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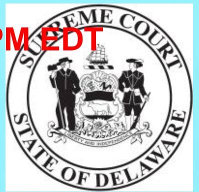

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IROQUOIS MASTER FUND LTD., On Behalf of Itself and All Others Similarly Situated,	)	
Lead Plaintiff Below-Appellant	)	No. 109, 2014
v.	)	Court Below: Court of Chancery of the State of Delaware Consol. C.A. No. 6170-VCN
ANSWERS CORPORATION, ROBERT S. ROSENSCHEIN, YEHUDA STERNLICHT, MARK B. SEGALL, W. ALLEN BEASLEY, R. THOMAS DYAL, MARK A. TEBBE, LAWRENCE S. KRAMER, SUMMIT PARTNERS L.P., AFCV HOLDINGS, LLC, and A-TEAM ACQUISITION SUB, INC.,	)	
Defendants Below-Appellees	)	

APPELLANT'S OPENING BRIEF

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April 16, 2014

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NATURE OF THE PROCEEDING

Stockholders of Answers Corporation ("Answers" or the "Company") brought this class action against the Company's Board of Directors (the "Board" or the "Director Defendants"), in connection with the acquisition of Answers at $10.50 per share by private equity firm Summit Partners L.P. ("Summit Partners"), through its portfolio company, AFCV Holdings, LLC ("AFCV"), and A-Team Acquisition Sub, Inc. ("A-Team") (collectively, the "Buyout Group") (the "Transaction"). Plaintiffs claim that Defendants breached their fiduciary duties in the context of a cash sale of the Company by, among other things, rushing the Transaction just before positive "looming q4 earnings" were to be announced and thereby consciously and artificially depressing the public market for Answers' stock. This manipulation of the market rendered the Board's primary justifications for the deal, a premium to market analysis and comparison to strategic alternative valuations, baseless. Because such conduct could not be advanced in the best interest of the Company, it was both unreasonable and in bad faith. Plaintiffs also allege that the Buyout Group aided and abetted the Board's fiduciary breaches.

The Court of Chancery granted summary judgment for Defendants, holding that no genuine issues of material fact remain regarding (1) whether the Board acted in bad faith; and (2) whether the Board was controlled by an interested party. Op. at 25-40. This appeal followed.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by resolving conflicts, weighing evidence, deciding among competing inferences and making factual findings in favor of Defendants.

2. The Court of Chancery erred in concluding that the Board acted reasonably in maximizing the sale price of the Company. Substantial record evidence exists that the Board knowingly rushed to approve the Transaction just days before the market would eliminate any change of control premium.

3. The Court of Chancery erred in concluding that the Board acted in good faith when the record reflects an extreme set of facts, including a deliberate manipulation of the timing of the Transaction to ensure that market would not eliminate any change of control premium. The actions of the Board are inconsistent with the best interests of the Company and demonstrate a conscious disregard for the Director Defendants' fiduciary duties.

4. The Court of Chancery erred in concluding that the Board exercised business judgment to approve the Transaction in light of perceived competitive and other risks from Google.

5. The Court of Chancery erred in finding no genuine issue of fact regarding Plaintiffs' aiding and abetting claim.

STATEMENT OF FACTS

A. The Parties

Plaintiffs were substantial holders of the common shares of Answers. A238. At the time of the Transaction, Answers was a Delaware corporation that provided answer-based internet search services to users primarily through its website, Answers.com. *Id*. Defendant Summit Partners is a private equity firm that invests in rapidly growing companies. A240. Defendant AFCV was the social media and online information resources portfolio company of Summit Partners. A241. Defendant A-Team was a Delaware corporation and an indirect wholly owned subsidiary of AFCV. *Id*.

B. The Offer

Redpoint was Answers' largest and 30% stockholder, with shares that admittedly could not be sold all at once. A660, A1183 at 95:1-95:4. Beginning as early as January 2010, Redpoint's two representatives on the Board, Beasley and Dyal, arranged meetings and calls for Answers' CEO Rosenschein to talk with potential acquisition partners. Beasley and Dyal, with the assistance of bankers from Thomas Weisel Partners, also arranged several meetings for themselves without including members of the Board other than Rosenschein. A279; A295-96.

On March 12, 2010, Redpoint received an email from Robert Abbe, from Jefferies & Company, Inc. ("Jefferies"), indicating that AFCV and Summit

Partners were interested in discussions concerning a possible combination with Answers. A284. Beasley and Dyal, without authorization from or informing the Answers Board, followed-up with Robert Abbe and agreed to meet AFCV's CEO, David Karandish. A286-89. The Court of Chancery recites, and the Proxy states that, at a March 17, 2010 Answers Board meeting, the Board discussed the possibility of exploring strategic alternatives to create stockholder value. A141. But, the minutes do not mention such a discussion at all. A292-93.

An internal Redpoint document dated June 2010 indicated that Redpoint had become dissatisfied with Answers' performance. Redpoint observed that inbound interest from merger partners in the Q&A space "had heated up" and decided to "take advantage" of this inbound M&A activity. A559. If no deal could be achieved, Redpoint indicated that the Answers management team would be replaced. *Id*. Redpoint owned over 2.5 million shares of an admittedly illiquid common stock which it would be unable to sell all at once in the open market. A660, A1183 at 95:1-95:4. The only way Redpoint could achieve a full liquidity event was through a sale of the entire Company and in May 2010, Redpoint was continuing "to look for ways to take advantage of the current liquidity markets." A305.

Beasley and Dyal continued to negotiate with AFCV on behalf of the Company, meeting on June 25, 2010 with AFCV. Beasley reported to

Rosenschein about this meeting and suggested a transaction be pursued. On July 14, 2010, Rosenschein and Answers' management met with representatives of AFCV in St. Louis. A315. On July 14, 2010, Answers and AFCV entered into a Mutual Confidentiality Agreement.

On August 9, 2010, Answers issued its second quarter earnings release after which its stock price dropped to $4.58 due to a large block sale. A144. According to the Proxy, a Board decision was made to continue to explore stockholder value through strategic alternatives. *Id*. As was the case in March, no discussions or potential valuations of strategic alternatives are recorded in the minutes of the August 13, 2010 Board meeting, a fact that is inconsistent with the assertion that the Board was actively involved in the exploration of strategic alternatives at this time and was overseeing the process. *See* A321-23.[1]

On September 8, 2010, with Answers' stock trading at approximately $5.50, AFCV sent Answers a letter of intent for a proposed acquisition with a price range of $7.50 to $8.25 per share. A328-64. At a Board meeting on September 15, 2010, the Board agreed that the offer from AFCV should not be accepted and that Answers' stock price was depressed. A366-68.

[1] This is one of many instances where the Proxy's recitation of the events conflicts with the contemporaneous documentary evidence; something that the Court of Chancery noted but from which the Court of Chancery failed to draw any negative inference. Op. at 8, n.32.

The Board did not engage UBS as its financial advisor until September 17, 2010, after AFCV had made its initial offer. *Id*. UBS was retained only to provide advice with respect to a sale. A1008 at A158:21-159:4; A1009 at 164:3-164:9 ("We were not mandated to pursue a strategic alternative other than a sale…"). UBS received a $2.3 million fee, all of which was contingent on a deal – $650,000 for a fairness opinion and $2.25 million upon closing. A158. Whether or not the wholly contingent nature of UBS's fee payable only upon a "Sale Transaction" created a conflict of any kind was never discussed by the Board. A1082 at 128:19-128:22.[2]

On October 19, 2010, AFCV raised its offer to $9 per share. A146. On October 28, 2010, Answers management met with AFCV, UBS and Jefferies at which time Answers presented AFCV with projections and the strategic plan for the remainder of 2010 and for 2011. A145; A817 at 76:6-77:11. At the end of October, the Company had prepared a forecast through 2011 that showed improved performance for the last quarter of 2010 and through 2011. A384; A818 at 79:3-79:23. In a November update to the Board, Rosenschein described Answers' business as "stable, profitable, with great assets, sitting on a strong cash position and generating more." A389.

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[2] The Court of Chancery incorrectly stated that Plaintiffs do not challenge UBS' independence. Op. at 23.

Following the Company's presentation, on November 4, AFCV raised its offer to $10.00 per share with a proposed exclusivity agreement. A145. According to the Proxy, on November 5, 2010, the Financing Committee of the Board met to consider the revised offer and determined that they could not agree to exclusivity. *Id*. No minutes of any November 5, 2010 meeting were produced in discovery despite the testimony of defendant Sternlicht that minutes were kept of all meetings of the Financing Committee. A1133 at 54:20-55:3.

On November 8, 2010, AFCV raised its offer to $10.25 and asked again for exclusivity. A393. Shortly thereafter, Jefferies informed UBS that AFCV was prepared to continue to discuss a possible transaction at the $10.25 price without exclusivity, if Answers agreed to reimburse AFCV for its expenses should Answers agree to engage in a different sale transaction. A145. On November 14, 2010, representatives of Jefferies delivered to UBS a non-binding letter of intent formally raising the offer to $10.25. *Id.*

C. The Board Fails to React to Dramatically Changed Circumstances

The financial results and prospects for Answers were improving significantly in the Fall of 2010. Answers' market price, which had fallen precipitously in August due to the sale of large blocks of shares by one holder, rose from a low of $4.58 in August to over $8 by the end of the 2010. A717 at 77:5-16.

It traded as high as $8.78 on February 1 and $9.15 on February 2, 2011, before the $10.50 Transaction was announced on the morning of February 3. A31.

Further, the Board was aware as of at least a December 8, 2010 Board meeting that Answers was materially outperforming its projections, and that its business was stabilizing and showing great promise into and through 2011. A400 ("During the discussion, management emphasized that the numbers for Q4 2010 were coming in stronger than expected"); A407. On December 9, 2010, Rosenschein provided UBS with updated estimates for the fourth quarter of 2010 ("Q4") reflecting $488,000 in additional revenue and $509,000 more in adjusted EBITDA. A430.

With full knowledge of these dramatic positive changes in the Company's quarterly results and enhanced prospects, no director ever suggested that the Transaction be reconsidered or delayed by a matter of just five days[3] to allow the market to absorb and react to the news of the improved Q4 performance or the positive 2011 outlook. By timing the Transaction just a few days before its scheduled release, that information was withheld from the public, and any other potential bidder. No director suggested that UBS perform any analyses to determine the best or any market price reasonably available to Answers'

[3] Using prior quarters in 2010 and prior years as a guide, Answers' 2010 Q4 earnings would have been released on February 8, 2011, 38 days after the quarter end, and the conference call would have discussed expected future results.

stockholders by assessing the effect that the upcoming Q4 earnings release might have on Answers' stock price. The Board's chosen approach instead was to allow UBS to share this information only with the Buyout Group and to warn the Buyout Group in January 2011 that the Company's "out-performance" and looming Q4 earnings announcement would jeopardize the Transaction. This implied that the stock price likely would overtake or surpass the current offering price; or, at the very least, that any lesser premium would render the Transaction unsupportable in the context of a cash sale of the Company. A561, 573, 575. When Answers published its Q4 results on March 17, 2011, the Transaction already had been announced, capping the market, and stockholders were precluded from ever knowing or getting the benefit of what the unaffected share price of Answers would have been. In this way, the Board deliberately and knowingly manipulated the timing of the Transaction in a manner that foreclosed the stockholders of the benefit of any increase in the stock price resulting from the Q4 actual results.

Three documents in evidence reflect that UBS warned the Buyout Group that it was critical to preempt any February 8 earnings release by timing the $10.50 deal before then, thereby neutralizing any market reaction and its likely effect on the $10.50 deal:

1. On January 5, 2011, Janine Shelffo from UBS sent an email to Beasley, Dyal, Rosenschein and Segall (four of seven Answers directors),[4] about a conversation she had with Summit: "**I told him that our concerns are both around certainty and timing, and shared my view that time is not a friend to this deal with continued outperformance and a looming q4 earnings call.**" A561 (emphasis added).

2. On January 13, 2011, Shelffo sent an email to this same group stating "I told him in no uncertain terms that he and his client have lost all credibility with us, that patience on our side of the table was dwindling, that there was general skepticism after almost a month of excuses about whether they could actually come up with the funding and that **with every day that passed with the stock price rising and the company outperforming made it less and less likely that our board would be interested in a deal anywhere near the price vicinity discussed**." A573 (emphasis added).

3. On January 15, 2011, Shelffo sent another email to Rosenschein, Beasley, Dyal and Segall regarding her interaction with Jefferies: "I also reiterated to him **that time has been no friend to this deal as the stock price has**

[4] While only four Board members were copied on UBS's email, other Board members independently expressed their own views that when those earnings were made public, the market would likely drive Answers' stock price higher, even higher than AFCV was offering. Defendant Kramer testified that the Board discussed the fact that the Q4 earnings would positively affect the Company's value and that "one would hope" that value would affect the stock price. A1079 at 81:12-83:11. Kramer testified further that an increase in Answers' stock price "might have attracted another buyer." A1086 at 145:3-145:8.

increased and the company has continued to outperform." A575 (emphasis added).

Thus, UBS specifically stated that any further increase in Answers' stock price would make it "less likely" that the Board would be able to approve a deal at "anywhere near" the price offered, recognizing that Answers' stock price would very soon rise above the offer price and that any premium would evaporate or disappear. In this way, the Board took away the impending upside in Answers' stock price and thus allowed the Board to describe the $10.50 deal as favorable when compared to the market price.

D. The Board Performs an Inadequate Market Check

On December 8, 2010, Shelffo advised Defendants Beasley, Dyal and Rosenschein that the Buyout Group, through Jefferies, continued to "push again the idea that we should do a quick market check in the next two weeks." A395. Shelffo admitted that two weeks was not a "real" market check, expressed concern about the timing of such a check coinciding with the Christmas holidays, when interest would be low and feedback poor, and questioned whether such a "quick" check would meet the Board's fiduciary obligations. *Id.* UBS recommended that "**to complete a real market check would be to do something in the new year**." *Id.* (emphasis added). But the Buyout Group continued to "push the idea that we

reach out to others before Christmas to satisfy our fiduciary duty and then sign up their deal." *Id.*

Despite UBS's concern that a "quick" market check in the last two weeks of the year would not satisfy the board's fiduciary duties, that is exactly what the Board authorized. UBS contacted ten potential strategic buyers during its "shopping" period. No financial buyers were contacted despite the facts that (1) Summit itself was a financial buyer; (2) Redpoint had recognized in June 2010 that there was inbound interest from private equity funds (A560); and (3) Rosenschein said in June 2010 that private equity should not be ruled out "even if the strategics are the more interesting." A309. These ten companies were provided with outdated October 2010 financial projections. A1340 at 160:20-161:22.[5]

Defendants asserted below, and the Court of Chancery took as true, that potential buyers were given stale October projections "so that we don't have multiple sets of numbers floating out there." A437. But Answers' CFO had indicated that he was able to send projection revisions right away. A432 ("I will send you a revised forecast within one hour"); *see also* A437 (CFO had prepared a revised forecast for 2011 and was prepared to create "a slide showing where we are trending towards as compared to the model."). Despite the availability of these

[5] The presentations to potential bidders did not break out results by quarter for 2010 and did not discuss the Company's Q4 results to date. *Id.* Answers' CFO could not recall whether potential buyers were provided with verbal updates regarding Q4 outperformance. *Id.* at 161:23-162:13.

revisions, UBS indicated that potential buyers should be told that Answers was still in the process of revising the 2011 forecast. A437.

UBS reported back to the Board regarding the result of its market check at the Board's December 23, 2010 meeting. By that time, three companies had not yet responded with feedback and four responded that they were not interested in a strategic acquisition. A552-53. Three companies expressed some interest and the Company's management team made presentations to these parties utilizing only the Company's October projections, as noted above. *Id.*

At a December 23 Board Meeting, UBS advised the Company that it would be prepared to inquire of "second tier prospects" but warned that delay could "jeopardize the Announce transaction." A553. The Board rejected any more exhaustive search despite the fact that AFCV had not yet even firmed up its financing. *Id.* Also at the December 23, 2010 Board Meeting, the Board was informed that Q4 had significantly outperformed the October 2010 plan provided to potential bidders. A550. Revenues were "far beyond the $5.2M forecast in the [October] Plan and even far north of the $5.75 forecasted earlier in December at the previous Board meeting" with "over $800,000 higher-than-Plan revenues fall[ing] to the bottom line." A551. The Board minutes reflect that revenues could even be record setting. *Id.*

By January 5, 2011, Answers' CFO sent UBS an updated forecast for 2011 noting that "2011 Adj EBITDA in this Plan is $917K higher than the October Plan." A566. That updated forecast was provided to the Board on January 19, 2011 and to AFCV that same week. A578-79.[6] On January 19, 2011, Shelffo set up a call with Summit Partners to review the revised 2011 forecast. A581. Other potential bidders, including those who had only received October projections, were not provided with the significantly improved January 2011 projections or a Q4 update, despite Defendants' assertion that the market check was ongoing.

E. The Buyout Group Offers an Extra Quarter to Get the Deal Done Before the Earnings Announcement

On February 1, 2011, AFCV raised its offer to $10.50 per share from the $10.25 it had offered just shy of three months earlier, on the condition that Answers agreed to sign "today." A609.

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[6] The actual results ultimately reported on March 17, 2011 were almost identical to the results set out in the January 24, 2011 update given to AFCV.

ARGUMENT

I. MATERIAL ISSUES OF FACT EXIST REGARDING WHETHER THE BOARD OBTAINED THE BEST PRICE REASONABLY AVAILABLE UNDER *REVLON* AND ACTED IN GOOD FAITH

A. Question Presented

Did the Court of Chancery err in holding that there were no genuine issues of fact regarding whether the Board failed to maximize the sale price of the Company and acted in good faith? *See* A78-101 (issues raised below).

B. Standard and Scope of Review

This Court's review of the trial court's determination of summary judgment "is *de novo*, not deferential, both as to the facts and the law." *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits of the Argument

A company's directors are to be single-minded in achieving the highest value per share in situations where there will be a sale of control of the corporation. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1994). Given the significance of a change in control transaction, the Court will subject "the directors' conduct to enhanced scrutiny to ensure that it is reasonable." *Id.* at 42. "The defendant fiduciaries bear the burden of proving that they 'act[ed] reasonably to seek the transaction offering the best value reasonable available to the stockholders,' **which could be remaining independent and not**

engaging in any transaction at all." *In re Rural Metro Corp. S'holders Litig.*, 2014 WL 971718, at *19 (Del. Ch. Mar. 7, 2014) (emphasis added).

1. The Board Did Not Act in a Manner to Achieve the Highest Value Available

At least as of December 2010, all members of the Board were aware that the Company's Q4 earnings were outperforming expectations. Yet the Board did not share the preliminary or final Q4 earnings report with any bidder other than the Buyout Group; provide any potential buyer other than the Buyout Group with updated projections;[7] discuss the effect that an early February earnings announcement might have on Answers' stock price; consider whether to delay signing the Merger Agreement announced on February 3 for just a few short days until the Q4 results became public and were allowed to be absorbed by the market; or ask UBS to perform any analyses of strategic alternatives.

Knowing that there was a risk, with Answers' stock already trading higher without the Q4 results, that delay would likely cause the premium to evaporate or vanish, the Board knowingly failed to fulfill its fiduciary duties and instead embarked on a course of conduct to deliberately keep positive market-moving information from being publicly disclosed before locking in the $10.50 deal with

[7] The Court of Chancery dismisses Plaintiffs' claim stemming from failure to provide the new projections to other bidders on the grounds that the failure to do so was some sort of timing issue between Answers' CFO and UBS in December. Op. at 14. This conclusion does not explain why, if the market check was ongoing, other bidders were not provided with the same projections and Q4 results that were given to the Buyout Group in January 2011.

AFCV. This was achieved by allowing UBS to warn Jefferies and Summit that the deal had better get done quickly; negotiating a $.25 increase in the $10.25 offer price that had remained unchanged since November 8, 2011; and rushing AFCV to get the deal signed before the Q4 earnings release. When the Q4 earnings were publicly announced in mid-March 2011 and the summary 2011 projections were provided in the Proxy, Answers' stock price was already capped at the deal price. In this way, the Board deliberately manipulated and artificially depressed the public market for Answers' stock.

Answers adjusted its earlier projections upwards in January 2011 by a material amount and reported actual results for Q4 that were higher than projections. Specifically, 2011 adjusted EBITDA was $917,000.00 higher than the October plan and Q4 average revenue per average page views ("RPMs") were significantly higher as well. A556, A569-70. Although the Board learned this information at a time when Defendants claim that the market check was "ongoing," the fact that the updated projections and actual Q4 results were not provided to anyone other than the Buyout Group creates a plausible inference that the market check was in fact over and Defendants wanted to get the deal done before the market impact of the Q4 earnings release could endanger the Transaction in any way. Consistent with that inference, UBS with the knowledge of four Board members warned the Buyout Group that it better move quickly or the Board would

not be in position to approve the deal at "anywhere near" the offer price. A573. Defendants asserted in the Court of Chancery that UBS's statements to Jefferies and the Buyout Group about the need to move quickly do not create a triable issue because these statements were just negotiating tactics and what Shelffo really feared was that the deal would fall apart if the Buyout Group knew that Answers was talking to other buyers. However, Shelffo nevertheless testified that she in fact believed what she said, even if she was in negotiating mode. A1018 at 199:14-199:25. Further, to the extent Ms. Shelffo's testimony is inconsistent with her contemporaneous emails, there remain disputed issues that must be tried.

The Board's primary stated bases for the $10.50 Transaction, as represented in the Proxy, were that the price constituted a premium to market and compared favorably to valuations of considered strategic alternatives. A151.[8] The Court of Chancery gave credence to these assertions despite the lack of evidentiary support for the Board's claim to have explored the value of any strategic alternatives and despite the fact that the premium to market only existed because of the Board's manipulative conduct in timing the Transaction days before 4Q earnings were to be publicly announced. Because of this manipulation, stockholders were purposely deprived of the opportunity to compare the deal price to the unaffected market

[8] On November 8, 2010, when AFCV offered $10.25, Answers' stock closed at $6.90 representing a premium of 48.5%. On February 3, the premium had shrunk to less than 15%.

price after the announcement of Q4 earnings, and any claim of a premium is illusory. In addition to thwarting an actual market reaction to the release, the Board never undertook any formal or written analysis necessary to assess even the potential market reaction to the announcement of the Q4 earnings. Thus, the Board had no basis for assessing whether $10.50 was the best price available, and had no basis to present the $10.50 price to stockholders as a premium offer.

Indeed, substantial evidence suggests that UBS and the Board were confident that Answers' stock price, which had been rising steadily to over $9.00, would go up even further after February 8. UBS, retained by the Board for its expertise, stated its belief that "time is not a friend to this deal." A561. The view espoused by UBS, which is the best available evidence bearing upon the likely market reaction and premium analysis, was that in just a few days the market price would trade up and possibly through the offer price making the Board unable to accept a deal at "anywhere near" $10.25. A573.

Further, the $10.25 offer had been on the table since November 2010. Between that time and last and final offer of $10.50, Answers' results from operations had greatly improved. Revenues were up, EBITDA was up, cash was up, projections were up, the stock market was up and Answers' stock price was up even without Q4 information. Importantly, the January 2011 projections, on which UBS relied and in which UBS said the Company had "confidence," reflected a

continuation and acceleration of the Q4 2010 upward trend and took into account anticipated Google "hits" in 2011. A156-57. Those positive dynamics render the rush to close the Transaction for an extra $0.25 ahead of the public earnings release inherently questionable. No document in the record reflects a belief by the Board that Answer's stock was overpriced or the stock might "tank" after the February 8, 2011 earnings announcement. In short, no documents in the record justify the Board's decision to take $10.50, when Answers' stock traded as high as $9.15 on February 2 without any disclosure regarding Q4 results.

This manipulation of the timing of the Company's disclosure to stockholders is egregious not only because the deal was recommended to stockholders as a premium deal, but also because the Board represented that receipt of the merger consideration was more favorable than strategic alternatives reasonably available to Answers' public stockholders and "represents a more attractive opportunity to Answers.com's stockholders than the value of the Answers.com common stock likely to be realized by Answers.com's stockholders in the event that Answers.com remained independent" A152. Despite these unequivocal representations in the Proxy, the record is devoid of contemporaneous evidence showing any written valuation analysis of strategic alternatives or where Answers' stock were likely to trade absent a deal, after the 4Q earnings were announced and with Answers' 2001 projections, which Answers represented were made "with confidence." A156.

The Proxy itself confirms that UBS only reviewed "current and historical market prices on Answers common stock." *Id.* As the Court of Chancery recently noted in *Rural Metro*: "The scope of the required information includes a reasonably adequate understanding of the value of not engaging in a transaction at all. Directors must 'act on an informed basis to independently ascertain how the merger consideration offered … compare[s] to [the company's] value as a going concern." *Rural Metro*, 2014 WL 971718, at *25. Answers had no debt and approximately $3 in cash per share on its balance sheet. That Answers' cash could be used by the Buyout Group to fund the purchase price itself should raise the question of why the record contains no analyses of uses of the free cash in the context of Answers remaining public. For example, logically, that cash position could warrant a cash dividend or a stock buyback and a publicly traded stub with the value of both exceeding $10.50. Yet no such analysis ever was done.

Similarly, no Board member asked UBS and UBS did not provide any formal analysis of the potential short-term market effect of the Company's release of Q4 results and improved forecast on the Company's 2011 stock price, the Company's value as a going concern, or the Company's growth prospects beyond one year. In fact, UBS's fairness opinion expressly disavows any opinion as to any alternatives other than the Transaction and UBS testified that no other alternative was discussed at the February 2 Board meeting at which the $10.50 offer was

accepted. A1009 at 165:6-165:12; A156 ("Our opinion does not address the relative merits of the transaction as compared to other business strategies or transactions that might be available to the Company or to the Company's underlying business decision to effect the transaction."). In the context of maximization of value for stockholders, the Board knew Answers' share price was poised to move up dramatically, yet had no expert evaluate the potential market price for Answers' stock, even when Q4 results were final. No director can claim that he sought the best price reasonably available without analyses of alternate scenarios, including remaining independent or delaying the Transaction for several days to assess market reaction to the earnings release. These analyses would have been crucial to the consideration of the adequacy of the control premium offered. In light of these facts and given the deliberate suppression of the announcement of Q4 earnings, this should not be a case "where a Board's independent sense of the value of the company is sufficient to carry the day." *Rural Metro*, 2014 WL 97178, at *30. The Board had the market to tell it what it needed to know. But the market was "no friend to the deal" and had to be neutralized.

2. The Board's Inaction Cannot Be Excused on the Basis of Google Risk

The Court of Chancery accepted the Director Defendants' testimonial evidence about "Google risk" that purportedly prevented the Board from delaying the Transaction for the purpose of exploring the possibility of getting a higher price

in the short term. Op. at 31 (noting "plausible business concerns about the stability and future success of the Company."). In so doing, the Court of Chancery weighed the evidence and resolved a sharp factual dispute against Plaintiffs. Contrary to the Court of Chancery's holding, there is ample evidence that establishes that the Board was not in a rush to sell the Company due to a hypothetical risk posed by Google. The transaction delay that would have been necessary was extremely short term -- holding off for just a few days for the purpose of evaluating market reaction to the public announcement of the Q4 earnings on February 8, 2011. Defendants proffered no evidence that the so-called Google risk was imminent. The only rational explanation for the rush to sign the deal is the one advanced by Plaintiffs: for the deal to be deliberately timed to beat the expected Q4 earnings announcement. Only after being warned of the effect on this deal if Q4 results were released before an agreement, AFCV added a quarter to its already 10-week old November 2010 offer of $10.25. AFCV, which still had not firmed up financing and had been in no apparent rush, was suddenly so incentivized to get the deal done that it used money from one of its other investment funds to help finance the deal. A689.

Like many companies in the internet space, Answers had been dependent on Google since day one and no director was able to articulate what exactly had changed since September 2010 in that regard making a rushed sale critical or

necessary just five days before a public positive earnings release. Defendant Tebbe, the creator of the beta for the Answers product, testified that dependence on Google had always been an issue for Answers. A1254 at 156:16-157:5; 154:20-155:5. The Google risk had been disclosed in Answers' 10Ks for at least the years 2009 and 2010, including discussions of the Google Services Contract which did not expire until 2012, potential competition from Google, and the potential effects of Google algorithm changes. While all Defendants acknowledged the ongoing risk of Google dependence on the Company's business, Sternlicht testified that the risk posed by dependence on Google was no different in 2010 or 2011 than it was in any other year. A1149 at 120:20-121:2. The positive January projections, which were affirmed in the April 2011 Proxy, further undercut the assertion that Google business risk had suddenly escalated in January or February and establish that the likely risk could easily have been withstood, at least in the short to intermediate term. A150, 566, 578. To the extent that Google posed a risk to the Company, that risk had been fully disclosed for years, was well-tolerated, and was reflected in Answers' stock price. Nothing in the record relating to Google should have precluded the Board from waiting a matter of five days to release Q4 earnings and put stockholders on equal footing with AFCV.

There is also not a single document that reflects a concern of the Buyout Group with any risk from Google other than the need for assurance that Google

would transfer the Google Services Agreement contract to AFCV. A578. In the last days of discussions, there are no references to any heightened Google risk in communications between the Buyout Group and the Board and at no point did the Buyout Group refuse to pay more due to any Google-related risk.

To the contrary, the evidence indicates that Answers was weathering Google's algorithm changes better than other companies in the industry. For example, the Board knew that one algorithm change in January 2011 did not affect Answers at all. A595. Further, Answers' CFO testified that potential algorithm changes already were factored into Answers' upward revised projections and that he had factored a large Google hit into his projections for March 2011, and subsequently pushed that hit back to May 2011. A1336 at 145:5-146:12; A543; A680. Kramer testified that Answers had taken steps to lessen its dependence on Google by hiring someone who had worked there and could "deal with… the company's dependence on Google." A1068 at 72:13-72:19. Even Redpoint acknowledged at its Annual Advisory Committee Meeting on February 1, 2001, the day before the February 2 Board meeting at which the deal was approved, that Answers was a profitable business with $25 million in cash and stressed that new initiatives had been put into place to "decrease dependency on Google." A623.

The evidence adduced by Plaintiffs establishes that the likely and expected positive market effect of the pending earnings release incited the rush to sign and

announce the deal as opposed to some Google algorithm change or competitive risk. The Court of Chancery erred in resolving such sharply argued issues of fact against Plaintiffs.

3. The Board's Inaction is not Remedied by a Quick, Inadequate Market Check

In addition to being totally uninformed about alternate valuations through a strategic alternative or through the market, the Board also failed to conduct an adequate market check and, therefore, had no basis to represent to stockholders that there was no likely other alternative transaction with any other buyer. The Board asserts that the market check to assess an alternative transaction began in November 2010, at the latest, and continued through Board approval of the Transaction. The contemporaneous documentary evidence tells another story: limited activities constituting the market check only took place from approximately December 8, 2011 through December 23, 2011. The market check was very short, limited in scope and purposefully timed (in the weeks leading up to the holidays) when interest was likely to be low. Despite the competing inferences to be drawn from the facts advanced by the parties, the Court of Chancery weighed the evidence and made factual findings in favor of the Board.

Many documents in the record indicate that the market check was not yet underway in early December, 2010. A November 3, 2010 email from Rosenschein indicated that, as of that date, he had been working with UBS on **one inbound**

suitor and that "[n]o outbound feelers have been made yet." A389; A1144 at 98:18-98:22. On December 2, 2010, defendant Rosenschein sent an email to a potential buyer stating: "You asked me to let you know if Answers.com were involved in strategic discussions. We are currently responding to **incoming strategic interest**." A393 (emphasis added). On December 8, 2010, Shelffo, wrote to a number of Board members noting that Jefferies, the banker for the buyer, was "push[ing] the idea that we reach out to others before Christmas to satisfy our fiduciary duty and then sign up their deal. A395. Shelffo also advised Defendants Beasley, Dyal and Rosenschein, who were leading the negotiations, that the Buyout Group, through Jefferies, continued to "push again the idea that we should do a quick market check in the next two weeks." *Id.* Together, these documents indicate that the market check did not get underway until December 8, at the earliest.[9]

The record evidence further reflects that any market check effectively concluded by December 23, 2010. The December 23 Board minutes reflect UBS reporting to the Board regarding the results of the market check, discussion of the possibility of contacting a wider range of potential buyers and the Board's determination not to authorize UBS to contact others after that date. A553-54. No Board member identified any particular action that UBS took after December 23

[9] The minutes of the Board are consistent with these emails. UBS was not authorized by the Board to begin a market check until the December 8, 2011 Board meeting. A401.

other than some follow-up communications with parties who first had been contacted in December. A1256-57 at 165:20-166:12. The Director Defendants' only evidence that the market check continued beyond December 23 is that no one ever instructed UBS to stop. Op. at 12.

Post December 23 documents also confirm the true length of the market check. The description of the market check in the February Board minutes details actions that were taken only in the period from December 8 through December 23, the two weeks prior to the Christmas holidays when interest would likely be low. A638. Indeed, the Proxy itself confirms the chronology of events that UBS began its market check after the December 8 Board meeting and recites no events that occurred after the December 23 report. A146-47

In addition to issues of timing, it cannot be disputed that no financial buyers were ever contacted despite earlier inbound expressions of interest; stale projections were disseminated and no updated projections were provided to potential purchasers other than the Buyout Group creating an unlevel playing field that favored AFCV; and no update regarding the Company's Q4 results was provided to any potential purchasers other than the Buyout Group after the initial contact. This type of market check, particularly in light of the Board's conduct regarding strategic alternatives and market prices, cannot support a finding of

reasonable conduct. Further, the Board's process provides no support for its statements that the Transaction provides the greatest value to stockholders.

4. There Were Material Issues of Fact Regarding Whether the Board's Conduct Rises to the Level of Bad Faith

The Court of Chancery erred in holding that no reasonable fact-finder could conclude that the Board's conduct rises to the level of bad faith sufficient to be treated as a non-exculpable fiduciary violation. Op. at 25-35. In the *Revlon* context, directors may not be acting in good faith under two scenarios: (1) if they "knowingly and completely failed to undertake their responsibilities," *Lyondell Chem. Co. v, Ryan*, 970 A.2d 235, 243-44 (Del. 2009); *see also In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012) (A director can act in bad faith where he or she "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties.") (footnote omitted); and (2) where the "'fiduciary intentionally acts with a purpose other than that of advancing the best interest of the corporation.'" *Chen v. Robert Howard-Anderson*, 2014 WL 1366551, at *26-28 (Del. Ch. Apr. 8, 2014); *see also id.* at *29 ("The plaintiffs can defeat summary judgment by citing evidence which, when evaluated under the Rule 56 standard, supports an inference that the directors made decisions that fell outside the range of reasonableness for reasons other than the pursuit of the best value reasonably available, which could be no transaction at all.").

Here, where the Board deliberately manipulated and suppressed the public market by sharing completed Q4 results of operations only with the Buyout Group and deliberately timed the Transaction to prevent the market from learning this information, both standards are met. At the very least, Plaintiffs have "adduced some evidence of a dispute of material fact" sufficient to defeat summary judgment. *See Metcap Secs. LLC v. Pearl Senior Care. Inc.*, 2009 WL 513756, at *3 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009)(TABLE).

As to the Board's conscious abandonment of its *Revlon* obligation, the Board agreed to the Transaction and recommended it to stockholders based upon its "market check," its claimed exploration and valuation of strategic alternatives, the purported premium to market and a comparison of the Transaction to remaining independent. However, the shop was inadequate, evidence documenting any exploration of the valuation of strategic alternatives, including a range of near-term to intermediate-term market price if remaining independent, is non-existent, and any premium here is contrived and illusory without such information. The Director Defendants manipulated the market through the timing of the Transaction and had no reasonable basis for representing to Answers' public stockholders that the deal price represented a premium to market or was preferable to other strategic alternatives. These actions affecting and impairing the public market in an effort to justify the Transaction price go beyond a due care violation.

All seven members of the Board of Answers were aware that Answers was outperforming in Q4 and that the Company was scheduled to announce blowout quarterly earnings in early February 2011. All seven directors also were shown several sets of projections in late 2010 and early 2011, showing incrementally greater EBITDA and revenue, and potentially record results. At the time that these directors were learning this positive information, the Buyout Group had not yet firmed up its financing and the deal was on hold. There is no compelling reason in the record that the deal had to be done in early February other than the likely market effect of the public release of Q4 results.

In response to these improved Q4 earnings and 2011 projections, the Board did not discuss or consider any analysis of potential market reaction or the valuation of any other strategic alternative to the Transaction. UBS was not retained to perform any such analyses, and its opinion expressed no such conclusions. A156; A370-77. Shelffo testified that no analyses of strategic alternatives other than sales transactions were provided by UBS and that other alternatives that could provide superior value to the Company were not presented by UBS to the Board. A1008-09 at 158:6-165:12.[10] In the face of these facts, the

[10] While Shelffo testified that other strategic alternatives were "discussed from time to time" during the course of UBS's engagement, no written analyses of those other alternatives have been produced by UBS or by the Board. A1008 at 159:6-159:15.

Court of Chancery wrongfully concluded that "Plaintiffs never direct the Court to any evidence exhibiting any intent to remain uninformed." Op. at 33.

Defendants will likely assert that Shelffo's emails to Jefferies and Summit were not sent to all seven Director Defendants and, if they did not know about the emails, they could not have acted in bad faith. This argument ignores that the Director Defendants knew the Q4 results would have a positive market effect whether or not they saw the actual emails. *E.g.*, A1079 at 81:12-83:11. UBS was simply stating the obvious and warning the Buyout Group to sign the agreement before the market could learn what UBS, the Buyout Group and the Board already knew at that point. Moreover, whether or not any director was required to know exactly what the market would do before raising any question is not the point – what matters is that not one director took steps to ensure that he had a reasonable basis for assessing the deal by asking UBS to do any relevant analysis of stock price or any strategic alternative other than the Transaction. As the Court of Chancery noted in in its Opinion on Defendants' motion for reargument: "The independent directors might also be able to show that they did not act in bad faith by showing that they thought any rise in Answers' stock would be short-lived, and thus, that Answers' stockholders, as a whole, would be better off with the consideration from the Merger than they would have been with Answers' stock." *In re Answers Corp. S'holder Litig.*, 2012 WL 3045678, at *4 n.24 (Del. Ch. July

19, 2012). No director made this showing and no director had a reasonable basis to make this judgment.

The Court of Chancery also held that no genuine issue exists as to the issue of bad faith because the Board had "plausible" business concerns. Op. at 31-32. However, as discussed in detail above, no single contemporaneous document in this case that specifically suggests that the deal should be rushed or accelerated for five days primarily because of some unspecified potential Google algorithm change or competitive threat. *See supra* at pp. 22-26. When the Board purportedly began discussing the exploration of strategic alternatives in early 2010, there was no discussion of selling the Company before Google destroyed it. Indeed, the deal sat stagnant for ten weeks in 2010, without financing in place, until it became apparent that Q4 earnings would cause a price movement that would render a deal at the offer price unfair and could result in Redpoint's loss of its sole liquidation opportunity through a sale. The only evidence in this case that expressly cites any need to rush and speed up the process are the warnings to the Buyout Group to move quickly due to outperformance, an upcoming earnings release and the likely effect of the market reaction thereto. Whether or not Defendants' testimony regarding "business concerns" is credible and outweighs the documentary evidence regarding the reasons for speeding up the deal and manipulating the market are questions that should be considered at a trial.

With respect to the market check, the Court of Chancery reasoned that even a 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." Op. at 30. Here, directors were told by their expert that "to do a real market check would be to do something in the new year." A395. The Board ignored this advice and embarked upon a market check in the last two weeks of December, knowing their advisor considered that market check to be not "real" and therefore insufficient. Moreover, in concluding that any market check, however inadequate, precludes a finding that the Board acted in bad faith, the Court of Chancery looked at each fact individually without considering the facts as a whole. The rushed market check has to be considered in the context of the improved Q4 earnings and projections, the failure to let the market react to the improved results and the warnings to the Buyout Group to move quickly before the premium disappeared. These facts create genuine issues as to whether the Board "utterly failed to obtain the best price available" in a manner that could support a showing of bad faith.

Additionally, the record evidence supports an inference that the Director Defendants made decisions that fell outside of the range of reasonableness for reasons other than the pursuit of the best value reasonably available. There is substantial support in the record for the assertion that Redpoint was driving this ship and wanted either a liquidity event or a significant housecleaning of

management. A559. Were Answers' stock price to trade through the deal price, Answers' stockholders might have a more valuable stock in their hands, but Redpoint would lose its liquidity event and its chance at recognizing a many times return on investment.

By June 2010, Redpoint had determined that if it could not find an immediate merger partner for the Company, Rosenschein would need to be removed from his post as Company CEO and his "team" "replace[d]." Specifically, Redpoint expressly stated "Need to either take advantage of inbound M&A interest or replace team. Leaning toward former." A560.

Indeed, Redpoint had already started to court others, at least to supplement the work being done by Rosenshein, including Patrick Keane, a former Google executive who was hired by Answers as a consultant. A388; A904 at 15:19-24. In an email to Dyal, Beasley stated: "I met Patrick [Keane] today. He is very good. He could run the company. He is open to it…." A388.

The topic of a management change had not only been discussed with Rosenschein but with the Board as a whole. A905 at 21:7-20; A388. Answers' CFO testified that the entire Answers' management team was not happy about the hiring of Keane. A1317 at 67:21-68:7. Others testified further that Redpoint and Answers' management clashed and that Redpoint was generally unhappy with the performance of management. A1318 at 71:13-72:25; *see also* A1177 at 47:22-

48:10; A547 (management felt "contempt" from Redpoint). Given this testimony, the Court of Chancery erred in concluding that management was not aware of Redpoint's dissatisfaction and that Redpoint did not have the power to effectuate management changes at Answers. Op. at 5. Rosenschein, in turn, knew that his position and power as chief executive was at risk. Redpoint did not like Answers' management, intended to lessen Rosenschein's role and intended to surround him with "Silicon-Valley-type talent." A1177 at 48:11-49:10. Hiring Keane already was indicative of such a move. But a buyer might allow Rosenschein to keep his full position. Thus, Rosenschein could have improved his vulnerable position through a merger.

With respect to the remaining four directors, the Court of Chancery failed to follow even its prior decisions in this case when it held that Plaintiffs must show that each defendant was controlled by either Rosenschein or Redpoint. *Compare* Op, at 24, 35-40 and *Answers*, 2012 WL 1253072, at *7 (holding that Plaintiffs only must show that facts exist supporting a fair inference that the each of them consciously acted in a manner contrary to the interests of Answers and its stockholders.). Defendants "bear the burden of persuasion to show that their motivations were proper and not selfish" and that "their actions were reasonable in relation to their legitimate objective." *Rural Metro*, 2014 WL 97178, at *18. As the Court of Chancery noted in its decision on the motion to dismiss: "Directors

can act in bad faith in breach of their duty of loyalty even in there is no whiff of self-dealing from their actions." *Answers*, 2012 WL 3045678, at *3.

Disputed facts exist in the record that suggest the Answers Board was purposefully trying to do something other than obtain the best price reasonable available for Answers stockholders for whatever reason. The Director Defendants unfairly managed the sale process to prevent timely market access to highly material operating results and this falsely represented that the $10.50 price legitimately represented a premium over market. Between the rushed market check, the Q4 results, the 2011 projections, UBS's emails, the market at over $9.00 on February 2 without any disclosure of the improved Q4 results, and the failure of the entire Board to do any formal analyses of the very metrics that they relied on in approving the Transaction, a fact-finder could determine that members of the Board consciously made a decision that fell outside of the range of reasonableness for reasons other than the pursuit of the best value reasonably available to Answers' stockholders.

II. MATERIAL ISSUES OF FACT EXIST REGARDING WHETHER THE BUYOUT GROUP KNOWINGLY PARTICIPATED IN THE BOARD'S BREACH OF FIDUCIARY DUTY

A. Question Presented

Did the Court of Chancery err in holding that there were no genuine issues of fact regarding whether the Buyout Group knowingly participated in the fiduciaries' breach? A103-05 (issues raised below).

B. Standard and Scope of Review

This Court's review of the determination of summary judgment "is de novo, not deferential, both as to the facts and the law." *Williams*, 671 A.2d at 1375.

C. Merits of the Argument

To prove an aiding and abetting claim against a non-fiduciary, a plaintiff must show: (i) the existence of a fiduciary relationship; (ii) a breach of that relationship; (iii) knowing participation by the defendant in the fiduciary's breach; and (iv) damages. *Malpiede v. Townson,* 780 A.2d 1075, 1096 (Del 2001). "A bidder may be liable to the target's stockholders if the bidder attempts to create or exploit conflicts of interest in the board. Similarly, a bidder may be liable to a target's stockholders for aiding and abetting a fiduciary breach by the target's board where the bidder and the board conspire in or agree to the fiduciary breach." *Id.* at 1097-98. To the extent that the Director Defendants breached their fiduciary duties, the first two elements are satisfied, even in the context of a breach of duty of care. *Rural Metro*, 2014 WL 97178, at *21-24.

The Court below erred in its knowing participation analysis. Plaintiffs asserted the Buyout Group's knowing participation primarily based on (1) their push to do a quick market check; and (2) the mid-January and early February 2011 warnings that "time is not a friend to this deal" in the face of a looming earnings call. Genuine issues of material fact exist regarding whether the Buyout Group received confidential information from the Board regarding Q4 results and improved projections, which arguably would have been material to the public stockholders, and whether the Buyout Group used that information to engineer a transaction that benefitted the Buyout Group and certain Board members, but which did not necessarily benefit Answers or its public stockholders. Summit and Jefferies were told separately by Shelffo that "time was not a friend to this deal." A 561, 573, 575. Whatever Shelffo claims that she meant, what Jefferies and Summit were told was that the Company had outperformed in Q4, was going to release its earnings and that, if that happened, the Board would not be able to support a deal at the offer price. Thus, Summit and Jefferies each were explicitly told to take action to prevent Answers stockholders from getting a higher price and took such action by adding $.25 to the offer price to get the deal done in an "expedient fashion." A148.

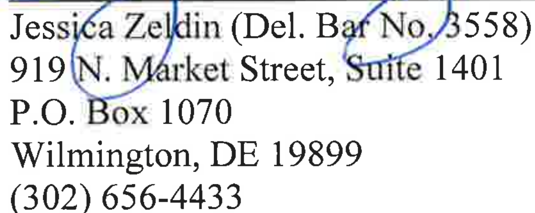
In granting summary judgment to the buyout Group on this claim, the Court of Chancery focused statements in Shelffo's emails that the Board was "pencils

down" until financing was in place. Op. at 40-41. The Court of Chancery failed to explain how UBS's explicit warnings to the Buyout Group that Answers' stock price might trade through the deal price if the deal were not done before the earnings release are completely neutralized by a statement that the Board was frustrated by a lack of progress with respect to financing. The emails to the Buyout Group from UBS, coupled with the Buyout Group's possession of inside, potentially market moving information, alone create triable issues as to whether the Buyout Group knowingly aided and abetted the fiduciary breach of the members of the Answers Board.

* * *

For all of the foregoing reasons, the Court of Chancery erred in granting summary judgment to Defendants.

ROSENTHAL, MONHAIT & GODDESS, P.A.



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April 16, 2014

EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ANSWERS CORPORATION	:	CONSOLIDATED
SHAREHOLDERS LITIGATION	:	C.A. No. 6170-VCN

MEMORANDUM OPINION

Date Submitted: October 16, 2013
Date Decided: February 3, 2014

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NOBLE, Vice Chancellor

I. INTRODUCTION

Defendants are the former directors of a corporation that operated an Internet questions and answers site, the corporation, and the buyout group which acquired it by merger. Shareholder plaintiffs' surviving claims challenging the transaction allege 1) that the CEO director and the two director nominees of the corporation's primary venture capital investor were conflicted and controlled the board, and 2) that the four remaining directors on the seven-person board breached their duty of loyalty and acted in bad faith. Finally, plaintiffs assert that the buyout group aided and abetted the directors' breach of fiduciary duty. Defendants have moved for summary judgment, and for the reasons that follow, their motions for summary judgment are granted.

II. BACKGROUND

Before the merger from which this litigation arises, Answers Corporation ("Answers" or the "Company") was a publicly-traded Delaware corporation with its principal place of business in New York. Answers operated Answers.com, a leading question and answer ("Q&A") Web site which supported six languages.[1] The site utilized wiki-based technologies to provide community-generated social knowledge, which allowed its answers to be improved and updated over time.[2] The site was, however, dependent on Google for its traffic and for its advertising

[1] Zeldin Aff., Ex. 1 (the "Proxy") at 20.
[2] *Id.*

revenues. Approximately 90% of the site's traffic came from search engines, principally Google's. Approximately 75% of its revenue came from Google's AdSense.[3] The Company had no control over the algorithms routing traffic to the Company's site or over the algorithms placing ads on the site.[4]

Answers' seven-person board (the "Board") was comprised of Defendants Robert Rosenschein, Allen Beasley, Thomas Dyal, Mark Tebbe, Lawrence Kramer, Mark Segall, and Yehuda Sternlicht (the "Director Defendants"). Rosenschein founded Answers in 1998 and was its Chairman, President, and Chief Executive Officer ("CEO"). The venture capital firm Redpoint Ventures ("Redpoint") was the Company's largest shareholder and owned approximately 30% of it. Beasley and Dyal are partners of Redpoint and served as its nominees to the Board. Segall was the chairman of the Company's Financing Committee; Beasley and Sternlicht were the committee's other members.[5] It is uncontested that four directors of the seven-member board, Tebbe, Kramer, Segall, and Sternlicht, were disinterested directors.[6]

AFCV Holdings, LLC ("AFCV") is a portfolio company of private equity firm Summit Partners, L.P. ("Summit") and has a focus on social media and online

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[3] *Id.* at 32.
[4] *Id.*
[5] *Id.* at 21.
[6] Defendants' brief describes Tebbe as a software pioneer, Kramer as the current President and Publisher of *USA Today*, Segall as a respected investment banker, and Sternlicht as an accountant with more than thirty years of experience. Answers Defs.' Opening Br. in Supp. of Their Mot. for Summ. J. ("OB") at 7.

information resources. Answers merged with A-Team Acquisition Sub, Inc. ("A-Team" and, collectively with AFCV and Summit, the "Buyout Group"), a wholly-owned subsidiary of AFCV. The Director Defendants, along with the Company and the Buyout Group, are referred to, collectively, as the "Defendants." Plaintiffs were shareholders of the Company.

A. *AFCV Indicates its Interest in Answers and Other Events in 2010*

In March 2010, Redpoint received an unsolicited expression of interest from AFCV concerning a possible business combination with Answers.[7] Answers, through Beasley and Dyal, responded to the expression of interest by setting up an initial meeting with AFCV's CEO, David Karandish.[8] The Board discussed the possibility of exploring strategic alternatives at a meeting on March 17, 2010, including the recent expression of interest from AFCV.[9] The Board decided it was in the best interest of the Company and its stockholders to explore these possibilities and to engage a financial advisor to assist in evaluating the Company's options.[10] Segall, as an independent director and chairman of the

[7] Proxy at 21.
[8] Zeldin Aff., Ex. 8. Beasley testified that he had only one meeting with Karandish in response to his expression of interest and then turned further negotiation over to the Company's management. *See* Beasley Tr. 144, 174 ("We would typically, as we did in the case of [AFCV], field the initial call and then turn it over to the Answers management . . . for them to follow up on."). As explained below, he and Dyal had one other meeting with AFCV representatives, but without other Company representatives. Beasley would also later reach out to the Buyout Group to attempt to negotiate a price increase.
[9] Proxy at 21.
[10] *Id.*

Financing Committee, was selected to evaluate potential financial advisors to recommend to the Board.[11]

Between March and September of 2010, representatives of Answers continued to meet with AFCV and engaged in early discussions related to a possible combination.[12] Beasley and Dyal met with AFCV representatives on June 25, acting in their capacity as representatives of AFCV.[13] However, the vast majority of communications between the Buyout Group and Answers at this time were conducted by Rosenschein.[14]

Answers also received expressions of interest from other entities around the time that AFCV expressed its interest.[15] The Company's Proxy reports that the Board considered alternative strategies on several occasions.[16] Also throughout

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[11] *Id.*
[12] *Id.* at 21-24.
[13] *Id.* at 23.
[14] *Id.* at 21-24. Beasley appears to have been a participant alongside Rosenschein in some of these conversations, although he was not a participant in a majority of them. *See id.*
[15] *Id.* A media company and private equity group initiated contact in January 2010; a further presentation was made to the private equity group in February 2010. Another private equity firm initiated contact in May 2010 and two additional meetings with that party occurred in July and August. A third private equity firm contacted Rosenschein in November 2010, after which an additional presentation was made later that month and the Company's financial advisor, UBS, followed up with the firm. The potential media acquirer did not pursue its expression of interest and the private equity firms terminated conversations with Answers and indicated they would not pursue an acquisition.
[16] *Id.* Specifically, the Board considered strategic alternatives during an executive session of its March 17, 2010 meeting; the Board "continued to believe it was in the best interests of the Company and its stockholders to explore strategic alternatives such that it would be fully informed" during a special meeting on April 16, 2010; certain members of the Board, during "informal conversations," were supportive of continued discussions and the exploration of strategic alternatives with AFCV after a May 10, 2010 meeting with AFCV; and, following the

that time the Board considered financial advisors and was informed about conversations with AFCV.[17]

Plaintiffs assert that Rosenschein sought a deal out of his fear of being fired as CEO. They make much of what appears to be an internal Redpoint document, dated June 2010, which evaluates its investment in Answers. The document indicates that the Company's status was "[b]elow expectations" and that Redpoint was considering options with its investment including "either tak[ing] advantage of inbound M&A interest or replac[ing the] team."[18] Despite Plaintiffs' assertions to the contrary, no evidence in the record demonstrates that Rosenschein or other directors of Answers were aware of Redpoint's assessments at this time or until discovery in this litigation.[19] Finally, although Rosenschein and other managers discussed future employment with AFCV prior to the signing of the merger agreement, Rosenschein stated that he was a representative of the shareholders

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August 9, 2010 earnings release, the Board agreed it was advisable to continue to explore strategic alternatives.

[17]Wagner Aff., Exs. 11-14.

[18] Zeldin Aff., Ex. 39 (the document's author notes a preference to take advantage of an M&A event rather than to replace the team).

[19] Plaintiffs primarily direct the Court to several emails between Beasley and Dyal in which they either express some frustration with Rosenschein or discuss a conversation with an Answers consultant who they were considering as a possible CEO replacement. Zeldin Aff., Exs. 15, 23. They also direct the Court to deposition testimony indicating that Redpoint wanted its investment to perform better and that management was aware of a certain amount of frustration about the Company's performance. Beasley Tr. 12-30; Steinberg Tr. 67-68, 71-72. However, none of these conversations can reasonably be interpreted as evidence that Redpoint had decided to, or threatened to, replace management or that such information was conveyed to management.

until the deal was completed.[20] AFCV also indicated that it would not make any firm commitments about future employment for any of the Company's employees.[21]

In June, upon the recommendation of the Board's Financing Committee and after reviewing the terms of engagement of the financial advisors under consideration, the Board decided to engage UBS as the Company's financial advisor.[22] Negotiations between Answers and UBS were not completed until September 17, 2010.

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[20] Rosenschein Tr. 218-19. Rosenschein testified:

> My specific representation to Mr. Karandish is that, and I told him this quite explicitly, up until the minute we sign the papers at closing, my first and only responsibility is to the shareholders of answers.com, and as much as I'd like to cooperate and we have certainly obligations, but I really, when we close, you know, he'll have my loyalty, but up until then I represent the shareholders.
>
> Now, specifically having to do with employment, we have no management contracts. We have no written or oral understandings regarding any medium to long-term employment, none. . . .
>
> That means my entire management team, everybody on the list, including myself, does not know if I have a job in five or six months – do not know it.

[21] Karandish testified:

> [A]ny team members and executives would be determined on a case-by-case basis as to whether to not they would stay and combine company, assuming that we closed, on a case-by-case basis at my discretion. . . .
>
> Case-by-case for everyone, including the CEO.
>
> Mr. Rosenschein has said that he would like to be part of the combined company. He has also said that he is a "big boy," . . . and that if he's not part of the combined company, that's okay, too.

Karandish Tr. 111-13.

[22] Proxy at 23.

On July 14, 2010, Answers and AFCV entered into a Mutual Confidentiality Agreement. On August 9, 2010, Answers issued its second quarter earnings release which reported a second consecutive quarterly drop in revenues, after which its stock price fell from $7.99 to $4.58 within a week.[23] Rosenschein's testimony suggests that the stock price decline was based on a single shareholder which dumped several hundred thousand shares in two days and not upon market fundamentals.[24] Answers also began providing information concerning the business with AFCV at this time. On August 31, 2010, Karandish informed Rosenschein that he had received the green light from Summit's investment committee to pursue a transaction with Answers.[25]

B. *Answers and AFCV Negotiate a Sale Price*

On September 2, 2010, Karandish called Rosenschein to discuss delivering a letter of intent for a purchase of Answers by AFCV and explained that AFCV was considering a price of $8.00 per share. On September 7, 2010, Karandish sent Rosenschein a non-binding letter of intent for an acquisition within a range of $7.50 to $8.25 per share.[26] The Board concluded at its next meeting on September 15, 2010, that a price in that range was inadequate.[27] Following further

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[23] *Id.* at 24.
[24] Rosenschein Tr. 77 ("It did not fundamentally alter our view of, you know, of the value [of the Company].").
[25] Zeldin Aff., Ex. 17.
[26] Zeldin Aff., Ex. 18.
[27] Wagner Aff., Ex. 15.

discussions between the financial advisors of Answers and AFCV, AFCV raised its offer to $9.00 per share on October 19, 2010. Rosenschein discussed "AFCV's willingness to increase its price" with certain Answers board members.[28] They decided that it was in the best interests of the Company and its stockholders to continue discussions and to exchange additional information with AFCV.[29]

On October 28, Rosenschein, Karandish, and other representatives of their companies met, and Answers provided AFCV with an updated management presentation and additional diligence materials and information, including projections and the strategic plan for the remainder of fiscal year 2010 and for 2011.[30] Thereafter, on November 4, 2010, AFCV raised its offer to $10.00 per share and also sent the Company an exclusivity agreement which would prevent it from discussing the possibility of a strategic transaction with other parties for a period of time.[31] The Financing Committee apparently considered this offer on November 5. It concluded that the $10.00 offer was a positive development, but would not agree to exclusivity with AFCV, and directed UBS to communicate its conclusions to AFCV's financial advisor.[32]

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[28] Proxy at 24.
[29] *Id.*
[30] *Id.* at 25.
[31] *Id.*
[32] *Id.* No minutes of this meeting of the Financing Committee have been produced. One member of the Financing Committee, during his deposition, asserted that minutes were prepared for every Financing Committee meeting. Sternlicht Tr. at 54-55.

Additional negotiations culminated in an offer from AFCV's financial advisor to UBS on November 8, 2010 for $10.25. AFCV again sought to condition the offer upon exclusivity.[33] After learning of AFCV's offer, Segall wrote the Company's lead financial advisor at UBS, Janine Shelffo, and Beasley: "Disappointing response. That suggests they will accept exclusivity at $10.50 if they are playing in quarters now. . . Feels at least $0.50 low to me (if not $1.50!)."[34]

The Financing Committee directed management and UBS to continue to negotiate with AFCV, although without exclusivity, because it believed it was in the best interest of Answers to retain its ability to consider other offers. AFCV agreed to continue negotiations if Answers would reimburse it for expenses if Answers engaged in another transaction at a higher price. During a special meeting on November 15 to consider AFCV's updated non-binding letter of intent and its expense reimbursement agreement, the Board determined it would be in the Company's best interest to allow AFCV to proceed with due diligence and for management to cooperate with it.[35] However, the Board made no final decision about whether to pursue the AFCV transaction or another transaction.[36]

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[33] Proxy at 25.
[34] Zeldin Aff., Ex. 24.
[35] Wagner Aff., Ex. 16.
[36] *Id.*

C. *Answers Evaluates Interest from Other Possible Acquirers*

Although Answers had received unsolicited interest from some potential acquirers from January 2010 to November 2010, the Board formally authorized UBS to approach ten other potential strategic buyers during its December 8 meeting.[37] UBS may have taken certain steps related to the market check slightly before this time. For example, it appears to have developed a list of potential bidders as of September 2010[38] and the minutes of the December 8 Board meeting and accompanying materials indicate that UBS initiated the market check in November.[39]

Plaintiffs focus on two emails sent just before the December 8 Board meeting in which Shelffo relayed negotiation information to Rosenschein, Beasley, Dyal, and Segall.[40] Shelffo, in both emails, describes AFCV "push[ing] the idea" that Answers conduct a quick market check in the two weeks preceding Christmas to satisfy the Board's fiduciary duties and then sign up a deal.[41] In the first of these emails, dated December 6, Shelffo wrote "I told [AFCV's banker] the board was

[37] Wagner Aff., Ex. 17 at 3 ("The Board also instructed UBS to explore the interest of other parties who might be interested in pursuing the acquisition of the Company, in parallel to management's discussions and negotiations with [AFCV], and to report to the Board and management on the results of its inquiries."); Proxy at 26.
[38] *See* Wagner Aff., Ex. 22 at 1, 18-19.
[39] Wagner Aff., Ex. 17 at 3 (UBS's representative "next described the status of conversations with other interested parties, and shared her thoughts as to the probability of any of these parties becoming serious candidate acquirers."); Wagner Aff., Ex. 23 at 3 ("Beginning in November 2010, after receiving an unsolicited offer from [AFCV], UBS conducted a market check contacting potential buyers to gauge their interest in a potential transaction with [Answers.]").
[40] Zeldin Aff., Ex. 26.
[41] *Id.*

not comfortable with that approach satisfying their fiduciary duty and that our UBS recommendation to complete a real market check would be to do something in the new year."[42]

At a special meeting of the Board on December 23, 2010, Shelffo reported the responses of the ten strategic acquirers that UBS contacted. Two companies had not responded, one was "probably not interested" due to a pending going-public transaction, and four indicated they were not interested in pursuing a transaction.[43] Board meeting minutes report that three companies expressed some interest in a transaction and that management had already presented information to those companies.[44] Shelffo assessed the interest of these parties in an acquisition, noted that UBS was waiting for additional information, and stated that UBS would be more able to gauge their interest once it received additional feedback.[45] In response to questions, Shelffo also discussed the advisability of soliciting interest from a wider range of potential acquirers. She commented that UBS was prepared to do so, but the Board should also balance the speculative benefits of running a more thorough search against the risks of delay which could jeopardize the AFCV transaction.[46]

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[42] *Id.*
[43] Wagner Aff., Ex. 18 at 4.
[44] *Id.*
[45] *Id.*
[46] *Id.*

Board members, during depositions, explained that the Board never told UBS to stop its market check[47] and that the check continued until the date the parties signed the merger agreement.[48] The Court cannot divine from the record the means by which the three interested acquirers indicated their lack of interest in Answers and when, if at all, such information was conveyed to the Board. However, the minutes from the Board's February 2, 2011[49] meeting confirm that the market check was limited to the strategic buyers discussed and that all three of the interested acquirers indicated a lack of interest.[50] Thus, AFCV's offer was the only offer that the Company received in 2010.

D. *The Fourth Quarter Results of 2010*

During the December 23, 2010 Board meeting, the Company's financial condition appeared to be improving. The Board was informed that the Company's fourth quarter performance "significantly" exceeded that of the plans submitted to

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[47] Dyal Tr. at 188.
[48] Kramer Tr. 86-87; Tebbe Tr. 201.
[49] Although the minutes are misdated February 2, 2010, the litigants clearly understand them to be the minutes from February 2, 2011. *See* OB at 16; Pls.' Answering Br. in Opp'n to All Defs.' Mots. for Summ. J. ("AB") at 29 n.18.
[50] Wagner Aff., Ex. 21 at 5 (noting "UBS had reached out to those it deemed to be the motivated buyers, but found that potential buyers were not interested in the Q&A space, especially as the Company's stock price began to rise." Shelffo stated "the process tested interest in the market in an acquisition of the Company, but that no such interest had been found."), 8 ("Questions were then asked whether there might be other potential acquirers whom UBS had not canvassed and whether any such acquirer could still come forward. In response Ms. Shelffo said that UBS was not aware of any such 'dark horse,' and that, based on the market check performed by UBS, it was not likely that the Company would receive a topping bid."); *see also* Proxy at 26.

AFCV in October and that it expected record revenues.[51] Specifically, anticipated revenues were projected to be $6.06 million or even higher, which was far beyond the $5.2 million forecast in the plans submitted to AFCV.[52] EBIDTA was also $800,000 higher than projected. Business metrics the Company relied upon were also favorable. Page views exceeded projections by 10%, although management attributed approximately 7% of that to page views received from Google.[53] Revenue per thousand page views ("RPMs")[54] had also exceeded projections by 5%.

The minutes also offered certain cautionary notes and contemplated the need to weigh the new projections. The minutes warned that there was "no assurance we will see continued strength as seen in Q4" and that "[p]ast experience leads us to expect negative Google surprises in 2011."[55] Based on this new information, management would prepare an updated forecast to be presented to the Board in January, which the Board would "need to evaluate and understand . . . before approving the [AFCV] transaction."[56]

Plaintiffs rely heavily on this relatively strong fourth quarter (the "Fourth Quarter Results"). They focus on a December 12 email exchange among

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[51] Wagner Aff., Ex. 18 at 1.
[52] *Id.* at 2.
[53] *Id.* at 1-2.
[54] Beasley Tr. 21.
[55] Wagner Aff., Ex. 18 at 2.
[56] *Id.*

Rosenschein, other managers, and UBS discussing which financials should be presented to potential interested acquirers during the market check. In the email chain, Shelffo wrote that "we should present the 2011 numbers as presented to [AFCV] so we don't have multiple sets of numbers floating out there. We can address verbally the outperformance we've seen in q4 and explain that we are still in the process of revising our forecast for 2011."[57] The Company's Chief Financial Officer ("CFO") replied that he would send a revised 2010 forecast should UBS wish to include it in any presentations.[58] By January 5, 2011, the CFO sent UBS an updated forecast for 2011.[59]

The Fourth Quarter Results also played some role in the Company's negotiations with AFCV. By January 2011, the Company's negotiators became concerned that AFCV was delaying finalizing the transaction and was unable to obtain financing for it. Shelffo referenced the Fourth Quarter Results to explain that the recent improvement in performance by Answers had decreased the Board's

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[57] Zeldin Aff., Ex. 31.
[58] Plaintiffs make several arguments based on these emails. AB at 23. First, the Court notes that because much of the evidence Plaintiffs muster here is based on a concern over the ability of individuals preparing information for presentations or presenting such information to do so in a timely manner based on last-minute requests, it seems far afield of Plaintiffs' bad faith claim against the disinterested directors. More importantly, because Plaintiffs' factual account in this section concerns an interchange between UBS and Answers's CFO, it provides little, if any, basis for assessing the Board's bad faith or its domination by Rosenschein or the Redpoint Directors and the Court therefore omits some unnecessary detail.
[59] Zeldin Aff., Ex. 41.

interest in a deal with AFCV in a series of three emails sent on January 5,[60] January 13,[61] and January 15[62] (the "Shelffo Emails"). These emails indicate that the Company put negotiations on hold until AFCV could demonstrate that it could fund the transaction.

Rosenschein provided revised forecasts to the Board on January 19, 2011 while informing them of the "intense" interactions between the parties, the "5-day hiatus" in negotiations, and updating them on remaining significant business

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[60] Zeldin Aff., Ex 40. On January 5, Shelffo wrote to Rosenschein, Beasley, Dyal, and Segall that a recent conversation with a Summit team member had resulted in certain assurances being made to Shelffo. However, she "told him that our concerns are both around certainty and timing, and shared [her] view that time is not a friend to this deal with continued outperformance and a looming q4 earnings call." The Summit representative assured her that his firm was "entirely committed to getting this done."

[61] Zeldin Aff., Ex. 43. UBS continued to negotiate with Summit's representative on behalf of Answers. Shelffo emailed Rosenschein, Beasley, Dyal, and Segall on January 13, 2011 that she "[j]ust got off a rather heated call with [AFCV's financial advisor]. The upshot is that they still don't have financing papers to provide us." Shelffo informed AFCV's financial advisor:

> [H]e and his client have lost all credibility with us, that patience on our side of the table was dwindling, that there was general skepticism after almost a month of excuses about whether they could actually come up with the funding and that with every day that passed with the stock price rising and the company outperforming made it less and less likely that our board would be interested in a deal anywhere near the price vicinity discussed. I asked him to communicate to his client that we are pencils down and have no interest in spending another penny pursuing this transaction until they demonstrate an ability to fund the transaction.

[62] Zeldin Aff., Ex. 44. Shelffo emailed Rosenschein, Beasley, Dyal, and Segall to explain that a Summit representative provided her a more detailed update in which he further confirmed Summit's commitment and expressed certain frustrations with its financial advisor. Shelffo maintained a hard line and told him that a particular deal term was "not our only business issue, that there are still a handful to work through in our view but that we were not prepared to commit any more resources to their deal until they prove they can finance it." She also "reiterated to him that time has been no friend to this deal as the stock price has increased and the company has continued to outperform."

issues.[63] He also informed the Board that the forecasts would be shared with AFCV later that week, which Shelffo began coordinating that same day.[64]

E. *Answers and AFCV Finalize a Price*

On January 25, 2011, Rosenschein again updated the Board to describe a meeting held the day before among Answers, AFCV, Summit, and their respective financial advisors. He explained that the "price discussion" was being saved for last but was expected that week.[65] Thereafter, the Financing Committee resumed its activities in a series of meetings on January 26 and 27. On January 26, the Financing Committee considered arguments in favor of increasing the share price beyond the pending offer of $10.25 per share.[66] Shelffo was in attendance and stated that UBS foreshadowed such arguments to AFCV's advisors and that they were resistant to a price increase.[67] Thus, Shelffo suggested a price increase between $0.25 and $0.75 per share. The Financing Committee agreed that Beasley should contact one of Summit's representatives to see if the price could be raised and to report back as soon as possible.[68]

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[63] Zeldin Aff., Ex. 45.
[64] *Id.*
[65] Zeldin Aff., Ex. 47.
[66] Wagner Aff., Ex. 19.
[67] *Id.* (AFCV's advisors argued that "the Company's RPMs current situation may pose a challenge; that [AFCV] viewed the Company's 2011 projections as quite aggressive; that [AFCV] had not incorporated any deal-related management bonuses in previous price discussions; and that the Company's exposure under [a separate] issue could justify a downward price adjustment.").
[68] *Id.*

According to the minutes of the January 27 Financing Committee meeting, Beasley contacted the Summit representative and Summit rejected his efforts to increase the sale price.[69] The Financing Committee agreed that UBS should make one last attempt at a price increase, although it believed that it was in the interest of Answers and its shareholders to accept the transaction at a price of $10.25 per share.[70]

On January 28, Rosenschein emailed the Board to set up a "tentative 90-minute general board meeting."[71] On February 1, apparently during a family vacation, Rosenschein emailed the Board to explain that he and Karandish had discussed the sale price and completing the deal that morning. Karandish consulted with AFCV's board and contacted Rosenschein to extend an offer of $10.50 per share "and not a penny more," if Answers signed that day.[72]

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[69] Wagner Aff., Ex. 20. A later document suggests that Beasley proposed an increase of $0.45 per share, although that document does not indicate whether other bargaining positions were taken. *See* Zeldin Aff., Ex. 53. In that document, Summit's representative wrote to Beasley and Dyal explaining its reasons for standing by the current price. He continued:

> The headline is that, based on our diligence, we are worse off (in terms of liabilities we are assuming and in terms of lower NOLs than UBS asked to pay for) by approximately $10 million. That equates to roughly $0.84 per share in purchase price. Despite our diligence findings, we are prepared to remain at a share price of $10.25 per share, which effectively raises our price by more than the $0.45 per share you proposed. For sake of clarify, we are not prepared to increase our price beyond $10.25 per share.

[70] Wagner Aff., Ex. 20. Shelffo also suggested at this meeting that Answers convene a Board meeting, at which UBS could share its fairness opinion. *Id.*

[71] Zeldin Aff., Ex. 50.

[72] Zeldin Aff., Ex. 54.

Rosenschein answered that a meeting on February 1 was impossible, but that he would "recommend this deal at this price to our board Wed afternoon [February 2]."[73]

F. *Answers Approves the AFCV Transaction*

On February 2, 2011, the Board convened telephonically to consider the AFCV offer. Rosenschein introduced the transaction and reviewed its history, including UBS's failed search for another suitor.[74] The Board heard presentations from its general counsel and outside counsel.[75] UBS described the market check, considered financial metrics, evaluated comparables, reviewed the terms of its engagement with Answers, and opined that the transaction was fair from a financial perspective.[76] The Company's CFO delivered management's analysis and considered certain pros and cons to the deal.[77]

Rosenschein also weighed the pros and cons of the deal with the Board in the context of the Company's plans and business environment. Rosenschein explained that the Company's stock price had been increasing in recent weeks, that the Q&A space was "hot" and had potential, and that site traffic had been encouraging. He described ongoing projects, for example, developing a direct

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[73] *Id.* Rosenschein also wrote that "[t]his is a big decision, requiring full board review of pros and cons." *Id.*
[74] Wagner Aff., Ex. 21 at 1.
[75] *Id* at 2-4. General counsel discussed the deal terms and conditions; outside counsel's presentation is redacted.
[76] *Id.* at 5-6.
[77] *Id.* at 7.

advertising sales force, attempts to increase the quality of content, and other initiatives. He also described certain risks, such as the execution risk of the Company's upcoming initiatives and the fact that it was experiencing declining RPMs.[78]

Rosenschein also addressed the Company's dependence on Google and the possibility that Google might begin to compete with it. He said that Google provided "90% of the Company's traffic and three quarters of its revenues" and that "[c]hanges that might be made by Google were outside the Company's control and could have a major adverse impact on the Company."[79] He also added that competition in the Q&A space was increasing, and in particular that Google had recently purchased a Q&A website and that Facebook had recently added a questions feature.

The Board then engaged in general discussion and asked questions, such as whether AFCV might increase its offer and whether other potential acquirers who were not canvassed might still come forward. Shelffo responded that $10.50 appeared to be "as high as [AFCV] was prepared to go" and there was no indication of AFCV holding back on price.[80] Shelffo also said she was unaware of any "dark horse" and, based on UBS's market check, it was unlikely that a topping

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 8.

bid would be forthcoming.[81] The Board weighed the pros and cons and voted unanimously to approve the transaction. The four disinterested directors each testified that he believed the transaction was fair and that he would not have voted for it if he believed otherwise.[82] That same day, Answers and AFCV signed a merger agreement.[83] A shareholder meeting to consider the proposed transaction was scheduled for April 12, 2011.

G. *Post-Transaction Developments*

Several complaints challenging the transaction were filed in this Court and were consolidated. Plaintiffs moved for a preliminary injunction on March 26, 2011 to prevent a shareholder vote. Also in March, Answers released the Fourth Quarter Results.[84] On April 11, 2011, after expedited discovery, this Court denied Plaintiffs' motion.[85] No topping bids were received by the Company except for the Greenspan offer, discussed below.[86]

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[81] *Id.*

[82] *See* Tebbe Tr. 203-04; Kramer Tr. 143-47; Sternlicht Tr. 123-27; Segall Tr. 163.

[83] *See* Proxy, Annex A. The agreement contained certain deal protections. These provisions included a "no shop" clause, a "no talk" provision, a matching rights provision, a termination fee plus expense reimbursement worth approximately 4.4% of the merger's equity value, and a force-the-vote provision. *In re Answers Corp. S'holders Litig. (Answers I)*, 2011 WL 1366780, at *8 n.50 (Del. Ch. Apr. 11, 2011). The merger agreement also permitted the Board to terminate the agreement if it received a superior proposal. Proxy at 67-68. Because an earlier decision held that they were not "inherently unreasonable," they are not discussed in great detail. *See infra* note 93 and accompanying text.

[84] Wagner Aff., Ex. 29.

[85] *Answers I*, 2011 WL 1366780 at *9-*10.

[86] Rosenschein Tr. 242. A topping bid could have been made for $0.40 cents above the sale price. *Id.*

On April 9, 2011, Brad Greenspan, an individual not otherwise associated with the parties, sent Rosenschein a letter stating he would pay $13.50 per share and offered Rosenschein a continued role with Answers after an acquisition. The Board considered and rejected the offer after concluding it was not made in good faith. Apparently Greenspan, in other concurrent litigation, indicated he was suffering financial hardships which demonstrated the frivolity of his offer.[87] The Court denied Plaintiffs the ten-day adjournment of the shareholder vote they sought in response to Greenspan's offer on April 13, 2011.[88] On April 14, 2011, a majority of the Company's stockholders approved the merger.[89]

Defendants moved to dismiss Plaintiffs' complaint on September 7, 2011. The Court considered Plaintiffs' two causes of actions: the first for breach of the fiduciary duties of care, loyalty, and good faith by the Board due to 1) a fatally flawed sales process, 2) unreasonable deal protection measures, 3) using the merger to extract certain benefits for itself, and 4) issuing materially misleading

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[87] Wagner Aff., Exs. 33 ¶ 21 (describing inability to pay court sanctions or for cross-country flight for Greenspan and attorney to attend deposition), 34 ¶ 5 (describing failure to pay phone bill which resulted in termination of service).

[88] *In re Answers Corp. S'holders Litig. (Answers II)*, 2011 WL 1562518 (Del. Ch. Apr. 13, 2011).

[89] Wagner Aff., Ex. 4 at 2.

proxy materials.[90] The second cause of action was asserted against the Buyout Group for aiding and abetting the Board's breaches of fiduciary duties.

Plaintiffs' claim alleging materially misleading proxy materials was dismissed as abandoned.[91] The Court held that Plaintiffs' breach of fiduciary duty claims survived based upon the duty of loyalty claims arising from the alleged potential conflicts and domination of Beasley, Dyal, and Rosenschein and the alleged bad faith by the Board's four other directors.[92] The Court held that the deal protection measures and certain benefits were not "inherently unreasonable, individually or collectively."[93] However, the Court permitted the claims to survive because they "allege[] a continuation of the breach of duty of loyalty" and thus if a breach of fiduciary duty was found "then the fact that the Board received benefits from the Merger that it had locked up might increase the Plaintiffs' recovery."[94] Plaintiffs' second claim against the Buyout Group also survived the motion to dismiss.[95]

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[90] *In re Answers Corp. S'holders Litig. (Answers III)*, 2012 WL 1253072, at *4 (Del. Ch. Apr. 11, 2012) (citing Pls.' Second Amended and Supplemental Class Action Compl. ¶¶ 87, 97-98, 104-05, 112-13).
[91] *Answers III*, at *8.
[92] *Id.* at *7-*8. Plaintiffs' duty of care claim could not survive the exculpatory provision in the Company's charter.
[93] *Id.* at *8.
[94] *Id.*
[95] *Id.* at *9-*10. A motion for reargument was filed after *Answers III* and was denied. *In re Answers Corp. S'holders Litig. (Answers IV)*, 2012 WL 3045678 (Del. Ch. July 19, 2012).

III. CONTENTIONS

Plaintiffs' surviving claims are therefore that Rosenschein, Beasley, and Dyal were conflicted and controlled the negotiation process. Plaintiffs also claim the Board breached its fiduciary duties by acting in bad faith to sell Answers before its rising stock price would exceed AFCV's offer through 1) purposefully engaging in a limited shopping process, 2) utterly failing to act in the interest of the Company's public shareholders after circumstances had changed to indicate the offer price was too low, and 3) exerting willful blindness to ignore alternatives to the transaction.[96] Plaintiffs have not alleged that UBS, the Board's financial advisor, was conflicted.[97] Finally, Plaintiffs allege that the Buyout Group received confidential information from the Board which it used to engineer a transaction that benefited the Buyout Group and certain members of the Board at the expense of the Company's shareholders.[98]

Defendants argue, in separate motions filed by the Director Defendants and the Buyout Group, that the record demonstrates their burden has been met under the summary judgment standard to show that no genuine issue of material fact

[96] AB at 33. Plaintiffs also claim the fairness opinion was flawed. Because the evidence presented concerning the market check demonstrates that it was valid, the Court need not consider this claim as discussed further herein.
[97] *Answers I*, at *5 (concluding, after considering claims about the Board's ability to rely on UBS's fairness opinion, that "UBS's independence and qualifications are not seriously challenged here . . . .").
[98] AB at 59.

remains on Plaintiffs' claims and that Plaintiffs' claims are meritless. Plaintiffs argue that triable issues of fact remain for all of their arguments.

IV. ANALYSIS

Because a disinterested Board majority approved the transaction, Plaintiffs must rely on claims that the Board acted in bad faith or that it was controlled by an interested party to survive these motions for summary judgment. The Court resolves the issues in reverse order, and concludes that there are no genuine issues of material fact that the Board did not act in bad faith and that the Company's CEO and the Redpoint directors did not control the Board.

A. *The Summary Judgment Standard*

A motion for summary judgment will be granted where the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[99] The moving party bears the initial burden of establishing that no genuine issue of material fact exists and the Court will review all evidence in the light most favorable to the nonmoving party.[100]

If the moving party has supported its motion for summary judgment, then the nonmoving party should provide evidence to establish the existence of a genuine issue of material fact.[101] The nonmoving party may not use mere

[99] Ct. Ch. R. 56(c).
[100] *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).
[101] *See* Ct. Ch. R. 56(e).

assertions or denials to create inferences against the movant. A fact is material if it "might affect the outcome of the suit under the governing law."[102] A genuine issue of material fact is present "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[103]

B. *Did the Board Act in Bad Faith?*

Delaware law imposes on directors, as the managers of a corporation, fiduciary duties to protect the interests of the corporation and its shareholders. The duty of care and the duty of loyalty apply in a change of control transaction and, in that context, require that the board "perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[104] "[T]here is no single blueprint that a board must follow to fulfill its [*Revlon*] duties."[105] The Court generally grants boards latitude to determine how to conduct an appropriate sale process. Thus, a board may reasonably prefer "a discreet approach relying upon targeted marketing by an investment bank" to conducting a public auction.[106] Prior decisions also support some leeway in determining which potential acquirers

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[102] *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009) (citations omitted).
[103] *Id.*
[104] *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citing *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182-183 (Del. 1986)).
[105] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).
[106] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505 (Del. Ch. 2000).

to target.[107] Finally, a plaintiff's inability to explain a Board's motivation to act in bad faith may also be relevant in analyzing bad faith claims.[108]

The contours of bad faith were considered in the context of a change of control transaction in *Lyondell*.[109] There, the Supreme Court confirmed that bad faith may be found where a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[110] The Supreme Court further held that:

> there are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties. Thus, the directors' failure to take any specific steps during the sale process could not have demonstrated a conscious disregard of 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.[111]

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[107] *See Miramar Firefighters Pension Fund v. AboveNet, Inc.*, 2013 WL 4033905, at *7 n.62 (Del. Ch. July 31, 2013) ("The Board's initial decision to pursue only financial buyers is not conduct that is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'" (citations omitted)); *see also In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *7 (Del. Ch. Mar. 4, 2011) ("The Board made a reasonable judgment [to pursue communications with three companies and gather information on a fourth without a public auction from among a list of 11 potential acquirers] that many of those companies listed did not have the financial ability to complete such a large transaction and that others were competitors that might improperly use any information received from Atheros in the event it remained a stand-alone company.").

[108] *See In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) ("Because the Complaint [alleging disinterested directors breached their duty of loyalty in approving a merger transaction] fails to plead any rational motive for the directors to do anything other than attempt to maximize the sale value of Morton's, it fails."); *Miramar Firefighters*, 2013 WL 4033905, at *7 ("Miramar provides *no reason* why the disinterested and independent AboveNet Directors . . . would engage in such a scheme." (alteration in original)).

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

[110] *Id.* at 243 (citations omitted).

[111] *Id.*

The Supreme Court continued:

> Directors' decisions must be reasonable, not perfect. "In the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties." The trial court denied summary judgment because the Lyondell directors' "unexplained inaction" prevented the court from determining that they had acted in good faith. But, if the directors failed to do all that they should have under the circumstances, they breached their duty of care.[112]

The Supreme Court thus determined that an inquiry in such a context should be based upon "whether [the] directors utterly failed to attempt to obtain the best sale price."[113]

The Court concludes there is no genuine issue of material fact concerning the Board's compliance with its fiduciary duties. It is undisputed that four of the seven directors, a majority of the Board, are disinterested.[114] The Plaintiffs must show that the four otherwise independent Board members were controlled by interested parties or rely on a claim of bad faith to demonstrate that the Board breached its fiduciary duties.

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[112] *Id.* (alterations in original) (citations omitted).
[113] *Id.* at 244.
[114] *Answers I*, at *3 ("Plaintiffs have not challenged the independence or disinterestedness of four directors on the seven member board," and thus "the process and the Proposed Transaction have been approved by a disinterested and independent board."); *Answers IV*, at *1 n.4 ("The Court did not, and does not, question that Sternlicht, Segall, Tebbe, and Kramer are independent and disinterested.").

Defendants establish that the Board did not abdicate its duties or act in bad faith. Defendants provide evidence demonstrating that Answers fielded a variety of unsolicited offers and that the Board, during multiple meetings in 2010, considered a variety of transactions, among them the AFCV acquisition.[115] Despite discussions with at least seven other possible acquirers, no potential acquirer, other than AFCV, ultimately made an offer. The Board, when fully constituted and when acting through its Financing Committee, rejected AFCV's requests for exclusivity a number of times to preserve its opportunity to identify and negotiate with other purchasers,[116] rejected several offers as inadequate,[117] and explored the possibility of increasing the price obtained until the deal was approved.[118] The Board's financial representative also advised the Board about the relative merits of pursuing a different sales process and advised it, during the Board's final consideration of its options, that additional bidders were unlikely to come forward. Defendants' evidence is consistent with a board's attempt to comply with its fiduciary duties and to obtain the best price it could.

Moreover, the Board, through its financial advisor, performed a market check. Although the exact timing of the check is uncertain on this record, Delaware law is clear that no specific steps are prescribed. Thus, although Shelffo

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[115] *See* notes 15, 16, 37, 43, 44, 45, 50 and accompanying text.
[116] *See supra* text accompanying notes 32-35.
[117] *See supra* text accompanying notes 27 & 32.
[118] *See supra* text accompanying notes 66, 70 & 80.

may have begun canvassing ten strategic buyers in November, before the Board's formal authorization, and although the record is not precise as to when the three interested strategic purchasers abandoned interest, it is clear that those efforts were attempts to comply with the Board's fiduciary duties.

Furthermore, management's earlier discussions with other financial buyers in 2010, even if not a part of the market check led by UBS, also provided the Board with additional information concerning potential acquirer interest. Similarly, there is evidence that the Board never asked UBS to terminate the check,[119] but that it did ask its financial advisor whether additional canvassing would be likely to result in a higher offer.[120] Finally, the disinterested Board members all believed the AFCV offer to be the best available offer for the shareholders.[121]

Thus, Plaintiffs' objections here concern the length of the check and the decision to pursue only ten strategic acquirers instead of a larger number of strategic and financial advisors. *Lyondell* counsels that there is a vast difference between a flawed, inadequate effort to carry out fiduciary duties and a conscious disregard for them. The Board did not consciously disregard those duties, even if

[119] *See supra* text accompanying notes 47 & 48.
[120] *See supra* text accompanying note 81.
[121] *See supra* text accompanying note 82.

Plaintiffs have suggested several ways in which the Board's efforts could have been more robust.

The evidence Plaintiffs forward, when interpreted in the light most favorable to them, supports their argument that the market check lasted only slightly longer than two weeks during the holiday season and focused only on strategic, rather than financial, buyers.[122] However, even 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.

Plaintiffs also argue that the Board failed to respond appropriately to the Fourth Quarter Results reported at the December 23 Board meeting. They argue that the Board knew it was undercutting the true value of the Company because it rushed the deal,[123] the Shelffo Emails demonstrate a desire to hide the Company's financial strength from the public while the Board finalized the deal,[124] and Segall's email stated that AFCV's offer of $10.25 could be as much as $1.50 lower than the value of Answers. They also argue that the only reason the deal was not finalized sooner was because of the Buyout Group's inability to obtain financing,

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[122] AB at 44-47 (arguing that the market check began on December 8 because that was the date the Board formally initiated it and that the check must have stopped on December 23, because the Proxy and individual Board members could not recall specific acts related to the check that occurred after that date).

[123] The primary piece of evidence Plaintiffs offer here is a single quote by Kramer that the process was "accelerated" which he later denied. Kramer Tr. at 144, 156.

[124] AB at 47-49.

and then question the sincerity of the Board's concern about the Company's dependence on Google.[125]

These arguments and the evidence nominally supporting them fail to create a material issue of fact regarding the Board's bad faith because the Board had plausible business concerns about the stability and future success of the Company. The Board, prior to approving the merger, reviewed the business challenges that the Company faced. It was particularly concerned about the Company's dependence on Google for both its traffic and ad revenue when considered alongside the reality that Google had complete autonomy to alter its algorithms without any consultation with the Company. Tebbe explained that "our business was literally at the whim of the Google algorithm . . . . every day we woke up and feared that Google's going to change its algorithm and kill our traffic."[126] Thus, in his view, the Company "lived and died by Google's decisions."[127] Steinberg expressed similar concerns: "Our entire business model was dependent on Google. And it wasn't like Google, you know, told us before they made changes. You just woke up one morning and found they did."[128]

Furthermore, the enterprise upon which Answers was dependent, Google, appeared to be positioning itself to become a competitor. The Board appropriately

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[125] AB at 49-51.
[126] Tebbe Tr. 108, 154.
[127] *Id.* 147.
[128] Steinberg Tr. 134-35.

considered the threat to the Company posed by its primary source of revenue and traffic seeking to enter the same space it occupied. The Board also considered what might have appeared to be lesser threats: that the Q&A space was heating up and that Facebook may have been positioning itself to offer services similar to those offered by the Company. After weighing such business risks, the Board was entitled to make a determination that selling the Company was in the best interest of the shareholders without a judicial second-guessing of its decision.

The Board also responded to the Fourth Quarter Results with efforts which, whether imperfect or not, did not exhibit a conscious disregard for its duties. When the Board was informed of the results, it indicated its concern about the Company's dependence on Google and was cognizant that its strong results did not guarantee improved (or sustained) results in future quarters. Management stated that it would prepare an updated forecast which the Board would need to review before approving any transaction with AFCV. UBS also committed to reviewing the changes to projections with AFCV and other potential acquirers and efforts were made to increase the merger consideration based on such improved results.

Plaintiffs' arguments also ignore the fact that the Fourth Quarter Results were provided to AFCV and that the bidder did in fact increase its offer price. The Board did not act in bad faith merely because AFCV argued its diligence revealed further offsetting liabilities or because the increased forecasts only yielded an

additional $0.25 per share. Plaintiffs' arguments also ignore that the Company released the updated financials to the public in March after the transaction was signed and again failed to generate a good faith topping bid.

Moreover, Plaintiffs' proffered evidence does not create a genuine issue of material fact. Evidence based upon a few isolated quotes stating the deal was accelerated or reflecting one director's belief, or perhaps mere bargaining position, of the Company's value does not state a claim for bad faith in this context. Such considerations are within the purview of a disinterested Board in assessing whether to pursue the proverbial bird in the hand over the one in the bush; particularly here, because no allegations have been made concerning the Board's motives for favoring AFCV as a bidder or presenting some other motive for failing to maximize shareholder value.[129]

Plaintiffs next assert that the four otherwise independent directors were deliberately uninformed and identify segments of the Board member's deposition transcripts in which individual Board members were confused about particular details of the transaction and could not recall certain activities of management.[130]

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[129] *See Koehler v. Netspend Hldgs., Inc.*, 2013 WL 2181518, at *12 (Del. Ch. May 21, 2013) ("Plaintiff provides no explanation of 'why the disinterested and independent directors would disregard their fiduciary duties' in order to advance [the CEO]'s interests." (citing *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *10 (Del. Ch. Jan. 31, 2013))).

[130] AB at 52-56. Although Plaintiffs assert that the four disinterested directors were intentionally uninformed, these are assertions that are unsupported by plausible evidence. Plaintiffs never direct the Court to evidence exhibiting any intent to remain uninformed and the evidence they do supply is the sort that, at most, might be cognizable under a duty of care claim.

Plaintiffs also emphasize how busy certain directors were during this period. Such arguments focus on the care with which the Board executed its duties and do not sustain the bad faith claim before the Court.[131]

Finally, Plaintiffs fail to advance a persuasive reason why the Board favored AFCV or consciously abdicated its fiduciary duties. Plaintiffs never explain what motivated the four disinterested directors to abandon their fiduciary duties or to favor the allegedly conflicted directors and only allege that Rosenschein and the Redpoint directors had improper motivations. In contrast, Defendants provide evidence that all of the disinterested directors believed the AFCV transaction was fair and would not have approved a transaction they believed was unfair to the Company's shareholders.[132]

In sum, there is evidence of a disinterested Board focused on attaining the highest value it could, and that evidence does not suffer from a disputed material fact. At the motion to dismiss stage, there may have been reason to be concerned about the Board's fiduciary duties if the Board lacked any justification for its decision to sell the Company while its performance appeared to be improving dramatically. However, Defendants have resolved those doubts by demonstrating

[131] Plaintiffs also argue that $10.50 price was based on inadequate analysis and a flawed fairness opinion and that a Board cannot rely on a flawed fairness opinion as a substitute to a market check. AB at 56-58. The Court need not address this argument because a market check was performed. There is no allegation that the Board was aware of any material shortcomings in the analysis.

[132] *See supra* text accompanying note 82.

the Board's concerns about the Google threat and the uncertainty surrounding the Company's future profitability. Although Plaintiffs identify a variety of ways in which they believe the process could have been better conducted, they offer no evidence of that extreme set of facts required to show that the board utterly failed to attempt to comply with its duties. Because the otherwise disinterested Board could nonetheless fail to be independent, the Court next considers whether Rosenschein or the Redpoint directors controlled the Board.

C. *Did Rosenschein Control the Board?*

A director lacks independence when she is beholden to a controlling party or so under the controller's influence that her discretion is sterilized.[133] Thus, control may be found when there is "a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[134] Conversely, independence means "a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[135]

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[133] *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002) (citing *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).
[134] *Id.* (citing *Aronson v. Lewis*, 473 A.2d 805, 816 (Del.1984)).
[135] *Aronson*, 473 A.2d at 816.

Plaintiffs argue primarily that Rosenschein was conflicted,[136] but they do not explain how Rosenschein dominated the Board.[137] Though the Court may be skeptical about Rosenschein's alleged conflict, it need not reach the issue because no genuine issue of material fact is present regarding his control of the Board. Plaintiffs appear to argue that the Board's approval of the transaction was corporate conduct undertaken to support Rosenschein's wish to sell the Company and thus the Board was dominated. Rosenschein needed such a transaction, Plaintiffs assert, because he knew the Redpoint directors intended to replace him and AFCV might allow him to stay on as CEO. However, Plaintiffs' mere invocation of the phrase "dominated and controlled" cannot alone create such an issue of disputed fact.[138]

Plaintiffs' theory suffers from several deficiencies. First, they offer no evidence that Rosenschein knew he would be fired. Second, they offer no evidence that he had a deal lined up with AFCV and in fact, Rosenschein was not

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[136] AB at 15, 43-44. Although the section labeled "The Merger Negotiations Were Led by the Conflicted Directors" mentions Rosenschein a few times, that section primarily argues that Beasley and Dyal took over the negotiations and the Board failed to supervise the sale process. *See* AB 16-21.

[137] Plaintiffs so zealously argue about purported Rosenschein's conflict, that they neglect to explain how he dominated the Board. The Court attempts to reconstruct what it understands Plaintiffs to have intended to argue based upon the factual narrative of Plaintiffs' brief.

[138] *Orman*, 794 A.2d at 24 (citing *Aronson v. Lewis,* 473 A.2d 805, 816 (Del.1984)) ("The shorthand shibboleth of 'dominated and controlled directors' is insufficient.").

hired by AFCV after the transaction.[139] Third, as discussed above, Plaintiffs never offer a persuasive theory as to why the otherwise disinterested Board members decided to abdicate their duties and favor Rosenschein. Fourth, Plaintiffs never direct the Court to specific evidence of an occasion when the Board acquiesced in Rosenschein's desires or Rosenschein attempted to impose his will upon it. Finally, the Board's decision to sell the Company is supported by other reasons cognizable under the business judgment rule, including the Board's apprehension that Google would soon compete directly against the Company and its recognition that, although the Company had benefited from a recent uptick in revenues, future results were uncertain.

The evidence Defendants provide, such as the Board meeting minutes, demonstrates a Board appropriately balancing business risks and attempting to comply with its fiduciary duties. Because Plaintiffs' arguments suffer from the problems identified above, no genuine issue of material fact is present and Defendants are entitled to summary judgment on the claim that Rosenchein somehow dominated these four directors.[140]

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[139] *See* Steinberg Tr. 152-53 ("All of senior management, with the exception of one member [in-house counsel], were let go in July . . . .").

[140] A corollary of Plaintiffs' failure to explain the nature of Rosenschein's domination of the Board is that they never argue he controlled, manipulated, or otherwise failed to provide information which the Board needed. None of the evidence Plaintiffs provide causes the Court to question whether disputed issues of fact exist in this regard as well.

D. *Did Beasley and Dyal Control the Board?*

Similarly, the Court does not need to determine whether Beasley and Dyal were conflicted because of the scant evidence offered by Plaintiffs regarding the Redpoint directors' ability to dominate the Board. Defendants' evidence indicates that Rosenschein and UBS served as the primary negotiators leading the Company through discussions with AFCV. The Board meeting minutes in December and February also portray a Board that deliberated without any undue interference. Plaintiffs contend a triable issue of fact exists because the Redpoint representatives held two meetings with Summit or AFCV without other Company representatives and because Beasley unsuccessfully attempted to increase the merger consideration. However, Plaintiffs do not demonstrate any specific acts of control. Moreover, there is no showing of any harm that could have resulted from these meetings.

Plaintiffs next argue that triable issues of fact exist because a series of emails include certain directors, but not others. These emails are not evidence of domination. Most of the cited emails are among Shelffo, Rosenschein, Beasley, Dyal, and Segall.[141] The emails provide updates about the AFCV negotiations or are side comments about those updates to a smaller group of recipients. That some

[141] Zeldin Aff., Exs. 26, 40, 43, 44. Plaintiffs also direct the Court to an email from Segall to Shelffo and Beasley and another email from Segall to Beasley and Dyal. Zeldin Aff., Exs. 24, 22.

directors were included in these emails simply reflects the reality that certain directors may have been more involved in the minutia of the transaction and others may have reviewed it at a higher level.

Plaintiffs also point to two emails in a side conversation between Redpoint representatives and Summit.[142] In the second email, a Summit representative explained why the deal price should be lowered based on Summit's additional diligence findings and then questioned if the "price you negotiated with us" would be honored.[143] The representative's use of "you," when read in the context of the email, refers to Beasley and Dyal as representatives of the Company and does not support a reasonable inference that Dyal or Beasley had a pre-cooked deal with Summit. However, even if these two had made a deal with Summit, there is no evidence that Dyal or Beasley had any ability to, or attempted to, force such a deal on the Board. On the contrary, the record demonstrates otherwise and ample evidence is present that the Company's representatives led the negotiation process, used reasonable efforts to attempt to increase the sale price, and that there was no pressure applied by Dyal or Beasley during the Board's well-documented deliberations.

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[142] Zeldin Aff., Exs. 52, 53. In the first email, Dyal explicitly disclaimed the need for Dyal and Beasley to participate in a call in which AFCV would explain why it would not raise its offer price.

[143] Zeldin Aff., Ex. 53.

Defendants' evidence establishes that the Board did not act in bad faith in complying with its fiduciary duties and that Rosenschein, Beasley, and Dyal did not dominate the Board. The evidence that Plaintiffs have forwarded to rebut Defendants' showing does not demonstrate a genuine issue of material fact upon which Plaintiffs could state a claim. Thus, the Director Defendants' motion for summary judgment is granted.

E. *Did the Buyout Group Aid and Abet a Breach of Fiduciary Duty?*

An aiding and abetting a breach of fiduciary duty claim requires a plaintiff to prove: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach.[144] Plaintiffs argue that genuine issues of material fact are present regarding whether the Buyout Group aided and abetted the Director Defendants' breach of fiduciary duty by knowingly participating in the breach and whether the Buyout Group received confidential information from the Board.

Plaintiffs argue the Buyout Group knowingly participated in the breach because the Shelffo Emails state that "time is not a friend to this deal" and that a Summit representative sought to speak with Redpoint. This evidence cannot reasonably be interpreted as evidence of knowing participation. The Redpoint

[144] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

directors informed the Summit representative that they had no need to speak directly about the issues the representative raised and that other Company representatives could follow up on Summit's concerns. Shelffo, in her emails, states that the Board may call off the deal because of concerns about AFCV's ability to finance the deal. Neither of these communications can reasonably be interpreted as evidence of a plan to breach or to induce a breach.

Next, Plaintiffs argue that the Buyout Group received confidential information from the Board because Shelffo indicated that the Buyout Group "pushed" for the market check to be completed in two weeks, because AFCV added $0.25 to the share price to expedite the deal, and because Beasley contacted Summit in January to try to raise the price. Plaintiffs argue that all of these circumstances indicate that the Buyout Group received confidential information in order to engineer a deal to buy the Company at the cheapest price possible.

Plaintiffs essentially invite the Court to interpret certain negotiations as evidence that confidential communication was elsewhere being exchanged. The Court declines to do so. The evidence Plaintiffs cite demonstrates that even arm's length negotiators need to email one another to complete a deal and that sometimes they offer suggestions on how to expedite the deal, which the opposing party may accept or reject. Plaintiffs provide no evidence indicating that confidential information was exchanged and are thus left only with their assertions that a

conspiracy must have existed between the Buyout Group and the Board. Such assertions cannot create a genuine issue of material fact.

Because Defendants present evidence of arm's length negotiations between the parties and Plaintiffs provide no evidence which can reasonably be interpreted to demonstrate knowing participation in a breach or the exchange of confidential communication and because no underlying breach of fiduciary duty is present, the Court grants the Buyout Group's motion for summary judgment.

V. CONCLUSION

For the reasons stated above, no genuine issue of material fact exists that the Director Defendants did not act in bad faith and that Rosenschein, Beasley, and Dyal did not control the Board. The transaction was approved by an independent and disinterested majority of the Board which did not act in bad faith. The Director Defendants' motion for summary judgment is therefore granted. Because there is no dispute of material fact as to whether the Buyout Group aided and abetted any breach of fiduciary duty, its motion for summary judgment is also granted.

An implementing order will be entered.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ANSWERS CORPORATION SHAREHOLDERS LITIGATION	:	CONSOLIDATED C.A. No. 6170-VCN

ORDER

AND NOW, this 3rd day of February, 2014, for the reasons set forth in the Court's Memorandum Opinion of even date,

IT IS HEREBY ORDERED that (1) The Answers Defendants' Motion for Summary Judgment and (2) Motion for Summary Judgment of Defendants AFCV Holdings, LLC, A-Team Acquisition Sub, Inc., and Summit Partners L.P., be, and the same hereby are, granted.

/s/ John W. Noble
Vice Chancellor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 16th day of April, 2014 that I caused to be served a copy of the foregoing APPELLANT'S OPENING BRIEF upon the following in the manner indicated:

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