IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AARON HOUSEMAN and NANCY HOUSEMAN,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	*Civil Action No. 8897-VCG*
	)	
ERIC S. SAGERMAN, THOMAS D. WHITTINGTON, CLINTON S. LAIRD, BROCK J. VINTON, RAYMOND IBARGUEN, GEORGE D. SERGIO, UNIVERSATA, INC., J.P. MORGAN CHASE BANK, N.A. and KEYBANC CAPITAL MARKETS, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 27, 2014
Date Decided: April 16, 2014

Eric M. Andersen, of Mark Anderson, P.A., Wilmington, Delaware, Attorney for the Plaintiffs.

Steven L. Caponi and Elizabeth Sloan, of Blank Rome LLP, Wilmington, Delaware, Attorneys for Defendants Eric S. Sagerman, Thomas D. Whittington, Clinton S. Laird, Brock J. Vinton, Raymond Ibarguen, George D. Sergio and Universata, Inc.

Stephen C. Norman and Matthew D. Stachel, of Potter Anderson & Corroon LLP, Wilmington, Delaware; OF COUNSEL: Geoffrey J. Ritts and P. Nikhil Rao, of Jones Day, Cleveland, Ohio, Attorneys for Defendant KeyBanc Capital Markets Inc.

GLASSCOCK, Vice Chancellor

This action involves a suit by a husband and wife (the "individual Plaintiffs"), who are stockholders and creditors of Universata, Inc. ("Universata," or the "Company").[1] In 2009, Universata exchanged a portion of its debt for 525,000 shares of its common stock, transferred to the individual Plaintiffs. In addition, as part of the transaction, the individual Plaintiffs received from Defendant Thomas Whittington, a director and shareholder of Universata, a right to exchange the shares of common stock for cash, in certain circumstances. Once this put right was triggered, Whittington would become obligated to pay the individual Plaintiffs $2.10 for each share of Universata stock. Thus, the individual Plaintiffs received two types of rights from that transaction: rights as stockholders of Universata, including statutory rights as well as the common law rights arising from the obligation of the directors of Universata to act consistently with their fiduciary duties; and contractual rights against Whittington under the put contract.

In 2011, Universata's board of directors approved a merger with a subsidiary of HealthPort Technologies, LLC ("Healthport") for consideration substantially less than $2.10 per share. Rather than pursuing a challenge to the merger or seeking statutory appraisal rights as stockholders, the individual Plaintiffs instead pursued their purported contractual put rights against Whittington, in a Minnesota state court. That action was dismissed with prejudice. Unsatisfied with that

[1] I refer to Aaron and Nancy Houseman as the "individual Plaintiffs" because the Complaint is partially brought as a class action on behalf of all stockholders of Universata.

outcome, the Plaintiffs brought this action, seeking to recover under theories of breach of duty with respect to the merger and quasi-appraisal, as well as to re-litigate the put-right claim. The Defendants have moved to dismiss. I examine the Plaintiffs' claims below.

I. FACTS[2]

A. The Parties

Prior to May 10, 2011, Universata was a Delaware corporation "provid[ing] comprehensive, on-site medical record Release of Information (ROI) services to hospitals and clinics."[3] Plaintiff Aaron Houseman and Defendants Thomas D. Whittington, Clinton S. Laird, Brock J. Vinton, Raymond Ibarguen, and George D. Sergio sat on the Company's Board of Directors (the "Board").

Universata was founded in 2003 on the collective contribution of friends and family members of founders Mark Ferrel, Eric Barnum, and David Ferrel. Throughout 2005 and 2006, then-Chairman Thomas Whittington purchased 60,000 shares of common stock. The Company continued to raise funds throughout 2007 and 2008 via private placements of 3,000,000 shares of common stock and 6,000

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[2] The facts stated herein are taken from the Plaintiffs' Verified Complaint, unless otherwise indicated.

[3] Compl. ¶ 24.

"debt units." According to the Complaint, the Company only "sporadically" issued—and never audited—quarterly financial statements.[4]

The Plaintiffs aver that in 2006, Aaron and Nancy Houseman—husband and wife—sold their business, Med-Legal, Inc., to Universata for a seven-year stream of payments totaling approximately $9 million. Universata had difficulty making those payments, however, and in November 2009, the Housemans elected to convert some of that debt into an equity interest of 525,000 shares in the Company. This conversion was sweetened by a put right under which Whittington would, in certain circumstances, be obligated to acquire those shares; the put agreement is discussed in detail below. At that time, Mr. Houseman became a director of Universata; Mrs. Houseman did not.

B. The Sales Process

In late 2010, HealthPort and at least one other interested party approached Universata about a potential acquisition. When Universata began to receive indications of interest from potential acquirers, the Company contacted legal counsel to determine how to proceed. At counsel's suggestion,[5] the Company

[4] *Id.* at ¶¶ 28-29.

[5] In a "valuation report" incorporated into the Plaintiffs' Complaint, Whittington explains that "[a]t the suggestion of our attorney, we approached [KeyBanc Capital Markets, Inc.] who represented us in an attempt to sell the operating business." *Id*. at ¶ 40. The Plaintiffs contend that Whittington's remark indicates that legal counsel advised the Board to obtain a fairness opinion, rejection of which legal advice constituted bad faith on the part of the Board. The Plaintiffs simultaneously contend, however, that the Company failed to obtain legal counsel to "advise[] the board of its fiduciary duties in selling the Company." *Id*. at ¶ 42.

contacted KeyBanc Capital Markets, Inc. ("KeyBanc"), who in 2009 had assisted Universata in an attempt to sell certain of the Company's assets, and was therefore familiar with the Company's business.

In March 2011, the Universata Board met to consider its options; Whittington addressed the Board as follows:

> As you know, we have been pursued by [HealthPort], IOD, and a potential merger partner. Our response has been to politely decline the "talking" offers and explain that we were doing well with confidence in our ability to have another banner year. . . . My personal feeling has been that we should stay independent and keep going. However, as a Board Member, it is necessary that I look at all opportunities and make Board decisions based on what is best for the shareholders under the circumstances of the company. One interested party, [HealthPort], keeps coming back despite our attitude of call us later and finally asked, "What will it take?" The Committee then took a hard look at our business, our competition, the dilution that would be caused by additional investment and gave a number to [HealthPort]. After several revisions to a Letter of Intent proposed by [HealthPort], [HealthPort] finally gave us everything that we felt we could get.[6]

At that meeting, the Board resolved to hire KeyBanc to assist with the transaction.[7]

Due to expense, the Company limited KeyBanc's engagement to assisting in due diligence and "identifying additional parties that could have an interest in

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[6] Compl. Ex. 8 at 1.

[7] The Plaintiffs contend that the Company did not hire KeyBanc until two days prior to signing the Merger Agreement, on May 7, 2011, the date indicated on the bank's amended engagement letter, but elsewhere admit that when "an unsolicited in-bound indication of interest came to management directly," "KeyBanc was hired for $200,000 to assist in the due diligence and close the deal." Pls.' Br. in Opp'n to KeyBanc's Mot. to Dismiss at 8.

acquiring the Company."[8] According to Board minutes attached to the Plaintiffs' Complaint, the Board considered obtaining a fairness opinion, but "[g]iven the exigencies of time and expense, the Corporation [did] not request[], and KeyBanc [did] not issue[], a fairness opinion, nor [did] KeyBanc perform[] the necessary analysis to reach the conclusion of fairness of the transaction."[9] Similarly, in an Information Statement provided to stockholders in connection with the transaction, the Company disclosed:

> The Company's Board of Directors decided not to employ independent financial consultants or other appraisers to determine the price to be offered in connection with the Merger or to consider the fairness of such price because (i) it believed that the cost of retaining such advisors would be unduly expensive in relation to the amount of consideration involved in the Merger, and (ii) any such determination, in the final analysis, would necessarily involve a subjective judgment.[10]

Thus, on May 10, 2011, the day the Board approved the Agreement and Plan of Merger by and among HealthPort Technologies, LLC, HealthPort Acquisition Subsidiary, Inc., and Universata, Inc. (the "Merger Agreement"), KeyBanc "did not prepare a written presentation summarizing [its] work," nor did it present a formal fairness opinion.[11] Instead, an investment banker at KeyBanc provided his

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[8] Compl. Ex. 1 at 17.
[9] Compl. ¶ 40.
[10] *Id.*
[11] *Id.* at ¶ 45.

informal opinion that the merger price was within a range of reasonableness.[12] At that Board meeting, the Company's legal counsel "conducted a detailed overview of [a summary of the Merger Agreement's terms] for the Board, covering all pertinent aspects of the Merger Agreement, and the legal aspects of the proposed merger with [HealthPort], and addressing the questions asked by members of the Board and guests at the meeting."[13]

Despite legal counsel's participation at the May 10 Board meeting, the Plaintiffs challenge the fact that the Board minutes do not expressly reflect that the Board was advised of its fiduciary duties. In addition, while acknowledging KeyBanc's involvement in the sales process, the Plaintiffs challenge the Board's failure to hire "a financial advisor to help it understand how much the Company was worth before selling it."[14] In addition, the Plaintiffs contend that the Board acted uninformedly by failing to hire "an auditor to audit its financial statements" or "a tax advisor or valuation professional to value [Universata's net operating losses] to assist in negotiating the purchase price with HealthPort."[15]

C. The Merger

On May 10, 2011, Universata entered into an agreement (the "Merger Agreement") whereby Universata would merge into HealthPort Acquisition

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[12] Compl. Ex. 7 at 3.
[13] *Id.* at 2.
[14] Compl. ¶ 40.
[15] *Id.* at ¶ 34.

Subsidiary, Inc., a wholly-owned subsidiary of HealthPort; in return, the stockholders of Universata would receive $1.02 per share in cash on June 1, 2011. In addition, a new Delaware corporation, "TechCo," would be created to hold a patent formerly owned by Universata, and each share of Universata stock would receive one share in that corporation. The Company was also to form three escrow accounts from which to pay the Company's sales tax liabilities, which had, until that time, gone unpaid; the stockholders were then to receive a pro rata distribution of the remaining funds one year from the transaction date. The stockholders received $0.17 per share from the escrowed funds on June 1, 2012. The Plaintiffs aver, however, that stockholders should have received $0.27 per share, based on language in the Information Statement explaining that "if $1,780,000 of the Escrow Fund is released and paid to the Escrow Participants, they will receive an additional amount equal to approximately $0.27."[16] They also aver that stockholders never received their interests in TechCo. Whittington served as "Shareholder Representative" to hold and distribute the merger consideration to the stockholders. According to the Complaint, Whittington did not set up separate trust accounts, but instead parked the consideration, including funds to be escrowed for payment of taxes, in a Rule 1.15A Attorney Trust Account. Whittington has failed to provide an explanation as to why the escrow payments

[16] Compl. Ex. 1 at 8.

ultimately released to shareholders totaled $0.17 per share rather than $0.27 per share, or why the stockholders have not yet received their TechCo stock. As explained below, those questions will be the subject of future proceedings.

Because the directors who approved the Merger Agreement collectively held a majority ownership interest in the Company, the Board did not solicit a stockholder vote to approve the transaction. Instead, the Merger Agreement was approved by written consent of the Defendant directors, who together owned approximately 55% of the voting shares in the Company.[17] Although he had initially voted to approve a prior Letter of Intent with HealthPort, Mr. Houseman did not vote or execute a consent in favor of the merger.

D. The Company's "Litigation Assets"

In addition to challenging the adequacy of the sales process, the Plaintiffs point to three side transactions they believe gave rise to derivative claims against the Company's directors, and therefore constitute "litigation assets" of the Company.[18]

First, the Plaintiffs challenge two decisions made at the May 10, 2011 Board meeting. The same day the Merger Agreement was approved, the Universata

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[17] Def. Directors' Op. Br. at 7.

[18] The Plaintiffs aver that the three side transactions described below were never "approved by the Board." *See, e.g.*, Compl. ¶ 36. It is unclear to me what the Plaintiffs intend to communicate with that statement; my best guess is that they are attempting to argue that those transactions are subject to procedural deficiencies.

Board amended its 2008 Equity Incentive Plan to provide that stock options held by employees would be treated, upon a change in control, like outstanding shares of common stock:

> Upon a merger, consolidation, reorganization, liquidation or recapitalization or the like of the Corporation, if the shares of outstanding Common Stock of the Corporation are to be exchanged for cash or other property, the Options under the Plan may be exchanged on a net issuance basis for the same per share amount of cash or other property as the holders of the Corporation's Common Stock receive.[19]

In addition, the Board voted to vest all outstanding "in the money" warrants to purchase shares in the Company. The Plaintiffs allege that certain of the warrants, which were issued in recognition of previously uncompensated services, were improperly issued to directors Ibarguen, Laird, and Whittington. Specifically, in April 2009, Ibarguen was issued 100,000 warrants "for counsel over 24 months . . .," Laird was issued 100,000 warrants for "28 months of guidance as CEO . . .," and Whittington was issued 100,000 warrants for "28 months of legal counsel and governance support . . . ."[20] The Plaintiffs argue that, because the individual directors' services had already been rendered without compensation, "Universata did not have any obligation to pay" the directors before the warrants were issued, and accordingly, the decision to issue those warrants would have been subject to a timely challenge, had one been made, presumably as constituting

[19] Compl. Ex. 7 at 7.
[20] Compl. ¶ 30.

waste. In other words, the Plaintiffs allege that, because the 2009 issuance of warrants to Ibarguen, Laird and Whittington was a breach of duty by the Board, its actions in 2011 vesting those warrants was also a breach of duty.

In addition, the Plaintiffs point to supposed irregularities in the hiring of Eric Sagerman as Universata's Chief Executive Officer on December 31, 2009. The Plaintiffs allege that "[t]he Board never had a meeting on December 31, 2009," and that "[t]o this day, although Plaintiff Director [Mr. Houseman] was a board member from the time Sagerman was appointed CEO, neither Whittington nor Vinton disclosed the actual contract signed with Sagerman much less sought the board's approval of the contract."[21] That purportedly invalid contract contained a severance package in the event of a change in control. Because they contend Sagerman's contract was invalid, the Plaintiffs suggest that the $507,267 change of control payment Sagerman received was inappropriately paid by the Board.

E. The Put Contract

In October 2009, the individual Plaintiffs and Whittington entered into an Agreement Regarding Stock dated October 16, 2009 (the "Put Contract") whereby, in exchange for their agreement to restructure their debt from the sale of Med-Legal, Inc., the Housemans received a right to require Whittington to purchase up to 525,000 of their shares in Universata at a price of $2.10 per share, any time

[21] *Id.* at ¶ 32.

between December 30, 2012 and December 30, 2013. The individual Plaintiffs also aver that, prior to the merger, Universata guaranteed Whittington's obligations under the Put Contract. They point to a May 10, 2011 resolution of the Board providing that:

> Company [will] assume the financial obligation of Thomas D. Whittington to Aaron Houseman, said obligation being that Aaron may Put his stock to Thomas D. Whittington at the end of 2012 for $2.10 per share, be paid for by the Company if a premium is required; however, the actual guarantee remains with [Whittington] until resolved by the Company or the Put is satisfied.[22]

However, the individual Plaintiffs allege that after the transaction closed, neither Whittington nor the Board honored its obligation, under the Put Contract or May 10 resolution, to purchase the Housemans' shares.

After the merger transaction closed, the individual Plaintiffs refused to tender their shares. However, rather than pursuing breach of fiduciary duty or appraisal claims at that time, the Plaintiffs instead filed a lawsuit against Whittington—but not the Company—in a Minnesota state court for breach of the Put Contract. In that lawsuit, the Plaintiffs claimed that Whittington had anticipatorily breached the Put Contract, which they alleged provided the Plaintiffs a right to sell their shares to Whittington for $0.91 per share over the merger consideration. The Minnesota court dismissed the action in February 2012, determining that:

[22] Compl. Ex. 8 at ¶ 6.

> When Universata merged with HealthPort, all shares of Universata were cancelled, and, by operation of law, ceased to exist. Plaintiffs cannot force Defendant to purchase something they no longer have the right to sell. Thus, the Put Option is no longer enforceable and [Plaintiffs'] claim for anticipatory breach fails.[23]

The individual Plaintiffs demanded (and received) distribution of their merger consideration at that time. They admit that "[t]his Complaint now takes over where the Minnesota lawsuit left off."[24]

F. The Plaintiffs' Claims

The Merger Agreement was signed on May 10, 2011. The Plaintiffs filed their Verified Complaint in this Court on September 12, 2013, more than two years later. That Complaint, styled as a "class action," asserts a count for breach of fiduciary duty against the individual Defendant directors; a count for accounting against Whittington and J.P. Morgan Chase Bank, N.A.;[25] a count for quasi-appraisal against Universata and the individual Defendant directors; a count for aiding and abetting breach of fiduciary duty against KeyBanc; and a count against the individual Defendant directors for failure to obtain consideration for "litigation assets"—choses in action held by Universata—under the rationale of *Parnes v. Bally Entertainment Corporation*.[26]

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[23] Compl. Ex. 2 at ¶ 3 (citations omitted).
[24] *Id*. at ¶ 9.
[25] The Plaintiffs voluntarily dismissed J.P. Morgan Chase Bank, N.A. as a Defendant on January 16, 2014.
[26] 722 A.2d 1243 (Del. 1999).

With respect to the Plaintiffs' claim for accounting of the funds distributed to stockholders from amounts held in escrow by Whittington as Stockholder Representative, I denied the Defendants' Motion to Dismiss at oral argument, and directed the parties to confer and, if necessary, address that issue in separate briefing. Accordingly, the Plaintiffs' accounting claim, including accounting for the TechCo shares, remains to be decided in future proceedings.

II. STANDARDS OF REVIEW

This action is before me on the Defendant directors' Motion to Dismiss and Motion for Judgment on the Pleadings, and on Defendant KeyBanc's Motion to Dismiss.

When evaluating a motion under Rule 12(b)(6), "[i]f the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss."[27] Such analysis is generally limited to the complaint itself, and "[a] judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint or (2) the document is not being relied upon to prove the truth of its contents."[28] Accordingly, "[t]he

[27] *King v. DAG SPE Managing Member, Inc.*, 2013 WL 6870348, at *5 (Del. Ch. Dec. 23, 2013).
[28] *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013).

Court may grant a motion to dismiss where the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[29]

Under Rule 12(c), "[a] motion for judgment on the pleadings will be granted if no material issue of fact exists and the moving party is entitled to judgment as a matter of law."[30] "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[31] However, "[w]hen considering a Rule 12(c) motion, the court must accept well-pled facts in the complaint as true and view those facts in the light most favorable to the nonmoving party."[32]

III. ANALYSIS

The Plaintiffs in this action bring counts for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, failure to obtain value for "litigation assets," and quasi-appraisal. In addition, in briefing, the Plaintiffs allege that the Defendants have breached their obligation to guarantee the Put Contract between Whittington and the individual Plaintiffs. I address those arguments in turn, below.

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[29] *Grace v. Ashbridge LLC*, 2013 WL 6869936, at *8 (Del. Ch. Dec. 31, 2013).
[30] *Fiat N. Am. LLC v. UAW Retiree Med. Benefits Trust*, 2013 WL 3963684, at *7 (Del. Ch. July 30, 2013).
[31] Ct. Ch. R. 12(c).
[32] *Fiat N. Am. LLC*, 2013 WL 3963684, at *7.

1. Fiduciary Duty Claims

The Plaintiffs bring a count for breach of fiduciary duty against the individual Defendant directors of Universata. Because Universata's Certificate of Incorporation includes a provision pursuant to 8 *Del. C.* § 102(b)(7) exculpating directors for breaches of the duty of care, and because the Plaintiffs recognize that a majority of the Board was disinterested in the merger transaction,[33] the Plaintiffs concede that, if they are to succeed on a fiduciary duty claim, such claim must be premised on a breach of the duty of good faith.[34] This Court has recently stated that, in the context of the sale of a company, a breach of the duty of good faith may be implicated *either* by a board's utter failure to attempt to satisfy its fiduciary duties, as alleged here in this Complaint, *or* by its "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation," for example by acting out of greed, hatred, lust, envy, revenge, shame, pride, or some

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[33] I note that the Plaintiffs explicitly concede that the Board was disinterested, such that a duty of loyalty claim could only be predicated on a breach of the duty of good faith. *See* Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 30 (noting that "[t]he Complaint does not attempt to allege facts that any of the Individual Defendants"—which Defendants include Whittington—"had a self-interest in the Merger to implicate the duty of loyalty. The Complaint alleges that because the Individual Defendants knowingly and completely failed to undertake their responsibilities in bad faith, they breach their duty of loyalty"). I recognize that, though the Plaintiffs have not argued that Whittington was interested in the transaction, he undoubtedly was, as he was "the single largest creditor of the Company," *id.* at 32, and because the transaction extinguished his liability under the Housemans' Put Contract, as described in detail below. However, Whittington's interest is insufficient to implicate the Universata Board's duty of loyalty, since the Plaintiffs have not alleged that a majority of the Board was interested in the transaction.

[34] *Id.* at 29.

other "human motivation."[35] The Plaintiffs here have not alleged—or even argued—that in negotiating a sale of the Company the Universata Board acted out of any interest other than maximizing stockholder value; instead, the Plaintiffs have put forth as the sole basis for a finding of a breach of the duty of good faith that, "because the Individual Defendants knowingly and completely failed to undertake their responsibilities in bad faith, they breach[ed] their duty of loyalty."[36]

This Court has explained many times that so-called "*Revlon* duties" require a board conducting the sale of a company to undertake that process reasonably, with the goal of attaining the best price for stockholders.[37] However, "[a]s the Supreme Court in *Lyondell Chemical Co. v. Ryan* explained, there is an important difference between a board's duty to maximize the value of a transaction as required by *Revlon*, and a board's duty of loyalty to act in good faith throughout that process: 'if the directors failed to do all that they should have under the circumstances, they

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[35] *Chen v. Howard-Anderson*, 2014 WL 1366551, at *28 (Del. Ch. Apr. 8, 2014).

[36] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 30-34. The Plaintiffs rely solely on the contention that the Universata Board breached its duty of good faith by "knowingly and completely fail[ing] to satisfy [its *Revlon*] duties," *id.* at 31, despite acknowledging that the standard for bad faith includes "situations where the fiduciary intentionally breaks the law, *where the fiduciary intentionally acts with a purpose other than that of advancing the bests interests of the corporation*, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *Id.* at 30 (emphasis added). Notably, the argument upon which the Plaintiffs choose to solely rely, and my analysis of that argument, is not in conflict with this Court's recent decision in *Chen*. *See Chen*, 2014 WL 1366551, at *24 ("The *Lyondell* decision of course would be dispositive to the extent the plaintiffs in this case made the same legal argument that the *Lyondell* plaintiffs made, namely that the directors consciously disregarded known obligations imposed by *Revlon*.").

[37] *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 830-31 (Del. Ch. 2011).

breached their duty of care. Only if they *knowingly and completely failed* to undertake their responsibilities would they breach their duty of loyalty.'"[38] Notably, "[an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties."[39]

The Plaintiffs allege several flaws in the sales process that might amount to a breach of the duty of care. The Plaintiffs allege, for example, that the Company failed to adequately inform itself of the value of the Company by (1) failing to obtain a formal fairness opinion from KeyBanc; (2) failing to hire a tax advisor to value its net operating losses; and (3) failing to audit the Company's financial statements. In addition, the Plaintiffs point to a statement from Whittington to the Board that "[a]t the suggestion of our attorney, we approached KEY Capital Markets who represented us in an attempt to sell the operating business," and understand that statement to reflect legal advice that the Board was required by its fiduciary duties to obtain a fairness opinion, which advice the Board flagrantly rejected.

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[38] *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *6 (Del. Ch. Oct. 16, 2013) (citing *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009)) (emphasis added); *see also In re Answers Corp. S'holders Litig.*, 2014 WL 463163, at *12 (Del. Ch. Feb. 3, 2014) ("*Lyondell* counsels that there is a vast difference between a flawed, inadequate effort to carry out fiduciary duties and a conscious disregard for them.").

[39] *Lyondell Chem. Co.*, 970 A.2d at 243 (citing *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008)).

Accepting those factual allegations as true, it is clear that the Universata Board did not conduct a perfect sales process; but, neither did it utterly fail to undertake *any* action to obtain the best price for stockholders.[40] In their Complaint, the Plaintiffs acknowledge that the Company contacted legal counsel, who advised the Company to contact KeyBanc; despite the Plaintiffs' contentions, that advice cannot be fairly read to indicate that, in counsel's legal opinion, the Board was required by its fiduciary duties to obtain a fairness opinion. Still, the Company did consider obtaining a fairness opinion, but found that:

> No experienced provider was willing to perform a valuation without a substantial payment on the order of $250,000.00. . . . KEY indicated that they were the logical ones to value the company and noted that their fee would be on the order of $300,000.00. Their Account Manager explained that KEY knew the purchase side of the equation, but it would take substantial effort to evaluate Universata's convoluted debt structure and they would need to comply with SEC and Banking regulations.[41]

Having considered the expense of obtaining a fairness opinion relative to the overall transaction value, the Board determined that hiring KeyBanc for the limited purpose of assisting in diligence, shopping the Company,[42] and providing an

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[40] *See, e.g.*, *In re Answers Corp. S'holders Litig.*, 2014 WL 463163, at *12 ("[E]ven this limited market check does not constitute a complete abandonment of fiduciary duty and thus is sufficient to survive a bad faith abandonment of duty claim.").

[41] Compl. ¶ 40; Compl. Ex. 6.

[42] While the Plaintiffs generally allege that KeyBanc did not shop the Company, they simultaneously allege that KeyBanc accepted an indication of interest from a second bidder and failed to disclose that bid to Mr. Houseman, and that KeyBanc failed to shop the company as directed by the Board; thus, the Plaintiffs concede that the Board engaged KeyBanc to handle a process that involved managing incoming bids.

informal opinion was in the stockholders' interests. The issue before me is not whether those actions were sufficient to adequately inform the directors about the value of the Company in satisfaction of the duty of care, but rather whether the Board *knowingly and completely failed* to undertake a reasonable sales process. To the contrary, the Board did undertake *some* process aimed at achieving the best price for stockholders, and considered, and rejected, obtaining a fairness opinion based on cost. That is not bad faith. To summarize, the Board contacted legal counsel; reached out to KeyBanc regarding its ability to issue a fairness opinion; determined that, due to the relative expense, it was not in the Company's best interest to obtain a fairness opinion; decided instead to hire KeyBanc to assist in shopping the Company and provide a more informal recommendation that HealthPort's offer was within a range of reasonableness; received and considered bids from multiple interested bidders; negotiated "several revisions to a Letter of Intent proposed by" HealthPort; after negotiating, ultimately received from HealthPort "everything that [the Board] felt [it] could get;" and again sought legal advice when reviewing the Merger Agreements' terms at the May 10 Board meeting.[43] The facts alleged fall short of demonstrating bad faith.

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[43] Compl. Ex. 8 at 1.

In 1985, the Delaware Supreme Court decided *Smith v. Van Gorkom*,[44] holding directors personally liable for breaching their duty of care in the sale of a company. Shortly thereafter, the Delaware General Assembly enacted Section 102(b)(7) of the DGCL, permitting companies to adopt in their certificates of incorporation a provision exculpating directors from money damages for violations of the duty of care.[45] Nearly all corporations take advantage of such provisions, presumably because doing so returns value to stockholders.[46] The Plaintiffs here, by investing in a company that has adopted an exculpation provision, have agreed to this tradeoff and accepted both its benefits as well as its burden: that money damages would be unavailable to them despite a breach of the duty of care not amounting to bad faith; that is, in the circumstances alleged here, absent the Board's utter failure to attempt to satisfy its duties under *Revlon.*

Finally, it bears mentioning that the directors who approved the transaction had a significant economic stake in the transaction: together, they owned more than fifty percent of the Company. This Court recently recognized that "a plaintiff's inability to explain a Board's motivation to act in bad faith may . . . be relevant in

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[44] 488 A.2d 858 (Del. 1985).

[45] *See Malpiede v. Townson*, 780 A.2d 1075, 1095 (Del. 2001) ("Section 102(b)(7) was adopted by the Delaware General Assembly in 1986 following a directors and officers insurance liability crisis and the 1985 Delaware Supreme Court decision in *Smith v. Van Gorkom*.").

[46] The benefits to a corporation of an exculpation provision to allow it to attract qualified directors, and allow those directors to undertake appropriate risk on behalf of the corporation, are obvious.

analyzing bad faith claims," at least at the summary judgment stage.[47] While the director Defendants' stake in the Company is not determinative here—as explained above, the Plaintiffs otherwise fail to allege facts sufficient to show that the Defendants acted in bad faith—the Plaintiffs have not attempted to suggest what could have caused these directors with substantial economic interests in the Company to utterly abandon their responsibilities to maximize value in selling the Company.

Accordingly, the process failures, as alleged, even if true and considering all inferences favorable to liability, do not state a claim for breach of the duty of good faith.

2. Aiding and Abetting Breach of Fiduciary Duty Claims

In addition to the breach of fiduciary duty claims brought against the individual Defendant directors, the Plaintiffs bring claims against KeyBanc for aiding and abetting the Universata Board's breach of fiduciary duty. This Court recently held in *In re Rural Metro Corp. Stockholders Litigation* that provisions authorized by 8 *Del. C.* § 102(b)(7) exculpating directors from breaches of the duty of care do not extend to protect third parties from aiding and abetting fiduciary duty claims, explaining that "[t]he literal language of Section 102(b)(7) only covers directors; it does not extend to aiders and abettors," which interpretation is

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[47] *In re Answers Corp. S'holders Litig.*, 2014 WL 463163, at *10.

consistent with the policy consideration that "[t]he threat of liability helps incentivize gatekeepers [such as investment bankers] to provide sound advice, monitor clients, and deter client wrongs."[48] Though Universata's 102(b)(7) provision does not exculpate KeyBanc from aiding and abetting a Universata director's breach, I find that the Plaintiffs fail to state a claim for aiding and abetting liability, as they have not adequately alleged that KeyBanc knowingly participated in any breach of duty.

To state a claim for aiding and abetting breach of fiduciary duty, a plaintiff must demonstrate "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) knowing participation in that breach by the non-fiduciary."[49] For purposes of my analysis here, I assume factors (1) and (2), and concentrate on the sufficiency of allegations of knowing participation by KeyBanc. Importantly, "[i]t is not the fiduciary that must act with *scienter*, but rather the aider and abetter;"[50] accordingly, "[k]nowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct

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[48] 2014 WL 971718, at *22-24 (Del. Ch. Mar. 7, 2014); *see also In re BJ's Wholesale Club, Inc. S'holders Litig*., 2013 WL 396202, at *14 (Del. Ch. Jan. 31, 2013) ("Even though the Plaintiffs have not adequately alleged a breach of the duty of loyalty, the aiding and abetting claims against the Buyout Group *might* still survive a motion to dismiss if the Court eventually finds that the Plaintiffs have adequately stated a duty of care claim, notwithstanding the Defendant Directors' exculpation from that claim under 8 Del. C. § 102(b)(7)."); *In re Del Monte Foods Co. S'holders Litig*., 25 A.3d 813, 838 (Del. Ch. 2011) ("By their terms, Sections 102(b)(7) and 141(e) do not protect aiders and abetters, and disgorgement of transaction-related profits may be available as an alternative remedy.").

[49] *Allied Capital Corp. v. GC-Sun Holdings, L.P*., 910 A.2d 1020, 1039 (Del. Ch. 2006).

[50] *In re Rural Metro Corp. S'holders Litig.*, 2014 WL 971718, at *30.

advocated or assisted constitutes such a breach."[51] This Court has previously explained that a third party knowingly participates in a breach of the duty of care if it "knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating the informational vacuum," or otherwise "purposely induce[s] the breach of the duty of care."[52] An inference of knowing participation may be made where, for example, an aider and abetter gained an advantage from a board's breach of its duties, or where the facts surrounding a transaction are "so egregious . . . as to be inherently wrongful."[53]

The Plaintiffs point to several alleged actions by KeyBanc that they believe demonstrate KeyBanc's knowing participation in the Universata Board's breach of its duty of care or duty of good faith. The Plaintiffs argue that "KeyBanc received another offer for the Company and did not inform [Mr. Houseman];" "KeyBanc did not disclose to the shareholders that it was one of the largest creditors of the Company owed [sic] $1.19 million;" "KeyBanc did not . . . attend the board meeting in which the Board decided to proceed with negotiating an agreement with HealthPort;" "KeyBanc issued a 'reasonableness' opinion to the Board that had no basis . . .;" and "KeyBanc never ran a process (even though it was hired to do so)

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[51] *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).
[52] *In re Rural Metro Corp. S'holders Litig.*, 2014 WL 971718, at *30.
[53] *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *14; *see also In re Rural Metro Corp. S'holders Litig.*, 2014 WL 971718, at *33 ("To show that a financial advisor acted with *scienter*, a stockholder plaintiff typically points to evidence of a conflict of interest diverting the advisor's loyalties from its client . . . .").

to shop the Company before the signing of the Merger Agreement."[54] In response, KeyBanc contends that "[a]ll that plaintiffs have fairly alleged is that KeyBanc provided limited services in connection with the Transaction, not that anyone at KeyBanc recognized that the defendants were violating, or endeavoring to violate, their fiduciary duties and knowingly promoted any such violations."[55]

First, the Plaintiffs' argument that knowing participation in a breach can be inferred by KeyBanc's lack of disclosure of certain facts to *Mr. Houseman* and to the Universata stockholders is unavailing, because the Plaintiffs fail to adequately plead that KeyBanc created an "informational vacuum" assisting the Universata *Board* in breaching its duty of care. The Plaintiffs contend that KeyBanc failed to disclose the existence of another bid to Mr. Houseman; however, they do not allege that KeyBanc failed to disclose that bid to its contact on the Board, or that it knew a majority of the Universata directors—or even that Mr. Houseman himself—never received that information.[56] That KeyBanc did not *directly* furnish information to Mr. Houseman does not support an inference that KeyBanc knew Mr. Houseman or any other director was acting uninformedly in evaluating the transaction. There is no allegation that KeyBanc failed to disclose the existence of a second bidder to

[54] Pls.' Br. in Opp'n to KeyBanc's Mot. to Dismiss at 12-13.
[55] KeyBanc's Reply Br. at 2.
[56] *See In re Rural Metro Corp. S'holders Litig.*, 2014 WL 971718, at *32 ("[The bank] knew and failed to disclose *to the Board* that on Saturday, March 26, 2011, senior bankers at [the bank] were engaged in a full-court press to convince Warburg to use [the bank's] staple financing . . . .") (emphasis added).

anyone at the Company, such that it knew the directors lacked material information. Additionally, while the Plaintiffs argue that KeyBanc failed to disclose to stockholders its creditor status, the Plaintiffs do not contend that the Universata *Board* was unaware of that fact, or that KeyBanc played any role in drafting the Information Statement provided to stockholders in connection with the transaction. Without allegations that KeyBanc actively concealed information to which it knew the Board lacked access, or promoted the failure of a required disclosure by the Board, the Plaintiffs fail to adequately plead knowing participation in a breach of duty: the Plaintiffs have simply not pled that KeyBanc misled the Universata Board or created an "informational vacuum" sufficient for a finding of knowing participation in a breach.[57]

Second, the fact that KeyBanc agreed to provide limited services in connection with the transaction, rather than the panoply of financial services—including a fairness opinion—it could have provided had the parties contracted for such, is not sufficient to support the inference that KeyBanc knew the Universata Board was breaching its fiduciary duties in selling the Company and abetted that breach. The Plaintiffs essentially suggest that an investment bank must provide all

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[57] These facts contrast with those in *Rural Metro*. *See id.* (finding that investment bank knowingly participated in board's breach of duty where it "*created* the unreasonable process and informational gaps that led to the Board's breach of duty," as it "knew that the Board and the Special Committee were uninformed about [the company's] value when making its critical decisions" and "never disclosed to the Board its continued interest in buy-side financing").

or none of the financial services it offers in valuing and marketing a company; KeyBanc contends that, for transactions of this size, such a rule would do a disservice to equity holders who, after the investment bank is paid, may walk away with very little.[58] Our case law interpreting *Revlon* makes clear that there is no single way to a sell a company[59]—no single financial service is *required*, and the fact that here, KeyBanc agreed to participate in a transaction wherein it would not issue a fairness opinion does not demonstrate that KeyBanc knew the failure to obtain additional services would constitute a breach of the Board's duties.[60] Moreover, KeyBanc's incentive to encourage such a breach is utterly lacking. The more services KeyBanc provided to the Company, the more fees it would earn; it was only the Board's interest in cost-saving that caused the parties to agree to the limited financial services ultimately procured. It was thus the Company's, but not *KeyBanc's*, interest that drove the structure of the financial services arrangement at issue here.[61]

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[58] KeyBanc's Reply Br. at 5.

[59] *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) ("[T]here is no single blueprint that a board must follow to fulfill its [*Revlon*] duties.").

[60] *See* Oral Arg. Tr. 64:5-6 ("[KeyBanc was not] required to do a fairness opinion. I concede that.").

[61] In *In re Rural Metro Corp. Shareholders Litigation*, the Court noted that the investment bank "knew that the Board was uninformed about [certain] critical matters, but failed to disclose the relevant information *to further its own opportunity to close a deal*, get paid its contingent fee, and receive additional and far greater fees for buy-side financing work." 2014 WL 971718, at *33 (emphasis added). There is no indication in the pleadings here, by contrast, that providing additional services would have been financially detrimental to KeyBanc.

Finally, the Plaintiffs argue that "KeyBanc never ran a process (*even though it was hired to do so*) to shop the Company before the signing of the Merger Agreement,"[62] and that such failure evidences KeyBanc's knowing participation in the Universata Board's breach of its duties. However, the Plaintiffs fail to allege, or even explain in briefing, which services KeyBanc was hired to provide but never performed. Although on a motion to dismiss a plaintiff's "well-pleaded allegations are accepted as true and all reasonable inferences are construed in favor of the plaintiff,"[63] "[n]o party to litigation can reasonably be expected to prepare a defense to conclusory allegations devoid of factual particulars which they could address and possibly contradict;"[64] accordingly, even on a motion to dismiss, a plaintiff "must set forth at least some set of facts supporting, or from which I could make inferences supporting," her claim.[65] Without any explanation from the Plaintiffs as to which processes KeyBanc was hired but failed to run, and how that failure aided and abetted the *Board's* fiduciary breach, I have no basis to infer that KeyBanc knowingly participated in the Board's breach of its duties based on a failure to perform under an agreement with the Board. At most, the Plaintiffs have pleaded, in a conclusory fashion, that KeyBanc breached a contract with Universata, *not* that it aided and abetted the Board's breach of its fiduciary duties.

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[62] Pls.' Br. in Opp'n to KeyBanc's Mot. to Dismiss at 13 (emphasis added).
[63] *Fitzgerald v. Cantor*, 1999 WL 66526, at *1 (Del. Ch. Jan. 14, 1999).
[64] *Id.* at *2.
[65] *Id.* at *1.

For the reasons explained above, the Plaintiffs' count for aiding and abetting fails to state a claim upon which relief could be granted.

3. The Board's Alleged Failure to Receive Value for "Litigation Assets"

The Plaintiffs also bring a count under *In re Primedia, Inc. Shareholders Litigation*,[66] pursuant to which they argue that "latent derivative claims which were assets of the Company were not valued or even recognized by the Individual Defendants as an asset which would increase the enterprise value of the Company."[67]

A stockholder who has been cashed out of her equity stake in a company by virtue of a merger has standing to bring an action directly attacking the fairness of the merger transaction, but lacks standing to pursue derivative claims on behalf of the company in which she no longer has an equity interest.[68] As this Court explained in *Primedia*, a stockholder may, in certain circumstances, characterize a suit for the lost value of a derivative claim as a direct attack on the fairness of the merger by demonstrating that the transaction failed to account for the value of certain of the company's assets, which assets include the value to the stockholders

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[66] 67 A.3d 455 (Del. Ch. 2013).

[67] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 9.

[68] *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 354 (Del. 1988) ("As recognized by this Court in *Cede Supr.*, direct attacks against a given corporate transaction (attacks involving fair dealing or fair price) give complaining shareholders standing to pursue individual actions even after they are cashed-out through the effectuation of a merger.").

of pending derivative actions.[69] In that case, the Court found both that a pending *Brophy* claim[70] was a litigation asset and that its value was material such that the merger consideration should have included it. In analyzing the plaintiffs' claims, the Court put forth the following standard:

> A plaintiff claiming standing to challenge a merger directly under *Parnes* because of a board's alleged failure to obtain value for an underlying derivative claim must meet a three part test. First, the plaintiff must plead an underlying derivative claim that has survived a motion to dismiss or otherwise could state a claim on which relief could be granted. Second, the value of the derivative claim must be material in the context of the merger. Third, the complaint challenging the merger must support a pleadings-stage inference that the acquirer would not assert the underlying derivative claim and did not provide value for it.[71]

This standard is premised on the idea that prior to a merger, stockholders own as an asset the value of any derivative claim that could be asserted; after a merger, "the right to bring a derivative action passes via merger to the surviving corporation,"[72] and the stockholders are entitled to receive consideration for the transfer of that asset.

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[69] *See In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 476 (Del. Ch. 2013) ("But the failure to obtain value for the [derivative] claim in turn rendered the Merger unfair to [the company's] minority stockholders, because they only received value for their share of [the company's] operating business and not for their share of the Derivative Action.").

[70] A *Brophy* claim is an action against an insider for disgorgement of profits earned by trading securities on material non-public information. *See Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949).

[71] *In re Primedia, Inc. S'holders Litig.*, 67 A.3d at 477.

[72] *Id.* at 476.

In an attempt to apply *Primedia* to the facts alleged here, the Plaintiffs argue:

> The loss of funds related to the issuance of the warrants, paying Sagerman's unauthorized salary and the acceleration of benefits in the 2008 Equity Incentive Plan reduced the Company balance sheet, but so is the gain of a corresponding litigation asset: a Company claim against the Individual Defendants to recover the misappropriated funds. This intangible corporate asset could have been liquidated though [sic] litigation against the wrongdoers, either by the Company or derivatively by a stockholder plaintiff on the Company's behalf.[73]

In other words, the Plaintiffs argue that the merger consideration was insufficient in that it failed to account for the value of litigation claims that could have been brought against the directors; they therefore argue that the class action Plaintiffs should recover for the value of those "litigation assets."

In making that argument, the Plaintiffs point to three Board decisions which never were, but purportedly could have been, brought as derivative claims against the Company: the Board's decisions to amend the 2008 Equity Incentive Plan, to vest all outstanding "in the money" warrants, and to honor parachute payments under Sagerman's employment agreement. These actions were taken at the same May 10 Board meeting at which the Board approved the Merger Agreement.

In response to the Plaintiffs' contentions that the Board actions described above should be characterized as "litigation assets," the Defendants point out that:

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[73] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 35.

> Under Housemans' theory, the alleged fiduciary breach giving rise to the Derivative Claims did not arise until the Board took action on the April 2009 Warrants, Sagerman Employment Agreement and 2008 Equity Incentive Plan at the May 10, 2011 board meeting [at which the merger was approved]. Prior to this date, the actions giving rise to the purported claim had not yet occurred. As a result, the alleged Derivative Claims that did not yet exist were not an asset the Director Defendants could have sought to sell to HealthPort.[74]

In other words, the Defendants argue that, because the alleged derivative claims came into existence, if at all, on the day the Merger Agreement was approved, the Board could not possibly have negotiated with HealthPort a price that included consideration for those assets. I agree. As explained above, the theory underlying *Primedia* is that stockholders are entitled to have their board negotiate for them consideration for assets that may be enjoyed by an acquirer. Accordingly, as a matter of theory, in order to apply the standard articulated in *Primedia*, a plaintiff must, as a threshold matter, plead that an underlying derivative claim existed at the time the acquirer negotiated a price for the company. The Universata Board, during negotiations with HealthPort, could have had no duty—or *ability*—to obtain value for an asset that did not yet exist; the Board simply never had an opportunity to negotiate with HealthPort a price for the value of alleged fiduciary breaches that had not yet occurred. Thus, I need not undertake an analysis under the *Primedia* factors; the Plaintiffs have failed to demonstrate failure to obtain value for corporate assets under that standard.

[74] Def. Directors' Reply Br. at 16-17.

The Plaintiffs find fault in the fairness of this analysis, suggesting that the above application of *Primedia* creates a perverse regime in which a board may commit self-dealing without consequence. [75] However, although the Plaintiffs fail to address it in briefing, our case law has specifically contemplated the concern the Plaintiffs raise. Namely, *Kramer v. Western Pacific Industries, Inc.*,[76] *Parnes v. Bally Entertainment Corp.*,[77] and *Golaine v. Edwards*[78] have examined the relationship between direct challenges to the fairness of a merger transaction and derivative claims alleging "unfair" diversion of merger consideration; have articulated the policy that directors' unfair acts of self-dealing throughout the course of a merger transaction should not be immune from stockholder challenge; and have thoughtfully explained that stockholders may directly challenge payments to directors that wrongfully take consideration off the table that otherwise would have been shared by stockholders on a pro rata basis. Accordingly, under that line of cases, a plaintiff has standing to bring a direct claim "challeng[ing] the validity of the merger itself, usually by charging the directors with breaches of fiduciary duty resulting in unfair dealing and/or unfair price," but *not* simply by alleging corporate mismanagement or waste.[79]

[75] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 36.
[76] 546 A.2d 348 (Del. 1988).
[77] 722 A.2d 1243 (Del. 1999).
[78] 1999 WL 1271882 (Del. Ch. Dec. 21, 1999).
[79] *Parnes*, 722 A.2d at 1245; *see also id.* ("The Kramer Court held that the complaint stated only a derivative claim for mismanagement. Although the complaint did allege that wrongful

The Plaintiffs have failed to assert a count specifically seeking liability for diversion of merger consideration under the authorities above. I am mindful, however, that at this stage of the proceedings I must assess the facts alleged in the Complaint to see if, together with the reasonable inferences drawn therefrom, a cause of action is reasonably conceivable. The facts pled include the facts that, *after* negotiating the sale price, the Board amended the 2008 Equity Incentive Plan to treat stock options as common stock upon a change in control, and to vest warrants which would otherwise have lapsed, diverting to directors over $300,000 (and perhaps significantly more)[80] of the previously-negotiated merger consideration, in the context of total merger consideration so small that the Board concluded that a fairness opinion costing $250,000 could not be justified. The sole theory of liability that the Plaintiffs articulate with respect to what they characterize as a "litigation asset" is that the Board failed to achieve value for certain derivative claims in the merger, an argument I have already rejected.

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transactions associated with the merger (such as the award of golden parachutes) reduced the amount paid to Western's stockholders, it did not allege that the merger price was unfair or that the merger was obtained through unfair dealing."); *Golaine*, 1999 WL 1271882, at *7 ("That is, *Parnes* can be straightforwardly read as stating the following basic proposition: a target company stockholder cannot state a claim for breach of fiduciary duty in the merger context unless he adequately pleads that the merger terms were tainted by unfair dealing. If the plaintiff cannot meet that pleading standard, then he has simply not stated a claim under Rule 12(b)(6). This merits focus of *Parnes* is, in my view, a more candid approach that places primary emphasis on whether compensable injury to the target stockholders is alleged rather than on whether the target stockholder's complaint has articulated only a waste or mismanagement claim for which there is likely no proper plaintiff on earth.").

[80] Notably, the Plaintiffs challenge only the vesting of 300,000 warrants they believe had been improperly issued, but the individual directors' interests in the vesting of options and warrants was greater than that. Merger Agreement Schedule 1.2.

However, based on the facts alleged, the Plaintiffs have stated a conceivable claim for diversion of assets under *Golaine*. *Golaine* makes clear that a "simple syllogism"—that the board diverted assets from the merger consideration to a "side deal," and therefore breached a duty to distribute merger consideration equally to all stockholders—is insufficient to state a claim.[81] To survive a motion for judgment on the pleadings, the plaintiff must plead facts supporting an inference that the side payment represented an *improper* diversion and that, absent the impropriety, the consideration would have gone to the stockholders: such a pleading states a direct claim against the defendant directors.[82] Here, the pleadings can be understood to allege that the warrants arose in a context which constituted self-dealing; that a second, post-merger-negotiation action by the Board causing those warrants to vest rather than lapse was further self-dealing, conferring a benefit on the directors not shared by the stockholders; and that the diversion was material in the context of the consideration at issue. That claim survives this Motion, therefore, subject to the Defendants' laches defense addressed below.[83]

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[81] *Golaine*, 1999 WL 1271882, at *9 (citing *Kramer*, 546 A.2d at 350 n.2).
[82] *Id.*
[83] I note also that, according to Schedule 1.2 of the Merger Agreement, 46,000 options belonging to Mr. Houseman vested upon the change in control, and so, to the extent that Mr. Houseman benefitted from the transactions he challenges, he may be subject to an acquiescence, estoppel, or other equitable defense.

4. Put Contract Claim

The Plaintiffs do not allege in their Complaint a count for breach of contract, but in briefing argue that they are entitled to exercise certain rights under the Put Contract. Assuming, without deciding, that this claim has been properly asserted here, it is precluded by a prior judicial decision holding that no such contractual obligations exist. The Put Contract, according to the Plaintiffs, began as a private obligation of Whittington, but became an obligation of the Company when the Board "agreed to payoff [sic] Plaintiffs [sic] 'in the money' put option contract by board resolution."[84] With respect to that decision, the Board minutes, attached as exhibits to the Plaintiffs' Complaint, state:

> [The] Company [will] assume the financial obligation of Thomas D. Whittington to Aaron Houseman, said obligation being that Aaron may Put his stock to Thomas D. Whittington at the end of 2012 for $2.10 per share, be paid for by the Company if a premium is required; however, the actual guarantee remains with [Whittington] until resolved by the Company or the Put is satisfied.[85]

The Plaintiffs characterize themselves (rather than Whittington) as the beneficiaries of this resolution. Nevertheless, they contend that, despite the resolution, "[t]o exact revenge on Plaintiff Director [Mr. Houseman] for not approving the merger and not signing the merger agreement, the Company did not honor [the] board resolution;" accordingly, "[t]he Individual Defendants failed to

[84] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 40.
[85] Compl. Ex. 8 at ¶ 6.

list the Housemans' put option contract the Company assumed on March 14, 2011" on Schedule 1.2 of the Merger Agreement as a debt to be paid from the merger proceeds.[86]

Although their legal theory is not explained in the Complaint, it would seem the Plaintiffs intend to argue that, by failing to include the Put Contract on the Merger Agreement Schedule, the Company has breached a promise to the Plaintiffs to assume Whittington's obligations under the Put Contract. However, the Plaintiffs have previously sued Whittington for breach of the same obligations in Minnesota state court; that court determined—in an action where the Plaintiff did not join the Company as a necessary party—that Whittington is no longer obligated under the Put Contract, because upon cancellation of the Universata shares in the merger, the Put Contract became unenforceable.[87] "The doctrine of issue preclusion prevents the relitigation of an issue that has been litigated and decided in a previous action, when the decision on that issue was essential to the previous action."[88] For the doctrine to apply, the parties in the former and present action need not be identical, as long as "the party against whom issue preclusion is asserted had a fair opportunity to litigate the issue in the first lawsuit."[89] As the

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[86] *Id.*

[87] The Minnesota state court decision is incorporated into the Complaint. *See* Compl. Ex. 2.

[88] *TR Investors, LLC v. Genger*, 2013 WL 603164, at *3 (Del. Ch. Feb. 18, 2013).

[89] *In re Wickes Trust*, 2008 WL 4698477, at *6 (Del. Ch. Oct. 16, 2008); *see also id.* ("Issue preclusion, however, does not require that the party asserting issue preclusion have been a party to the original action. Rather, the only requirement is that the party against whom issue

individual Plaintiffs have litigated the issue of Whittington's obligation under the Put Contract, this Court is bound by the Minnesota state court's determination that, upon consummation of the merger, Whittington's obligations under the Put Contract were extinguished. Thus, even assuming that the Company did in fact undertake Whittington's obligations under that contract, because he is no longer so obligated, the Plaintiffs fail to state a claim based upon the Put Contract upon which relief could be granted.

5. Quasi-Appraisal Claim

Finally, recognizing that Aaron Houseman—a Universata director at the time of the merger—had access to the Company's financial information,[90] only his wife, Nancy Houseman, brings a claim for quasi-appraisal under *Berger v. Pubco Corp.*,[91] arguing that "[t]he Individual Defendants failed to provide to the Universata shareholders (a) the correct version of the merger agreement that was signed by the Individual Defendants; (b) the correct version of the appraisal statute; and (c) basic financial data ([including] audited financial statements and projections of future cash flow) to allow the Universata shareholders to decide

preclusion is asserted had a fair opportunity to litigate the issue in the first lawsuit. Having had a fair chance once, that party is barred from rearguing its case."); *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984) ("We have applied collateral estoppel where: '(1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.'") (citations omitted).

[90] Oral Arg. Tr. 79:19-23.

[91] 976 A.2d 132 (Del. 2009).

whether to demand appraisal."[92] The Defendants respond that the alleged omissions were not material, and that the Plaintiffs' recovery is barred by laches.

The doctrine of laches may bar a plaintiff's request for equitable relief where she has unreasonably delayed in seeking that relief, and such delay has prejudiced the defendant.[93] In most circumstances, resolution of a laches defense is inappropriate on a motion to dismiss, and "the Supreme Court has cautioned that dismissal of a complaint based on an affirmative defense is inappropriate '[u]nless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it.'"[94]

Here, the Merger Agreement at issue was signed on May 10, 2011; the Plaintiffs waited twenty-eight months from that date to file their Complaint in this Court on September 12, 2013. Undoubtedly, that delay was caused by the Plaintiffs' decision to first try their luck in a Minnesota state court in pursuit of claims against Whittington for breach of the Put Contract; had that action been successful, it would have vindicated their right to force a sale of their interest in Universata, and thus extinguished their claims brought here as stockholders. The Plaintiffs, however, failed on those claims, and admit that "[t]his Complaint now

[92] Pls.' Br. in Opp'n to Def. Directors' Mot. to Dismiss at 9.
[93] *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009).
[94] *Bean v. Fursa Capital Partners, LP*, 2013 WL 755792, at *6 (Del. Ch. Feb. 28, 2013) (citing *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009)).

takes over where the Minnesota lawsuit left off."[95] When asked why the Plaintiffs chose to wait so long to file this suit, counsel did not contend that the Plaintiffs failed for some time to discover the alleged deficiencies in the Information Statement; such an argument would be difficult to make, since the Plaintiffs concede that Mr. Houseman, as a director of Universata, was aware of all material information in connection with the transaction, as well as what was disclosed to the stockholders. Instead, when asked why the Plaintiffs waited so long to seek quasi-appraisal, counsel responded:

> [The Plaintiffs] didn't know that quasi-appraisal rights were available until they talked to me. Okay. It's the word "quasi-appraisal" is just intimidating. So when I looked at the documents when I was first retained, I noticed this. I thought of the quasi-appraisal statute, and I thought of *Pubco*. I said, "Were the forecasts attached?" No.[96]

Thus, counsel represented at oral argument that the Housemans failed to file this action within a reasonable time, not because they lacked information *about the transaction* until several years after it had occurred, but because they did not know they could seek a quasi-appraisal remedy under Delaware law.

As explained above, a dismissal based on laches is better decided on a fully-developed factual record, which would include not only the Plaintiffs' reasons for delay, but resulting prejudice to the Defendants. Therefore, I deny the Defendants' Motion to Dismiss with respect to the Plaintiffs' quasi-appraisal count; I expect the

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[95] Compl. ¶ 9.
[96] Oral Arg. Tr. 78:8-15.

Defendants will file a Motion for Summary Judgment on this count as they find appropriate.

IV. CONCLUSION

For the reasons explained above, the individual Defendant directors' Motion to Dismiss and Motion for Judgment on the Pleadings is granted in part and denied in part. Defendant KeyBanc's Motion to Dismiss is granted. The parties should confer and submit an appropriate Order.