IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MIRAMAR FIREFIGHTERS PENSION FUND, On Behalf of Itself and All Others Similarly Situated, Plaintiff, v. ABOVENET, INC., JEFFREY BRODSKY, MICHAEL J. EMBLER, BILL LAPERCH, RICHARD POSTMA, RICHARD SHORTEN, JR., STUART SUBOTNICK, ZAYO GROUP, LLC, and VOILA SUB, INC., Defendants.	:	**C.A. No. 7376-VCN**

MEMORANDUM OPINION

Date Submitted: April 16, 2013
Date Decided: July 31, 2013

Peter B. Andrews, Esquire of Faruqi & Faruqi, LLP, Wilmington, Delaware, Juan E. Monteverde, Esquire of Faruqi & Faruqi, LLP, New York, New York, and Jacob A. Goldberg, Esquire of Jenkintown, Pennsylvania, *Attorneys for Plaintiff*.

Gregory P. Williams, Esquire, Raymond J. DiCamillo, Esquire, and Kevin M. Gallagher, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, *Attorneys for Defendants*; Adam Offenhartz, Esquire, Nancy Hart, Esquire, and Lindsey Schmidt, Esquire of Gibson Dunn & Crutcher LLP, New York, New York, *Attorneys for Defendants Zayo Group, LLC and Voila Sub, Inc.*; and Tariq Mundiya, Esquire and Jeffrey B. Korn, Esquire of Willkie Farr & Gallagher LLP, New York, New York, *Attorneys for Defendants AboveNet, Inc., William LaPerch, Jeffrey Brodsky, Michael J. Embler, Richard Postma, Richard Shorten, Jr., and Stuart Subotnick*.

NOBLE, Vice Chancellor

Plaintiff Miramar Firefighters Pension Fund ("Miramar"), a former stockholder of Defendant AboveNet, Inc. ("AboveNet" or the "Company"), alleges that the former directors of AboveNet (the "AboveNet Directors" or the "Board"), breached their fiduciary duties in connection with the acquisition of the Company (the "Merger") by Defendant Zayo Group, LLC and its related entity (collectively, "Zayo").[1] Miramar further alleges that Zayo aided and abetted the AboveNet Directors' breach of their fiduciary duties. The Defendants have moved to dismiss the Complaint.[2] Because the Complaint fails to state a reasonably conceivable claim, the Defendants' motion is granted.

I. BACKGROUND

A. *Parties*

Miramar brings this class action on behalf of the former public stockholders of AboveNet. Through its private optical network, AboveNet provided high bandwidth connectivity solutions and IP services in the United States and Europe.[3] Before the Merger, Defendant Bill LaPerch ("LaPerch") was the President and Chief Executive Officer ("CEO") of the Company and a member of the Board.[4] The remaining AboveNet Directors were not officers of the Company and had

---

[1] The Merger was completed through Defendant Voila Sub, Inc. (the "Merger Sub"), Zayo's wholly-owned subsidiary.
[2] Verified Second Am. Class Action Compl. (the "Compl.").
[3] Compl. ¶ 5.
[4] *Id.* at ¶ 8.

served on the Board since at least 2003.[5] Zayo is a Delaware limited liability company that provides, among other things, "high bandwidth infrastructure and carrier neutral colocation."[6]

B. *The Merger*

On March 19, 2012, AboveNet announced that it would be acquired by Zayo for approximately $2.2 billion in cash or $84 per share (the "Merger Agreement"), a 13 percent premium over AboveNet's March 16, 2012, stock price and a 21 percent premium over its average closing stock price for the 60 days preceding the announcement of the Merger. The Merger closed in June 2011 after 99.7 percent of the shares voted were cast in favor of the transaction (82.5 percent of the total outstanding stock).

C. *The Scheme to Take AboveNet Private*

As detailed in the Complaint, Miramar's theory is that LaPerch, by January 2011, had concocted a plan to sell the Company to a private equity buyer so that he could retain his role as CEO and roll over his equity into the private venture. J.P. Morgan, allegedly hired to go along with LaPerch's plan, began identifying potential suitors and the Board undertook a price discovery process. Through spring 2011, LaPerch "repeatedly prevailed upon the Board to exclude strategic

---

[5] The other AboveNet Directors are Jeffrey Brodsky, Michael J. Embler, Richard Postma, Richard Shorten, Jr., and Stuart Subotnick.
[6] Compl. ¶ 12.

acquirers from any involvement in the price discovery process . . . ."[7] Simultaneously, LaPerch worked with J.P. Morgan allegedly to manipulate the Company's financial projections in order to make it more attractive to a private equity buyer.[8] For example, J.P. Morgan reduced the Company's projected revenue growth rate of 12.5 percent in 2016 to a 3 percent projected revenue growth rate in 2020.[9]

However, in April 2011, word leaked about AboveNet's "price discovery process" and strategic acquirers began to express interest. One strategic acquirer submitted an indication of interest of $85 per share. While LaPerch and the Board were "forced to create the appearance of opening the process to some strategics[,]" they nonetheless "refused to open the process to Zayo out of alleged concern for Zayo's ability to finance a transaction."[10] By June 2011, LaPerch allegedly convinced the Board to shut down the sale process for fear that strategic buyers would be willing to pay more for AboveNet than financial sponsors.[11]

But in January 2012, LaPerch "rekindled" his plan to take the Company private by re-opening negotiations with private equity buyers and causing J.P. Morgan to lower again the Company's financial projections. By February, AboveNet entered into a letter of intent and an exclusivity period with a

---

[7] *Id*. at ¶ 24.
[8] *Id*. at ¶ 26.
[9] *Id*. at ¶ 26.
[10] *Id*. at ¶ 28.
[11] *Id*. at ¶¶ 29-30.

consortium of private equity buyers "in an effort to prevent any strategic acquirers from disrupting [LaPerch's] plan to take the Company private."[12] In an attempt to justify and to cover up its exclusion of strategic buyers, the Board hired Moelis & Co. ("Moelis") to run a post-Merger Agreement go-shop. Miramar criticizes the Board's hiring of Moelis because it had never conducted a go-shop before.[13] As the Board closed in on a deal with a private equity group at $78 per share, David Caruso, the CEO of Zayo, contacted LaPerch and expressed an interest in acquiring AboveNet for $80 per share.

According to Miramar, LaPerch and the Board grudgingly allowed Zayo access to the due diligence data room in exchange for a confidentiality agreement, which included a standstill provision.[14] The Board then allegedly tried to derail Zayo's interest by refusing to allow J.P. Morgan to offer staple financing to Zayo, even though the Board had previously allowed J.P. Morgan to provide financing for private equity sponsors.[15]

Nonetheless, as the negotiations progressed with the bidders, the private equity group refused to bid higher than $78.50 per share, while Zayo made an initial offer of $80 per share. After Zayo conducted its due diligence and engaged in further negotiations with AboveNet, the Board ultimately reached a deal with

---

[12] *Id*. at ¶ 34.
[13] *Id*. at ¶ 35.
[14] *Id*. at ¶ 37.
[15] *Id*. at ¶ 37.

Zayo at $84 per share, after consulting with its two financial advisors, both of whom opined independently that the price was fair.[16]

Miramar claims that had the Board attempted to sell AboveNet to strategic buyers all along, it would have been able to obtain a higher price for the Company.[17] Miramar further asserts that J.P. Morgan and Moelis manipulated their fairness opinions to make $84 per share seem fair.[18]

Miramar also alleges that the Board agreed to onerous deal protection devices in the Merger Agreement, including a $45 million termination fee, which compounded the ineffective go-shop.[19] Among other criticisms, Miramar complains that the thirty-day go shop was not long enough to yield any competing offers.[20]

D. *Contentions*

Miramar brings two causes of action against the Defendants. First, it alleges that the AboveNet Directors breached their fiduciary duty of loyalty by either acting in their own self-interest or acquiescing in the desires of LaPerch, who

---

[16] *Id*. at ¶ 38.
[17] *Id*. at ¶ 39.
[18] *Id*. at ¶ 40. With respect to Moelis' fairness opinion in particular, Miramar complains that it selected an irrationally low growth rate to "suppress the bottom of the discounted cash flow valuation range . . . ." *Id*. at ¶ 44. Miramar also complains that the AboveNet Directors failed to inquire about the discrepancies between the J.P. Morgan fairness opinion and the Moelis fairness opinion. *Id*. at ¶¶ 42-43.
[19] *Id*. at ¶ 50.
[20] *Id*. at ¶ 49. The Merger Agreement restricted the Board's ability to respond to solicitations after the go-shop period. AboveNet could respond to unsolicited proposals provided that the bidder submitted a bona fide alternative proposal and entered into a confidentiality agreement with AboveNet. *Id*.

wanted to retain his position as CEO of the Company.[21] Miramar further alleges that the AboveNet Directors "failed to take adequate measures to ensure that the interests of AboveNet's former shareholders were properly protected . . . ."[22] Second, Miramar asserts that Zayo knowingly aided and abetted the AboveNet Directors' breach of their fiduciary duties.

II. ANALYSIS

A. *The Rule 12(b)(6) Standard*

The Defendants have moved to dismiss the Complaint. A motion to dismiss must be granted when a "plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[23] A trial court must "accept all well-pleaded factual allegations in the Complaint as true . . . [and] draw all reasonable inferences in favor of the plaintiff."[24] Although the standard is a minimal one, the Court "will not credit conclusory allegations or draw unreasonable inferences in favor of the Plaintiff[]."[25]

---

[21] *Id*. at ¶¶ 62-67.
[22] *Id.* at ¶ 63.
[23] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[24] *Id.*
[25] *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *5 (Del. Ch. Jan. 31, 2013); *see also Gerber v. Enter. Prods. Hldgs., LLC*, 2012 WL 34442, at *8 (Del. Ch. Jan. 6, 2012), *rev'd on other grounds*, 67 A.3d 400 (Del. 2013) ("[A] trial court is required to accept only those reasonable inferences that logically flow from the face of the complaint and is not required to accept every strained interpretation of the allegations proposed by the plaintiff.") (internal quotation marks omitted).

B. *Duty of Loyalty Claim*

For a duty of loyalty claim to survive a motion to dismiss, the Complaint must state facts that reasonably support the inference that a majority of the directors (1) were self-interested or not independent or (2) acted in bad faith.[26]

First, the Complaint fails to proffer facts that support a reasonable inference that a majority of the AboveNet Directors were self-interested or not independent of LaPerch. Directors are self-interested when they "appear on both sides of a transaction" or "derive [a] personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[27] The personal financial benefit must be material to the director, that is, "significant enough 'in the context of the director's economic circumstances'" to impair her impartiality.[28] A director is independent when her "decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[29] Directors are presumed independent and disinterested under Delaware law.[30]

---

[26] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239-40 (Del. 2009).
[27] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
[28] *Orman v. Cullman,* 794 A.2d 5, 23 (Del. Ch. 2002) (italics omitted) (quoting *In re Gen. Motors Class H S'holders Litig.,* 734 A.2d 611, 617 (Del. Ch. 1999)).
[29] *Aronson*, 473 A.2d at 816.
[30] *Id*. at 812.

Except for LaPerch, who Miramar alleges "wanted to build a bigger Company by selling it to private equity buyers while maintaining his role as CEO[,]"[31] the Complaint does not seriously challenge the disinterestedness of the remaining directors. The Complaint alleges that the AboveNet directors "directed their efforts to securing a deal to take the Company private to provide significant benefits to [themselves]" but fails to identify what benefits they, other than LaPerch, might have received.[32] The Complaint also contains conclusory allegations that the Board "went along with LaPerch's plan"[33] and "succumbed" to LaPerch's desire to "steer the sale of the Company to private equity buyers."[34] Without more, allegations that the AboveNet Directors acquiesced in LaPerch's plan are insufficient to raise a reasonable inference that they were beholden to, or controlled by, LaPerch.[35] Accordingly, the Complaint fails to plead a duty of loyalty claim against the AboveNet Directors arising from any disabling interest or lack of independence.

---

[31] Compl. ¶ 22.
[32] *Id*. at ¶ 65.
[33] *Id*.
[34] *Id*. at ¶ 3.
[35] *See In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) ("That directors acquiesce in, or endorse actions by, a chairman of the board—actions that from an outsider's perspective might seem questionable—does not, without more, support an inference of domination by the chairman or the absence of directorial will."). Similarly, allegations that the directors participated in LaPerch's scheme by turning a "blind eye" to manipulated financial projections or by "inexplicably [doing] nothing[,]" do not show, without more, that the directors were dominated and controlled by LaPerch. Compl. ¶ 42; Pl.'s Br. in Opp'n to Defs.' Mot. to Dismiss Second Am. Verified Class Action Compl. ("Pl.'s Br.") 23.

Second, Miramar has alleged that the AboveNet Directors acted in bad faith by (1) failing to obtain adequate consideration for the Merger; (2) excluding strategic buyers from the sale process in favor of financial sponsors; and (3) agreeing to onerous and preclusive deal protection devices.

In the *Revlon* context, directors are obligated to obtain the best sale price reasonably attainable.[36] Thus, "bad faith will be found if [the AboveNet Directors] intentionally fail[ed]" to obtain the best price reasonably attainable for AboveNet, "demonstrating a conscious disregard for [their] duties."[37] "A breach of the duty of loyalty may also exist, notwithstanding approval by a majority of disinterested and independent directors, 'where the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'"[38]

1. Inadequate Consideration

Miramar asserts that the AboveNet Directors consciously disregarded their duty to sell AboveNet at the best price reasonably attainable. In support, the Complaint asserts that (i) the $84 per share price was inadequate based on a third-party analyst who valued AboveNet at $86 per share;[39] (ii) senior management and J.P. Morgan manipulated the financial projections, initially, to facilitate a sale to

---

[36] *See Lyondell Chem. Co*., 970 A.2d at 242.
[37] *In re BJ's Wholesale Club, Inc.*, 2013 WL 396202, at *7 (internal quotation marks omitted).
[38] *Id*. (quoting *In re Alloy, Inc. S'holder Litig*., 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011)).
[39] Compl. ¶ 20.

private equity buyers, and then later, to support the transaction with Zayo, a strategic acquirer; (iii) the Board knowingly ignored the material differences in the projections used by J.P. Morgan and Moelis; and (iv) the Board hired Moelis even though it was allegedly incompetent to conduct a go-shop. Each of these allegations is addressed below.

First, Miramar relies upon one analyst's commentary that the Merger price was inadequate and AboveNet's receipt of an indication of interest for $85 per share to imply that the AboveNet Directors knew that the Merger price was inadequate.[40] But these facts alone or together do not raise a reasonable inference of disloyalty. "It is not enough to argue that the financial press published objections to the adequacy of the [sale] price."[41] Allegations of this sort are plainly insufficient to rebut the business judgment rule.[42] The $85 per share indication of interest is of no moment as well. Tellingly, the Complaint does not indicate whether the interested party's $85 per share non-binding preliminary expression of interest ever materialized into a bona fide offer. The Court cannot reasonably infer that the party ever submitted a firm offer for AboveNet or that it somehow continued to participate in the sale process. In contrast, the Complaint concedes

[40] *Id*. at ¶¶ 20, 29.
[41] *In re CompuCom Sys., Inc. S'holders Litig*., 2005 WL 2481325, at *7 (Del. Ch. Sept. 29, 2005).
[42] *See In re BJ's Wholesale Club, Inc.,* 2013 WL 396202, at *12 ("The Plaintiff's . . . argument, that the Board knew BJ's was worth more based on third-party analysts' price targets, overlooks the fact that (1) those analysts' estimates were not based on the confidential business information provided to the Buyout Group and available to the Board and (2) no other bidders offered (after nearly a year-long sales process) a higher bid.").

that the next highest bona fide bid for AboveNet was $78.50 per share, and that no bids higher than $84 per share emerged during a lengthy public sale process and a thirty-day go-shop. Thus, from those facts, the Court cannot reasonably infer that the $84 per share price was inadequate.

Second, the Complaint alleges that LaPerch and J.P. Morgan manipulated the Company's financial projections.[43] Initially, Miramar claims that LaPerch and J.P. Morgan manipulated AboveNet's financial projections to make them "a more affordable target for a private equity buyer."[44] Later, however, LaPerch and J.P. Morgan, with the knowledge of the Board, "manipulated the lower end of the valuation range" to make the $84 per share price from Zayo—a strategic buyer—seem "fair and reasonable when it was not."[45] Miramar specifically asserts that J.P. Morgan, in extrapolating AboveNet's financial forecasts beyond 2016, "ratcheted down the Company's growth rate" from "13% in 2018 to 3% in 2021" to devalue the projections.[46] To state a non-exculpated breach of fiduciary duty

[43] Compl. ¶¶ 26, 32-33, 40.
[44] *Id*. at ¶ 26. Miramar's contention is premised on the assumption that strategic buyers are often able to pay more for an acquisition than private equity buyers. Thus, Miramar assumes that the lower price target would attract more private equity buyers. However, Miramar does not explain why the lower price target would not also make AboveNet even more attractive to strategic acquirers.
[45] *Id*. at ¶ 40.
[46] *Id*. at ¶¶ 32-33.

claim based on errors in a financial advisor's analysis requires that Miramar allege that the Board relied upon "what it knew was an inaccurate analysis."[47]

Setting aside the inconsistency between these assertions, Miramar's allegations do not sustain a duty of loyalty claim for two reasons. First, the alleged manipulation is merely a quibble with J.P. Morgan's financial analysis.[48] Even with the sizeable decrease in AboveNet's growth rate projection, there is no reason to believe that the use of a conservative growth rate in the terminal year of a discounted cash flow analysis was not a rational estimate by J.P. Morgan.[49] Moreover, Miramar does not allege that J.P. Morgan's fairness analysis was not fully disclosed. The fully informed stockholders were fully capable of voting against the Merger if they believed that J.P. Morgan's use of a conservative terminal growth rate was unreasonable. Nothing more is required under Delaware law.[50] Second, Miramar has failed to allege facts that create an inference that the Board knew of the manipulation.[51] The Complaint claims LaPerch and senior

---

[47] *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *25 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012).

[48] *See In re Morton's Rest. Gp., Inc. S'holders Litig.*, 2013 WL 3828788, at *11 (Del. Ch. July 23, 2013) (noting that "this sort of sidewalk superintending of the banker's advice does not sustain a complaint").

[49] *Id.* (noting that the long-term growth rate for the U.S. economy is only 2 to 3 percent per year and that a 9 percent perpetuity growth rate would be an extreme case).

[50] *Id.* at *11 n.107. Similarly, Miramar disagrees with Moelis's use of a two to three percent perpetual growth rate in its fairness opinion. Compl. ¶ 44. The use of conservative growth rates in long-term financial projections is hardly indicative of bad faith.

[51] In only one instance does the Complaint allege that the Board participated in, and had knowledge of, the manipulation of the financial projections. *Id.* at ¶ 40. This allegation is, at best, conclusory. Furthermore, the extrapolated projections which J.P. Morgan utilized and the

management caused J.P. Morgan to lower the financial projections. However, the assumptions and projections utilized by J.P. Morgan and Moelis were not so irrational that the Board had to have known their analyses were flawed. Thus, the Complaint fails to sustain a reasonable inference that the Board either unreasonably relied upon J.P. Morgan's fairness opinion or acted in bad faith.

Third, for similar reasons, Miramar's allegation that the AboveNet Directors turned a blind eye to the different financial projections used by J.P. Morgan and Moelis is also unavailing. Those differences consisted of a discrepancy in the advisors' financial projections for 2018 and the use of different revenue growth rates beyond 2018.[52] Miramar has not explained adequately why any of the inputs used were *per se* unreasonable. Nor has it explained why those differences were material, why the Board should have voiced skepticism at the disparate analyses, and how those minor differences create an inference that the AboveNet Directors manipulated the sale process. "The reality that the two banks used some different assumptions and came to somewhat different outcomes does not create any rational

---

Board relied upon are not "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re BJ's Wholesale Club, Inc.*, 2013 WL 396202, at *13.

[52] Compl. ¶¶ 42-45.

inference of impropriety."[53] The Court need not accept Miramar's strained interpretation of the pleaded facts.

Finally, Miramar's criticism of the Board's selection of Moelis to conduct the go-shop also does not support a reasonable inference that the AboveNet Directors consciously disregarded their duty to sell AboveNet at the best price reasonably attainable. All that Miramar has alleged is that Moelis had never run a go-shop before and that the Board never inquired about that fact.[54] But Miramar never attacks the adequacy of the go-shop process except to contend that it was too short. Moreover, even assuming that Moelis was incompetent, Miramar has not alleged that the Board was aware of that fact.[55] While the pleaded facts might

---

[53] *In re Morton's Rest. Gp., Inc.*, 2013 WL 3828788, at *12 (noting that "what would be more disturbing would be if somehow two advisors generated by some sort of harmonic convergence, exact replicas of each other's reasoning.").

[54] Miramar contends that Moelis was not selected with "reasonable care" as required under 8 *Del. C.* § 141(e). But Miramar has not alleged that the Board had no basis for selecting Moelis. It only alleges that the Board failed to inquire whether Moelis had ever run a go-shop before.

[55] Miramar essentially asks this Court to draw an inference that Moelis was incompetent because it had never conducted a go-shop before. Miramar then asks the Court to infer that the Board knew Moelis was incompetent based on the Board's failure to inquire about whether it had performed a go-shop before. These inferences are too tenuous. They also appear to lack merit. In the Complaint, Miramar has selectively quoted from the deposition transcript of one of Moelis's advisors. *See New Jersey Carpenters Pension Fund v. info*GROUP*, Inc.*, 2011 WL 4825888, at *2 n.1 (Del. Ch. Sept. 30, 2011) (noting that a Court "may consider documents both integral to and incorporated into the complaint"). When read in context, Moelis "had extensive M&A experience, including running sell side M&A transactions, which have no distinction from a go-shop process." Aff. of Kevin M. Gallagher in Supp. of Defs.' Br. in Supp. of their Mot. to Dismiss Pl.'s Second Am. Verified Class Action Compl. ("Gallagher Aff.") Ex. 3 (Matthew Clark Dep.) at 135. Moreover, the Proxy discloses that during the go-shop period Moelis solicited a substantial number of strategic and financial sponsors. Gallagher Aff. Ex. 1 (Proxy) at 44.

Certain facts have been drawn from the Proxy for context; they are not material to the Court's conclusions.

conceivably implicate a breach of the duty of care, they do not establish a reasonable inference that the AboveNet Directors consciously hired an incompetent advisor to run a charade.

2. The Scheme to Exclude Strategic Buyers

Miramar alleges that LaPerch and the Board purposely excluded strategic buyers in favor of financial sponsors. In support, Miramar asserts (i) that the Board permitted J.P. Morgan to offer stapled financing to private equity buyers, but not to Zayo;[56] (ii) that the Board, at LaPerch's bidding, terminated the sale process "to prevent strategic competitors from scuttling the plan to take the Company private"[57] and (iii) that the Board conspired with the Company's two independent financial advisors to manipulate the financial projections.

As a preliminary matter, the theory that the Board schemed to exclude strategic buyers is at tension with the ultimate outcome of the sale process. A strategic acquirer purchased AboveNet and LaPerch did not maintain his employment. If such a scheme existed, it was a wildly unsuccessful one. Miramar attempts to salvage its duty of loyalty claim on the ground that the Board eventually decided to sell the Company to a strategic buyer after all, but at a wholly inadequate price, by conspiring with its financial advisors to manipulate the fairness opinions and to conduct a sham go-shop. This second theory of disloyalty,

[56] Compl. ¶ 37.
[57] *Id*. at ¶ 30.

however, is even less conceivable than the first one. Miramar provides *no reason* why the disinterested and independent AboveNet Directors (*and LaPerch*) would engage in such a scheme.[58]

The Board's decision to offer financing to private equity buyers, but not to Zayo, poses the question of whether the differential treatment was reasonably justified. Nothing in the Complaint sheds light on this question. Delaware law does not require that a board of directors treat all bidders equally if "shareholders' interests justified such a course."[59] When viewed in the light most favorable to Miramar, this type of inexplicable disparate treatment of a serious bidder would typically lend itself to a reasonable inference of bad faith.[60] However, Zayo was the successful bidder. It either did not need the financing or obtained financing from some other source.[61] Moreover, there are no well-pleaded facts that Zayo would have offered a higher price had such financing been offered. The record reflects that the Board's bargaining caused Zayo to pay $4 more per share than its

---

[58] *In re BJ's Wholesale Club, Inc.*, 2013 WL 396202, at *10. With respect to Miramar's first theory of disloyalty, the Complaint also fails to explain "why the disinterested and independent [AboveNet] directors would disregard their fiduciary duties in order to secure [LaPerch's] future employment." *Id.*

[59] *See In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *9 (Del. Ch. Jan. 3, 2013).

[60] *Id.* at *8-10 ("The Amended Complaint . . . states a reasonably conceivable claim that the Novell Defendants treated a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably attainable.").

[61] The Proxy discloses that Zayo's offer included executed financing commitments. Gallagher Aff. Ex. 1 (Proxy) at 38-39. If true, the Board had no reason to offer or not to offer financing to Zayo.

original offer. Thus, it is not reasonably conceivable that the shareholders were deprived of the best price reasonably attainable.

In addition, Miramar alleges that the Board terminated the sale process by June 2011 in response to an indication of interest valued at $85 per share from a strategic acquirer. But the well-pleaded facts do not support that inference.[62] By early April 2011, word had leaked that AboveNet was engaged in a "price discovery process."[63] However, the Complaint does not allege that, by June 2011, AboveNet had received any firm offers from private equity buyers or strategic acquirers. Despite several months of trying to sell the Company, it appears that the Board had not received any serious offers by June 2011—from financial or strategic buyers—that justified the sale of the Company.[64] Thus, the Board may have decided to stop the price discovery process because no adequate offers had been obtained. It is not reasonably conceivable that a disinterested and independent board would abandon the sale process at the slightest expression of

---

[62] The Complaint alleges that the Board repeatedly denied strategic bidders the opportunity to participate in the bidding process in the first stage, was "forced to create the appearance of opening the process to some strategics[,]" and refused to allow Zayo to participate in the process by late April 2011 because of concern that it would not be able to finance the transaction. Compl. ¶¶ 25, 28. 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." *In re Alloy, Inc.*, 2011 WL 483716, at *7 (internal quotation marks omitted).

[63] Compl. ¶ 27.

[64] That inference is in accord with the Proxy, which discloses that the Board engaged in negotiations during spring 2011 with ten private equity buyers and six strategic bidders. Only one offer emerged from those discussions—a $74 per share cash offer from a private equity consortium. Gallagher Aff. Ex. 1 (Proxy) at 32-33. Notably, that offer was $10 per share less than what the Board accepted in March 2012. *Id.* at 33.

interest from a strategic sponsor because it wanted to secure the CEO's future employment by orchestrating a deal with a financial buyer.

Miramar's final allegation—that the Board favored financial buyers by allowing its advisors to lower the Company's financial projections—has already been addressed. The alleged modifications to projections were not so far beyond the bounds of reasonable judgment that the Board had to have known that the inputs were inaccurate or that the use of such inputs was inexplicable on any ground other than bad faith. In conclusion, the Complaint does not set forth a reasonably conceivable set of facts that the AboveNet Directors favored private equity buyers over strategic sponsors.

3. Deal Protection Devices

Miramar further alleges that the Merger Agreement contained onerous and preclusive deal protection devices. These measures included a $45 million termination fee, representing roughly two percent of the deal's equity value, a thirty-day go shop, and a no-solicitation clause following the go-shop.[65] Miramar contends that because the Board excluded strategic acquirers from the sale process, the thirty-day go-shop was too short, and thus, destined to fail.[66] Although Miramar acknowledges that the go-shop could have been extended fifteen days, the Complaint asserts that bidders would not have enough time to execute a

[65] Compl. ¶¶ 48-51.
[66] *Id*. at ¶ 49.

confidentiality agreement, exchange information, and conduct due diligence within the thirty-day period.[67]

Miramar relies on *Netsmart* for the proposition that "an inert, implicit post-signing market check does not, on this record, suffice as a reliable way to survey interest by strategic players."[68] However, unlike the Merger Agreement, which allowed the Board to solicit strategic bidders actively, the *Netsmart* merger agreement prohibited the board from shopping the company. Importantly, Miramar does not allege that the Board did not actively shop the Company; rather, it quibbles with the Board's decision to hire Moelis. The lack of those types of allegations and the Board's decision to conduct a go-shop suggest that the Board actively canvassed the market for strategic acquirers.

Although Miramar claims conclusorily that the delay in soliciting strategic acquirers prejudiced the sale process, the Complaint fails to explain how the process was not cured by the subsequent inclusion of strategic sponsors before the Merger Agreement was executed and during the thirty-day go-shop.

Even when considered cumulatively, the remaining deal protection devices—the termination fee and the no-solicitation clause (which became operative after the go-shop period terminated)—are unremarkable and have been

---

[67] Pl.'s Br. 22.

[68] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 197 (Del. Ch. Mar. 14, 2007). According to the Proxy, the Board did not actively solicit strategic acquirers but allowed them to join the process. Gallagher Aff. Ex. 1 (Proxy) at 28-31. During the go-shop, Moelis contacted 34 strategic parties and 14 financial parties. *Id.* at 44.

repeatedly upheld by the Court as reasonable under similar circumstances.[69] Nothing in the Complaint warrants a different finding here.[70]

C. *Aiding & Abetting Claim*

Miramar's claim that Zayo aided and abetted the AboveNet Directors' breach of their fiduciary duties fails.[71] First, Miramar has not stated a claim for a breach of the fiduciary duty of loyalty. Second, even if it had pleaded a fiduciary duty claim, the Complaint lacks any facts suggesting that Zayo knowingly participated in the financial manipulation that allegedly made the $84 per share price seem fair.[72] In contrast, the record reflects that Zayo was an arms-length bidder. Accordingly, Miramar has failed to set forth a reasonably conceivable set of facts that Zayo aided and abetted a breach of fiduciary duty.

---

[69] *See e.g., In re Orchid Cellmark Inc. S'holder Litig*., 2011 WL 1938253, at *7-8 (Del. Ch. May 12, 2011).

[70] Miramar has also asserted a duty of care claim against the AboveNet Directors. That claim is dismissed because AboveNet's certificate of incorporation contains an exculpatory provision—as authorized by 8 *Del. C.* § 102(b)(7)—that "immunizes [the AboveNet Directors] for liability for monetary damages as a result of a breach of their duty of care." *McMillan v. Intercargo Corp*., 768 A.2d 492, 501 (Del. Ch. 2000); *see also* Gallagher Aff. Ex. 2 (AboveNet's Certificate of Incorporation), Art. VI. On a motion to dismiss, a court may take judicial notice of an exculpatory charter provision. *McMillan*, 768 A.2d at 501 n. 40.

The foregoing shows that the AboveNet Directors acted neither disloyally nor in bad faith. The exculpatory provision contemplated by § 102(b)(7) is dependent upon the loyalty and good faith of its protected directors.

[71] *See e.g., Malpiede v. Townson,* 780 A.2d 1075, 1096-97 (Del. 2001) (noting that an aiding and abetting claim requires the existence of a fiduciary relationship, a breach of the fiduciary duty, knowing participation in the breach, and damages proximately caused by the breach).

[72] Of course, the Court cannot infer that Zayo knowingly participated in AboveNet's alleged efforts to thwart Zayo's efforts to acquire the Company.

III. CONCLUSION

The Complaint is plainly insufficient to survive a motion to dismiss. Far from being reasonably conceivable, Miramar's allegations fail to cast doubt on the independence and disinterestedness of the AboveNet Directors, except for LaPerch. Nor do the well-pleaded facts come close to raising a reasonable inference that the AboveNet Directors excluded strategic sponsors from the sale process, knowingly participated in the manipulation of the Company's financial projections, or agreed to onerous deal protection devices and an inadequate purchase price. The Complaint is dismissed with prejudice.

An implementing order will be entered.