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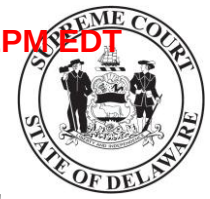

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IROQUOIS MASTER FUND LTD., On Behalf of Itself and All Others Similarly Situated, Lead Plaintiff-Below, Appellant v. 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	No. 109, 2014 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE Consol. C.A. No. 6170-VCN

ANSWERING BRIEF OF APPELLEES AFCV HOLDINGS, LLC, A-TEAM ACQUISITION SUB, INC., AND SUMMIT PARTNERS L.P.

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NATURE OF PROCEEDINGS

After nearly one year of discussions and negotiations, Answers Corporation ("Answers") announced on February 3, 2011 that it had entered into a definitive merger agreement to be acquired by AFCV Holdings, LLC ("AFCV"), a portfolio company of Summit Partners L.P. ("Summit"; collectively with AFCV and A-Team Acquisition Sub, Inc., the "Buyout Group"). The price of $10.50 per share of Answers common stock represented a premium of approximately 34% over the volume-weighted average closing share price for the 90 trading days prior to the merger announcement.

Just four days after the merger was announced, the instant action was filed challenging the merger and asserting claims for breach of fiduciary duties against the Answers board of directors ("the Answers Defendants") and aiding and abetting against the Buyout Group. With respect to the aiding and abetting claim, Plaintiffs generally assert that the Buyout Group knowingly colluded with certain allegedly conflicted Answers directors to "engineer" a rushed merger to benefit the colluding parties and prevent Answers shareholders from getting a higher price.

Plaintiffs appeal from the Court of Chancery's February 3, 2014 Order granting the defendants' motions for summary judgment on all claims ("Op."). On March 2, 2014, Plaintiffs filed their Notice of Appeal. This is the Answering Brief of the Buyout Group.

SUMMARY OF ARGUMENT

1. Denied. To the extent that this argument is directed at the claims asserted against the Answers Defendants, the Buyout Group respectfully refers the Court to the Answering Brief of the Answers Defendants-Appellees ("Answers' Brief"). *See* Answers' Brief, Summary of Argument. With respect to the aiding and abetting claim, the Court of Chancery correctly applied Delaware law in granting the Buyout Group's motion for summary judgment where: (i) Plaintiffs failed to establish an underlying breach of fiduciary duty (Op. at 27-42); (ii) Plaintiffs failed to provide any "evidence which can reasonably be interpreted to demonstrate knowing participation in a breach" (*id.* at 40-42); and (iii) the undisputed record is replete with evidence showing arm's-length negotiations between the parties (*id*. at 42), which cannot give rise to liability for aiding and abetting as a matter of law.

2. Denied. Because this argument is directed at the claims asserted against the Answers Defendants, the Buyout Group respectfully refers the Court to Answers' Brief. *See* Answers' Brief, Summary of Argument.

3. Denied. Because this argument is directed at the claims asserted against the Answers Defendants, the Buyout Group respectfully refers the Court to Answers' Brief. *See* Answers' Brief, Summary of Argument.

4. Denied. Because this argument is directed at the claims asserted against the Answers Defendants, the Buyout Group respectfully refers the Court to Answers' Brief. *See* Answers' Brief, Summary of Argument.

5. Denied. The undisputed record developed after several years of litigation demonstrates lengthy, hard-fought, arm's-length negotiations that were conducted in good faith by the Answers Defendants and its advisors on the one hand, and AFCV and its advisors on the other. As the undisputed record further reflects, the Answers Defendants repeatedly rejected AFCV's offers as they strove to achieve the best possible price for Answers' shareholders, resulting in four increases in offer price and a 30% increase from AFCV's original offer. Apart from failing to present evidence that the Answers Defendants breached their fiduciary duties, Plaintiffs offered no evidence that the Buyout Group knowingly participated in any such breach. In particular, Plaintiffs offered no evidence showing that the merger terms were so egregious that knowing participation could be inferred; that the Buyout Group was aware that any Answers director was conflicted (much less that the Buyout Group exploited any purported conflicts); or that the Buyout Group otherwise caused the Answers board to make the decisions challenged by Plaintiffs. The Court of Chancery thus properly granted the Buyout Group's motion for summary judgment as to the aiding and abetting claim, finding there was "no dispute of material fact as to whether the Buyout Group aided and

abetted any breach of fiduciary duty" where: (i) "no underlying breach of fiduciary duty is present," (ii) "Defendants present evidence of arm's length negotiations between the parties," and (iii) "Plaintiffs provide no evidence which can reasonably be interpreted to demonstrate knowing participation in a breach or the exchange of confidential communication." Op. at 42. For these reasons, this Court should again emphasize the long-standing rule in Delaware that "'evidence of arm's-length negotiation with fiduciaries negate[s] a claim of aiding and abetting, because such evidence precludes a showing that the [bidder] knowingly participated in the breach by the fiduciaries.'" *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *26 (Del. Ch. May 4, 2005) (citations omitted), *aff'd*, 897 A.2d 162 (Del. 2006).

COUNTERSTATEMENT OF FACTS[1]

A. The Buyout Group

AFCV was established in 2007 to build, develop, and acquire a broad range of internet technologies, businesses, and resources connecting consumers seeking advice with content from both expert and consumer communities. A241 ¶ 20.

A-Team Acquisition Sub, Inc., a wholly-owned subsidiary of AFCV, was formed for the purpose of the merger transaction to acquire Answers.com (the "Merger"). *Id.* ¶ 21.

Summit is a growth equity firm. A240 ¶ 19. At the time of the Merger, affiliated entities of Summit held a majority voting interest in AFCV. A140.

Jefferies & Company, Inc. ("Jefferies") acted as the banker for AFCV. A141.

B. The Answers Defendants

Prior to the acquisition by AFCV, Answers was a publicly traded Delaware corporation that owned and operated the Internet website Answers.com, a Q&A web site. A238 ¶ 8; A140.

Robert S. Rosenschein founded Answers in 1998 and served as Chairman of the Answers board and Chief Executive Officer. A238 ¶ 9. The remaining members of the seven person Answers board include: (1) Yehuda Sternlicht, who

[1] The Buyout Group incorporates the Counterstatement of Facts set forth in Answers' Brief, and herein address only facts directly related to the aiding and abetting claim asserted against them. *See* Answers' Brief, Counterstatement of Facts.

also served on the Financing Committee (A238-39 ¶ 10); (2) Mark Segall, who served as Chairman of the Financing Committee (A239 ¶ 11); (3) Mark A. Tebbe, who also served as Vice Chairman and Lead Director (*id*. ¶ 12); (4) Lawrence Kramer (*id.* ¶ 13); (5) W. Allen Beasley, a general partner of the venture capital firm Redpoint Ventures ("Redpoint"), whose affiliates were Answers' largest stockholders prior to the Merger, and who also served on the Financing Committee (A239-240 ¶ 14; A141); and (6) R. Thomas Dyal, a general partner with Redpoint (A240 ¶ 15). As set forth in Answers' Brief, Plaintiffs do not purport to challenge the disinterest or independence of Mr. Sternlicht, Mr. Segall, Mr. Tebbe, or Mr. Kramer, i.e., four of the seven members of the Answers board. *See* Answers' Brief at 16.

C. Negotiations with Answers

AFCV identified Answers as of potential strategic interest after conducting a review of various Internet sites based on web traffic. *See* A858-59 at 13:11-16:10. AFCV had no pre-existing relationship with Answers. *See* A708 at 39:13-40:12; A884 at 115:7-12. AFCV first expressed interest in acquiring Answers in March, 2010, nearly a year before it actually acquired Answers. A141; A284; A245-46 ¶ 39.

In early September 2010, AFCV made its first offer to acquire Answers, in a range of $7.50-$8.25. A247 ¶ 46; A327-364. During a September 15, 2010 board

meeting, the Answers board considered and rejected AFCV's offer, as well as the exclusivity sought by AFCV. A365-68. Two days later, Answers' financial advisor, Dan Lee of UBS Securities LLC ("UBS"), sent Mr. Rosenschein a summary of discussions with Jefferies. C50-51. Mr. Lee stated that Jefferies was told that "the Board is looking for a price north of [AFCV's] current range [of $7.50-$8.25]." *Id.*

Over the next five months, Answers and AFCV continued to engage in extensive negotiations, with AFCV raising its offer price multiple times. Answers rejected each increased offer and continued to reject the exclusivity sought by AFCV as it explored strategic alternatives. A248-49 ¶¶ 50, 52-53; A252 ¶ 63. On November 4, 2010, AFCV again increased its offer to $10 per share. A249 ¶ 52. The next day, the Financing Committee of the Answers board once again considered and rejected the increased offer, as well as AFCV's renewed request for exclusivity. *Id.* ¶¶ 52-53. Unable to obtain the desired exclusivity, AFCV ultimately agreed to proceed without it if Answers would agree to a level of expense reimbursement. A249-250 ¶ 54; A145-46. On November 14, 2010, AFCV submitted its fourth offer at $10.25. A250 ¶ 55. That offer was again rejected by Answers and the parties continued to negotiate and conduct diligence in the months that followed. A146-49.

On December 8, 2010, Janine Shelffo of UBS advised Messrs. Rosenschein, Segall, Beasley, and Dyal that AFCV's investment banker had "pushed again the idea that we should do a quick market check in the next two weeks," but that she had told him that "the board was 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." A395. During a December 23, 2010 Answers board meeting, Ms. Shelffo updated the Answers board regarding negotiations with AFCV and further updated the board regarding other potential buyers whom UBS had been contacting. A550-53. In response to an inquiry from board members regarding the willingness of AFCV to pay a higher price, "Ms. Shelffo responded that Jefferies . . . stated several times that the offer in the [November] LOI was their client's final price." A553.

On January 5, 2011, Ms. Shelffo reported on additional discussions with Jefferies and Summit about the Buyout Group's efforts to secure financing for the transaction:

> I spoke with C.J. [Fitzgerald] at Summit a short while ago as he was in a board meeting all day. He was very candid and I would say it was a significantly reassuring call. He was apologetic and expressed surprise at how his advisor has been communicating around the financing topic with us and walked me through exactly where they are . . . .
>
> I told him 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. He reassured me that Summit is entirely

> committed to getting this done quickly and he is working on the assumption that we could get something signed as early as next week. . . .

A561-64. Despite the assurance that the deal could be signed as early as the following week, the parties continued to negotiate price, terms, and other issues for nearly another month.

On January 13, 2011, Ms. Shelffo sent a further update: "[j]ust got off a rather heated call with Jefferies. The upshot is that they still don't have financing papers to provide us." A572-73. Ms. Shelffo further reported that she told Jefferies that "patience" on the Answers' side of the bargaining table was "dwindling":

> I told him in no uncertain terms that he and his client have lost all credibility with us, that patience on our side of table [sic] 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.

Id. On Saturday, January 15, 2011, Ms. Shelffo reported that in further discussions regarding financing, Mr. Fitzgerald raised a material adverse event issue relating to Google traffic and proposed a working session to discuss it. *Id*. Ms. Shelffo said that she told Mr. Fitzgerald that the issue was not the only outstanding issue and that there were "still a handful to work through in [Answers'] view but that

[Answers was] not prepared to commit any more resources to their deal until [AFCV] prove[s] they can finance it." A574-76.

On January 19, 2011, Mr. Rosenschein sent an update to the Answers board providing the latest 2011 forecasts and reporting on, among other matters, the state of negotiations with AFCV. A578. With respect to the $10.25 offer from the Buyout Group that had been outstanding since November, Mr. Rosenschein stated that "[i]n light of recent Q4 out-performance and rise in stock price, we will be pushing for more, but obviously expect strong pushback." *Id.* The email further noted a number of "significant business issues" still to be negotiated, including, among others, break-up fees, disputed closing conditions, tax issues, Google contract assignment consent, and "[m]aterial adverse effects" pertaining to "[w]ho bears the risk if there's another 'Google traffic event'" and "EBITDA surprises." *Id*. Mr. Rosenschein further stated that the revised 2011 forecasts would be shared with AFCV. A578-79.

Mr. Rosenschein was correct in predicting "strong pushback" from the Buyout Group regarding Answers' updated forecasts as the parties continued to negotiate vigorously over price and other terms. A578. On January 25, 2011, Mr. Rosenschein updated the board regarding a telephonic meeting held the day before with representatives from Answers, AFCV, Summit, UBS, and Jefferies. A585. As Mr. Rosenschein contemporaneously noted in describing the call, AFCV "beat

up management's 2011 model" in what Mr. Rosenschein described as a "prelude to the upcoming price discussion." *Id.*; *see also* A587-88 (reporting that AFCV "viewed [Answers] projections as quite aggressive," and AFCV believed that other issues "could justify a *downward* price adjustment") (emphasis added).

On January 29, 2011, more than two months after AFCV made its fourth offer of $10.25 per share, Mr. Fitzgerald wrote to Answers directors Beasley and Dyal:

> 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 price of $10.25 per share, which effectively raises our price by more than the $0.45 per share you proposed. For the sake of clarity, we are not prepared to increase our price beyond $10.25 per share.
>
> Jefferies will reach out to UBS to walk them through the details of our findings. Once that has been completed please let us know if you are willing to live up to the deal and price that you negotiated with us. We are otherwise pencils down until then.

C60.

Mr. Fitzgerald's email did not end price negotiations. Additional discussions ensued, and on February 1, 2011, Mr. Rosenschein of Answers and AFCV's CEO, David Karandish, spoke by telephone. A148. Mr. Rosenschein informed Mr. Karandish that the Answers board considered AFCV's offer of $10.25 per share to be inadequate. *Id.* Later that day, Mr. Karandish and Mr. Rosenschein again spoke by telephone, and AFCV countered with its "best and

final" offer of $10.50. *Id.*; *see also* A252 ¶ 63; B712 (February 1, 2011 email from Mr. Rosenschein summarizing discussions with David Karandish, stating Mr. Karandish "just called me back and offered $10.50/share and not a penny more, if we signed today").

On February 2, 2011 – nearly one full year after AFCV first expressed interest in Answers and after multiple offers by AFCV had been rejected by the Answers board as inadequate – Answers and AFCV entered into a definitive merger agreement. A255-56 ¶¶ 72-73, 77. The price of $10.50 per share of Answers common stock represented a premium of approximately 34% over the volume-weighted average closing share price for the 90 trading days prior to the merger announcement. A151. On April 14, 2011, Answers' stockholders voted to approve the Merger, and it subsequently closed. B262-64.

ARGUMENT

I. THE COURT OF CHANCERY'S DECISION GRANTING THE BUYOUT GROUP'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED

A. Question Presented

Did the Court of Chancery correctly conclude that there is no dispute of material fact as to whether the Buyout Group aided and abetted any breach of fiduciary duty?

B. Scope of Review

A motion for summary judgment may be granted "if there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009). On appeal from a decision granting summary judgment, this Court's scope of review is *de novo*. *Id.* at 241 n.14.

C. Merits of Argument

To establish a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must prove the following elements: "'(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." *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (alteration in original) (citations omitted). "Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Id.* at 1097; *see also Binks v. DSL.net, Inc.*,

2010 WL 1713629, at *10 (Del. Ch. Apr. 29, 2010) ("The standard for an aiding and abetting claim is a stringent one, one that turns on proof of scienter of the alleged abettor.").

Under these standards, "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." *Malpiede*, 780 A.2d at 1097-98. Rather, to establish aiding and abetting, plaintiffs must show that the alleged aider and abettor "attempt[ed] to create or exploit conflicts of interest in the board" or that "the bidder and the [target] board conspire[d] in or agree[d] to the fiduciary breach." *Id.* "Knowing participation" requires both "knowledge" and "participation." Thus, while a third party bidder can be found liable "by buying off the board in a side deal, or by actively exploiting conflicts in the board to the detriment of the target's stockholders," unsupported allegations should not be allowed to undercut the "the long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting." *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010) (citation omitted).

In opposing the Buyout Group's motion for summary judgment, Plaintiffs failed to point to ***any*** evidence showing that: (i) the Merger terms were anything other than the result of arm's-length negotiations; (ii) the Buyout Group knew of any purported conflicts on the part of the Answers directors, much less that they

sought to create or exploit any such conflicts; (iii) the Buyout Group conspired or colluded with conflicted directors to prevent Answers shareholders from receiving a higher price; or (iv) the Buyout Group otherwise caused the Answers board to approve the merger (or indeed, had any involvement in the Answers board's process). The Court of Chancery therefore properly granted summary judgment on the aiding and abetting claim. *Cf. Malpiede*, 780 A.2d at 1098 (rejecting contention that the Court of Chancery's holding "reflected impermissible factfinding on a motion to dismiss," where there was "no indication in the amended complaint that [the acquirer] participated in the board's decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue"); *Morgan*, 2010 WL 2803746, at *8 ("Under our law, both the bidder's board and the target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement. To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem.").

Plaintiffs offer no evidence supporting a different conclusion on appeal. The Court of Chancery's decision granting the Buyout Group Defendants' motion for summary judgment on Plaintiffs' aiding and abetting claim should be affirmed.

1. Plaintiffs Failed to Establish An Underlying Breach of Fiduciary Duty.

As the Court of Chancery correctly found, and for the reasons set forth in Answers' Brief, undisputed evidence established that the Merger was approved by an independent and disinterested majority of the Answers board who did not breach their duty of loyalty to Answers. *See* Op. at 42; *see also* Answers' Brief, Section I.C. Because Plaintiffs failed to establish an underlying predicate breach of the duty of loyalty, Plaintiffs' aiding and abetting claim against the Buyout Group necessarily fails as a matter of law. *See Malpiede*, 780 A.2d at 1096 (the requisite elements include an underlying breach of fiduciary duty); *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011) ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability.").

Although not directly raised in Appellants' Opening Brief ("AOB"), Plaintiffs may contend that even if the Answers Defendants cannot be held liable for a breach of the duty of care because of the exculpation clause in Answers' certificate of incorporation, the Buyout Group may nonetheless be held liable for aiding and abetting such a breach of the duty of care, presumably relying upon Vice Chancellor Laster's recent decision in *In re Rural Metro Corporation Shareholders Litigation*, – A.3d –, 2014 WL 971718 (Del. Ch. Mar. 7, 2014); AOB at 38. Yet, *Rural Metro* is of no help to Plaintiffs, for at least two reasons. *First*,

in *Rural Metro*, the aider and abettor was the seller's own financial advisor, RBC, whom the seller's board relied upon in conducting the sale process and who failed to disclose to that board that it was conflicted in its representation of the company. 2014 WL 971718, at *26-33. Such a situation is fundamentally different than this case, where AFCV was a third party bidder with its own duties to get the best deal terms for its investors. *See, e.g.*, *Morgan*, 2010 WL 2803746, at *7 (noting that bidder "owed fiduciary duties to its own stockholders to use [its] funds prudently, of course, and was not obligated to offer an inflated price for [target] when it could acquire the company for less through honest bargaining"). Thus, unlike the aider and abettor in *Rural Metro*, there is no evidence or even suggestion that the Buyout Group was in a fiduciary relationship with the Answers board, that it participated in decisions of the Answers board challenged by Plaintiffs, or that it otherwise caused the Answers board to make the decisions at issue.

Moreover, unlike in *Rural Metro*, Plaintiffs' theory in this case necessarily presupposes that Answers directors breached their duty of loyalty and that the Buyout Group aided and abetted that breach. In particular, Plaintiffs allege that the Buyout Group knowingly colluded with certain allegedly conflicted Answers directors – Messrs. Beasley and Dyal (the so-called Redpoint directors), and Mr. Rosenschein (Answers' CEO) – to "engineer" a rushed transaction that benefitted

the colluding parties but harmed Answers' shareholders. AOB at 39.[2] Since, as set forth in Answers' Brief and as the Court of Chancery correctly held, Plaintiffs failed to offer evidence that the Answers board breached its duty of loyalty, the aiding and abetting claim necessarily fails.

2. There Is No Evidence Demonstrating Knowing Participation in Any Breach of Fiduciary Duty.

Plaintiffs' aiding and abetting claim separately fails because Plaintiffs fail to establish that the Buyout Group "knowingly participated" in any alleged breach of fiduciary duty. *See Malpiede*, 780 A.2d at 1097; Op. at 42. Although Plaintiffs contend that the "Court below erred in its knowing participation analysis" (AOB at 39), it is Plaintiffs who are mistaken, and the court below that reached the proper conclusion.

To show "knowing participation," Plaintiffs must offer evidence that the Buyout Group had both "knowledge" of the purported breach and "participated" in the alleged breach as a result of: (i) trying to create or exploit conflicts of interest in the Answers board; (ii) conspiring with the Answers board in a fiduciary breach; or (iii) entering into an agreement where the terms of the Merger were so egregious

[2] *See also* AOB at 34-35 (asserting that "[t]here is substantial support in the record for the assertion that Redpoint [represented by directors Beasley and Dyal] was driving this ship" and if "Answers' stock price [were] 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."); *id.* at 36 (contending that Rosenschein [Answers' CEO] knew his position was at risk and "could have improved his vulnerable position through a merger").

as to be inherently wrongful. *Supra* at 13-16.[3] Not only is the record devoid of evidence showing any such "knowing participation," it is replete with evidence showing the exact opposite: good-faith, arm's-length negotiations that, as a matter of law, cannot give rise to liability for aiding and abetting.

a. The Terms of the Merger Were Not Egregious.

As the Court of Chancery found in ruling on Plaintiffs' preliminary injunction motion and on Defendants' motions to dismiss, there was nothing "egregious" about the terms of the Merger itself such that it could be inferred that the Answers board favored AFCV at the expense of Answers' shareholders. *See, e.g.*, *In re Answers Corp. S'holder Litig.*, 2012 WL 1253072, at *8 (Del. Ch. Apr. 11, 2012) ("There is nothing inherently unreasonable, individually or collectively, about the deal protection measures at issue here."); *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 (Del. Ch. Apr. 11, 2011) ("The deal protection measures complained of by the Plaintiffs 'are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty.'") (footnote omitted) (citation omitted). Plaintiffs do not dispute this point on appeal. Although Plaintiffs speculate that the Merger price should have been higher, nowhere do Plaintiffs characterize the Merger price as "egregiously" low or point to any evidence supporting such an assertion. Nor could they. *Supra* at 12;

[3] As noted above, Plaintiffs offer no evidence suggesting that the Buyout Group participated in or otherwise caused the Answers board to make the decisions challenged by Plaintiffs.

Answers, 2011 WL 1366780, at *5 n.53 ("The Court is satisfied that, even after considering the liquidity discount associated with thinly-traded stock and the control premium . . . the offer price still represents a premium for Answers' shareholders."). Thus, there is no basis to argue that the substantive terms of the Merger were sufficiently "egregious" to be "inherently wrongful." *Morgan*, 2010 WL 2803746, at *4.

b. There Is No Evidence that the Buyout Group Sought to Create or Exploit Any Conflict With Respect to Any Answers Director.

Nor is there evidence that the Buyout Group sought to exploit or create conflicts among Answers directors. In the first instance, Plaintiffs do not even suggest (nor did they argue before the Court of Chancery) that Messrs. Sternlicht, Tebbe, Kramer, or Segall – a majority of the Answers board – were anything other than disinterested and independent in deciding that Answers should be sold to AFCV. *Supra* at 16; *see also* Op. at 27 & n.114; Answers' Brief, Section I.C.

Second, to the extent that Plaintiffs continue to assert that three of Answers' directors, Messrs. Rosenschein, Beasley, and Dyal, were conflicted with respect to the sale of Answers due to purported employment and liquidity conflicts (AOB at 34-36), even if this contention had record support (and it does not), the record is devoid of any evidence showing that the Buyout Group was aware of, much less exploited, such purported conflicts.

For example, Plaintiffs contend that Mr. Rosenschein was conflicted because he believed that he was at risk of losing his position as CEO of Answers and was thus "incentivized to find an acquirer who might be more willing to promise him continued employment." A247 ¶ 44; AOB at 35-36. Yet, Plaintiffs offer no evidence that any of the internal Redpoint documents or discussions upon which this assertion is purportedly based were ever shared with the Buyout Group and thus, offer no evidence that the Buyout Group was aware of this alleged conflict. Nor is there evidence that AFCV offered Mr. Rosenschein (or any other Answers officer or director) a future position as part of the negotiations.

Instead, there is evidence to the contrary: both Mr. Rosenschein and Mr. Karandish testified that Mr. Rosenschein was *not* promised continued employment by the Buyout Group during negotiations,[4] and his employment was, in fact, terminated shortly after the Merger. Op. at 36-37 (finding that Plaintiffs "offer[ed] no evidence that [Rosenschein] had a deal lined up with AFCV" and noting "in fact, Rosenschein was not hired by AFCV after the transaction"). Indeed, any suggestion that the Buyout Group and Mr. Rosenschein colluded in a fiduciary breach to sell Answers quickly at the lowest price possible is obviously counter-

[4] *See, e.g.*, A753 (Rosenschein Transcript) at 218:22-219:6 ("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."); A883 (Karandish Transcript) at 111:10-112:22 (testifying that Answers management would be evaluated on a "case-by-case" basis upon close of the then- proposed Merger).

factual: the undisputed evidence shows that Mr. Rosenschein, as one of the principal negotiators for Answers and as a member of the Answers board, repeatedly rejected multiple offers by AFCV to purchase Answers. *See supra* at 6-12.

Plaintiffs fare no better with their assertion that the Buyout Group knowingly exploited a purported "liquidity" conflict of the two Redpoint directors. AOB at 34-35, 39. In the first instance, the *internal* Redpoint documents that Plaintiffs rely upon for this purported conflict (A559) fail to show Redpoint had an exigent need for cash. *See, e.g.*, *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1037 (Del. Ch. 2012) ("No pled facts in the complaint support a basis for conceiving that [the controlling shareholder] wanted or needed to get out of Synthes at any price, as opposed to having billions of reasons to make sure that when he exited, he did so at full value."). More importantly, Plaintiffs offered no evidence that the Buyout Group ever saw any of these "internal" Redpoint documents. Thus, Plaintiffs offered no evidence that the Buyout Group was aware of a purported Redpoint liquidity conflict, let alone that it sought to use that purported conflict to speed up negotiations and/or obtain a lower price.

Additionally, there is no evidence that any of the directors – whether the four independent directors, the Redpoint directors, or Mr. Rosenschein – had any reason to favor the Buyout Group over any other particular bidder. Thus, to the

extent Plaintiffs suggest (again contrary to the evidence) that the Redpoint Directors and/or Rosenschein were somehow improperly motivated to sell Answers quickly, there is no evidence that any director was motivated to sell Answers to the Buyout Group as opposed to any other potential buyer who would be willing to buy the company, and no director was offered or promised any type of "side deals" or payments by the Buyout Group in an effort to create or induce any alleged conflict. *Cf. McGowan v. Ferro*, 2002 WL 77712, at *3-4 (Del. Ch. Jan. 11, 2002) (noting that the requisite level of detail to show "knowing participation" by a non-fiduciary typically involves facts regarding excessive collateral or side agreements or payments that were utilized to induce the fiduciaries to breach their fiduciary duties).

In sum, there is no evidence that the Buyout Group sought to create or exploit any conflicts as to any Answers director. *See* Op. at 34 ("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."). To the contrary, the record is replete with evidence of protracted, good faith, arm's-length negotiations between the parties, as shown *supra* at 6-12.

c. Plaintiffs' Theory Regarding a "Rushed" Transaction Failed to Raise a Material Issue of Fact Regarding Their Aiding and Abetting Claim.

Despite the undisputed evidence of protracted, arm's-length negotiations between Answers and the Buyout Group that began in earnest in September 2010 and continued for nearly five months until February 2011, on appeal, Plaintiffs continue to press the theory that the Buyout Group was able to use confidential information received from Answers regarding Q4 results and projections "to engineer" a rushed transaction before Answers' 4Q2010 results were announced, thus preventing Answers' stockholders from receiving a higher price. AOB at 39. Such "facts" – that the Buyout Group received confidential information and sought to move quickly – fail to support an aiding and abetting claim as a matter of law.

i. Seeking to Move Expeditiously Does Not Establish Aiding and Abetting.

Plaintiffs contend that they sufficiently raised genuine issues of material fact regarding whether the Buyout Group pushed for a quick closing to the transaction and thus, purportedly aided and abetted the alleged fiduciary breaches of the Answers board, by pointing to an email from Ms. Shelffo (UBS) to several Answers directors noting that AFCV's financial advisor (Jefferies) continued to "'push again the idea that [Answers] should do a quick market check in the next two weeks.'" AOB at 27, 39; A395. As an initial matter, this argument is contrary to the undisputed record below – which shows that Answers' banker rejected the

alleged request by AFCV's banker. *See* A395 ("I told him [the Jefferies banker] the board was 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."). Regardless, as shown above, because there is no evidence that the Buyout Group sought to exploit conflicts or otherwise colluded with any Answers directors, the fact that the Buyout Group sought to push toward a close reflects nothing more than arm's-length bargaining, and therefore cannot support a claim for aiding and abetting. *See supra* at 14-15; *see also In re BJ's Wholesale Club, Inc., S'holders Litig.*, 2013 WL 396202, at *14 (Del. Ch. Jan. 31, 2013) (allegations that "Buyout Group pressured the Board to accept a lower price and engage in a hasty sale" did not support aiding and abetting claim); *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *21 (Del. Ch. July 29, 2008) ("[a] hard bargain, however, cannot suffice to establish an aiding and abetting claim where the parties negotiated at arm's-length"), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009).

ii. The Mere Receipt of Confidential Information Does Not Suffice to Show Aiding and Abetting.

Plaintiffs also assert that the Buyout Group used confidential information about Answers Q4 results and projections to compel the Answers board to close the deal quickly to the detriment of Answers' shareholders, i.e., before the stock would supposedly rise and scuttle the deal. AOB at 39. The undisputed evidence

shows, however, that in January 2011, *after* the Buyout Group received the supposedly "blowout" numbers, the Buyout Group expressly told Answers it did *not* believe those numbers and asserted that its own diligence results could support an $0.84 per share reduction in price. *See supra* at 11. In other words, contemporaneous and undisputed evidence suggests continuing, hard-fought, arm's-length bargaining – the very opposite of rushed, collusive dealings between the Answers board and the Buyout Group to the detriment of Answers' stockholders. Regardless, even assuming that the Buyout Group was the only potential buyer to get data showing Answers' outlook was improving (it was not, as detailed in Answers' Brief) and even assuming there was evidence that the Buyout Group believed this financial data (it did not), Plaintiffs' theory necessarily assumes that the Buyout Group had some means by which it could compel the Answers board to act to the detriment of the company's shareholders.

Since, as shown above, Plaintiffs offered (i) no evidence that the Buyout Group colluded with Messrs. Beasley, Dyal or Rosenschein (who in themselves represented only a minority of the Answers' board), (ii) no evidence that the Buyout Group was even aware of any conflicts on the part of these individuals, and (iii) no evidence that the Buyout Group sought to exploit any purported conflicts, the notion that the Buyout Group could have caused or did cause the Answers board to make a decision detrimental to the interests of Answers' shareholders, is

simply illogical. *See, e.g.*, *In re Bioclinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *11 (Del. Ch. Oct. 16, 2013) (where complaint was devoid of allegations showing knowing participation, allegations regarding acquirer's alleged "'unfettered access to the Company's confidential information, including information about the Company's business plans'" failed to show aiding and abetting) (citation omitted).

To the extent that Plaintiffs appear to suggest for the first time on appeal that Summit and/or Jefferies may have colluded with Ms. Shelffo/UBS (AOB at 39), there is *no record evidence* supporting such an assertion. Nor do Plaintiffs offer evidence of any UBS conflicts or relationships that could have been exploited by the Buyout Group or offer any explanations as to why the Buyout Group would have had leverage over, or any ability to control, UBS. *See also* Op. at 23 & n.97. Indeed, while Plaintiffs contend Ms. Shelffo (Answers' banker) "explicitly told" Summit and Jefferies "to take action *to prevent* Answers stockholders from getting a higher price" (AOB at 39 (emphasis added)), a review of the cited emails (A561-62; A573; A575) shows that no such statement was made.

3. The Court Should Re-Affirm Delaware's Long-Standing Rule that Arm's-Length Bargaining is Privileged and Does Not, Absent Actual Collusion in Fiduciary Wrongdoing, Constitute Aiding and Abetting.

The reality here is that AFCV: (i) was a third party buyer with no prior relationship with anyone on the Answers board; (ii) engaged in lengthy

negotiations with Answers and its independent financial advisor; and (iii) had obligations to its own investors to obtain the lowest price possible in the transaction. Yet, despite these undisputed facts, and this Court's reminders that "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting," *see Malpiede*, 780 A.2d at 1097-98, *supra*, the Buyout Group still had to expend considerable resources defending this litigation even in the absence of facts showing that it engaged in any nefarious behavior.

Given this, the Buyout Group respectfully suggests that the Court take this opportunity to re-affirm and re-emphasize its holding in *Malpiede*, as well as the Court of Chancery's recent decisions in such cases as *Morgan* and *BJ's Wholesale Club* by making clear that "*Malpiede's* requirement that the third party knowingly *participate* in the alleged breach – whether by buying off the board in a side deal, or by actively exploiting conflicts in the board to the detriment of the target's stockholders – is there for a reason." *Morgan*, 2010 WL 2803746, at *8 (citing *Malpiede*, 780 A.2d at 1096); *see also BJ's*, 2013 WL 396202, at *14-18.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Answers Defendants-Appellees' Answering Brief, it is respectfully submitted that the Court of Chancery's decision granting Defendants' motions for summary judgment should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2014, the foregoing ANSWERING BRIEF OF APPELLEES AFCV HOLDINGS, LLC, A-TEAM ACQUISITION SUB, INC., AND SUMMIT PARTNERS L.P. was served by File & Serve*Xpress*, on the following attorneys of record:

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