IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE OPENLANE, INC.	:	Consolidated
SHAREHOLDERS LITIGATION	:	C.A. No. 6849-VCN

MEMORANDUM OPINION

Date Submitted: September 26, 2011
Date Decided: September 30, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

This action arises out of the proposed merger (the "Merger") of Defendant OPENLANE, Inc. ("OPENLANE" or the "Company") with Defendant Riley Acquisition, Inc. ("Riley"), a wholly-owned subsidiary of Defendant ADESA, Inc. ("ADESA"), which in turn, is a wholly-owned subsidiary of Defendant KAR Auction Services, Inc. ("KAR" and, together with Riley and ADESA, collectively, the "Purchasing Entities" or "KAR"). Plaintiff William S. Treadway has brought a class action on behalf of himself and all other public shareholders of OPENLANE. Under the terms of the Merger, the Purchasing Entities propose to acquire OPENLANE for approximately $210 million or approximately $8.30 per share in an all-cash transaction. Treadway has moved to enjoin preliminarily the Merger. This is the Court's decision on that motion.

II. BACKGROUND

A. *The Parties*

Treadway has at all relevant times been the owner of OPENLANE common stock.

OPENLANE is a Delaware corporation, and ninety percent of its revenues come from selling "off-lease" vehicles (leased vehicles turned in by consumer-lessees). OPENLANE's common stock trades on the OTC Pink Sheets.

Defendants Adam Boyden, Mark Bronder, Peter Kelly, Paul Madera, David Marquardt, R. Gary McCauley, L. David Sikes, and Michael Stein currently, and at all relevant times have been, members of OPENLANE's board of directors (the "Board"). Kelly is also the Company's current Chief Executive Officer ("CEO"). Madera is affiliated with the private equity firm Meritech Capital Partners, and Marquardt is affiliated with August Capital. As of August 24, 2011, the Board (or the entities for which members of the Board work) held beneficial ownership of approximately sixty percent of OPENLANE's outstanding capital stock, and the sixteen-person group of the Board and OPENLANE's current executive officers held beneficial ownership of 68.46% of the Company's stock. The Complaint also alleges that, as a result of the Merger, the members of the Board (excluding Kelly) stand to receive more than $2.4 million, and Kelly stands to receive $1.4 million, in accelerated options. Kelly also has negotiated an agreement to serve as the Company's CEO and President following the Merger, for which he will receive an annual base salary of $332,000.

KAR is a Delaware corporation that "according to its website, . . . operates a complete auction solution throughout North America."[1] ADESA is a Delaware corporation. Riley, also a Delaware corporation, was created for the sole purpose of effectuating the Merger. Defendant Shareholder Representative Services LLC ("SRS") is a Colorado limited liability company.

B. *Factual Background*

By April 2010, the Board was anticipating a decline in the number of vehicles coming off lease in 2011-12, and expected that this decline would significantly and negatively impact OPENLANE's business. On May 7, 2010, OPENLANE and Montgomery & Company LLC ("Montgomery") signed a formal engagement agreement, under which Montgomery would undertake a market outreach to a limited number of strategic acquirers, including KAR and Company A. In late August 2010, Company A stated that it would potentially be interested in acquiring substantially all of OPENLANE's assets for $90 million. In September 2010, OPENLANE terminated its formal engagement with Montgomery.

On December 8, 2010, the Board held a meeting to evaluate OPENLANE's competitive position and its strategic alternatives. At that

[1] Verified Class Action Complaint (the "Complaint" or "Compl.") at ¶ 21.

meeting, management presented forecasts and Montgomery made an informal presentation of certain financial analyses it had performed based on management's forecasts. Montgomery provided an analysis of selected precedent transactions, an analysis of selected publicly traded companies, and an illustrative leveraged buyout analysis. Based on its analysis of selected precedent transactions, Montgomery estimated a range of EBITDA multiples of 7.7x to 18.6x and applied these multiples to OPENLANE's EBITDA for the preceding twelve months, which resulted in an implied enterprise value for OPENLANE ranging from $106.5 million to $256.4 million. At the meeting, the Board also reviewed a document labeled "Board Discussion/View Requested to Determine Best Course of Action and Next Steps."[2] That document states that "private equity and [venture capital] have shown new interest in [OPENLANE] as a platform asset."[3]

On January 28, 2011, Company A made a verbal offer to acquire OPENLANE for (1) $50 million cash, (2) $50 million in a five year note, and (3) 2.5 million shares of Company A's stock, valued by Company A at $40 per share.[4] In February 2011, OPENLANE rejected Company A's bid, and made a counteroffer, which in turn, was rejected by Company A. In a

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[2] Transmittal Aff. of Seth D. Rigrodsky, Esq. ("Rigrodsky Aff."), Ex. 10.
[3] *Id.*
[4] Company A also stated that the purchase price would be reduced on a dollar for dollar basis to the extent OPENLANE had less than $48 million in cash at closing.

document entitled “Potential Buyers,” dated February 4, 2011, Montgomery identified thirty-one potential financial buyers for OPENLANE, as well as eight strategic buyers in addition to Company A and KAR.

On May 6, 2011, OPENLANE received a written indication of interest (“IOI”) from KAR that proposed a preliminary purchase price in the range of $200 million to $210 million plus positive working capital for all of the issued and outstanding capital stock of OPENLANE. In May 2011, OPENLANE and Montgomery entered into a new agreement, which provided that Montgomery would perform a market outreach to a limited number of strategic acquirers, including KAR, Company A, and Company B. On May 23, 2011, the Board directed its management to make a counteroffer to KAR of $230 million plus positive working capital. KAR rejected that counteroffer. On June 8 and 9, Montgomery contacted Company B regarding a potential acquisition of a company in its vertical market. Thereafter, OPENLANE and Company B entered into a mutual nondisclosure agreement, and Montgomery provided preliminary due diligence materials to Company B.

On June 16, 2011, a member of the Board contacted Company A, asking if it would like to make a bid for OPENLANE. Company A declined to make a bid. On June 20, 2011, OPENLANE received a written IOI from

Company B providing for an estimated purchase price of $200 million. In late June, the Board discussed the IOIs received from KAR and Company B, and at the direction of the Board, a representative of OPENLANE's management reached out to Company B to discuss a resubmittal of its offer, but received no response. On June 24, 2011, OPENLANE and KAR signed an IOI, which included a 30-day exclusivity period.

On August 11, 2011, the Board unanimously approved the Merger. On August 15, OPENLANE, KAR, and SRS entered into an "Agreement and Plan of Merger" (the "Merger Agreement"). The next day, OPENLANE received consents from a majority of the Company's preferred and common shareholders (the "Majority Consent") sufficient under Delaware law and OPENLANE's charter, to approve the Merger Agreement. Additionally, as a condition to closing the Merger, the "[h]olders of at least 75% of the outstanding shares of the Company [s]tock (. . . on an as converted to common stock basis) shall have executed and delivered to the Company . . . [a written consent adopting and approving the Merger Agreement]."[5] That condition could have been waived by KAR.[6] That condition was, however, satisfied on September 12, 2011. The Merger Agreement includes a

[5] Rigrodsky Aff., Ex. 27 (Merger Agreement) at § 7.2. The 75% condition to closing is referred to as the "Supermajority Consent."
[6] *Id.*

stringent no-solicitation provision,[7] provides that SRS is "appointed as agent and attorney in fact for and on behalf of each of [OPENLANE's shareholders]. . . ,"[8] and contemplates an escrow agreement (the "Escrow Agreement").[9] Under the terms of the Escrow Agreement, $26 million of the Merger consideration will be held in escrow for at least eighteen months. The purpose of the Escrow Agreement is to provide a fund to protect KAR from numerous contingencies, including its indemnification obligations to the members of the Board and successful appraisal proceedings by OPENLANE shareholders.

On September 8, 2011, OPENLANE filed a proxy with the SEC on Schedule 14A (the "Proxy"). The Proxy was sent, pursuant to Section 228 of the Delaware General Corporation Law (the "DGCL"), to those OPENLANE shareholders who had not already approved the Merger Agreement. The Proxy requested that those shareholders ratify the Merger Agreement, waive their appraisal rights, and provide an advisory consent for certain "golden parachute" payments, by executing and delivering a stockholder acknowledgement (the "Stockholder Acknowledgement") by September 28, 2011.

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[7] *Id.* at § 6.4.
[8] *Id.* at § 10.1.
[9] *Id.* at §§ 3.2, 9.5.

On September 9, 2011, Treadway filed the Complaint and a motion for a preliminary injunction, requesting that the Court enjoin the Merger. The Complaint alleges three counts. Count I alleges that the members of the Board breached their fiduciary duties by failing to undertake an adequate process to sell OPENLANE; Count II alleges that the members of the Board breached their fiduciary duties regarding disclosure by filing a Proxy that failed to disclose material information; and Count III alleges that OPENLANE, KAR, and SRS aided and abetted the Board members' breach of their fiduciary duties. On September 20, 2011, OPENLANE filed a supplemental proxy (the "Supplemental Proxy" or "Supp. Proxy") that mooted most of Treadway's disclosure claims, and which extended the deadline for stockholders to execute the Stockholder Acknowledgement to October 3, 2011.

III. CONTENTIONS

OPENLANE and the Board (the "OPENLANE Defendants"), on the one hand, and KAR, ADESA, and Riley, on the other, have each filed a brief in opposition to Treadway's motion for a preliminary injunction. The OPENLANE Defendants argue that a preliminary injunction is an extraordinary remedy which Treadway has not earned because he has failed to show a likelihood of success on the merits. The OPENLANE Defendants argue that under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[10] when a board of directors is selling a company, it is required to act reasonably, not perfectly, and that here, the Board acted reasonably. The Board, the OPENLANE Defendants contend, was independent, and its interests were aligned with those of OPENLANE's public stockholders because the members of the Board owned a majority of OPENLANE's stock and were being cashed out along with the public shareholders. Moreover, the OPENLANE Defendants argue that the Board was very knowledgeable about OPENLANE's business, received financial advice on the sale of OPENLANE from Montgomery, and conducted a targeted market check.

The OPENLANE Defendants contend that Kelly's employment agreement with the Purchasing Entities did not affect the sales process, and that escrow agreements are common in deals of this size. They also argue that the no-solicitation provision in the Merger Agreement does not violate *Omnicare, Inc. v. NCS Healthcare, Inc.*[11] due to the short time period between the signing of the Merger Agreement and the Majority Consent. Finally, the OPENLANE Defendants argue that Treadway has failed to show a likelihood of success on his disclosure claim.

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[10] 506 A.2d 173 (Del. 1986).
[11] 818 A.2d 914 (Del. 2003).

The Purchasing Entities argue that Treadway has failed to show a likelihood of success on his aiding and abetting claim. They contend that Treadway has failed to establish an underlying breach by the Board and, even if he had established such a breach, Treadway has failed to demonstrate that KAR knowingly participated in that breach.

In opposing the arguments of the Board, Treadway argues that the sales process undertaken by the Board was flawed, and in violation of the requirements set out in *Revlon* and *Omnicare*. Treadway contends that the Board engaged in a flawed sales process because it only contacted three potential buyers,[12] failed to perform an adequate market check, failed to receive a fairness opinion (from an independent source or otherwise), and relied on scant financial information in approving the Merger. Treadway argues that this flawed sales process led to a transaction that failed to maximize shareholder value, in part, because of the Escrow Agreement. Treadway also argues that the members of the Board breached their fiduciary duties by agreeing to improper deal protection devices. "The no-solicitation clause and the lockup of the shareholder vote through the combined voting power of OPENLANE's directors and executive officers

[12] A brief conversation with a fourth potential buyer, one with a very different business model, amounted to nothing.

are ‘preclusive and coercive’ in the absence of a fiduciary out provision.”[13] Treadway contends that Kelly and the other members of the Board were motivated to approve the Merger for improper reasons. Namely, that both Kelly and the other members of the Board were motivated by the acceleration of their options, and that Kelly was motivated by the additional fact that KAR had offered him employment in the Company after the Merger. Moreover, although Treadway candidly admits that most of his disclosure claims have been mooted by the Supplemental Proxy, he nonetheless contends that there are a few categories of information that still need to be disclosed in connection with the Board’s solicitation of the Shareholder Acknowledgment. Finally, in opposing the arguments of KAR, Treadway argues that although at this stage of the proceeding he is focusing on obtaining injunctive relief, if he is able to obtain that relief he will later be able to establish that KAR aided and abetted the Board’s breach of its fiduciary duties.

IV. ANALYSIS

In order to obtain a preliminary injunction, Treadway “must demonstrate: (1) a reasonable probability of success on the merits; (2) that

[13] Pl.’s Opening Br. in Supp. of his Mot. for Prelim. Inj. (“Pl.’s Opening Br.”) at 28 (citing *Omnicare*, 818 A.2d at 918).

[he] will suffer irreparable injury if an injunction does not issue; and (3) that the balance of the equities favors the issuance of the injunction."[14]

A. *Probability of Success*

1. <u>Whether the Board was Independent</u>

Treadway contends that Kelly and the other members of the Board were motivated to approve the Merger for improper reasons. The Complaint alleges that, as a result of the Merger, the members of the Board (excluding Kelly) stand to receive $2.4 million, and Kelly stands to receive $1.4, in accelerated options. The OPENLANE Defendants, however, contend that many of the options to be cashed out in the Merger had vested long ago.[15] Moreover, at the hearing on Treadway's motion for a preliminary injunction, counsel for the OPENLANE Defendants stated that: "[t]here's only one director who had options that were being accelerated through this transaction. . . . That's Mr. Kelly."[16] At the hearing, Treadway's counsel did not take issue with that statement. Thus, it appears that seven of the eight Board members did not even have their options accelerated through the Merger. Even if counsel for OPENLANE were incorrect, however, and all

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[14] *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *10 (Del Ch. May 20, 2011, revised May 24, 2011) (citing *Revlon*, 506 A.2d at 173; *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010)).

[15] *See* The OPENLANE Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Prelim. Inj. ("OPENLANE Defs.' Br.") at 30 (citing Stein Dep. Tr. at 85).

[16] Prelim. Inj. Hr'g Tr. ("Hr'g Tr.") at 36.

of the members of the Board did receive accelerated options, that fact, without more, does not suffice to impugn the disinterestedness of the members of the Board.[17] The accelerating of stock options is a routine aspect of merger agreements.

The Complaint also alleges that Kelly has negotiated an agreement to serve as the Company's Chief Executive Officer and President following the Merger. Kelly, however, is only one member of the Board. The facts do not show that Kelly dominated the other seven Board members, and, without more, the fact (or mere possibility) that one of eight Board members is not independent or disinterested does not affect the independence of the Board as a whole.[18] Even if Kelly were conflicted, his efforts in negotiating the

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[17] *See Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) ("The accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price.") (citing *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 (Del. Ch. 1999)).

[18] Treadway also takes issue with the fact that, under the terms of the Merger Agreement, the preferred stock of certain Board members (and certain entities for which members of the Board work) is being converted to common stock and cashed out, as opposed to receiving its liquidation preference. By converting to common, these Board members are receiving more of the Merger proceeds than they would if they took their liquidation preference. Treadway appears to argue that this fact demonstrates that those Board members had interests that diverged from those of OPENLANE's public stockholders. The Merger, however, had to provide either that the preferred would be converted to common or that the preferred stockholders would take their liquidation preference. Each of those options benefited some preferred shareholders and harmed others. *See* Rigrodsky Aff., Ex. 25. Moreover, the extent to which any of the Board members benefited was slight. The fact that, under the terms of the Merger, the preferred stock of certain Board members was converted to common and that this was slightly more beneficial to them than taking a liquidation preference does not suggest that those Board members were not independent or had personal interests that materially diverged from those of the Company's other stockholders.

Merger Agreement and dealing with other potential acquirers do not taint the process. The Board was aware of Kelly's possible employment after consummation of the transaction and was fully committed to the process.[19] A competent executive who will stay on after the transaction may be viewed as value-adding by an acquirer. Moreover, the reported annual salary ($332,000) that Kelly would receive from KAR is relatively minor when compared to his share of the Merger proceeds ($10 million).

2. Whether the Board Breached its Duty to Secure the Best Value Reasonably Attainable for OPENLANE's Shareholders

"When the . . . Board decided to enter into a transaction that involved the sale of the [C]ompany in a change of control transaction, it was charged with the obligation to secure the best value reasonably attainable for [OPENLANE's] shareholders, and to direct its fiduciary duties to that end."[20] "There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end."[21] Moreover, if a board fails to employ any traditional value maximization tool, such as an auction, a broad market check, or a go-shop provision, that board must possess an impeccable

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[19] At least one other potential suitor wanted Kelly to remain with the business.

[20] *Dollar Thrifty*, 14 A.3d at 595 (citing *Revlon*, 506 A.2d at 184 n.6; *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994)).

[21] *Smurfit-Stone Container Corp.*, 2011 WL 2028076, at *16 (citing *QVC Network Inc.*, 637 A.2d at 45; *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

knowledge of the company's business for the Court to determine that it acted reasonably.[22] Despite the similarity between the words "rational" and "reasonable," the reasonableness that is required of directors when they undertake a change of control transaction is significantly more stringent than the rationality review that characterizes the business judgment rule.[23] This enhanced scrutiny involves two key features: "(a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[24]

Ultimately, under enhanced scrutiny, members of the Board have "the burden of proving that they were adequately informed and acted reasonably."[25] "In the context of [a] preliminary injunction, [Treadway] must establish a reasonable likelihood that at trial the [members of the Board] would not be able to show that they had satisfied their fiduciary duties."[26]

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[22] *See Barkan*, 567 A.2d at 1287 ("When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.").
[23] *See Dollar Thrifty*, 14 A.3d at 599 n.181.
[24] *QVC Network Inc.*, 637 A.2d at 45.
[25] *Id.*
[26] *Optima Int'l of Miami, Inc. v. WCI Steel, Inc.*, C.A. No. 3833-VCL, at 130 (Del. Ch. June 27, 2008) (TRANSCRIPT).

Although the Board's decision-making process was not a model to be followed, Treadway has failed to establish a reasonable likelihood that at trial the Board would not be able to show that its actions were adequate under the first element of enhanced scrutiny. The Board performed a targeted market check over the course of about a year, and seriously pursued transactions with two legitimate strategic buyers, ultimately choosing the transaction that offered OPENLANE's shareholders more value. Although there is no contention (and, on these facts, there could not be) that Montgomery provided the Board a fairness opinion, the Board did receive some financial information from Montgomery, which the Board used to help it make the decision to enter into the Merger Agreement. Treadway correctly notes that Montgomery's financial analysis was undertaken in December 2010, approximately eight months before the Merger Agreement was executed. Thus, that analysis was, at least to some extent, stale. Moreover, Treadway suggests that in a May 11, 2011 Board meeting, Kelly had indicated that OPENLANE was doing better than the December 2010 financials had suggested.[27] As Kelly explained in his deposition, however, OPENLANE only exceeded expectations in the first quarter of 2011.

[27] Pl.'s Opening Br. at 24 n.10.

OPENLANE underperformed in the second quarter.[28] Moreover, Kelly testified that "on a year-to-date basis, we are underperforming our 2011 budget, and my expectation is that, on a full-year basis, we will underperform our 2011 budget."[29] Thus, OPENLANE's business outlook had not improved between December 2010 and August 2011; there was still the issue of a declining number of vehicles coming off lease.

OPENLANE also appears to be one of those seemingly few corporations that is actually "managed by" as opposed to "under the direction of" its board of directors.[30] The facts show that the Board knew OPENLANE's business very well. Two directors, Kelly and Boyden, co-founded OPENLANE in 1999, and the remainder of the Board is either invested in OPENLANE or affiliated with a company that is invested in OPENLANE. Two Board members, Bronder and Marquardt, have both had or overseen investments in OPENLANE and been on the Board since 1999, OPENLANE's inaugural year. Moreover, McCauley and Sikes have been Board members since 2002. The record also demonstrates that the Board regularly held meetings, and that it held nine meetings between December 2010 and August 2011. Thus, the record supports the conclusion that this is

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[28] Kelly Dep. Tr. at 23.
[29] *Id.* at 24.
[30] 8 *Del.* C. § 141(a).

one of those few boards that possess an impeccable knowledge of the company's business.

Although the Board failed to pursue any financial buyers for OPENLANE, that strategy is understandable in light of the Board's impeccable knowledge. Madera and Marquardt are affiliated with private equity firms, and they were likely to know whether financial buyers would be interested in OPENLANE and approximately how much those buyers would be willing to pay. As Stein explained in his deposition testimony: "we didn't have a growth story that would be attractive to [financial acquirers]. . . . [W]e have two directors on the [B]oard who are active partners in very active companies that deal in that environment constantly. They shared that view, that we would not be attractive."[31]

The OPENLANE Defendants also suggest that the Board failed to pursue any financial buyers because "there was a legitimate concern over the potential harm which could be caused by leaks, and [the Board] believed that the potential for such leaks [would increase] if financial buyers were engaged."[32] It is easy to be skeptical of that argument. Assuming the Board was worried about leaks and that non-disclosure agreements are of limited value, leaks would be more likely to occur between and among strategic

[31] Stein Dep. Tr. at 15.
[32] OPENLANE Defs.' Br. at 26 (citing Kelly Dep. Tr. at 45; Stein Dep. Tr. at 64-65).

buyers (entities in OPENLANE's line of business or a related line of business), than among or between financial buyers (entities unlikely to know of (or be curious about) OPENLANE). Nonetheless, the Court accepts the argument that, in light of the Board's impeccable knowledge, the Board knew whether financial buyers would be interested in OPENLANE. Thus, the record reveals that the Board undertook an adequate "decisionmaking process."[33]

Turning to the reasonableness of the Board's actions in light of the then-existing circumstances, the Board anticipated a decline in the number of off-lease vehicles in 2011-12, and it appears, quite logically, to have wanted to sell OPENLANE before that decline had a material impact. Moreover, although OPENLANE is a public company because its common stock trades on the OTC Pink Sheets, it is a small public company with, historically, perhaps more in common with a private company. This raises a question as to when a small public company, like OPENLANE, would want to pay a financial advisor to undertake an extensive market check or provide a fairness opinion. The fact that a company is small, however, does not modify core fiduciary duties and would not seem to alter the analysis, unless its board, like OPENLANE's, was well-versed in the company's business.

[33] This conclusion depends upon the specific facts and context of this case. It is not a broad-based assessment of the role of financial buyers.

In other words, small companies do not get a pass just for being small. Where, however, a small company is managed by a board with an impeccable knowledge of the company's business, the Court may consider the size of the company in determining what is reasonable and appropriate.

The Court also takes notice that, as of August 24, 2011, the Board held over 59% of OPENLANE's outstanding capital stock, and that the sixteen person group of the Board and OPENLANE's current executive officers held over 68% of the Company's outstanding capital stock. That is a "circumstance" of the Merger, and the fact that, collectively, the Board had more to lose or gain from a change of control transaction than any other OPENLANE shareholder, suggests that the Board would be motivated to get the best price reasonably available for OPENLANE's shareholders.

In short, the facts show that this was a reasonable effort by a highly competent board to maximize shareholder value. Treadway has failed to meet his burden of establishing a reasonable likelihood that at trial the Board would be unable to show that it secured the best value reasonably attainable for OPENLANE's shareholders.

3. <u>Whether the Escrow Agreement is Unfair and Evidences the Board's Failure to Meet its Fiduciary Duties</u>

Escrows are relatively common in deals for "private" companies. They are rare in deals for "public" companies, probably because of the difficulty and expense of multiple stages of payment and perhaps because of shareholder expectations. The Escrow Agreement does not necessarily violate any mandatory standard. Treadway suggests that the "public" should be relieved of the burden of the Escrow Agreement, but he offers no persuasive reason for his position. First, the Escrow Agreement is part of the "deal." Second, presumably escrows reduce buyer risk and provide comfort to (incentivize) a buyer to pay more, again presumably a benefit to the selling shareholders. Funds that are drawn from escrow in accordance with the terms of the Escrow Agreement will effectively reduce the net price per share. Thus, the Escrow Agreement's primary consequence for current purposes is that it exposes the deal price to some degree of risk. The Escrow Agreement was fairly disclosed to the shareholders; it is not improper; it does not provide a basis for interim injunctive relief because it does not carry with it a reasonable likelihood of success on the merits. Perhaps it was a bad idea—the Court, of course, expresses no opinion on that—or perhaps it will cause problems in the future, but it was within the Board's decision-making authority.

4. Whether the Defensive Devices Protecting the Merger are Impermissible under Delaware Law

A board's decision to adopt defensive devices which "lock up" a merger mandate special scrutiny under the two-part test set forth in

Unocal.[34] The first part of the *Unocal* test requires that the Board demonstrate that it "had reasonable grounds for believing a danger to corporate policy and effectiveness existed . . . ."[35] This is essentially a process-based review. "Directors satisfy the first part of the *Unocal* test by demonstrating good faith and reasonable investigation."[36] Nevertheless, the "'process' has to lead to the finding of a threat."[37] "[N]o matter how exemplary the board's process, or how independent the board, or how reasonable its investigation, to meet their burden under the first prong of *Unocal* defendants must actually articulate some legitimate threat to corporate policy and effectiveness."[38]

The second part of the *Unocal* test requires that the Board demonstrate that its defensive response was "reasonable in relation to the threat posed."[39] "This inquiry involves a two-step analysis. The [Board] must first establish that the merger deal protection devices adopted in response to the threat were not 'coercive' or 'preclusive,' and then demonstrate that their response was within a 'range of reasonable responses'

[34] *Omnicare*, 818 A.2d at 934 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).
[35] *Unocal*, 493 A.2d at 955.
[36] *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989).
[37] *Air Prods. and Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 92 (Del. Ch. 2011).
[38] *Id.*
[39] *Unocal*, 493 A.2d at 955.

to the threat perceived."[40] Thus, to satisfy his burden, Treadway must establish a reasonable likelihood that at trial the members of the Board would not be able to show that they had reasonable grounds for believing a danger to corporate policy and effectiveness existed and that the response they adopted to combat that threat was reasonable in relation to the threat posed.

In a change of control transaction where a majority of the board has no interest in the surviving entity, the board does not have the entrenchment goal which the Supreme Court was worried may have motivated the directors in *Unocal*.[41]

In *Omnicare*, the Supreme Court stated that the threat identified by the board at issue there "was the possibility of losing the Genesis offer and being left with no comparable alternative transaction."[42] The facts here suggest that there were few suitors for OPENLANE and that if OPENLANE waited too long to consummate a transaction its business could significantly decline (at least in the near future), which presumably would prevent it from consummating a transaction comparable to the Merger. Treadway has not

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[40] *Omnicare*, 818 A.2d at 935 (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387-88 (Del. 1995)).
[41] 493 A.2d at 955 ("We must bear in mind the inherent danger in the purchase of shares with corporate funds to remove a threat to corporate policy when a threat to control is involved. The directors are of necessity confronted with a conflict of interest, and an objective decision is difficult.").
[42] 818 A.2d at 935.

alleged anything to counter those facts, and thus, he has not suggested that the Board failed to articulate a threat.

As for the second part of *Unocal*, the Supreme Court has articulated the situations in which a response will be considered either coercive or preclusive. "A response is 'coercive' if it is aimed at forcing upon stockholders a management-sponsored alternative to a hostile offer."[43] "A response is 'preclusive' if it deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise."[44] In *Omnicare*, the Supreme Court determined that shareholder voting agreements negotiated as part of a merger agreement, which guaranteed shareholder approval of the merger if put to a vote, coupled with a merger agreement that both lacked a fiduciary out and contained a Section 251(c) provision requiring the board to submit the merger to a shareholder vote, constituted a coercive and preclusive defensive device.[45] Specifically, the Court described the merger as an impermissible "*fait accompli*:"

> [T]he record reflects that any stockholder vote would have been robbed of its effectiveness by the impermissible coercion that predetermined the outcome of the merger without regard to the merits of the [competing] transaction at the time the vote was scheduled to be

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[43] *Id.* (citing *Unitrin*, 651 A.2d at 1387; *Time Inc.*, 571 A.2d at 1154).
[44] *Id.* (citing *Unitrin*, 651 A.2d at 1387).
[45] *Id.* at 936.

> taken. . . . In this case, despite the fact that the . . . board has withdrawn its recommendation for the [original] transaction and recommended its rejection by the stockholders, the deal protection devices approved by the . . . board operated in concert to have a preclusive and coercive effect.[46]

The Merger, now before the Court, was not a *fait accompli*. Although the Merger Agreement contained a no-solicitation clause, there, evidently, was no shareholders' voting agreement entered into as part of the Merger. Treadway seems to suggest that "the lockup of the shareholder vote through the combined voting power of OPENLANE's directors and executive officers" was a defensive device,[47] but the record, at least at this preliminary stage, merely suggests that, after the Board approved the Merger Agreement, the holders of a majority of shares quickly provided consents.[48]

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[46] *Id.* (citations omitted).

[47] OPENLANE Defs.' Br. at 28.

[48] There is no evidence of a stockholders' agreement, written or otherwise, to lockup statutory approval of the Merger. The Merger was approved through the solicitation of shareholder consents under 8 *Del. C.* § 228. Although there apparently was no shareholders' agreement, sight should not be lost of the fact that the Board members, either individually or as representatives of entities owning substantial blocks of OPENLANE stock, controlled the "vote" with approximately sixty percent of OPENLANE stock. Thus, as a practical matter, approval by a majority of shares within the day after the signing of the Merger Agreement was a virtual certainty. The solicitation of consents from other stockholders would not formally complete the approval process because the closing of the Merger was conditioned upon at least 75% of the shares having been committed in favor of the transaction. That condition, however, was waivable by KAR. Consents from non-board-related shareholders necessary to finalize the process would not be obtained until almost a month after the signing of the Merger Agreement.

Under the DGCL, a majority of a corporation's outstanding stock must support a merger,[49] and stockholders are allowed to manifest their approval through written consent in this instance.[50] If stockholders wish to submit their consents soon after the board has approved a transaction, they may do so.[51] The Merger Agreement neither forced a transaction on the shareholders, nor deprived them of the right to receive alternative offers. In fact, if a majority of OPENLANE's shareholders had not consented to the Merger Agreement twenty-four hours after the Board executed it, the Board could have terminated the Merger Agreement without having to pay any termination fee.[52] Thus, the one defensive device that Treadway has articulated, the no-solicitation clause, was of little moment because within that twenty-four-hour period, the Board would be able to back out if consents were not obtained or the deal could be concluded if the consents were obtained.

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[49] 8 *Del.* C. § 251(c)
[50] 8 *Del.* C. § 228(a)
[51] *See Optima*, C.A. No. 3833-VCL, at 127 ("[A] stockholder vote is not like the lockup in Omnicare. . . . [T]he stockholder vote here was part of an executed contract that the board recommended after deciding it was [the stockholders' better option]. . . . Therefore, the stockholder vote, although quickly taken, was simply the next step in the transaction as contemplated by the statute. Nothing in the DGCL requires any particular period of time between a board's authorization of a merger agreement and the necessary stockholder vote.").
[52] Merger Agreement at § 7.2.

Treadway does not appear to make any arguments that the no-solicitation clause inherently was not within the range of reasonableness. Moreover, it would appear reasonable for a board to protect a transaction that it viewed as obtaining the best reasonable price with at least one short-lived defensive measure. That is what the Board did here. The Board agreed to a no-solicitation clause in the Merger Agreement, but the Board could terminate the entire Merger Agreement a day later if OPENLANE's shareholders had not, by then, consented to the Merger.[53] Thus, Treadway

[53] Treadway's opening brief could be read to argue that the Merger Agreement was invalid because it lacked a fiduciary out. *See* Pl.'s Opening Br. at 27 ("[T]he Merger Agreement is highly unusual in that it lacks a 'fiduciary out' clause."). At the hearing on Treadway's motion for a preliminary injunction, however, Treadway's counsel was asked by the Court: "[I]s there a requirement in Delaware law for a transaction like this to have a fiduciary out?" Treadway's counsel responded: "I think the answer to that is that there is no—Delaware courts have been careful to say there is no black letter Delaware law as to what or what is not necessary in a particular transaction." Hr'g Tr. at 24.
Omnicare may be read to say that there must be a fiduciary out in every merger agreement. "[T]he . . . board was required to negotiate a fiduciary out clause to protect the . . . stockholders if the [original] transaction became an inferior offer." *Omnicare*, 818 A.2d at 938. "The . . . board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders." *Id.* at 939 (citing *QVC Network Inc.*, 637 A.2d at 42-43; *Grimes v. Donald*, 673 A.2d 1207, 1214-15 (Del. 1996)). Nevertheless, when a board enters into a merger agreement that fails to contain a fiduciary out it is not at all clear that the Court should automatically enjoin the merger when no superior offer has emerged. In *Omnicare* itself, the Supreme Court held unenforceable a merger agreement without a fiduciary out, thereby allowing the board to consider what the Supreme Court viewed as a hostile bidder's superior offer. Thus, hostile bidders are on notice that Delaware courts may not enforce a merger agreement that lacks a fiduciary out if they present a board with a superior offer. If, however, a merger agreement lacks a fiduciary out, and no better offer has emerged why should the Court enjoin the merger? To require that a fiduciary out clause be put in the merger agreement when sophisticated hostile bidders are on notice that the merger agreement may be found unenforceable if they submit a superior offer? Enjoining a merger when no superior offer has emerged is a perilous endeavor because there is always the possibility that the existing deal will vanish, denying shareholders the

has failed to show that he has a likelihood of success on his claim that the defensive measures protecting the Merger are impermissible under Delaware law. Treadway's preclusiveness or lockup argument ultimately fails to demonstrate a probability of success because shareholders with the majority of shares—acting with the same incentives as most shareholders would have—consented to the Merger. This may simply be a matter of majority rule by shareholders who were under no obligation to act in any particular way.

5. Disclosure Claims

While Treadway concedes that most of the disclosure claims he initially asserted have been mooted by the Supplemental Proxy, he nonetheless maintains that several disclosure claims remain. The individual claims fall into one of three categories of challenged omissions from the Proxy and Supplemental Proxy (together, the "Proxies"): (1) their description of certain aspects of the sale and approval processes; (2) their treatment of the financial analyses reviewed by the Board; and (3) their

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opportunity to accept any transaction. *See Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS, at 28 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT). There is no alternative or competing offer—importantly, none that is arguably superior—and that suggests that caution should be exercised before enjoining a transaction with no viable alternative and no ready cure. On the other hand, there was little or no publicity about the OPENLANE-KAR transaction before it was announced and almost immediately thereafter irrevocable consents from holders of a sufficient number of OPENLANE shares to approve the Merger were obtained, leaving the impression (or reflecting the reality) of a "done deal." Under such circumstances, it is not surprising that another suitor has not emerged.

description of the Board's decision-making process for concluding that the price received from KAR was fair.

At the outset, it is important to note the somewhat unusual circumstances under which the Proxies were issued. As previously recounted, the Majority Consent was obtained on August 16, 2011, one day after the Board approved the Merger, and the Supermajority Consent was expected to be (and was) received around the time the Proxy was filed.[54] Only Majority Consent—not Supermajority Consent—was needed to *approve* the Merger.[55] Supermajority Consent was a condition precedent to closing waivable by KAR.[56] As such, after the Majority Consent was obtained on August 16, 2011,[57] no further consents were needed, so long as KAR wanted the deal to close. The Proxies solicited Stockholder Acknowledgements. Among other things, a shareholder who executed a Stockholder Acknowledgement approved and ratified the Merger Agreement and waived his appraisal rights.[58] The Proxy itself clearly stated that receipt of Stockholder Acknowledgements was not necessary for the Merger to close. In a section entitled "Consent Required for Approval" the Proxy

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[54] The Proxy was filed on September 8, 2011, and the Supermajority Consent was obtained on September 12, 2011. Rigrodsky Aff., Ex. 3 (Supp. Proxy) at 1, 3.
[55] Merger Agreement at § 4.26.
[56] *Id.* at § 7.2(i).
[57] Compl. at ¶ 51.
[58] Rigrodsky Aff., Ex. 2 (Proxy) at B-1 (Annex B).

stated: "Because the Majority Consent and [Supermajority] Consent has or will be obtained, the Company's ability to satisfy its obligations to obtain stockholder approval under the Merger Agreement and Delaware law will not be affected if you do not execute and deliver the Stockholder Acknowledgement, or if you fail to provide your broker or other nominee with instructions to do so."[59]

The stockholder actions solicited by the Proxies inform the extent of disclosure required in order for the Board to fulfill its fiduciary duties. To be clear, the Board's fiduciary duties remain the same; it is merely that the type of information and the level of detail required to be disclosed may differ based upon what actions are solicited by a proxy. Here, the Proxies must disclose sufficient information to allow the shareholders to make an informed decision regarding whether they wanted to waive their appraisal rights and to take the other actions pursuant to the Stockholder Acknowledgement; notably, none of these actions would seem to have any effect on whether or not the Merger closed.

(a) *The Disclosure Framework*

When soliciting shareholder action, the fiduciary duties of care and loyalty require that the directors of a Delaware corporation:

[59] *Id.* at 16.

> "disclose fully and fairly all material information within the board's control . . . ." The burden of establishing materiality rests with the plaintiff, who must demonstrate "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[60]

Although non-material facts need not be disclosed, the Board has "an obligation to provide the stockholders with an accurate, full, and fair characterization" of any facts relating to a matter that has been partially disclosed.[61]

(b) *Sale and Approval Processes*

The first group of challenged omissions concerns OPENLANE's disclosures regarding the sale and Merger approval processes. Specifically, Treadway questions the Proxies' failure to provide additional details regarding the material facts and circumstances (i) surrounding the sale process and the Board's decision to approve the Merger; and (ii) that led to the Board's obtaining the Majority Consent. For the following reasons, the Court determines that Treadway has no reasonable probability of success with respect to these claims.

Neither of these claims is well-defined. Aside from alleged material omissions pertaining to (i) the financial analyses used by the Board, and (ii)

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60 *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009) (quoting *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).
61 *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).

its decision-making process for concluding that the price received from KAR was fair (both addressed separately below), Treadway alleges only one specific fact related to the sale and approval processes that is absent from the Proxies: that Company B might have increased its offer if given an additional three to four weeks of due diligence. While it is true that "[f]acts relating to the sale and negotiation process are material to shareholders,"[62] Treadway has not suggested that any such facts—excluding those specific claims examined and rejected below—are absent from the Proxies.

Over the course of six pages, the Supplemental Proxy provides a detailed narrative of the sales process and recounts significant events, such as the retention of Montgomery, discussions with various potential acquirers, and negotiations with KAR.[63] Details regarding the Board's decision to approve the Merger are also disclosed,[64] and the Supplemental Proxy provides two long lists of the positive and potentially negative factors the Board considered.[65]

With regard to receipt of the Majority Consent, the Supplemental Proxy states:

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[62] Pl.'s Opening Br. at 36 (citing *Gantler*, 965 A.2d at 710-11).
[63] *See* Supp. Proxy at 5-10.
[64] *See id.* at 10-13.
[65] *See id.* at 11-12.

> On August 16, 2011, the Company obtained the Majority Consent from certain of its stockholders that are affiliated with members of the Board: MPI Holdings, Inc., entities affiliated with Meritech Capital Partners, entities affiliated with August Capital and the Company's CEO, Peter Kelly. The Company did not request that any Stockholder enter into a voting agreement, and the Company did not enter into a voting agreement with any Stockholder, in connection with the Merger.[66]

Given that Treadway's stated fear concerning the consents disclosure relates to the Board's high level of ownership,[67] this disclosure would appear to state plainly the information a reasonable investor would need to understand the impact that the Board's ownership had on acquiring the Majority Consent.

Finally, as for Company B's continuing interest in OPENLANE, the Supplemental Proxy fully and fairly discloses the information that would be material to a reasonable investor, including details of the discussions between OPENLANE and Company B, details of Company B's IOI, and the reasons why the OPENLANE did not further pursue a deal with Company B.[68] Although it is true that Company B once stated that it "may" be able to increase its offer if given three to four weeks of additional due

[66] *Id.* at 3.
[67] Pl.'s Opening Br. at 45-46.
[68] Supp. Proxy at 8-10.

diligence,[69] in a later conversation with Kelly, Company B's CEO stated that he had "all of the information [he] need[ed]" and would respond within twenty-four hours if he could make a higher offer; he never contacted OPENLANE.[70] This additional fact—which was disclosed[71]—leaves little value in Treadway's proposed disclosure, which if included in the Proxies, would amount to little more than a "play-by-play" of the negotiations with Company B.[72]

For the foregoing reasons, Treadway has failed to prove a reasonable probability of success on the merits with regard to the sales and approval processes disclosure claims.

(c) *Financial Analyses*

Treadway asserts that the Proxies suffer from two material omissions involving the financial analyses reviewed by the Board in conjunction with the Merger. For the following reasons, the Court determines that Treadway has no reasonable probability of success with respect to these claims.

(i) <u>Barclays Analysis</u>

First, Treadway contends that the Proxies must disclose whether the Board relied upon an analysis provided by Barclays as part of a sales pitch

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[69] Rigrodsky Aff., Ex. 22 (Slide Deck from June 22, 2011, Board Meeting) at 5.
[70] Kelly Dep. Tr. at 75-77.
[71] See Supp. Proxy at 9.
[72] Adequate disclosure does not require a "play-by-play description of merger negotiations." *Globis Partners, L.P.*, 2007 WL 4292024, at *14.

that presented "illustrative financial multiples for a potential OPENLANE initial public offering based on an analysis of selected publicly traded companies"[73] (the "Barclays Analysis"). Treadway further asserts that, if the Barclays Analysis was relied upon, the range of implied values must also be disclosed.

The Supplemental Proxy discloses that the Barclays Analysis was presented at the May 11, 2011 Board meeting and considered in conjunction with the Board's assessment of an initial public offering ("IPO") as a strategic alternative.[74] Since this is the only mention of the Barclays Analysis in the Proxies,[75] a reasonable investor would infer that it was not relied upon for the purpose of assessing the Company's value or the fairness of any bid received. It is unclear whether this inference is correct, though. In their Answering Brief, the Board members state that at the May 11, 2011 Board meeting the Barclays Analysis was used to assess the KAR IOI and helped form the basis of other analyses presented.[76] At oral argument, however, counsel for OPENLANE drew a distinction between "looking at"

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[73] Supp. Proxy at 7.
[74] *Id.*
[75] Notably, it is not referred to in the section of the Supplemental Proxy that discusses the financial analyses management used in assessing the Merger. *See id.* at 13-16.
[76] *See* OPENLANE Defs.' Br. at 20-21.

and "relying upon" a document, and stated that the Barclays Analysis was merely "looked at" with regard to deciding whether to approve the Merger.[77]

Ultimately, it does not matter for purposes of the disclosure claim whether the Barclays Analysis was "relied on" or merely "looked at." This information was provided to the Company as part of an investment bank's self-marketing efforts and as such, cannot be expected to be a thorough, impartial analysis. A bank trying to sell IPO services has an incentive to adopt the most favorable valuation assumptions in order to assure that its IPO looks attractive, giving the bank a better chance of garnering business. Moreover, the Barclays Analysis itself disclaims any guarantee of accuracy and states that it shall not be deemed to constitute financial advice.[78] Plainly, this is not an analysis that should have been relied upon for a task as serious as weighing the sale of a company. Furthermore, whatever the results of the Barclays Analysis might indicate about the price received in the Merger, this information would not be material to a reasonable investor due to the lack of reliability in the Analysis noted above.

While the substantive contents of the Barclays Analysis would not be material to a reasonable investor—assuming *arguendo* that the Board did rely upon it—knowledge of the Board's reliance could be material. Such a

[77] Hr'g Tr. at 69.
[78] Transmittal Aff. of D. McKinley Measley, Esq., Ex. 6 (Barclays Analysis) at 10.

disclosure would be material if the Barclays Analysis composed a significant portion of the total analysis, such that, given the weakness of the Barclays Analysis, a reasonable investor might doubt the rigor of the process employed to assess the Merger. But this is not the case here. As discussed in the Court's assessment of Treadway's *Revlon* claim, OPENLANE's analysis—without consideration of the Barclays Analysis—was sufficiently robust. Therefore, knowledge of whether the Barclays Analysis was relied upon would not be material to a reasonable investor.

Finally, the Barclays Analysis, if used, would not have undercut the reasonableness of KAR's bid. In fact, when the Barclays Analysis metrics were applied to the KAR IOI, it was concluded that "the KAR IOI was low based on a revenue multiple, but a premium . . . based on an EBITDA multiple."[79] Given that the Barclays valuation models were likely aggressive, this suggests that the Company received a significant premium when valued using EBITDA, which dampens any concern one might have that a revenue-based valuation appears low.[80]

[79] Rigrodsky Aff., Ex. 13 (Advance Materials for May 11, 2011, Board Meeting) at 10.
[80] It bears mentioning that the analyses prepared by Montgomery all utilized EBITDA multiples, thus suggesting that EBITDA was the appropriate measure for OPENLANE.

(ii) Montgomery Analyses

It is well-established that shareholders are entitled to a fair summary of the work performed by the financial advisors upon whose advice the board has relied.[81] But, this duty does not require the directors to provide financial information that is "merely 'helpful or cumulative'" or the full range of information needed to permit stockholders to make "an independent determination of fair value."[82] Treadway asserts that the Proxies' disclosures regarding the financial analyses performed by Montgomery (the "Montgomery Analyses") are materially lacking in multiple respects, but for the reasons discussed below, none of these arguments is availing.

First, Treadway argues that the disclosures regarding the *Analysis of Selected Precedent Transactions* and *Analysis of Selected Public Company Transactions* lack sufficient detail, namely the identity and financial metrics of the underlying transactions and an explanation that the multiples disclosed represent the 25th and 75th percentiles. This level of detail is simply not necessary for the directors to fulfill their duty to provide a "fair summary." The Supplemental Proxy explains the methodology Montgomery employed and the resulting multiples. Providing details of all of the underlying transactions analyzed would likely inundate the reader and

[81] *See Globis Partners*, 2007 WL 4292024, at * 11.
[82] *Id.* (quoting *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 954 (Del. Ch. 2001)).

dilute the impact of the disclosure;[83] further, these details are more akin to what is needed to make "an independent determination of fair value" than they are to a "fair summary." While explaining that the multiples disclosed represent the 25th and 75th percentiles would surely be helpful, failing to do so is not misleading.[84] A reasonable investor would expect disclosure of the multiples most likely to be achieved, and by providing the midrange, this is what the Supplemental Proxy discloses. Furthermore, provision of the actual multiples on the high and low ends of the range would serve little purpose, as Treadway implicitly admits in his criticism of the disclosed range, which he characterizes as "unhelpfully wide."[85]

Treadway also asserts that the Proxies' failure to disclose other financial analyses performed by Montgomery—specifically the *Stay the Course – M&A Later* analysis (the "M&A Later Analysis")—is a material omission. The M&A Later Analysis provides estimated share prices under various scenarios assuming OPENLANE were to stay independent and pursue a sale in 2014. Again, Treadway undercuts his own argument by

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[83] *See Arnold*, 650 A.2d at 1280 ("Delaware law does not require disclosure of . . . information which would tend to confuse stockholders or inundate them with an overload of information").
[84] *See In re MONY Group, Inc. S'holders Litig.*, 852 A.2d 9, 24-25 (Del. Ch. 2004) ("while directors do not have to provide information that is simply 'helpful,' once they take it upon themselves to disclose information, that information must not be misleading").
[85] Pl.'s Opening Br. at 43.

claiming the M&A Later Analysis "yields an incredibly wide valuation range of $1.73 to $9.88 per share,"[86] a range that would tend to *support* the Merger, which was consummated at a price near the top of that range without any of the execution risk involved in deferring a sale until 2014. Perhaps sensing the weakness of his argument, Treadway claims that investors would recognize the flaws in M&A Later Analysis if its inputs were disclosed.[87] This argument is far too conclusory and speculative to be persuasive.[88]

For the foregoing reasons, the Court concludes that Treadway did not establish a reasonable probability of success on the merits with regard to the financial analysis disclosure claims.

(d) *Fair Price*

Treadway's final group of disclosure claims relates to the Board's evaluation and determination of what was a fair price for the Company. Specifically, Treadway asserts that there are material omissions related to Kelly's view of a fair price and how the Board determined what number to propose as a counteroffer to Company A. For the following reasons, the

[86] *Id.* at 45.

[87] Treadway specifically points to allegedly "low exit multiples and artificially high discount rates." *Id.*

[88] Beyond the fact that Treadway provides no support for his assertion that the inputs are unreasonable, the inputs would seemingly need to be very far off the mark for this analysis to cast the Merger in a bad light. Furthermore, as noted above, disclosure of inputs of the type requested here goes beyond what is necessary for a "fair summary."

Court determines that Treadway has no reasonable probability of success with respect to these claims.

(i) Kelly's View of a Fair Price

Kelly's presentation at the May 11, 2011 Board meeting included the following statement: "For some time now, my view has been that $10/share would be a good outcome, all things considered. One that I would wholeheartedly recommend to the [Board] as the right thing to do."[89] Treadway asserts that this statement needs to be disclosed since it reflects "management's view of the Company's true value."[90]

The Supplemental Proxy includes a summary of the May 11 Board meeting and notes that Kelly indicated that the KAR IOI "was at the lower end of the range that management would like to receive."[91] Furthermore, Treadway's characterization of this statement—"management's view of the Company's true value"—does not comport with the statement itself. A more reasonable interpretation of the statement is that $10 per share is the best price one could reasonably hope to achieve, and that such an offer would not require too much agonizing on the part of the Board. While such a price would certainly be considered *a* fair price, it would not be the *only* fair price,

[89] Advance Materials for May 11, 2011, Board Meeting at 16.
[90] Pl.'s Opening Br. 38.
[91] Supp. Proxy at 7.

and would likely be at the very top of the range of fair prices conceivably achievable.[92] Given this more reasonable interpretation of Kelly's statement, a reasonable investor would not deem such minutiae material.

(ii) $250 Million Counteroffer to Company A

Treadway contends that the $250 million counteroffer to Company A reflects upon the Board's view of the Company's value, and as such, the amount of the counteroffer and how that amount was determined should have been disclosed. The Supplemental Proxy does disclose that the Board considered Company A's offer, instructed Kelly to make a counteroffer, and that Company A responded that it would not revise its bid to the level of the counteroffer.[93]

Treadway's assertion does not comport with basic negotiating tactics. First, regardless of what a selling party may consider a company's fair value to be, that person will seek the highest price she can receive, even if that price is far above the presumed fair value. Thus, it is not clear from a counteroffer what a seller believes a company's fair value to be. Further, by countering with an offer of $250 million, the Board essentially accepted that it would receive less than $250 million. The final price received, $210

[92] This interpretation is in harmony with Kelly's explanation of the statement, which he explained should not be interpreted as saying "$10 per share is the lowest price at which it would be the right decision to sell." Kelly Dep. Tr. at 54.
[93] Supp. Proxy at 6-7.

million, is indeed between Company A's offer ($200 million) and the $250 million counteroffer. Additionally, the Supplemental Proxy discloses a significant amount of information regarding the Board's assessment of OPENLANE's value.[94]

Considering that a counteroffer is not necessarily a reliable indicator of a Board's view of the Company's value and the significant value-related disclosures made in the Proxies, it cannot be said that a reasonable investor would view the alleged omission as having significantly altered the total mix of information made available in the Proxies.

(iii) <u>Fair Value</u>

Finally, Treadway asserts a catch-all claim contending that there is a material omission related to "how the [Board] determined that the [Merger] would allow shareholders to 'realize immediately a fair value for their investment.'"[95] Besides the specific alleged material omissions considered above, he does not set forth any additional specific omissions. With regard to the Company's value and the Board's decision to approve the Merger, the Supplemental Proxy provides two long lists of the positive and potentially negative factors the Board considered and discloses a significant amount of

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[94] *See id.* at 13-16 (disclosures regarding financial analyses).
[95] Pl.'s Reply Br. in Supp. of his Mot. for a Prelim. Inj. at 14 (quoting Supp. Proxy at 11).

information about the financial analyses the Board utilized.[96] Treadway has simply not suggested that any material facts—beyond those specific claims examined and rejected above—are absent from the Proxies, and thus, he has not carried his burden to show a reasonable probability of success on the merits.

For the foregoing reasons, Treadway has failed to demonstrate that he is likely to succeed on the merits of his disclosure claims.

B. *Irreparable Harm*

If the Court's assessment of the merits of Treadway's claims is correct, especially in the absence of any competing offer, there is no likelihood of irreparable harm if interim injunctive relief is not granted. If the Court had concluded that Treadway's merits-based claims had a probability of success, then there most likely would be a sufficient risk of irreparable harm.[97] In light of the Court's conclusion that Treadway has not demonstrated a reasonable probability of success on the merits, he also has failed to set forth a cognizable risk of irreparable injury.

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[96] *See* Supp. Proxy at 11-16.

[97] In a *Revlon* scenario, the Court's role in assessing an application to enjoin the transfer in advance in critical. With an independent and disinterested board that is presumably protected by a Section 102(b)(7) charter provision, the Court's options for post-merger relief are limited. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009).

C. *Balancing of the Equities*

Although Delaware law does not impose a rigid set of rules by which to measure the adequacy of a board's efforts to maximize shareholder value when it puts the company up for sale, the lack of an auction, a fairness opinion, a broad pre-signing solicitation, a fiduciary out, or any post-agreement market check necessarily raises concerns. No reason for the absence of these tools has been offered, other than that OPENLANE is a small company, the Board was intimately involved with the Company's business and fully familiar with its market economics, and a couple of possible strategic acquirers with whom there had been some dissension did not offer as much. On the other hand, even though it has been roughly seven weeks since the transaction was announced, no one else has come forward as a potential acquirer. Although the circumstances and the deal protection efforts may have discouraged any potential buyer, sophisticated buyers likely would have understood that, if a materially better offer were to be made, judicial relief might have been available.[98]

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[98] The Purchasing Entities have not been bashful about reminding the Court that they have in hand all the consents that they need to close the transaction. This is not an instance where the stockholders' votes are not counted until a stockholders' meeting that has been scheduled for a date certain. Here, the Purchasing Entities have simply extended the date by which consents may be submitted (even though consents are not essential). Perhaps they are suggesting that, with a few ministerial steps, the transaction would be completed and the Court would be confronted with the challenge of unwinding the deal instead of simply stopping it before it happened. The Court trusts, nonetheless,

Moreover, the Board members (and for these purposes, Kelly may be overlooked) were knowledgeable, had (or were responsible for) significant holdings of OPENLANE stock, and had the same incentive that all shareholders should have held: value maximization. When the interests are as well-aligned as they are here, judicial interference should not occur without better reasons than those offered by Treadway.

In sum, although the process could readily have been enhanced and the confidence that value had been maximized, in fact could have been increased, on the whole, a balancing of the equities does not tilt toward enjoining the transaction.

V. CONCLUSION

For the foregoing reasons, the motion for a preliminary injunction will be denied. An implementing order will be entered.

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that they recognize the capacity of equity, when properly called upon, to fashion an appropriate remedy.