate to infer that the Alloy directors breached their duty of care. The alleged flaws in Macquarie's fairness opinion, however, cannot support a reasonable inference that the board's decision to approve the Merger was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[62]

Furthermore, Plaintiffs' allegations that Macquarie skewed its fairness opinion are generally conclusory and unsupported by specific facts. First, while the Complaint adequately alleges that Macquarie represented both the board and the Special Committee, there are no specific allegations from which one reasonably could infer that Macquarie's representation of the board caused it to further Diamond's and Johnson's *personal* interests, nor have Plaintiffs cited any legal authority to support drawing that inference. Second, Diamond's and Johnson's participation in due diligence meetings, standing alone, does not support an inference that they compromised or otherwise influenced the integrity of Macquarie's work. To the contrary, one would expect a thorough evaluation

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> essential question is the present and future value of the firm, directors with long and intimate contact with the firm may reasonably feel less need for the guidance that investment houses may offer.").

61 *See Van Gorkom*, 488 A.2d at 881.

62 *Turner*, 846 A.2d at 981 (internal quotation marks and citation omitted).

of Alloy to involve those two insiders because, according to Plaintiffs, they had "the best knowledge and experience regarding the Company and its business and strategy."[63] Plaintiffs disagree with the financial analysis Macquarie performed, but the Complaint does not allege with any specificity that Diamond or Johnson caused that analysis to be inaccurate or subpar.[64]

Third, the fact that a substantial portion of Macquarie's compensation is contingent upon consummation of the Merger does not support an inference that Macquarie intentionally undervalued Alloy. As a general matter, "[c]ontingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome."[65] Although this Court has held that stockholders may have sufficient concerns about contingent fee arrangements to warrant disclosure of such arrangements, that need to disclose does not imply that contingent fees necessarily produce specious fairness

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63 Compl. ¶ 53.

64 To the extent Plaintiffs believe that Macquarie's valuation of Alloy and the Merger consideration paid were objectively inadequate, they were free to exercise their rights to appraisal pursuant to 8 *Del. C.* § 262. For purposes of the Alloy Defendants' motion to dismiss, however, those allegations of inadequacy are insufficient to support a claim that, in negotiating and approving the Merger, the full board or the Special Committee acted disloyally or in bad faith.

65 *In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. May 12, 2011); *see also Cty. of York Empls. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (noting, on motion to expedite proceedings, that the "inherent conflict" of an investment banker's contingent compensation "is not unusual").

opinions.[66] In this case, Plaintiffs provide nothing more than conclusory allegations that the presence of a contingent fee structure must have influenced Macquarie, but they do not allege, for example, that the actual compensation received was excessive or extraordinary.[67] In these circumstances, I cannot conclude that a broad salvo against such a common practice, standing alone, supports a reasonable inference that the fairness opinion rendered in this case is so flawed that the Alloy directors could not have relied upon it in good faith.

Finally, to whatever extent allegations of a financial advisor's investment in a transaction might support an inference of bias, I conclude that such an inference would not be reasonable in this case because Plaintiffs have overstated their allegations. The Complaint explicitly refers to the Preliminary Proxy when alleging that Macquarie may co-invest in the Merger.[68] The complete context of that disclosure document, however,

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66 *See Atheros*, 2011 WL 864928, at *8 ("The Court does not imply that [the financial advisor] has committed a wrong here because of the contingent fee arrangement; it simply observes that the incentives are so great that the stockholders should be made aware of them and that this contingent fee structure is material to their decision to support or oppose the Transaction.").

67 *See Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 984 (Del. Ch. 2000) (finding directors had not breached their duty of care when relying on financial advisor alleged to be conflicted by contingent compensation because, among other reasons, the advisor was entitled to compensation and there was nothing to suggest that compensation was excessive or extraordinary).

68 Compl. ¶ 68.

reveals that Macquarie had a less dubious interest in the Merger.[69] According to the Preliminary Proxy, "[a]ffiliates of Macquarie Capital may co-invest with [Holdings] and its affiliates and may invest in limited partnership units of affiliates of [Holdings] in the future" because Macquarie provides "a broad range of securities activities and financial advisory services," which could include, among other interests, holding short or long positions in a variety of financial instruments.[70] The possibility that Macquarie may co-invest in Holdings does not suggest that Macquarie is likely to invest in the Merger. Plaintiffs' allegation that Macquarie may co-invest with Holdings at some indefinite time, thus contextualized, does not support a reasonable inference that Macqurie skewed its valuation of Alloy for its own benefit.

All that remains, therefore, of Plaintiffs' bad faith claim are the allegations that the Merger consideration was inadequate and that Diamond and Johnson will benefit from it. As to the Merger consideration, Alloy shareholders received $9.80 per share, which represents a premium of 14% over Alloy's closing price the day before the Merger was announced and a 27% premium over the average closing price for the thirty trading days before the Merger was announced. I cannot conclude that this price was "so far beyond

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69 *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) ("When a complaint partially quotes or characterizes what a disclosure document says, a defendant is entitled to show the trial court the actual language or the complete context in which it was used [on a motion to dismiss].")

70 Prelim. Proxy 38.

the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[71]

Nor can I infer that the board acted in bad faith because of the benefits inuring to Diamond and Johnson. The cases in which benefits to a member of a target's management have been found sufficient to support a finding of bad faith are readily distinguishable from this case. For example, in *Parnes v. Bally Entertainment Corp.*,[72] the Supreme Court found bad faith where otherwise disinterested and independent directors acquiesced to a merger agreement after the company's chairman and CEO conditioned his approval of *any* merger on his receiving numerous and substantial personal benefits, including cash payments, warrants, stock conversions in excess of $65 million, and the transfer of certain corporate assets.[73] In *Crescent/Mach I Partners, L.P. v. Turner*,[74] this court found bad faith where the company's chairman, CEO, and controlling shareholder secured various "side-deals" not available to the minority shareholders, including, among other things, diversion of cash consideration that otherwise would have been merger consideration and redemption of six million of his—and only his—shares to ensure personal tax advantages not available to the minority.

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71 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 981 (Del. Ch. 2000) (internal quotation marks and citation omitted).

72 722 A.2d 1243 (1999).

73 *Id.* at 1246.

74 846 A.2d 963 (Del. Ch. 2000).

Here, by comparison, the allegedly bad faith benefits to Diamond and Johnson include (1) continued employment as CEO and COO, respectively, (2) an exchange of their existing Alloy shares for shares in Alloy's new parent company, and (3) an initial profits interest grant in that parent. Unlike in either *Parnes* or *Turner*, however, the acquiror insisted on these terms as a condition of the Merger.[75] Moreover, these terms can be explained on grounds other than bad faith. One plausible, and legitimate, explanation is that ZelnickMedia wanted to ensure that those members of Alloy's management with the best knowledge and expertise regarding the Company continued to manage its affairs after the Merger and that they were properly incentivized to do so.[76] Given this plausible and legitimate explanation for the board's decision to approve the benefits to Diamond and Johnson, I cannot reasonably infer that doing so was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[77]

Accordingly, I conclude that Plaintiffs' Complaint fails to allege specific, well-pleaded facts that would give rise to a reasonably conceivable set of circumstances under

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75 *See* Compl. ¶¶ 42, 44.

76 *See Morgan v. Cash*, 2010 WL 2803746, at *5 (Del. Ch. July 16, 2010) ("[R]etaining management is a routine occurrence for the obvious reason that an acquiror often wants to keep existing management in order to ensure that the acquired assets continue to be managed optimally. To view the retention of management on reasonable terms with suspicion would only undermine business practices that often facilitate the difficult transitions required when two businesses merge." (footnote omitted)).

77 *Turner*, 846 A.2d at 981 (internal quotation marks and citation omitted).

which Plaintiffs could recover on a claim that, in negotiating and approving the Merger, the Alloy directors failed to act loyally or in good faith. Therefore, the Alloy Defendants' motion to dismiss the Unfairness Claims will be granted.

C. The Disclosure Claims

The duty of disclosure is a specific application of corporate directors' fiduciary duties of care and loyalty,[78] requiring directors "to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[79] The Complaint alleges that the board breached its duty of disclosure by omitting material information in the Preliminary Proxy about the retention of Macquarie, the financial analysis and valuation of Alloy performed by Macquarie, and additional information regarding the "genesis" of the Merger and related transactions. "This Court does not defer to directors' judgment about what information is material," but determines materiality for itself "from the record at the particular stage of a case when the issue arises."[80]

As a threshold matter, Plaintiffs have virtually abandoned the Disclosure Claims. On August 25, 2010, the Court denied Plaintiffs' motion for expedited proceedings after finding that the Complaint failed to assert a colorable claim that the Preliminary Proxy

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78 *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001).

79 *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).

80 *Turner*, 846 A.2d at 988.

contained any disclosure violations sufficient to justify expedition.[81] Although motions to expedite and motions to dismiss invoke distinct standards of review, Plaintiffs relegated their arguments against dismissal of their Disclosure Claims to a single paragraph of their answering brief.[82] Additionally, the argument that Plaintiffs chose to brief only half-heartedly addressed Defendants' grounds to dismiss the Disclosure Claims. Plaintiffs argued primarily that "the fact that Defendants filed a preliminary proxy . . . rife with disclosure deficiencies is indicative of a disloyal process and should be viewed as a part of the overarching failure of loyalty here."[83] On its own, this argument does not substantiate an independent claim that Alloy's board breached its duty of disclosure. Moreover, Plaintiffs do not attempt to refute the Alloy Defendants' contention that the holding of *In re Transkaryotic Therapies, Inc.*[84] precludes recovery of monetary damages for disclosure violations after a merger has been consummated.[85]

On a related point, Plaintiffs have not sought to amend the Complaint since Alloy supplemented the Preliminary Proxy by filing a definitive proxy statement with the SEC on October 5, 2010 (the "Definitive Proxy").[86] To an extent, the Definitive Proxy

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81 Tr. of Teleconf. on Mot. to Expedite 29-41.

82 Pls.' Ans. Br. 26-27.

83 *Id.*

84 954 A.2d 346 (Del. Ch. 2008).

85 *Id.* at 362; Alloy Defs.' Op. Br. 22; Alloy Defs.' Reply Br. 3 n.1.

86 Alloy, Inc., Proxy Statement (Schedule 14A) ("Def. Proxy") (Oct. 5, 2010). The Court takes judicial notice of the Definitive Proxy not for the truth of the

addressed at least some of the allegedly material omissions of the Preliminary Proxy.[87] Although the Court is not aware of any express requirement that a plaintiff amend her complaint to account for supplemental disclosures and although motions to dismiss are limited to the facts as alleged in the complaint, the harm caused by a disclosure violation is not the deficient disclosure itself but the consequential uninformed shareholder vote.[88] In this case, where the Merger has closed and, therefore, the Court cannot order corrective disclosures, Plaintiffs' claim for monetary damages survives only to the extent that material omissions continued to exist when the shareholders voted—*i.e.*, after Alloy filed the Definitive Proxy. In other words, even if Plaintiffs were under no express requirement to amend the Complaint in light of the Definitive Proxy, the fact that they chose not to do so further supports the Court's view that they have essentially abandoned the Disclosure Claims.

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statements contained therein, but rather for the uncontested fact that the Alloy Defendants made supplemental disclosures in the Definitive Proxy that relate to at least some allegedly material omissions in the Preliminary Proxy referred to in the Complaint.

87 For example, the Complaint alleges that "[t]he Preliminary Proxy does not disclose what portion of [Macquarie's] fee is contingent on closing the [Merger] . . . ." Compl. ¶ 87. The Definitive Proxy stated that Alloy "has agreed to pay Macquarie Capital fees, in the sum of $2,350,000, of which $1,300,000 is contingent upon completion of the merger." Def. Proxy 44.

88 *See Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) (holding duty of disclosure requires full and fair disclosures *when* the board seeks shareholder action); *Brinckerhoff v. Tex. E. Products Pipeline Co.*, 2008 WL 4991281, at *4 (Del. Ch. Nov. 25, 2008) (dismissing disclosure claims where the allegedly omitted facts already were part of the total mix of information before the shareholder vote).

In any event, I dismiss Plaintiffs' Disclosure Claims based on the § 102(b)(7) exculpatory provision in Alloy's certificate of incorporation. As stated above, the duty of disclosure is a specific application of directors' more general fiduciary duties of care and loyalty. As such, a failure to disclose a material fact could result from a breach of either of those fiduciary duties. An exculpatory provision under 8 *Del. C.* § 102(b)(7), such as Alloy has, would preclude, for example, a claim for money damages for disclosure violations that were made in good faith—*i.e.*, for failures to disclose resulting from a breach of the fiduciary duty of care rather than from breaches of loyalty or good faith.[89]

In this case, there is no evidence that, in authorizing the disclosures, the Alloy directors breached their duty of loyalty or acted in bad faith. Again, Plaintiffs argue primarily that the alleged disclosure violations of the Preliminary Proxy "should be viewed as a part of the overarching failure of loyalty here."[90] Having found in Part II.B *supra* that the Complaint does not assert well-pleaded allegations sufficient to support a reasonable inference that a breach of loyalty occurred in negotiating or approving the Merger, I find this argument unpersuasive. Similarly, though criticizing the overall transaction process, the Complaint makes no factual allegations that the board acted disloyally or in bad faith when authorizing the Preliminary Proxy specifically.

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89 *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 (Del. 1996) ("A good faith erroneous judgment as to the proper scope or content of required disclosure implicates the duty of care rather than the duty of loyalty. Thus, the disclosure violations at issue here fall within the ambit of the protection of section 102(b)(7)." (citation and footnote omitted)).

90 Pls.' Ans. Br. 27-28.

Accordingly, any omission concerning the engagement of Macquarie, the financial analysis it performed, or the "genesis" of the transaction would implicate only the duty of care.[91] The exculpatory provision of Alloy's certificate of incorporation, therefore, precludes monetary liability against the Alloy Defendants, which in turn compels dismissal of Plaintiffs' Disclosure Claims.[92]

D. The Aiding and Abetting Claims

Finally, I turn to Plaintiffs' aiding and abetting claims against the Non-Company Defendants. "A third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party 'knowingly participates' in the breach."[93] As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability.[94] Having determined above that the Complaint does not state a claim for breach of fiduciary duty, I must dismiss, in turn, Plaintiffs' aiding and abetting claims for failure to state a claim.

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91 *See Zirn*, 681 A.2d at 1062; *In re Transkaryotic Therapies, Inc.*, 954 A.2d at 362-63.

92 *See Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287-88 & n.36 (Del. 1994) (holding a disclosure claim may be dismissed pursuant to section 102(b)(7) where there are no breaches of loyalty or good faith).

93 *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (footnote omitted).

94 *Id*. (predicate breach of fiduciary duty is element of aiding and abetting claim); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *21 (Del. Ch. Dec. 1, 2009) ("One cannot aid and abet a breach of fiduciary duty, however, where no duty has been breached in the first place." (footnote omitted)).

III. CONCLUSION

For the reasons stated in this Opinion, I grant Defendants' motions to dismiss the Complaint in its entirety under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

IT IS SO ORDERED.