IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BIOCLINICA, INC. SHAREHOLDER LITIGATION	) *CONSOLIDATED*) Civil Action No. 8272-VCG)

MEMORANDUM OPINION

Date Submitted: July 25, 2013
Date Decided: October 16, 2013

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GLASSCOCK, Vice Chancellor

Where a complaint seeking to enjoin a merger on grounds of breach of duty by the company's directors is insufficient to support a motion to expedite, the chances of the same allegations surviving a motion to dismiss are vanishingly small.[1] Those chances are smaller still where the motion to dismiss comes after the merger has closed, the duty of care claims have fallen away with the request for injunctive relief, only damages are sought, and the allegations are necessarily limited to duty of loyalty claims.[2] I am faced with such a motion here. Although the Plaintiffs amended the Complaint after I denied their Motion to Expedite, I find that the new allegations are mostly simple revisions, and in any event are no more persuasive than the old.[3]

The Plaintiffs, former stockholders of BioClinica, Inc. ("BioClinica"), brought this action seeking to enjoin the acquisition of BioClinica by JLL Partners, Inc., BioCore Holdings, Inc. and BC Acquisition Corp. (collectively, "JLL"). On February 25, 2013, I denied the Plaintiffs' Motion to Expedite this litigation,

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[1] That is because the standard for expedition, colorability, which simply implies a non-frivolous set of issues, is even lower that the "conceivability" standard applied on a motion to dismiss. *See In re K-Sea Transp. Partners L.P.*, 2011 WL 2410395, at *5 n.8 (Del. Ch. June 10, 2011) (stating that the colorability standard in the context of a motion to dismiss requires only a non-frivolous cause of action).

[2] While an exculpation clause insulates directors from liability for breaches of the duty of care, such breaches can still support injunctive relief. *See, e.g.*, *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 542 (Del. 1996) ("While section 102(b)(7) and charter provisions adopted thereunder will leave stockholders without a monetary remedy in some instances, they remain protected by the availability of injunctive relief.").

[3] To paraphrase Lucas Jackson, sometimes nothin' can be a real cool hand, in cards, perhaps even in life, but not in legal pleadings. Cool Hand Luke (Warner Brothers 1967).

finding that the Plaintiffs had failed to state a colorable claim. That decision foreclosed the Plaintiffs' attempts to enjoin the acquisition, and the transaction closed on March 13, 2013. The Plaintiffs amended their Complaint on April 22, 2013, and the Defendants have since moved to dismiss. For the reasons I explain below, I find that the Plaintiffs have failed to state a claim upon which relief can be granted, even accepting the allegations as true and drawing all reasonable inferences in favor of the Plaintiffs. Therefore, this action is dismissed.

I. BACKGROUND[4]

BioClinica is a clinical research company that provides assistance to pharmaceutical, biotechnology and medical-device companies engaged in conducting clinical studies.[5] Like many companies, BioClinica was hit hard by the economic downturn in 2008 and 2009.[6] By 2012, BioClinica's revenues and income were growing again.[7] In May 2012, the BioClinica board of directors (the "Board") determined that it would explore a sale of the company.[8] The Board

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[4] The facts are drawn from the Plaintiffs' Second Amended Complaint and the Schedule 14D-9 filed in support of the tender offer. The 14D-9 has been incorporated by reference into the Complaint, because the Plaintiffs rely on the facts in the 14D-9 extensively and challenge the adequacy of the disclosures in the 14D-9. *See, e.g.*, *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 2013 WL 4106655, at *1 (Del. Ch. July 23, 2013) ("[T]he Complaint is largely based on pervasive references to the company's Schedule 14D-9 Recommendation Statement . . . filed in connection with the tender offer, and that document must also be considered as having been incorporated in the Complaint as well.").
[5] Am. Compl. ¶ 13.
[6] *Id.* at ¶ 36.
[7] *Id.* at ¶¶ 36-44.
[8] *Id.* at ¶ 46.

established a committee of independent directors (the "Committee") to evaluate and negotiate any potential transactions, and engaged the services of EP Securities LLC ("Excel") to act as its financial advisor.[9] According to the Complaint, the Board instructed Excel to pursue private equity bidders instead of strategic bidders "to avoid disclosing confidential information to BioClinica's competitors . . . ."[10] Excel contacted seventeen potential private equity bidders, including JLL.[11] However, JLL declined to make a bid for BioClinica at that time.[12] In June 2012, several private equity bidders entered into non-disclosure agreements with BioClinica and met with BioClinica's management team and Excel.[13] In August 2012, Excel informed the Committee that three private equity bidders were interested in exploring an acquisition of BioClinica.[14] At that point, the Committee instructed Excel to solicit potential strategic acquirers.[15] Excel reached out to four strategic companies that it believed might be interested in acquiring BioClinica.[16]

Two strategic acquirers, Strategic Acquirer A and Strategic Acquirer B, expressed interest in a transaction with BioClinica and executed Non-Disclosure

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[9] *Id.* at ¶ 46; BioClinica, Inc. Form 14D-9 at 14.
[10] Am. Compl. ¶ 46.
[11] BioClinica, Inc. Form 14D-9 at 14.
[12] *Id.*
[13] Am. Compl. ¶ 47.
[14] *Id.* at ¶ 48.
[15] *Id.*
[16] BioClinica, Inc. Form 14D-9 at 14.

Agreements (the "NDAs").[17] In October 2012, Strategic Acquirer A informed Excel that it would not pursue a transaction.[18] On October 17, 2012, Strategic Acquirer B expressed an interest in acquiring BioClinica at a price ranging from $6.85 to $7.26 per share.[19] Around the same time, JLL reentered the sales process, executed an NDA, and met with Excel to discuss a potential purchase of BioClinica.[20]

On November 14, 2012, Excel reported that, although management at Strategic Acquirer B was "serious" about acquiring BioClinica, its board had declined to authorize the submission of a final bid.[21] On the same day, JLL expressed an interest in acquiring BioClinica at a price between $7.00 and $7.25 per share, contingent on exclusivity and due diligence.[22] After reviewing its fiduciary duties and considering that Excel had solicited twenty-one bidders yet only JLL remained seriously interested, the Committee decided to grant exclusivity to JLL.[23] At this point in the sales process, Excel had been seeking bidders for six months, and the only credible bidders were JLL and Strategic Acquirer B.[24] The request for exclusivity was granted "'so long as the final offer from JLL was no

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[17] Am. Compl. ¶ 49.
[18] BioClinica, Inc. Form 14D-9 at 15.
[19] Am. Compl. ¶ 50; BioClinica, Inc. Form 14D-9 at 15.
[20] Am. Compl. ¶ 50; BioClinica, Inc. Form 14D-9 at 15.
[21] BioClinica, Inc. Form 14D-9 at 16.
[22] Am. Compl. ¶ 52.
[23] *Id.* at ¶ 53; BioClinica, Inc. Form 14D-9 at 16.
[24] Am. Compl. ¶¶ 46, 47, 49, 52.

lower than the high end of the range' i.e. $7.25 per share."[25] In early January 2013, JLL requested an extension of its exclusivity period and disclosed to BioClinica that it was simultaneously pursuing an acquisition of CoreLab Partners, Inc. ("CoreLab"). On the same day, although Excel had been attempting to convince JLL to raise its offer price above $7.25 per share, JLL revealed that it was "considering revising its offer to less than $7.25 per share" as a result of "concerns regarding BioClinica's projected capital expenditures in coming years."[26] JLL sought an extension of the exclusivity period, to which the Committee agreed.[27]

On January 23, 2013, JLL confirmed that it would maintain its offer to acquire BioClinica at a price of $7.25 per share in an all-cash, two-step tender offer.[28] This price values BioClinica's equity at approximately $123 million and represents a premium of 23.2% over BioClinica's average closing price for the previous 90 days and a premium of 28.7% over the average price for the previous 52-week period.[29] Upon receiving this offer, the Committee agreed to recommend the transaction to the Board.[30] From January 25 through January 29, 2013, the Board met with Excel, company management, and its legal advisors multiple times to review the fairness of the transaction. At these meetings, Excel orally opined

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[25] Am. Compl. ¶ 53 (quoting the 14D-9).
[26] *Id.* at ¶ 53; BioClinica, Inc. Form 14D-9 at 17.
[27] Am. Compl. ¶ 53.
[28] *Id.* at ¶¶ 54, 56.
[29] *Id.* at ¶ 56.
[30] *Id.* at ¶ 54.

that the merger consideration was fair to the stockholders, and a written version of its fairness opinion was produced on January 29, 2013.[31]

The Merger Agreement was finalized on January 29, 2013, and the Board unanimously voted to approve the transaction.[32] On January 30, 2013, BioClinica issued a joint press release with JLL and BioCore, announcing the tender offer for BioClinica.[33] JLL purchased both BioCore and BioClinica, seeking to merge the two companies.[34] Upon the merger of the two companies, BioClinica's CEO and President, Mark L. Weinstein, was expected to lead the combined company.[35]

The Merger Agreement contained several deal-protection devices that the Plaintiffs challenge as being preclusive of other offers. In particular, the Merger Agreement contained a no-solicitation provision; a $6.5 million termination fee that included $2 million in expense reimbursement; information rights; and a top-up option.[36] Additionally, JLL was relieved of the effect of BioClinica's poison pill, which was left in effect with respect to any other stockholder.[37] The Plaintiffs allege that these deal-protection devices dissuaded Strategic Acquirer B from making an offer for the company.[38]

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[31] *Id.* at ¶¶ 4, 63.
[32] *Id.* at ¶¶ 54, 56.
[33] *Id.* at ¶ 56.
[34] *Id.*
[35] *Id.*
[36] *Id.* at ¶¶ 76-78.
[37] *Id.* at ¶ 80.
[38] *Id.*

According to the Plaintiffs, at some time during the sales process, the Board provided JLL with revised capital expenditure estimates for 2012 and 2013.[39] Previously, management had predicted that 2012 capital expenditures would amount to $9.5 million; the actual amount expended was $8.9 million.[40] After the 2012 results were released, management projected capital expenditures to reach $11.9 million in 2013, which was revised upward from an earlier estimate of $6-8 million.[41] The Plaintiffs allege that the capital expenditure estimates were purposefully inflated in an attempt to depress the implied values for BioClinica in the fairness opinion because it was "difficult for Excel to render an opinion of fairness."[42]

II. STANDARD OF REVIEW

Under Rule 12(b)(6), this Court will not dismiss a complaint if there is a "reasonably conceivable" set of circumstances under which the plaintiff could prevail.[43] In determining whether to dismiss a complaint, the Court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the non-

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[39] *See id.* at ¶ 10 ("[A]fter approval of the Transaction, the Board, without explanation, disseminated significantly revised financial projections resulting in the Board being able to cover its tracks and recommend the Transaction to Company shareholders in a far more favorable light."). The Defendants note, however, that "it is clear from the [14D-9] upon which Plaintiffs exclusively rely that the revised projections were delivered to JLL and Excel by early January at the latest and, in all events, before the Tender Offer was approved." Defs.' Op. Br. at 25. Thus, the parties dispute when the revised capital expenditure estimates were provided to JLL.
[40] Am. Compl. ¶ 55.
[41] *Id.*
[42] *Id.* at ¶ 65.
[43] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Holdings LLC,* 27 A.3d 531, 535 (Del. 2001).

moving party.[44] "Although the standard is a minimal one, the Court will not credit conclusory allegations or draw unreasonable inferences in favor of the Plaintiff."[45]

III. ANALYSIS

The Plaintiffs have pled three Counts against the Defendants. In Count I, the Plaintiffs allege that the BioClinica directors breached their duties of care and loyalty in approving the transaction. In Count II, the Plaintiffs allege that the directors breached their duties of disclosure to the stockholders by providing misleading disclosures in the Schedule 14D-9 circulated on behalf of the transaction. Finally, in Count III, the Plaintiffs allege that JLL aided and abetted these alleged breaches of fiduciary duty. For reasons I explain below, none of these claims states a reasonably conceivable set of facts under which the Plaintiffs could prevail.[46]

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[44] *Red Oak Fund, L.P. v. Digirad Corp.*, 2013 WL 4014283, at *1 (Del. Ch. Aug. 5, 2013).

[45] *Miramar Firefighters Pension Fund v. AboveNet, Inc.*, 2013 WL 4033905, at *3 (Del. Ch. July 31, 2013) (internal quotations omitted).

[46] I note preliminarily that with respect to the Motion to Expedite, I held that most of these claims were not colorable. *See In re BioClinica, Inc. S'holder Litig.*, 2013 WL 673736, at *6 (Del. Ch. Feb. 25, 2013). The standard for a motion to expedite is "colorability" and the standard for a motion to dismiss under Rule 12(b)(6) is "reasonable conceivability—in my view, a higher, although still minimal, pleading burden. *See Reserves Dev. Corp. v. Wilmington Trust Co.*, 2008 WL 4951057, at *2 (Del. Ch. Nov. 7, 2008) (stating that a colorable claim is "essentially a non-frivolous cause of action"); *Cottle v. Carr*, 1988 WL 10415, at *3 (Del. Ch. Feb. 9, 1988) (describing the standard of colorability as being "litigable"). Nonetheless, because the Plaintiffs amended their Complaint after I decided that they had failed to state a colorable claim, I consider the Plaintiffs' claims in light of the additional allegations contained in the Amended Complaint. *See In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *4-12 (Del. Ch. Apr. 4, 2012) (analyzing and dismissing a complaint under Rule 12(b)(6) following a prior finding of noncolorability, where the plaintiffs had amended their complaint).

1. Duty of Loyalty Claims

Pursuant to 8 *Del. C.* § 102(b)(7), the exculpation provision in BioClinica's certificate of incorporation absolves its directors from monetary damages arising out of breaches of the duty of care.[47] Therefore, in order to recover damages, the Plaintiffs must successfully assert a claim not entitled to exculpation, i.e., a breach of the duty of loyalty.[48]

The Complaint alleges two bases on which the Board could be held liable for breaching its duty of loyalty in approving the Merger Agreement: the directors procured material benefits for themselves that were not shared by the other stockholders, and the directors did not act in good faith in approving the transaction. However, as I explain below, the Plaintiffs have failed to adequately plead any breach of the Board's duty of loyalty to the BioClinica stockholders.

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[47] 8 *Del. C.* § 102(b)(7) provides that a certificate of incorporation may include:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. . . .

[48] *See, e.g.*, *Miramar Firefighters Pension Fund*, 2013 WL 4033905, at *8 n.70 (dismissing a *Revlon* duty of care claim where a 102(b)(7) provision would exculpate such a breach); *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009) (holding that the Court need not reach the question of whether a board breached its duty of care in the presence of a 102(b)(7) exculpation provision, since "even if *Revlon* applied to this case, application of the exculpatory clause would lead to dismissal unless the Plaintiffs have successfully pleaded a failure to act loyally (or in good faith), which would preclude reliance on the Section 102(b)(7) provision").

A. Director Interest

The Plaintiffs argue that the BioClinica Board breached its duty of loyalty because the directors obtained benefits from the transaction that were not shared by the other stockholders. In support of this argument, the Plaintiffs allege that (1) the directors were interested due to vesting of stock options, (2) BioClinica's CEO, Mark Weinstein, was expected to become the CEO of the new entity formed by the merger of BioClinica and BioCore, and could receive a severance package if he were terminated, and (3) director John Repko was formerly an officer of Covance, a fifteen percent stockholder of BioClinica, and was therefore interested in the transaction.[49]

First, the Plaintiffs' contention that the vesting of stock options in a change of control transaction implicates the duty of loyalty is frivolous. Delaware courts recognize that stock ownership by decision-makers aligns those decision-makers' interests with stockholder interests; maximizing price. Our Courts have therefore routinely held that an interest in options vesting does not violate the duty of loyalty.[50]

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[49] Pls.' Answering Br. at 19. That the Plaintiffs deemed their "unique benefits" argument worthy of only a single paragraph in their brief speaks to the Plaintiffs' own confidence in its value.

[50] *See In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *13 n.64 (Del. Ch. Feb. 29, 2012) (rejecting argument that directors were interested due to vesting of stock options because "the directors' interests would be aligned with the shareholders in seeking the highest price for their shares reasonably available"); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (holding that the accelerated vesting of modest stock

Second, the Plaintiffs' allegations regarding Weinstein's and Repko's interests in the transaction, even if true, cannot amount to a breach of the Board's duty of loyalty. To effectively rebut the business judgment rule, the Plaintiffs must plead either that (1) a majority of the directors had some material interest in the transaction, or (2) Weinstein or Repko, as the only purportedly interested directors, dominated or controlled the Board.[51] The Plaintiffs have failed to allege that a majority of the nine-member Board was interested. In fact, the Board appointed a Committee of independent directors—Nowicki, Coyne, Parker, and LoCastro—to run the sales process, and the Plaintiffs do not allege any interest on their part. Neither have the Plaintiffs alleged that Weinstein or Repko dominated or controlled that disinterested Committee. As the Plaintiffs have not satisfactorily alleged that the Board's decision to approve the merger was the result of director self interest, the Plaintiffs' claims must fail here.

B. Good Faith

Because the Board is exculpated from breaches of the duty of care, and because the Plaintiffs fail to adequate allege any director interest in the transaction, the Plaintiffs' remaining claims against the directors must be based on a breach of

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options did not render directors interested where the "interests of the shareholders and directors [were] aligned in obtaining the highest price").

[51] *See Miramar Firefighters Pension Fund*, 2013 WL 4033905, at *3 ("Without more, allegations that the AboveNet Directors acquiesced in [the interested director's] plan are insufficient to raise a reasonable inference that they were beholden to, or controlled by, [the interested director].").

the duty of good faith to survive. The duty to act in good faith is part of the duty of loyalty.[52] Breaches of the duty of good faith include "situations where the fiduciary intentionally breaks the law, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[53]

The Plaintiffs argue that the Board breached its duty of good faith by "inflating" the capital expenditure estimates provided by management and used in Excel's fairness opinion in order to knowingly depress the implied values in those valuations. This allegation is purely conclusory; it is unsupported by any specific pleading. Though the capital expenditure estimates were revised upward for 2013, nothing in the pleadings indicates that this revision was unreasonable or was done to deceive the stockholders. Without specific alleged facts indicating an interest in the transaction, there is no reason to suspect that the directors would intentionally push this particular transaction through to the detriment of the stockholders. In other words, without a story of *why* the directors would artificially inflate the capital expenditures, there is no basis to conclude that they acted in bad faith—if

[52] *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("[T]he requirement to act in good faith 'is a subsidiary element[,]' i.e., a condition, 'of the fundamental duty of loyalty.'") (internal citations omitted).
[53] *In re Goldman Sachs Grp, Inc. S'holder Litig.*, 2011 WL 4826104, at *13 (Del. Ch. Oct. 12, 2011) (internal quotations omitted).

the Board acted with a purpose other than advancing the best interests of the corporation, the Plaintiffs have not explained what that purpose was. Instead, the Plaintiffs have expressed disagreement with *Excel's* financial analysis, but that does not demonstrate a breach of the Board's duty of loyalty.[54] Furthermore, the increase in expected capital expenditures risked reduced merger consideration, as evidenced by the fact that JLL threatened to lower its offer due to these amended capital expenditure estimates. It seems highly unlikely that the BioClinica directors would have any incentive to artificially raise the capital expenditure estimates to the extent that it would depress the offer from JLL; their interests, like those of all the stockholders, was to the contrary.

The Plaintiffs also allege that the Board failed to satisfy its *Revlon* duties. When directors engage in efforts to sell a company, their goal must be to maximize the value of the company.[55] Because directors face "potentially subtle structural or situational conflicts" when evaluating whether to engage in change-of-control transactions, this Court applies enhanced scrutiny in assessing whether the directors have complied with their fiduciary duties.[56] Under this enhanced scrutiny, the directors bear the burden of showing that "they sought to secure the transaction offering the best value reasonably available for the stockholders" and

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[54] *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 2013 WL 4106655, at *11 (Del. Ch. July 23, 2013).
[55] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).
[56] *In re Del Monte Foods Co. Shareholders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011).

that their actions were reasonable in light of their objective.[57] To demonstrate that they acted reasonably, the directors "bear the burden of proving that they (i) followed a reasonable decision-making process and based their decisions on a reasonable body of information, and (ii) acted reasonably in light of the circumstances then existing."[58] In determining whether directors acted reasonably, this Court will not second-guess the business decisions of the directors, but rather will determine whether the directors' decisions were within a range of reasonableness.[59] "Through this examination, the court seeks to assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and to thereby smoke out mere pretextual justifications for improperly motivated decisions."[60]

The Plaintiffs argue that the directors breached their *Revlon* duties by failing to conduct a reasonable sales process. They have not, however, alleged facts that would show that any Board action throughout the sales process was done in bad faith. As the Supreme Court in *Lyondell Chemical Co. v. Ryan* explained, there is an important difference between a board's duty to maximize the value of a transaction as required by *Revlon*, and a board's duty to act in good faith throughout that process: "if the directors failed to do all that they should have

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[57] *Id.* (internal quotations omitted).
[58] *Id.*
[59] *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1001 (Del. Ch. 2005).
[60] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010).

under the circumstances, they breached their duty of care. Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty."[61] Here, the Plaintiffs argue that the Board did not satisfy its *Revlon* duties, but they fail to plead circumstances which demonstrate that the Board *knowingly and completely* failed to satisfy those duties. In fact, it appears that the Board did satisfy its *Revlon* duties by forming a committee of independent directors, engaging Excel's financial advising services, and retaining independent legal counsel.

The Plaintiffs point out that the Board instructed Excel to first approach private equity bidders, and ask that I infer some sinister motive from the Board's initial decision not to solicit strategic bidders. There are, however, no well-pled facts suggesting bad intentions on behalf of the Board. On the contrary, approaching private equity bidders seems like an entirely reasonable way to protect BioClinica's confidential information during a first market test. Furthermore, even if the directors did initially favor private equity bidders, the directors later authorized Excel to solicit strategic bidders. That those strategic bidders were unwilling to make a binding offer to acquire BioClinica does not imply any bad faith on the part of the directors.

[61] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009).

Excel reached out to twenty-one separate entities during the auction process, several of whom signed NDAs with BioClinica. The auction was run by a Committee of independent directors and supported by a fairness opinion from Excel. The directors were regularly apprised of their fiduciary duties. The auction resulted in a price of $7.25, which includes a premium of approximately twenty-five percent over the stock price. Over eighty-eight percent of the stockholders agreed the price was adequate and tendered their shares. I see nothing remarkable—and certainly nothing to indicate bad faith—in this sales process.

On the contrary, the Plaintiffs labor to convert a common set of facts into a scandal.[62] Yet a review of the Schedule 14D-9, the document from which the Complaint undoubtedly drew the vast majority of its facts, reveals that the Plaintiffs' argument is hollow. For example, though the Plaintiff faults the directors for granting exclusivity to JLL while Strategic Acquirer B had expressed a "serious" interest in acquiring BioClinica, that allegation selectively ignores the predicate of the *same sentence* in the 14D-9 which explains that *the bidder's board refused to make a final offer*.[63]

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[62] The Plaintiffs have pled a generic set of facts alleging that BioClinica was "poised" to experience rapid growth in mid-2012, but that the company essentially made a gift to an acquirer with little care or due diligence on the part of the company's board of directors. These allegations lack the specifics to state a claim.

[63] *See* BioClinica, Inc. Form 14D-9 at 16 ("[A]lthough the senior management of Strategic Partner B indicated that it was serious about pursuing a transaction, the board of Strategic Partner B declined to authorize the submission of a formal bid.").

The Plaintiffs argue that my decision in *Koehler v. NetSpend Holdings Inc.* supports their theory of liability because the directors (1) relied on a fairness opinion they knew was weak and (2) impermissibly tailored the sales process in favor of JLL. In *Koehler*, I determined that the stockholder plaintiff had demonstrated a likelihood of success on the merits in a situation where the NetSpend directors had engaged in a sale to a strategic partner without the benefit of any sort of market check.[64] The Netspend directors' decision, while not *per se* unreasonable, created the context through which the directors' later decisions were viewed. Given that there was no market check, the sales process, including the board's reliance on a weak fairness opinion (in which the discounted cash flow suggested implied values much higher than the sales price), as well as the use of strong deal-protections (including don't-ask-don't-waive provisions about which the board was uninformed), was likely unreasonable.

Koehler provides no inoculation from a motion to dismiss based simply on a bare allegation of a "weak" fairness opinion, and this case is easily distinguishable. *Koehler* involved no market check; this board employed a full canvas. *Koehler* involved adoption of extraneous don't-ask-don't-waive provisions into the Merger Agreement; that allegation is not present here. *Koehler* involved potential breaches of a duty of care in support of injunctive relief; here, the Plaintiff must

[64] *Koehler v. NetSpend Holdings, Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013).

adequately plead breach of the duty of loyalty. The defendant board in *Koehler* consciously conducted a single-bidder process. That fact is critical. Where a sale has been accomplished through a single-bidder process, neither the stockholders nor the Court has any market-based indication that the offer price is adequate. In that context, the board's process becomes particularly important because it is the only mechanism through which the board can demonstrate that, had a market check been conducted, no superior offer would have emerged. The board's reliance on a "weak" fairness opinion is relevant where the fairness opinion provides *the only equivalent of a market check*.[65] That consideration is lacking here.

The Plaintiffs also argue that the BioClinica Board impermissibly skewed the sales process to discourage a strategic bidder and in favor of JLL. According to the Complaint, selecting a private equity bidder over a strategic bidder was attractive to the directors because it would allow Weinstein and the management team to remain in control of the company after the acquisition. Yet, as explained above, the Plaintiffs have failed to plead facts showing that Weinstein or management controlled the directors. Likewise, the assertion that JLL was a

[65] In drafting *Koehler*, I was conscious of the possibility that taking note that the fairness opinion was "weak" might induce some opportunistic plaintiffs to champion "weak fairness opinions" as the breach-of-fiduciary-duty claim du jour. I (apparently unsuccessfully) attempted to convey in *Koehler* that the weakness of the fairness opinion was *contextual*. That is, in the absence of a market check, I was left to view the board's decision-making and sales process in the context of the DCF's indication that the company could have been worth more. Directors of Delaware corporations have a right to rely on experts under 8 *Del. C.* § 141(e). That the fairness opinion in *Koehler* provided context for my analysis of the board's decision-making process does not create a new basis to challenge every sales process.

favored bidder is flatly contradicted by the facts in this case. The Committee conducted an extensive auction over an eight-month period. During that auction, JLL initially *declined to bid*.[66] It was only in October 2012, five months into the sales process, that JLL emerged as a serious bidder. Faced with these facts, any assertion that the sales process "favored" JLL is conclusory and not well-pled. In any event, absent an allegation of disloyalty on the part of a majority of the Board, these claims are relevant only to whether the Directors breached their duty of care. Since such claims are barred by the 102(b)(7) exculpation provision, it is sufficient that I find, as I have, that the Plaintiffs have alleged insufficient facts to suggest that the BioClinica Board acted in bad faith throughout the sales process.

Finally, the Plaintiffs point out that, as a component of maximizing shareholder value in a change of control transaction, directors have a duty not to "lock up" a deal in a way that would preclude other bids for the company.[67] But as explained above, "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties" amounting to bad faith.[68] The Plaintiffs allege that the deal-protection devices are

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[66] Despite JLL's initial lack of interest, BioClinica did not throw up its virtual hands and abandon the sales process because its "favorite bidder" was not interested. Instead, the company entered into NDAs with several private equity firms and began soliciting strategic bidders.
[67] *See In re Cogent, Inc. S'holders Litig.*, 7 A.3d 487, 508-09 (Del. Ch. 2010) (explaining that the cumulative effect of deal protection measures may not be unreasonably preclusive of topping bids).
[68] *Lyondell Chem. Co*, 970 A.2d at 243.

unreasonable in that they are preclusive to other bidders, but cannot point to any deal-protection devices that prevented other motivated bidders from making a bid for the company, let alone demonstrate that the Board acted in bad faith in negotiating the terms of the agreement. In fact, the allegedly unreasonable deal-protection devices—a no-solicitation provision, a poison pill, a reasonable termination fee, information rights, and a top-up option—have been routinely upheld by this Court.[69] As explained in my decision on the Motion to Expedite, in which I held that this claim was not colorable, these deal-protection devices, in the context of an otherwise reasonable sales process, have been found non-preclusive.[70] Because the Plaintiffs have not demonstrated that the Board agreed to these deal-protection devices in bad faith, these claims must fail.

To summarize, the Plaintiffs' claims against the Defendant Directors for breaches of the duties of care and loyalty fail to state a claim upon which relief could be granted. Even drawing all reasonable inferences on behalf of the Plaintiffs, the Plaintiffs have failed to plead facts under which it is reasonably conceivable that the Plaintiffs could recover.

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[69] *See In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *8 (Del. Ch. May 12, 2011); *see also Lyondell Chem. Co.*, 970 A.2d at 241 (describing a similar package of deal protections as "not unusual or preclusive").

[70] Of course, deal protective devices, properly used, can facilitate a transaction and thus add value for the stockholders. A board must balance this fact with the understanding that improperly-preclusive protective devices can discourage superior offers that otherwise may be available.

2. Disclosure Claims

In disseminating a Recommendation Statement on behalf of a transaction, directors have a duty "to disclose fully and fairly all material information within the [directors'] control."[71] "To survive a motion to dismiss, the plaintiffs must provide some basis for a court to infer that the alleged violations were material. For example, a pleader must allege that facts are missing from the statement, identify those facts, state why they meet the materiality standard and how the omission caused injury."[72] An omission is material if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[73] Proving materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused a reasonable investor to change his vote," but instead necessitates "a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[74] Disclosure violations can, in appropriate circumstances, implicate the duty of loyalty as well as the duty of care.[75] Here, any disclosure claim that does not

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[71] *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001).
[72] *Id.* at 1086-87 (internal quotations omitted).
[73] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (emphasis removed) (quoting *TSC Indus. v. Northway, Inc.,* 426 U.S. 438, 449 (1976)).
[74] *Id.*
[75] *See Orman v. Cullman*, 794 A.2d 5, 41 (Del. Ch. 2002) ("The fiduciary duty to disclose material facts does not solely implicate the duty of loyalty, a breach of which results in liability that cannot be avoided by an exculpatory provision. Rather, '[t]he duty of directors to observe

adequately allege a violation of the duty of good faith cannot survive the exculpation provision in BioClinica's certificate of incorporation.[76]

There is a reason that disclosure claims are rarely litigated after a transaction closes. The nature of this claim, post-merger, becomes evident when one considers what the Plaintiffs would have to prove to receive more than nominal damages here.[77] To receive compensatory relief, the Plaintiffs would have to demonstrate not only that reasonable stockholders would consider the undisclosed information material and that the misleading or inadequate disclosures involved a breach of the duty of loyalty on the part of the directors, but also that, had this information been disclosed, at least thirty-eight percent of the stockholders who voted in favor of the transaction would have changed their vote; and that the value of the stock was greater than the value received in the tender offer.[78] Such allegations are absent here.

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proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty and good faith.'") (internal citations omitted).

[76] *See In re Alloy, Inc.*, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011) ("An exculpatory provision under 8 *Del. C.* § 102(b)(7), such as Alloy has, would preclude, for example, a claim for money damages for disclosure violations that were made in good faith—*i.e.*, for failures to disclose resulting from a breach of the fiduciary duty of care rather than from breaches of loyalty or good faith.").

[77] *See O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 917 (Del. Ch. 1999) ("A plaintiff, therefore, is entitled to *per se* nominal damages for a breach of the duty of disclosure. So long as the plaintiff pleads sufficiently the other specific elements of a breach of the fiduciary duty of disclosure arising from a false statement, omission or partial disclosure, a plaintiff may request nominal damages, without pleading causation or actual quantifiable damages.").

[78] *See id.* ("A plaintiff who seeks more than nominal damages for breach of the duty of disclosure . . . must set forth in a well-pleaded complaint allegations sufficient to support the remedy sought. As a result, when a plaintiff requests more than nominal damages, a plaintiff

Here, the Plaintiffs allege that the directors violated their duties of disclosure to the stockholders by omitting three material facts in the Recommendation Statement provided to stockholders in connection with the transaction. First, the Plaintiffs argue that the Defendants should have disclosed why they adjusted the capital expenditures upward. Second, the Plaintiffs allege that the directors failed to disclose certain inputs used in Excel's fairness opinion. Third, the Plaintiffs contend that the directors should have disclosed whether the NDAs executed with fifteen potential bidders contained don't-ask-don't-waive clauses.

I held in my Memorandum Opinion on the Motion to Expedite that the first and second of these claims were not colorable. Since the Plaintiffs have not attempted to convince me that my earlier decision was incorrect, I refer the reader to the relevant sections of my Memorandum Opinion for additional analysis. In brief, the stockholders are entitled to management's best estimates of future financials as of the time of the merger.[79] The directors need not explain the basis for their estimates nor why they have adjusted their estimates.[80] Furthermore, when describing the inputs of a fairness opinion, the directors need only provide a "fair summary of the substantive work performed by the [financial advisors]."[81]

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also will have to plead causation and identify actual quantifiable damages in order to survive a motion to dismiss.").

[79] *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 673736, at *6 (Del. Ch. Feb. 25, 2013).

[80] *Id.*

[81] *In re NetSmart Tech., Inc. S'holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007).

The Plaintiffs argue that the directors failed to disclose why they adjusted their estimates for capital expenditures, and that this omission would have been material information to the stockholders. I disagree. As I explained in my previous Memorandum Opinion, our law concerning proxy disclosures does not require such detailed disclosure. The directors disclosed that the capital expenditure estimates were increased and that the increased numbers were used in the fairness opinion. A stockholder, suspecting for some unidentified reason that there was error—or nefarious intent—behind the revised estimate, could have performed her own DCF using the previous estimates, as the Plaintiffs have done. I have no reason to believe that a reasonable stockholder would perceive the basis for adopting management's revised estimate of capital expenditures—other than that the new estimate represented management's current best forecast—as adding to the total mix of information. Therefore, as I found in my Memorandum Opinion, this claim fails to identify a material omission. In any event, I find unsupported in the pleadings the implied suggestion—necessary to recovery here—that the failure to disclose the reason for the adjustment resulted from bad faith on the part of the directors.

Second, the Plaintiffs argue that the directors failed to disclose certain inputs provided to Excel for use in the fairness opinion. Specifically, the Plaintiffs argue that the following "omissions" were material:

> (a) the reasons for the selection of the EBITDA range and why it was so low in comparison to BioClinica's peers, precedent transactions an [sic] own EBITDA multiples prior to the transaction; (b) what was meant by multiples ranging 6.0x to 8.0x on "$8.0 million of net cash"; (c) how growth rates were determined especially since the range utilized fell below expected inflation rates and are pessimistic given BioClinica's projected EBITDA, revenue and earnings per share; and (d) free cash flows for the year 2016.[82]

The Plaintiffs have not adequately described why any of these purported "omissions" would be material, as opposed to merely of interest, to stockholders. As I noted above, the directors have a duty to disclose a "fair summary" of the inputs and procedure used to construct the fairness opinion. The stockholders are not entitled, however, to granular details concerning why individual inputs were selected or rejected. The directors here disclosed past financial data, current financial data, and financial projections, to the extent they were provided to Excel.[83] Contrary to the Plaintiffs' argument that stockholders would find the requested information as contributing to the total mix of information at the time of the merger, in my opinion, requiring this level of disclosure would more likely obfuscate an otherwise clear summary of Excel's valuations and recommendation. Furthermore, to the extent the Plaintiffs' arguments for additional disclosures disagree with Excel's analysis, "a complaint about the accuracy or methodology of

[82] Pls.' Answering Br. at 24.
[83] BioClinica, Inc. Form 14D-9 at 21-27, 35.

a financial advisor's report is not a disclosure claim."[84] Next, the Plaintiffs argue, as they did in favor of the Motion to Expedite, that management-created free cash flow estimates for 2016 must be disclosed to the stockholders. The Defendants have represented several times that management did *not* estimate free cash flows for 2016; instead, the estimates used by Excel were created *by Excel*. Management need not disclose intermediate calculations, made by its financial advisors, used in crafting inputs for its DCF analysis.[85] In any event, these allegations are irrelevant, because even assuming a material non-disclosure, the Plaintiffs fail to plead facts sufficient to demonstrate that any of this data was withheld *in bad faith.*

Finally, the Plaintiffs argue that the directors should have disclosed whether the NDAs signed by potential bidders during the sales process contained don't-ask-don't-waive clauses. The Plaintiffs admit that they have no evidence that the NDAs contained such clauses. Instead, the Plaintiffs argue that "they are being asked to plead what they cannot possibly know."[86] Yet no one is "asking" the Plaintiffs to bring a claim about hypothetical don't-ask-don't-waive clauses. The Plaintiffs have the burden of bringing claims based on actual facts and reasonable

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[84] *Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (quoting *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 28 n.52 (Del. Ch. 2004), *judgment entered sub nom. In re The Mony Grp. Inc. S'holder Litig*., 2004 WL 5389603 (Del. Ch. Mar. 1, 2004)).
[85] *See In re SeraCare Life Scis., Inc. S'holder Litig.*, C.A. No. 7250-VCG, at 6 (Del. Ch. March 20, 2012) (TRANSCRIPT) ("[W]here the advisor derived the [free cash flow] projections on its own, those projections do not have to be disclosed.").
[86] Pls.' Answering Br. at 28.

inferences, rather than speculation.[87] Obviously, no disclosure could, or should attempt to, describe all clauses *not* included in NDAs, or, for that matter, all breaches of duty the directors have *not* committed.

Because the Plaintiffs have not pointed to any inadequate disclosures that implicate a breach of the Board's duty of good faith, the Plaintiffs have failed to state a claim upon which relief can be granted.

3. Aiding and Abetting Claims

Finally, the Plaintiffs argue that "Defendants BioClinica, JLL, Acquisition Sub and BioCore Holdings by reason of their status as parties to the Merger Agreement, and their possession of nonpublic information, aided and abetted the Individual Defendants in the aforesaid breach of their fiduciary duties."[88] "To survive a motion to dismiss, the complaint must allege facts that satisfy the four elements of an aiding and abetting claim: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach."[89] The Court may infer that a defendant "knowingly participated" in a breach where "the bidder attempts to create or exploit conflicts of interest in the

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[87] *See In re Coca-Cola Enters., Inc. S'holders Litig.*, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007) ("The Court will not . . . give any credence to conclusory allegations or wildly speculative and unreasonable conjecture.").

[88] Am. Compl. ¶ 101.

[89] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001) (internal quotations omitted).

board," but not from "a bidder's attempts to reduce the sale price through arm's-length negotiations."[90]

Because I have found that the Plaintiffs fail to adequately allege that the Board breached its duty of loyalty, the Plaintiffs' claims that JLL aided and abetted that breach must likewise fail. However, I declined to address whether the Board breached its duty of care, since the 102(b)(7) provision would exculpate the directors from those claims; yet, because Section 102(b)(7) solely exculpates directors (as opposed to secondary actors), it is possible that an aider and abettor could be liable for a directors' otherwise exculpated breach of the duty of care.[91]

The Plaintiffs state in support of an aiding and abetting claim that the Board's "breaches of fiduciary duties could not and would not have occurred but for the conduct of defendants BioClinica, JLL, Acquisition Sub and BioCore Holdings who, therefore, aided and abetted such breaches in the possible sale of BioClinica to JLL."[92] Specifically, the Plaintiffs attempt to bolster that tautology by arguing that:

> JLL negotiated exclusively with the Company and enjoyed unfettered access to the Company's confidential information, including information about the Company's business plans. . . . With such close access to the Company's confidential information . . . JLL

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[90] *Id.* at 1097.
[91] *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011) ("By their terms, Sections 102(b)(7) and 141(e) do not protect aiders and abetters, and disgorgement of transaction-related profits may be available as an alternative remedy.").
[92] Am. Compl. ¶ 102.

> undoubtedly understood BioClinica's true value, giving it an unfair advantage over other bidders.[93]

Additionally, the Plaintiffs argue that "the Board did not resume discussions with other bidders after it entered into exclusivity with JLL, ensuring that JLL had the upper hand in purchasing BioClinica without any serious competition."[94] These allegations in no way suggest that JLL "participated in the board's decisions, conspired with the board, or otherwise caused the board to make the decisions at issue,"[95] and therefore insufficiently allege that JLL had knowledge of any breach of the BioClinica Board's duty of care.

Finally, the Plaintiffs argue that "JLL pressed the Board into preclusive deal terms during the merger negotiations . . . ."[96] But as explained above, the use of the particular deal-protection devices at issue here has routinely been upheld as non-preclusive, where the sales process was otherwise reasonable.[97] Because the Plaintiffs have not alleged that the Board agreed to any deal protection measures that would constitute a violation of the Board's duty of care, this aiding and abetting claim must also fail.

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[93] Pls.' Answering Br. at 31.
[94] *Id.*
[95] *Malpiede*, 780 A.2d at1098.
[96] Pls.' Answering Br. at 33.
[97] *See supra* note 69.

IV. CONCLUSION

In conclusion, I find that the Plaintiffs have failed to state a reasonably conceivable claim against the BioClinica directors upon which relief may be granted. The Plaintiffs have similarly failed to state a claim against JLL for aiding and abetting. Therefore, the Plaintiffs' Amended Complaint is dismissed with prejudice. An appropriate order accompanies this Memorandum Opinion.