IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES MICHAEL BINKS, Plaintiff, v. DSL.NET, INC., a Delaware corporation; DSL.NET COMMUNICATIONS, VA., INC., a Virginia corporation; DSL.NET ATLANTIC, LLC, a Delaware corporation; MEGAPATH, INC., a Delaware corporation; MDS ACQUISITION, INC., a Delaware corporation; NETIFICE COMMUNICATIONS, INC., a Delaware corporation; DAVID F. STRUWAS; KEIR KLEINKNECHT; KIRBY G. PICKLE; WILLIAM J. MARSHALL; JAMES D. MARVER; ALAN E. SALZMAN; PAUL J. KEELER; ROBERT B. HARTNETT, JR.; ROBERT G. GILBERTSON; STEVEN B. CHISHOLM; J. BROOKE MASTIN; PAUL MILLEY; E. CAREY WALTERS; MARC R. ESTERMAN; ROGER EHRENBERG; RODERICK GLEN MacMULLIN; KENNETH KHARBANDA; DEUTSCHE BANK TRUST COMPANY, a Delaware corporation; DEUTSCHE BANK TRUST COMPANY AMERICAS, a Delaware corporation; DEUTSCHE BANK AG LONDON DIVISTITURE, a foreign corporation; VANTAGEPOINT VENTURE PARTNERS, L.P.; a Delaware limited partnership; VANTAGEPOINT VENTURE PARTNERS III(Q), L.P., a Delaware limited partnership; VANTAGEPOINT VENTURE ASSOCIATES III, L.L.C., a Delaware limited liability partnership; VANTAGEPOINT VENTURE PARTNERS III, L.P., a Delaware limited partnership; VANTAGEPOINT COMMUNICATIONS PARTNERS, L.P., a Delaware limited partnership; VANTAGEPOINT VENTURE ASSOCIATES, L.L.C., a Delaware limited corporation; VANTAGEPOINT	:	**C.A. No. 2823-VCN**

COMMUNICATIONS ASSOCIATES, LLC, a Delaware limited corporation; VANTAGEPOINT VENTURE PARTNERS 1996, L.P.; MICHAEL L. YAGEMANN; MICHAEL SOWADA; D. CRAIG YOUNG; THE BANK STREET GROUP, a Delaware corporation; DUNKNIGHT TELECOM, LLC, a Delaware corporation; KNIGHT VISION FOUNDATION, INC., a non-profit Florida corporation; LAURUS MASTER FUND LTD., a Cayman Islands company; HARRY HOPPER; COLUMBIA CAPITAL, INC., a Delaware corporation; COLUMBIA CAPITAL EQUITY PARTNERS II (QP), L.P., a Delaware limited partnership; COLUMBIA CAPITAL EQUITY PARTNERS, III Q.P., L.P., a Delaware limited partnership; COLUMBIA CARDINAL PARTNERS, LLC, a Virginia limited liability company; COLUMBIA BROADSLATE PARTNERS, LLC, a Delaware limited liability corporation; COLUMBIA CAPITAL EQUITY PARTNERS III (AI), L.P., a Delaware limited partnership; LAFAYETTE PRIVATE EQUITIES, INC., a Delaware corporation; LAFAYETTE INVESTMENT FUND, L.P., a Delaware limited partnership; CHARLES RIVER PARTNERSHIP X, a Delaware Partnership; CHARLES RIVER PARTNERSHIP X-A, a Delaware partnership; CHARLES RIVER PARTNERSHIP X-B, a Delaware partnership; CHARLES RIVER PARTNERSHIP X-C, a Delaware partnership; N.I.G.-BROADSLATE, LTD., a Cayman Islands corporation; E-TRADE FINANCIAL CORPORATE SERVICES, INC., a Delaware corporation; CEDE & CO., a Delaware corporation; DEPOSITORY TRUST COMPANY, a New York, foreign corporation; and DOES 1 through 100,

Defendants.

MEMORANDUM OPINION

Date Submitted: August 18, 2009
Date Submitted: April 29, 2010

Charles Michael Binks, of Yorba Linda, California, a Self-Represented Plaintiff.

David J. Teklits, Esquire, Kevin M. Coen, Esquire, and Christine J. Dealy, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendants MegaPath, Inc.; MDS Acquisition, Inc., David F. Struwas; Keir Kleinknecht; Paul J. Keeler; Robert B. Hartnett, Jr.; Robert G. Gilbertson; Steven B. Chisholm; J. Brooke Mastin; Paul Milley; E. Carey Walters; Marc R. Esterman; DSL.net Communications, Virginia, Inc.; DSL.net Atlantic, LLC; Netifice Communications, Inc.; and D. Craig Young.

NOBLE, Vice Chancellor

I. INTRODUCTION

In early 2006, DSL.net, Inc. ("DSL" or the "Company") was in a heap of financial trouble. Its board of directors (the "Board"), after obtaining guidance from a financial advisory firm, was confronted with the choice of bankruptcy or borrowing funds from Defendant MegaPath, Inc. ("MegaPath"). It chose to do the deal with MegaPath. To obtain the loan from MegaPath, DSL issued convertible notes (the "MegaPath Financing Transaction").[1] Within a few months, MegaPath, through the exercise of its conversion rights, had obtained more than 90% of DSL's common stock and proceeded with a short-form merger (the "Merger") that had the effect of eliminating the minority stockholders.

One of those former minority stockholders, Plaintiff Charles M. Binks, brought this action to assert a wide range of claims against not only DSL's former directors and MegaPath, but also numerous individuals and entities involved with DSL's short, and apparently unprofitable, life.[2] He alleges inappropriate conduct spanning the inept to the corrupt.

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[1] Unless otherwise noted, any reference to the "Board" is to DSL's board of directors as constituted at the time of the MegaPath Financing Transaction.

[2] In his Amended Complaint, Binks, a self-represented litigant, used more than 100 pages and 250 paragraphs to plead his claims against 60 named defendants, some of whom have not been accurately identified, and 100 unnamed defendants. Illustrating the difficulty of bringing complex shareholder litigation as a self-represented plaintiff, many of Binks's claims are also transparently without merit. For example, Binks argues that the Board violated its duties under both Delaware and federal law by failing to give him a proxy vote on a statutory short-form merger. Am. Compl. ¶ 152.

Several of the Defendants have moved to dismiss the Amended Complaint. Two primary obstacles confront Binks. First, to the extent that his claims are purely derivative, he lost standing to pursue them as a result of the Merger.[3] Second, he challenges the actions of a board of directors, which, when the critical decisions were made, was comprised of a majority of independent and disinterested directors who had reasonably evaluated the Company's options and solicited responsible advice. For these and other reasons discussed below, the pending motion to dismiss will be granted.

II. BACKGROUND

A. *The Parties*

DSL was a Delaware corporation that provided high-speed data communications, Internet access, and related services, principally to small and medium-sized businesses throughout the United States. In March 2007, DSL was acquired through a statutory short-form merger by MegaPath.

Additionally, Binks's listing of alleged corporate malfeasance and misfeasance commences before the Company's initial public offering in 1999. Any claims arising out of these early events are time-barred, and he also lacks standing to pursue them. Binks defends his recitation of palpably non-actionable conduct as an attempt to "lay down a pattern of abuses, that indicate the managerial philosophy of the companies and individuals involved, and are important to an understanding of the climate in which the allegations of Amended Complain [sic] occurred." Pl.'s Answering Br. in Opp'n at 1.

[3] *See, e.g.*, *Schreiber v. Carney*, 447 A.2d 17, 21 (Del. Ch. 1982) ("[A] merger which eliminates a complaining stockholder's ownership of stock in a corporation also ordinarily eliminates his status to bring or maintain a derivative suit on behalf of the corporation, whether the merger takes place before or after the suit is brought, on the theory that upon the merger the derivative rights pass to the surviving corporation which then has the sole right or standing to prosecute the action.").

Until the Merger, Binks beneficially owned more than twenty-three million shares of DSL common stock, for which he had paid more than $1.5 million; at one time he was one of the largest individual holders of DSL common stock. Binks held shares in DSL from the time of the Company's initial public offering in 1999 until 2007.

The Board, at the time of the MegaPath Financing Transaction, consisted of Defendants David F. Struwas, Keir Kleinknecht, Paul J. Keeler, Robert B. Hartnett, Jr., and Robert G. Gilbertson. Defendant MegaPath, a Delaware corporation, is one of the leading providers of secure access and managed network communications services. Other "MegaPath Defendants" include Defendant MDS Acquisition, Inc. ("MDS"), a wholly owned MegaPath subsidiary used as the acquisition vehicle for the Merger,[4] Defendant Netifice Communications, Inc. ("Netifice"),[5] Defendant D. Craig Young, the President and Chief Executive Officer of MegaPath, as well as Defendants Paul Milloy and Emerson Walters of MegaPath who became MegaPath's designated members of the DSL Board on August 28, 2006, immediately following the closing of the MegaPath Financing Transaction, and Defendants J. Brooke Mastin and Steven B. Chisholm of MegaPath who joined the DSL Board on January 18, 2007.

[4] After the Merger, MDS changed its name to DSL.net, Inc. which is also named as a Defendant. Reference will be to MDS. Former subsidiaries of DSL, DSL.net Communications, Virginia, Inc. and DSL.net Atlantic LLC, have also been named as Defendants.
[5] MegaPath at one time had been known as Netifice.

Binks has also included among the Defendants in this suit: (1) The Bank Street Group ("Bank Street"), a financial advisory firm hired by the Board to evaluate strategic options for the Company; (2) individuals and entities associated with VantagePoint Venture Partners, L.P. ("VantagePoint"), which was the controlling shareholder of DSL during certain (disputed) times in question; (3) certain individuals and entities affiliated with DunKnight Telecom, LLC ("DunKnight"), which held DSL debt at the time of the MegaPath Financing Transaction and which, Binks asserts, participated in self-dealing transactions with the Company; (4) individuals and entities associated with Deutsche Bank Trust Company ("Deutsche Bank"), which entered into a Note and Warrant Purchase Agreement with DSL upon which Binks bases certain claims; (5) individuals and entities associated with Columbia Capital, Inc., which held preferred stock of DSL during certain periods in question; and (6) other various and sundry Defendants including E-Trade Financial, Inc., through which Binks purchased his DSL shares, and the Depository Trust Company, which Binks asserts failed to provide all of the stock certificates he was owed at the time of the Merger, thereby negatively affecting his appraisal rights.

B. *The Events Leading Up to the Merger*[6]

For several years before the Merger, DSL had been suffering from declining fortunes as a result of mounting customer cancellations, which Binks alleges were the result of wrongful acts of DSL management, including DSL executives funneling its customers into rival telecommunications companies with which they were also involved, in addition to a host of other self-dealing transactions that allegedly occurred throughout the Company's history. Binks contends that this was part of a "scheme to loot the [C]ompany"[7] through which "the Company was stolen from the stockholders by driving the stock price down to next to nothing, while these Defendants were cashing in millions of dollars."[8]

Regardless of the source of its difficulties, from an early stage DSL required substantial outside financing in order to continue as a going concern. VantagePoint, which owned a controlling stake in DSL throughout much of its existence, had allegedly provided approximately $30 million in financing to DSL during the Company's early stages.[9] In July 2003, entities affiliated with Deutsche Bank entered into a Note and Warrant Purchase Agreement with DSL for $30 million in notes that gave Deutsche Bank the right to purchase a large minority

[6] The "facts," such as they are, are drawn almost entirely from the Amended Complaint and, as such, may not be entirely clear or internally consistent.
[7] Am. Compl. ¶ 66.
[8] Am. Compl. ¶ 70.
[9] Am. Compl. ¶ 217.

stake in the Company. Although such rights were never exercised, shortly after this agreement was signed, VantagePoint filed a Transfer of Control Application with the Federal Communications Commission (the "FCC") requesting authority for it to relinquish indirect majority control over DSL as a result of the transaction through which Deutsche Bank "might obtain a minority interest," thereby potentially causing VantagePoint's ownership interest to fall below fifty percent.[10] Binks alleges that this application was simply a mechanism employed to trigger the payment of dividends to holders of certain classes of preferred stock, made up of VantagePoint, Columbia Capital, and their related entities, which allegedly eventually allowed for the conversion of their preferred stock to DSL common stock, thereby diluting shareholder equity and devaluing the Company.[11]

In late 2005, DunKnight and Defendant Knight Vision Foundation acquired $13 million in DSL debt in consideration for a payment of $6 million made in November 2005 and another $4 million in January 2006 (the "DunKnight Transaction"). These payments were used by DSL to repurchase stock, warrants, and debt held by Deutsche Bank and VantagePoint.[12]

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[10] Am. Compl. ¶ 101.

[11] *Id.*

[12] Am. Compl. ¶¶ 122, 125. Binks asserts that this was part of a conspiracy between VantagePoint and MegaPath to purchase DSL "for fractions of a penny." Specifically, he alleges that the DunKnight Transaction was employed as "a nine month predatory financing transaction that disguised the self dealing of this short form merger with MegaPath." Am. Compl. at 6.

Despite the financing it had received, by early 2006, the Company's sustained operating losses raised serious doubt as to whether DSL could continue as a going concern. In addition, the two debt instruments held by the DunKnight entities were scheduled to mature in September of that year.[13]

C. *The MegaPath Financing Transaction*

In an effort to escape its precarious financial position, DSL, in February 2006, retained Bank Street to consider alternative financing mechanisms and to seek out potential buyers for the Company.[14] Following a roughly six month process, in August 2006, Bank Street presented the Board with a report concluding that the best available option for the Company and its shareholders was the MegaPath Financing Transaction, under which MegaPath would receive certain convertible notes that, in aggregate, would represent more than 90% of the Company's shares, if fully converted. Bank Street considered bankruptcy the only other alterative for the Company, given that its senior secured debt was about to mature and that other offers made by interested parties were contingent on the

[13] In June 2006, the Board agreed to issue 3,712,500 shares of DSL common stock to DunKnight and 187,500 shares to Knight Vision, as consideration to extend the debt maturity date by four months, to December 5, 2006. Binks alleges that, nevertheless, these companies were issued an aggregate of 7,425,000 shares for this extension. These actions, Binks asserts, were in violation of the Board's fiduciary duties. Am. Compl. ¶ 123.

[14] Am. Compl. ¶¶ 126, 183.

Company's entering bankruptcy.[15] At the time, DSL had a market capitalization of approximately $7.5 million.[16]

It is perhaps worth noting here that the Amended Complaint asserts that MegaPath President and CEO Young was or had been a "special advisor" to Bank Street's subsidiary, The Bank Street Telecom, at about this same time. Binks claims that this relationship made Bank Street "an *undisclosed* interested party,"[17] and that, as a result of his role as a special advisor to Bank Street's subsidiary, Young "had absolute control over Bank Street [the parent], and acted in such a way to make sure that all offers were rejected other than the offer by the companies in which he had an interest, MDS and MegaPath."[18]

The Board approved the MegaPath Financing Transaction and, on August 22, 2006, the Company and MegaPath entered into a purchase agreement (the "Purchase Agreement") under which MegaPath would pay $13 million to DSL for five promissory notes (the "Notes") in the principal amount of $15 million, with four of the Notes convertible into shares of DSL common stock.[19] Binks

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[15] Am. Compl. ¶ 199.
[16] Am. Compl. ¶ 181.
[17] Am. Compl. ¶ 130(d).
[18] Am. Compl. ¶ 126. This allegation, as with many of Binks's allegations, is an example of a conclusory allegation that the Court need not accept in the absence of supporting factual allegations. *See* text accompanying note 36, *infra*.
[19] Am. Compl. ¶ 185. Specifically, MegaPath received a non-convertible note for $13 million (for which it paid $11 million), and four convertible notes for a combined additional $2 million (for which it paid face value).

asserts that "[b]ecause the Non-Convertible note already provides full consideration for the total amount loaned by MegaPath to DSL, *MegaPath essentially received over 2.6 billion shares of DSL stock and a 91% ownership of the Company for no consideration*."[20]

At the same time that the Purchase Agreement was signed, the Board "duly met and approved" an amendment to the DSL Charter (the "Charter Amendment") to increase the number of authorized shares of the Company's common stock from 800,000,000 to 4,000,000,000 in order to satisfy the conversion terms of the Notes.[21] The proceeds from the MegaPath Financing Transaction were used to repay the Company's secured notes held by the DunKnight entities, which were about to mature. On August 28, 2006, upon the closing of the MegaPath Financing Transaction, Kleinknecht and Gilbertson resigned from the Board and were replaced by two directors affiliated with MegaPath.

On January 1, 2007, MegaPath converted three of the Notes and, as a result of that conversion, became owner of 53.4% of the common stock of the Company.[22] A week later, the Company sent a proxy statement to its shareholders seeking approval of the Charter Amendment in order to increase the number of

[20] *Id.* (emphasis in original).
[21] Am. Compl. ¶ 115. The amendment also decreased the par value of the shares of common stock from $0.0005 to $0.0001. Am. Compl. ¶ 194.
[22] Am. Compl. ¶ 192.

DSL's authorized shares. The record date selected for vote eligibility was January 2, one day following MegaPath's conversion of the Notes.

In the proxy statement, the stockholders were informed that the Board had approved the MegaPath Financing Transaction and Charter Amendment because it had concluded, first, that the transaction with MegaPath was the only reasonably available means of avoiding bankruptcy and of providing some opportunity to preserve shareholder value and, second, that the shareholders would have likely received nothing for their shares had DSL declared bankruptcy. The proxy statement also reported that MegaPath was likely to complete the Merger, but that it had not determined what amount would be paid to the public shareholders.[23]

On January 30, 2007, at a special meeting, the shareholders approved the Charter Amendment increasing the number of authorized shares. In March 2007, MegaPath exercised its option to convert the fourth convertible note into DSL stock, and, with its holding of more than 90% of the Company's common stock, thereafter consummated a short-form Merger pursuant to Section 253.[24] Binks was ultimately offered $24,000 for his $1.5 million investment.[25]

[23] Am. Compl. ¶ 131.
[24] 8 *Del. C.* § 253.
[25] Am. Compl. ¶ 131.

D. *The Parties' Contentions*

At base, Binks asserts that Defendants[26] breached their fiduciary duties by (1) structuring the MegaPath Financing Transaction to result in a near-total loss of share value for public shareholders; (2) structuring the transaction to eliminate the need for a vote by DSL shareholders on the Merger; (3) transferring a substantial corporate asset to MegaPath for little or no consideration; and (4) making incorrect or misleading disclosures in the proxy statement filed regarding the Charter Amendment.[27]

According to Binks, not only did the MegaPath Financing Transaction exclude the DSL shareholders from determining whether the Merger was in their best interest, but it also overwhelmingly diluted the equity value of the public shareholders in the Company and resulted in the complete destruction of their voting rights. In seeking to counter Defendants' claims that the MegaPath Financing Transaction was the best and only alternative to bankruptcy, Binks alleges that shareholders were never given any discrete or detailed information

[26] Binks is not particularly careful with his descriptions of which of the Defendants he holds responsible for which set of alleged wrongs. Because of that, the Court is called upon to speculate from time to time as to which Defendants might plausibly be viewed as responsible for the particular conduct in question.

[27] Binks has also raised fiduciary duty claims surrounding the incorrect filing of paperwork with the FCC with respect to the transfer of control from DSL to MegaPath. The Court will not consider these claims here. They arise under federal regulatory law, not Delaware corporate law, and there is no assertion that the FCC was not satisfied with the corrected filing. In addition, the claim would likely be characterized as a derivative claim for which Binks no longer has standing to assert and, if not, would be a duty of care claim that DSL's § 102(b)(7) charter provision would exculpate as to the money damages now sought by Binks.

supporting the conclusion that DSL had no better alternative. In addition to claims related to the MegaPath Financing Transaction and the Merger, Binks brings other claims arising out of various allegedly wrongful actions in the years leading up to the Merger.

E. *The Claims for Relief*

Binks has identified the following causes of action: breach of fiduciary duty and aiding and abetting such a breach for failure to obtain the best transaction reasonably available by entering into the MegaPath Financial Transaction, which, as was foreseeable and inevitable, resulted in the Merger (Count I); breach of fiduciary duty and aiding and abetting such a breach in approving the MegaPath Financing Transaction (Count II); breach of fiduciary duty and aiding and abetting such a breach in diluting the DSL shareholders' equity through the MegaPath Financing Transaction (Count III); breach of fiduciary duty and aiding and abetting such a breach in approving the DunKnight Transaction (Count IV); corporate waste (Count V); breach of fiduciary duty under the entire fairness standard (Count VI); gross mismanagement by the Board and other Defendants involved in the management of DSL (Count VII); aiding and abetting breach of fiduciary duty (Count VII); fraud, against former DSL directors and VantagePoint principals William J. Marshall, James D. Marver, and Alan Salzman for failing to report accurately their full ownership in DSL in various filings required by the Securities

and Exchange Commission and/or for allegedly trading on material nonpublic information related to the Company (Count IX);[28] and breach of the implied obligation of good faith and fair dealing related to the grant of the dividends to holders of preferred stock following the issuance of notes to Deutsche Bank (Count X).[29]

Binks seeks money damages, including punitive damages, as well as a constructive trust to be imposed in order for "all defendants to account for all damages caused by them and all profits and special benefits and unjust enrichment they have obtained as a result of their unlawful conduct, including all salaries, bonuses, fees, stock awards, options, pay-outs, common stock sale proceeds, consulting and management fees, [and] transaction fees. . . ."[30] Binks also has a pending appraisal action related to the Merger.[31]

Defendants DSL.net Communications, Virginia, Inc., DSL.net Atlantic, LLC, Struwas, Kleinknecht, Keeler, Hartnett, and Gilbertson, along with the MegaPath Defendants (the "Moving Defendants"),[32] seek the dismissal of all claims against them on various grounds, including that the Board was entitled to

[28] Originally mislabeled in the Amended Complaint as Count VII.
[29] Originally mislabeled in the Amended Complaint as Count VIII.
[30] Compl., Wherefore Clause ¶ B.
[31] *Binks v. DSL.net, Inc.*, C.A. No. 3129-VCN.
[32] Defendant Marc R. Esterman, who was DSL's general counsel and helped to negotiate the MegaPath Financing Transaction, is also a Moving Defendant.

the protection of the business judgment rule, and that certain of the claims are barred by laches or a lack of standing following the Merger.

III. DISCUSSION

A. *The Applicable Standard*

The Moving Defendants' motion to dismiss is governed by Court of Chancery Rule 12(b)(6). A motion to dismiss for failure to state a claim upon which relief may be granted will only succeed where it appears with reasonable certainty that "under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[33] The standard is deferential to the plaintiff; in considering a motion to dismiss, the Court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint and must draw all reasonable inferences from such facts in favor of the plaintiff.[34] Nevertheless, a court "need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiffs' favor unless they are reasonable inferences."[35] Moreover, conclusory allegations are not accepted as true without specific supporting factual allegations.[36]

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[33] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).
[34] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).
[35] *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (citation omitted).
[36] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. Ch. 1995).

B. *The Fiduciary Duty Claims Based on the MegaPath Transaction and the Merger (Counts I – III)*

Binks brings a number of claims against the Moving Defendants for various breaches of fiduciary duties relating to the MegaPath Financing Transaction and the Merger. Specifically, Binks styles the fiduciary duty claims in three counts—that the Board breached its fiduciary duties: (1) by failing to obtain the best price reasonably available for shareholders in the context of a change in control transaction, as required under *Revlon* (Count I); (2) by approving the MegaPath Financing Transaction (Count II); and (3) by executing the MegaPath Financing Transaction and thereby diluting shareholder equity (Count III).

1. The Business Judgment Rule and *Revlon* Duties

Under Delaware law, courts apply a presumption that directors of corporations act "independently, with due care, in good faith and in the honest belief that [their] actions were in the stockholders' best interests."[37] This presumption, the "business judgment rule," is "[a]t the foundation"[38] and "[a]t the core of Delaware corporate law."[39] The business judgment rule operates to "protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments."[40] Delaware courts apply

[37] *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996).
[38] *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005).
[39] *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005).
[40] *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

the protections of the business judgment rule to decisions made by disinterested and independent directors acting in good faith and with due care.[41] "[W]here business judgment rule presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'"[42]

However, where a transaction constitutes a "change in corporate control," "*Revlon* duties" refocus the board's traditional fiduciary duties and require it to try in good faith to "seek the best value reasonably available to the stockholders."[43] Where the duty under *Revlon* applies, the Court's ordinarily deferential "rational basis" review gives way to an objective "reasonableness" standard of review, both to the process and the result, under which the Court evaluates whether the board has complied with its fundamental fiduciary duties.[44]

The Moving Defendants contend both that the Board is entitled to the protection of the business judgment rule with respect to the MegaPath Financing Transaction and that the Merger is not subject to the *Revlon* standard. Defendants cite the *Glassman* case which held that "appraisal is the exclusive remedy available

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[41] *See, e.g.*, *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[42] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).
[43] *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 48 (Del. 1994). *See also Malpiede v. Townson*, 780 A.2d 1075, 1083-84 (Del. 2001) ("*Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply. . . . [Instead,] *Revlon* emphasizes that the Board must perform its fiduciary duties in the service of a special objective maximizing the sale price of the enterprise.").
[44] *QVC*, 637 A.2d at 45. Nevertheless, "a court applying enhanced judicial scrutiny should be deciding whether the directors made *a reasonable* decision, not *a perfect* decision." *Id.*

to a minority stockholder who objects to a short-form merger."[45] Consequently, they argue, Counts I, II, and III should be dismissed. Binks counters that the Merger ought to be considered as part of a broader transaction that included the MegaPath Financing Transaction, and that, as such, the initial grant of Notes to MegaPath ought to render the entire arrangement subject to *Revlon* scrutiny. Unlike in traditional *Revlon* cases, Binks does not contest that another transaction would have been forthcoming but was either subsequently ignored or rebuffed by the Board. Instead, Binks argues generally that "if the Board had been independent and disinterested they could and would have made a similar deal with a party not interested in looting DSL.net and serving their own interests," pointing specifically to the $450 million tax loss carryforward "that would have been worth a great deal more than the $13 million DSL.net received."[46] Additionally, Binks suggests that "a bankruptcy would probably have been a better solution for DSL.net and its shareholders than the solution selected."[47]

2. Is *Revlon* Applicable?

It is, perhaps, easy to doubt the assumption that the MegaPath Financing Transaction—a debt placement that occurred more than six months before the short-form Merger and which was entered into without any express guarantee that

[45] *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001).
[46] Pl.'s Answering Br. in Opp'n at 3.
[47] *Id.*

the Merger would occur—should be assessed under any special standard. Yet, the Court is mindful that it is reviewing the efforts of a self-represented plaintiff, and it is not unreasonable to review the Amended Complaint as alleging that the short-form Merger was an inevitable and foreseeable consequence of the MegaPath Financing Transaction. As the Supreme Court in *QVC* pointed out, in determining whether the transaction constitutes a "change in control" for *Revlon* purposes, "the answer must be sought in the specific circumstances surrounding the transaction."[48] Inferring that the relevant events should be collapsed for analytical purposes into a single transaction is also consistent with this Court's earlier consideration of the issue:

> I assume for purposes of deciding this case, without deciding, that the granting of immediately exercisable warrants, which, if exercised, would give the holder voting control of the corporation, is a transaction of the type that warrants the imposition of the special duties and special review standard of [*Revlon*].[49]

This assumption arose out of the Court's recognition that *Revlon* duties may arise when a board, as here, "approves a transaction having a change in corporate control effect (. . . specifically, . . . where corporate action plays a necessary part in the formation of a control block where one did not previously exist)."[50]

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[48] *QVC*, 637 A.2d at 46.
[49] *Equity-Linked Investors L.P. v. Adams*, 705 A.2d 1040, 1055 (Del. Ch. 1997).
[50] *Id.*

Evaluating the MegaPath Financing Transaction under the *Revlon* standard also has the advantage of giving Binks the most favorable analytical framework for assessment of his claims. It additionally would make the fiduciary duty claims that comprise the core of the Amended Complaint at least arguably direct. If the MegaPath Financing Transaction were evaluated outside of the context of the short-form Merger, the Board's failures, assuming that there were any, might well be viewed as giving rise only to derivative claims which would have been beyond Binks's reach once the Merger occurred. For these reasons, the Court will assume, without deciding, that the MegaPath Financing Transaction is subject to review under *Revlon*.

Nevertheless, for the reasons set forth below, the Court concludes that the Board was independent and disinterested with respect to the MegaPath Financing Transaction, was well informed by independent advisors of the available alternatives to the Company besides its ultimate sale to MegaPath, and acted in good faith in arranging and committing the Company to that transaction, especially in light of the circumstances and the paucity of other options available to DSL. As such, the Board fully met its obligations under *Revlon*.

3. Considering the Board's Independence

The Amended Complaint does not suggest any facts beyond sweepingly general allegations that the Board was improperly interested in the MegaPath

transaction or otherwise that its members were so personally conflicted as to raise duty of loyalty issues. Binks broadly contends that the Board "was not independent and disinterested; indeed, they were incredibly interested and self serving."[51] In support of this contention, he maintains that two of the five directors serving on the Board at the time of the MegaPath Financing Transaction, Struwas and Kleinknecht, were compromised because both were associated with DunKnight, the debtholder whose notes were being paid off in the transaction.[52] In addition, Binks alleges that Struwas maintained certain business relationships with rival telecom companies that were linked to MegaPath.[53]

The Court will assume for purposes of this motion to dismiss that Struwas and Kleinknecht were not disinterested, as Binks avers. Nevertheless, Binks concedes that he does not challenge the independence or disinterestedness of Hartnett, Keeler, or Gilbertson, who constituted a majority of the Board and who also supported the MegaPath Financing Transaction.[54] Moreover, Binks does not allege that Struwas or Kleinknecht exercised control over these directors such that they should not be considered independent as a result of any undue influence.

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[51] Pl.'s Answering Br. in Opp'n at 3.

[52] Struwas was a minority stockholder in DunKnight and was also allegedly the CEO of DSL Internet Corporation, a rival telecommunications company controlled by DunKnight, or its affiliate, at the same time that he served as the CEO and chair of DSL. Am. Compl. ¶ 113.

[53] Binks alleges that Struwas was simultaneously the CEO and Chairman of yet another rival company, Supra Telecommunications and Information Systems Inc., which was a second-tier subsidiary of Columbia Capital, which, Binks alleges, was also the controlling stockholder in MegaPath. Pl.'s Answering Br. in Opp'n at 8-16.

[54] Pl.'s Answering Br. in Opp'n at 8.

To make the case that a board's decision is marred by improper interest and disloyalty, as Binks here contends, "a plaintiff must normally plead facts demonstrating 'that a *majority* of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director.'"[55] This Binks has failed to do. Thus, even assuming that Struwas and Kleinknecht were not independent, the Board's decision should still be entitled to the presumption of independence and disinterestedness.

4. Were the Independent Directors Adequately Informed?

Where a decision has been made by an independent and disinterested board, the burden on a plaintiff to plead an actionable *Revlon* claim is substantial. Director liability for breaching the duty of care "is predicated upon concepts of gross negligence."[56] Presumably, any duty of care violation by the Board would also be exculpated by the § 102(b)(7) provision in DSL's charter. Likewise, an "extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that the disinterested directors were intentionally disregarding their

[55] *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (citation omitted). "Directorial interest exists whenever divided loyalties are present, or a director has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders." *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984). However, for the interest to be a "disabling" interest, it must be "of such subjective material significance to that particular director that it is reasonable to question whether that director objectively considered the advisability of the challenged transaction to the corporation and its shareholders." *Orman*, 794 A.2d at 25 n.50.

[56] *McMullin v. Beran*, 705 A.2d 910, 921 (Del. 2000).

duties."[57] Facially, the facts of the Amended Complaint do not meet this high standard sufficient to allege a breach by the Board of its duties of care or loyalty, or a lack of good faith in considering the MegaPath Financing Transaction. DSL was suffering from severe financial distress, which even Binks concedes.[58] The Board enlisted an ostensibly independent financial advisory firm to consider the various options that the Company could pursue. The financial advisor concluded, after a six-month long study, that the only option available that would avoid bankruptcy was the MegaPath Financing Transaction. The Board reasonably concluded that shareholders were unlikely to receive any value for their shares should the Company enter into bankruptcy and, thus, that transactions predicated on such an action would not be in their best interest.

Binks argues, however, that "a reasonable inference is that [the outside independent directors] would not have voted the way they did unless they were given materially false or misleading information or if information was concealed or withheld from them."[59] Otherwise, "if they [were informed], then a reasonable inference is that they were interested."[60]

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[57] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (quoting *In re Lear Corp. S'holders Litig.*, 967 A.2d 640, 654-55 (Del. Ch. 2008)). Moreover, "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Lyondell*, 970 A.2d at 243.
[58] Pl.'s Answering Br. in Opp'n at 2-3.
[59] *Id.* at 8.
[60] *Id.*

The material interest of a number of directors *less* than a majority may rebut the presumption of a disinterested board if "an interested director fail[s] to disclose his interest in the transaction to the board *and* a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction."[61] Binks contends that the independent directors, if truly independent, would not have blessed the MegaPath Financing Transaction had they been aware of Struwas's alleged connections to MegaPath or the alleged relationship between MegaPath's President and CEO Young and Bank Street, the Company's financial advisor.

With respect to Young, as the Moving Defendants point out, "the Amended Complaint is completely devoid of any facts to support that Mr. Young played any role with respect to the DSL.net Board's consideration of the transactions, much less such a role as to support a breach of fiduciary duty claim against the directors."[62] Moreover, even if one assumes that Young was a special advisor to Bank Street's subsidiary at the time that Bank Street was preparing recommendations for the Board, a fact that Binks does not explicitly state, this Court will not rely on this fact alone as support for the otherwise conclusory allegation that Young successfully employed this relationship to completely

[61] *Orman*, 794 A.2d at 22-23 (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) (additional internal citations omitted)).
[62] Moving Defs.' Reply Br. in Support of their Mot. to Dismiss at 4-5.

subvert Bank Street's professional obligations as a financial advisor for his own benefit. Thus, the Court concludes that the fact of Young's alleged professional connection to a subsidiary of the Board's financial advisor would not be considered by a reasonable director to be a significant fact in their evaluation of the transaction.[63]

Likewise, Struwas's alleged connections to supposed competitors of DSL, including a competitor whose chief stockholder was also the chief stockholder in MegaPath, is not sufficiently material to constitute a significant fact to a reasonable director, considering the transaction in light of the fact that it was prepared and presented by Bank Street, not Struwas, and that no viable alternative option appeared available to the Company.

5. Did the Board Satisfy its Duties Under *Revlon*?

"There are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties."[64] Where a board is found to be independent, disinterested, and adequately informed, the decision to enter into a change in control transaction should be upheld unless the directors "utterly failed to attempt to obtain the best

[63] Furthermore, even if this would be a significant fact, it would raise only a duty of care claim—one to be exculpated by DSL's § 102(b)(7) provision—not a duty of loyalty claim, or otherwise undermine the Court's assessment of the Board's independence and disinterestedness, because it does not impinge upon the disinterestedness or independence of the Board but merely upon the reasonableness of its reliance on its outside advisor.

[64] *Lyondell*, 970 A.2d at 243. *See also id.* at 242 ("There is only one *Revlon* duty—to 'get the best price for the stockholders at a sale of the company.' No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control.") (citation omitted).

sale price."[65] In the Court's thorough search of the jumbled pleadings of the self-represented litigant and after drawing all inferences in his favor, the Court cannot conclude that Binks has adequately pleaded a *Revlon* claim or provided any other rationale for why the Board's business judgment should not be upheld.

Binks suggests that bankruptcy—the only other option apparently available—would have been preferable. However, "[b]ecause there can be several reasoned ways to try to maximize value, the court cannot find fault so long as the directors chose a *reasoned* course of action."[66] Here, the Board's conclusion that the MegaPath Financing Transaction was preferable to bankruptcy was within its business judgment, and Binks's conclusion otherwise is not sufficient grounds to base a claim that the Board "utterly failed" to obtain the best price for shareholders.

The Court's decision in the *Equity-Linked Investors* case is instructive on this point. In that case, preferred shareholders questioned the judgment of the board of a company on the "lip of insolvency"[67] that was required "to complete a financing transaction rapidly, or else face bankruptcy."[68] The board received an offer for convertible financing, much like in this case. The preferred shareholders, who, because of their favorable liquidation preference, preferred to have the

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[65] *Id.* at 244.
[66] *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 115 (Del. Ch. 2007).
[67] *Equity-Linked Investors*, 705 A.2d at 1041.
[68] *Id.* at 1051.

company liquidated and the assets distributed, made an offer comparable or perhaps superior to the third-party's offer, which the board declined.

The Court concluded that a board's obligation to "maximize[e] the present value of the firm's equity," was "not obvious" where "(1) the transaction is not a merger or tender offer with a 'price' per share . . . and (2) the transaction (or alternatives now advanced) are not otherwise easily reduced to a present value calculation."[69] As such, the board could have reasonably concluded that pursuing a course that maintained the possibility of further benefits from the company's assets, including its intellectual property, was arguably superior to the liquidation of the firm. The Court noted the difficulty in applying the *Revlon* test to such circumstances, holding:

> [U]nlike two competing cash transactions or transactions in which widely traded securities are offered, the alternatives that plaintiff poses are rich with legitimate, indeed unavoidable, occasions for the exercise of good faith business judgment. Where judgment is inescapably required, all that the law may sensibly ask of corporate directors is that they exercise independent, good faith and attentive judgment, both with respect to the quantum of information necessary or appropriate in the circumstances and with respect to the substantive decision to be made.[70]

The Court noted further that, given the fact that the other bidder sought to retain the company as a going concern, "[e]ven if one were to believe that the preferred stock's offer that came before trial should be accepted as a bona fide alternative to

[69] *Id.* at 1058.
[70] *Id.*

reach the company's long-term goal, there would be sufficient substantive differences between [the winning] proposal and the only alternative that might have been available, to permit the judgment of the independent board to stand."[71] Thus, the Court concluded that the board had acted reasonably in pursuit of the "highest achievable present value" of the common stock in concluding in good faith that "the corporation's interests were best served by a transaction that it thought would maximize potential long-run wealth creation."[72] Similarly, because Binks has failed to plead adequate grounds for inferring that the Board was anything other than independent, disinterested, and sufficiently well-informed, his personal opinion that bankruptcy would have been superior cannot be enough to sustain a *Revlon* claim.

Accordingly, Counts I, II, and III are dismissed with respect to the Board.

C. *The Aiding and Abetting Claims (Counts I – III & Count VIII)*

In conjunction with his first three counts—and in its own separate count (Count VIII), Binks raises aiding and abetting claims against all other Defendants with respect to the alleged fiduciary duty breaches by the Board. The Moving Defendants seek to have the count dismissed with respect to them.[73]

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[71] *Id.* at 1058-59.
[72] *Id.* at 1059.
[73] The Moving Defendants interpreted Binks's aiding and abetting claim as implicating only MegaPath and, thus, focused their argument on why such claims should be dismissed as to MegaPath alone. Given the scattershot nature of the allegations in the Amended Complaint and the lack of clarity as to which Defendants each claim pertains, however, such a premise cannot

The standard for an aiding and abetting claim is a stringent one, one that turns on proof of scienter of the alleged abettor. In order to establish a valid aiding and abetting claim, the plaintiff must plead facts that would show: (1) the existence of a fiduciary relationship; (2) that the fiduciary breached its duty; (3) that a defendant, who is not a fiduciary, knowingly participated in the breach; and (4) damages to the plaintiff that resulted from the concerted action of the fiduciary and the non-fiduciary.[74]

Here, however, the Court has not perceived any underlying breach of fiduciary duty from which to derive liability against the relevant Moving Defendants. Moreover, this Court has consistently held that "evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries."[75] Binks has not alleged any facts that the MegaPath Financing Transaction was anything other than an arm's-length negotiation between MegaPath and the Company.[76] As such, Count VIII is dismissed with respect to the Moving Defendants.

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safely be assumed, and the Court will review the aiding and abetting claims as if alleged against all of the Moving Defendants.

[74] *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

[75] *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9, 1998).

[76] Binks asserts that "[t]he Amended Complaint makes it abundantly clear that numerous relationships abounded, and MegaPath was inextricably intertwined with DSL.net, as well as the

D. *The Conspiracy/Entire Fairness Claim (Count VI)*

1. MegaPath's Actions as a Controlling Shareholder

Count VI of the Amended Complaint alleges that "[a]s a result of the conspiracy between MegaPath and VantagePoint, MegaPath assumed the fiduciary duties owed by a controlling shareholder. . . . The original Transaction is therefore a Transaction between VantagePoint and a controlling stockholder, which must then be reviewed for entire fairness."[77]

A shareholder does not owe fiduciary duties to the company's other shareholders unless "it owns a majority interest or *exercises control* over the business affairs of the corporation."[78] Only those transactions that occur at the behest of an actual—not a potential—controlling shareholder may be subject to entire fairness review.[79] As Binks has failed to allege any facts in support of his allegations that MegaPath controlled the Board before the signing of the Purchase Agreement, the only claims that might be subject to entire fairness review are those that occurred between the point in time that MegaPath became DSL's controlling shareholder (either with the conversion of the first of the Notes on January 1, 2007,

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other entities." Pl.'s Answering Br. in Opp'n at 2. However, the Court has been unable to locate any such allegations in Binks's lengthy Amended Complaint.

[77] Am. Compl. ¶ 229.

[78] *Ivanhoe Partners v. Newmont Mining Corp.*, 555 A.2d 1334, 1344 (Del. 1987).

[79] Binks's assertions that MegaPath owed DSL shareholders fiduciary duties prior to obtaining a controlling position "[b]y virtue of its ability to control the future of DSL" and that "MegaPath's fiduciary duties began when it affirmatively sought to control DSL's fate" misstate Delaware law. Am. Compl. ¶ 201.

or perhaps upon the appointment of its representatives to the Board in August 2006), and when the Merger was ultimately effectuated in March 2007.

In either case, the only event that occurred during the relevant window was the vote on the Charter Amendment on January 30, 2007. However, the Charter Amendment was first approved by an independent and disinterested Board in August 2006, before the appointment of MegaPath's representatives. MegaPath's only involvement with the shareholder vote was in voting in favor of its passage. Whatever fiduciary duties it owed, "even a majority stockholder is entitled to vote its shares as it chooses, including to further its own financial interest."[80]

2. Alleged Conspiracy Between MegaPath and VantagePoint

Binks also seeks to bring the MegaPath Financing Transaction under the entire fairness standard by asserting the existence of a conspiracy between VantagePoint and MegaPath to transfer ownership of DSL to MegaPath for "for no or little consideration."[81] To sustain a claim for civil conspiracy, a plaintiff must show the combination of two or more persons for an unlawful purpose, or a

[80] *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996) (citing various Delaware cases for support).

[81] Pl.'s Answering Br. in Opp'n at 19. Presumably, alleging such conspiracy would allow the Court to view the transaction as between a controlling shareholder—in this case, VantagePoint—and a third party, thus subject to entire fairness review. The conspiracy allegation is necessary as VantagePoint was no longer the controlling shareholder at the time of the MegaPath Financing Transaction.

combination for the accomplishment of a lawful purpose by unlawful means.[82] Further, the plaintiff must establish facts suggesting "knowing participation" among the conspiring partners. Scienter can be established by showing: (1) the participation of two or more persons; (2) some object to be accomplished; (3) a meeting of the minds on the object or course of action; (3) one or more overt acts; and (4) damages as a proximate result thereof.[83]

However, Binks has failed to allege adequately any relationship between VantagePoint and MegaPath beyond *ipse dixit* speculation, much less any understanding or overt combination between them to defraud DSL's shareholders.[84] Indeed, this allegation requires viewing the DunKnight Transaction—which eliminated VantagePoint's equity stake in DSL nine months prior to the MegaPath Financing Transaction—as a ruse perpetrated in furtherance of this conspiracy, to which Binks has provided absolutely no factual support

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[82] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1238 (Del. Ch. 2001), *rev'd on other grounds*, 817 A.2d 149 (Del. 2002).

[83] *Carlton Inv. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at *15 n.11 (Del. Ch. Nov. 21, 1995).

[84] The only allegations linking the two entities are Binks's statement that the officers and directors of MegaPath "were linked to VantagePoint and DSL.net," and the fact that MegaPath had been a wholesale customer of DSL since 2003, during which time VantagePoint was the Company's controlling shareholder—though MegaPath's purchases of services from DSL never exceeded 1% of DSL's net revenues in any one year that DSL provided such services to MegaPath. Am Compl. ¶¶ 15, 130(d). In addition, Binks raised at oral argument the contention that MegaPath was located in the same business complex as a real estate investment firm owned by an individual who lived in the same neighborhood as Salzman, then-managing director of VantagePoint. Tr. at 23-24. Even if true, this is not a fact that would support a claim for conspiracy.

beyond mere speculation and innuendo.[85] Thus, Count VI, Binks's claim for breach of fiduciary duty under the entire fairness standard, is also dismissed.

E. *The Fiduciary Duty Claim Based on the DunKnight Transaction (Count IV)*

The Moving Defendants additionally seek dismissal of Binks's breach of fiduciary duty claim regarding the DunKnight Transaction on the grounds that it does not state a cognizable claim against any of them. Count IV asserts that VantagePoint—not one of the Moving Defendants—was, at the time of the DunKnight Transaction, "the controller of DSL, and therefore owed fiduciary duties to DSL and to the DSL shareholders,"[86] which duties it allegedly violated by "(i) causing DSL to pay it amounts that were vastly in excess of what DSL actually owed; and (ii) causing DSL to enter into the DunKnight transaction. . . ."[87] Binks asserts that the Moving Defendants should not be dismissed from this Count,

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[85] Binks offers two factual allegations in support of his contention that the DunKnight Transaction was part of an overall conspiracy between VantagePoint and MegaPath to acquire DSL at a heavy discount. The first is that, shortly after the DunKnight Transaction, DunKnight agreed to release its $3.3 million lien on the assets and capital stock of a DSL subsidiary that the Company wished to sell. Binks asserts that such a release would not have been rational for a creditor of a company facing potential bankruptcy unless the creditor possessed insider information: "Kleinknecht did in fact have that insider information and knew he would be receiving a great sum of money through his the [sic] nine month financing, which again, was a part of the scheme alleged." Am. Compl. ¶ 79. The second allegation is that the DunKnight notes were ultimately paid off following the MegaPath Financing Transaction "at nearly face value." Binks suggests that this is "suspect" because the proceeds from the DunKnight Transaction had previously paid off other debt at a substantial discount, and DSL should have been able to negotiate a similar discount with the DunKnight entities. Am. Compl. ¶ 193. Neither of these claims amounts to anything more than unfounded speculation and innuendo; therefore, neither is entitled to any judicial deference.

[86] Am. Compl. ¶ 216.

[87] Am. Compl. ¶ 221.

which is styled "Against All Defendants," because Count IV "sets forth numerous well pleaded, specific facts, alleging a breach of fiduciary duty, and aiding and abetting, against all Defendants. . . ."[88]

Any breach of fiduciary duty claims arising out of the DunKnight Transaction were necessarily extinguished by the Merger, thus Binks no longer has standing to bring them. As noted previously, Binks has not alleged necessary facts to suggest that the DunKnight Transaction—which, at base, is an allegation that the Board overpaid for financing—ought to be considered as part of the MegaPath Financing Transaction and thereby not be barred by the Merger.[89] As such, Count IV is dismissed as to the Moving Defendants.

F. *The Corporate Waste Claim (Count V)*

Binks brings a claim for corporate waste against the Board and MegaPath on the grounds that DSL issued MegaPath over 2.6 billion of its shares for "no consideration" other than the loan that "DSL is obligated to repay to MegaPath."[90] The Moving Defendants assert that MegaPath did not owe fiduciary duties to the shareholders and, furthermore, that the claim is derivative and, therefore, extinguished by the Merger.

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[88] Pl.'s Answering Br. in Opp'n at 17.
[89] *See supra* note 85.
[90] Am. Compl. ¶ 225. Presumably, this refers to the $13 million non-convertible note.

Defendants are correct that MegaPath was an unaffiliated third-party before the MegaPath Financing Transaction, and, thus, owed no fiduciary duties to the DSL shareholders that could be breached in the transaction. Furthermore, to sustain a claim of corporate waste against the Board, Binks "must shoulder the burden of proving that the exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'"[91] Given that the Court has concluded that Binks has not adequately alleged that the Board failed to meet its obligations under *Revlon* with respect to this transaction, this would seem to preclude a claim for corporate waste on the same facts, which arises "only in the rare 'unconscionable case where directors irrationally squander or give away corporate assets.'"[92]

Finally, Binks's claim for corporate waste is most appropriately treated as a derivative claim therefore extinguished by the Merger, as Binks no longer had standing to bring it.[93] Thus, the claim for corporate waste is appropriately dismissed on these grounds, as well.

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[91] *In re Walt Disney*, 906 A.2d at 74 (citations omitted).

[92] *Id. See also Steiner v. Meyerson*, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995) ("If under the circumstances any reasonable person might conclude the deal made sense, then the judicial inquiry ends.").

[93] *See Agostino v. Hicks*, 845 A.2d 1110, 1124 (Del Ch. 2004) ("[Q]uestion[ing] the adequacy of consideration the Company received . . . [is] undoubtedly a derivative claim."). Binks's repeated invocation of *Gatz v. Ponsoldt*, 2007 WL 1120338 (Del. Apr. 16, 2007), for the notion that courts may "[l]ook[] through the form of the transaction to its substance" and thereby find direct claims where derivative claims only would typically survive is unavailing because, here, there is

G. *The Gross Mismanagement Claim (Count VII)*

Binks brings a claim against the "DSL Defendants" (presumably the Board and those former directors named as Defendants) for gross mismanagement on the grounds that they "abandoned and abdicated their responsibility and duties with regard to prudently managing the business of DSL in a manner consistent with the duties imposed upon them by law," in breach of "duties of due care, diligence and candor. . . ."[94] This claim likewise fails on the grounds that it is a derivative claim and, thus, barred by the Merger,[95] and because Binks has failed to allege facts sufficient to rebut the business judgment rule during any relevant period. Further, those claims based upon conduct that occurred prior to November 2005 are barred by laches.[96]

H. *The Fraud Claim (Count IX)*

The Moving Defendants seek to dismiss Binks's fraud claim (Count IX) on the grounds that it does not allege a claim against any of them.[97] Binks concedes

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no substantive reason why the derivative claims at issue here ought to be considered direct claims.

[94] Am. Compl. ¶ 244.

[95] *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005) (holding that "claims for gross negligence and failure to provide competent and active management are clearly derivative").

[96] Breach of fiduciary duty claims for damages are subject to the three-year statute of limitations under 10 *Del. C.* § 8106, which is applied by analogy to proceedings in equity. *See, e.g.*, *Bokat v. Getty Oil Co.*, 262 A.2d 246, 250 (Del. 1970).

[97] Count IX specifically discusses Binks's SEC disclosure violations against Salzman, Marshall, and Marver and insider trading allegations against Salzman and Marver. More accurately, the Amended Complaint's narrative describes such allegations, though Count IX only references the disclosure violations alleged against Salzman. Am. Compl. ¶¶ 68-76, 250-51.

this deficiency but asserts that "the Amended Complaint is full of allegations, suggesting the presence of fraud against many of the other Defendants," and now seeks leave to further amend the Amended Complaint to add such counts.[98] For the reasons discussed in Section III.L., *infra*, Binks's request to amend the Amended Complaint "to allege facts supporting fraud allegations against other defendants"[99] is denied, and Count IX is dismissed with respect to the Moving Defendants.

I. *The Claim for Breach of Implied Obligation of Good Faith and Fair Dealing (Count X)*

The Moving Defendants additionally seek to dismiss Binks's claim for breach of good faith and fair dealing (Count X) with respect to the payment of certain dividends in 2003 and 2004, allegedly in violation of the DGCL. This claim is neither a direct claim nor a claim eligible for equitable tolling;[100] thus, it is dismissed because of the lack of standing and laches.

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[98] Pl.'s Answering Br. in Opp'n at 21.

[99] *Id.*

[100] Binks asserts that he "reasonably relied on information provided by the Defendants, raising the reasonable inference that he did not know of the Breach of Good Faith and Fair Dealing until much later." Pl.'s Answering Br. in Opp'n at 22. However, given that all of the relevant information was publicly available at the time of the violation and not concealed from Binks, and that he could have informed himself of the relevant facts through the exercise of reasonable diligence, it cannot be said that any such reliance by Binks was reasonable such that equitable tolling should apply. At any rate, this is also clearly a derivative claim extinguished by the Merger.

J. *Possible Disclosure Claims*

While not included in a separate count, Binks has included allegations throughout the Amended Complaint that the Board failed to disclose certain material information in the Company's January 2007 proxy. Specifically, Binks argues that the proxy statement "failed to disclose facts necessary for an informed approval of the Merger."[101] The information that Binks asserts DSL failed to disclose to shareholders included: (1) "detailed information supporting the conclusion that DSL had no better alternative,"[102] including a copy of the report that Bank Street prepared for the Board, as well as the names of the alternative suitors that had submitted bids predicated on DSL filing for bankruptcy, the nature of their proposed transactions, and the reasons the Board did not pursue further discussions with these parties; (2) information regarding the financial and operational status of Company, including the number of DSL's customers and subscribers and the value of the Company's real estate and other assets (including its tax loss carryforward), to determine whether the consideration paid by MegaPath was adequate;[103] (3) "material facts concerning BankStreet [sic], who was presented as a disinterested party, but in fact was very much conflicted in its

[101] Am. Compl. ¶ 130.
[102] Am. Compl. ¶ 199.
[103] *Id.*

efforts to find a new business partner for DSL.net,"[104] and additional facts about the prior business relationship between MegaPath and DSL;[105] and (4) information about the value shareholders would get for their shares, including the price that MegaPath intended to pay in the Merger, as well as the value shareholders could receive through a bankruptcy sale.[106] Binks also claims that the proxy was inconsistent regarding MegaPath's ultimate intentions for completing the Merger.[107]

As the Moving Defendants point out, however, many of the facts allegedly undisclosed were, in fact, included in DSL's proxy statement.[108] Moreover, the information that Binks seeks relates almost exclusively to the MegaPath Financing Transaction and the propriety of entering into it. As the proxy statement was distributed in connection with the Charter Amendment, not the shareholder approval of a short-form Merger, the only information necessary to provide to the shareholders dealt with the suitability of expanding the number of DSL's authorized shares. Finally, even if the Court determined that the Amended

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[104] Am. Compl. ¶ 130.
[105] Am. Compl. ¶ 130(d). Specifically, the fact that MegaPath "held DSL.net's second largest wholesale agreement to provide services at a wholesale price," despite the fact that this relationship accounted for less than 1% of DSL's revenues in any given year and that this wholesale agreement and the monetary amounts involved therein were disclosed in the proxy.
[106] Am. Compl. ¶ 130(c).
[107] Am. Compl. ¶ 131.
[108] Whether these disclosures were consistent with Binks's own personal theories is of no consequence.

Complaint adequately alleged that the Board failed to disclose certain material facts—which it has not—the only available remedy for these supposed disclosure violations, supplemental disclosure, would now "be an exercise and futility and frivolity."[109] Thus, any disclosure claims otherwise successfully pleaded by Binks are also dismissed.

K. *Dismissal of Young under Rule 12(b)(2)*

The Moving Defendants seek to dismiss all counts against Young pursuant to Court of Chancery Rule 12(b)(2) on the grounds that the Court lacks personal jurisdiction over him.[110] While Young is the President and CEO of MegaPath, a Delaware corporation, MegaPath's principal place of business is California, where Young resides. Defendants assert that Young "does not conduct business in Delaware, and does not maintain continuous and systematic contacts with Delaware."[111]

In order to exercise personal jurisdiction over a nonresident defendant, the Court must determine: (1) that there is a statutory basis for exercising such jurisdiction—typically the Delaware long-arm statute; (2) that subjecting the nonresident defendant to jurisdiction in Delaware would not violate the Due

[109] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362 (Del. Ch. 2008).
[110] Although the Court has concluded that no substantive claim survives against Young, it is, nonetheless, appropriate to consider whether the Court could exercise personal jurisdiction in the event that it is at some point determined that there is a potentially viable claim against him.
[111] Moving Defs.' Opening Br. in Support of their Mot. to Dismiss at 27.

Process Clause of the Fourteenth Amendment.[112] Under Rule 12(b)(2), the burden rests on the plaintiff to show a *prima facie* basis for the Court's exercise of personal jurisdiction; nevertheless, "when no evidentiary hearing has been held, the [plaintiff's] burden is a relatively light one. . . ."[113]

Binks seems to suggest that Young is subject to personal jurisdiction under our long-arm statute. While our courts extend the statute's reach as far as the Constitution permits in establishing personal jurisdiction over a nonresident defendant,[114] strict compliance with the statutory provisions of 10 *Del. C.* § 3104 is, nevertheless, still necessary.[115] Because of Young's lack of presence in Delaware, Binks must look to Section 3104(c)(4), which permits the Court to extend personal jurisdiction over a defendant for tortious acts where that defendant "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State."[116]

Binks claims that "the Amended Complaint is full of allegations alleging tortious injuries, solicitations for business, engagements in other persistent courses of conduct in the State" and that Young "derives substantial revenue from services,

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[112] *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 768-69 (Del. 1986).
[113] *Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003).
[114] *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).
[115] *See, e.g.*, *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *3 (Del. Ch. July 10, 1991).
[116] 10 *Del. C.* § 3104(c)(4).

or things used or consumed in the State. . . ."[117] These protestations notwithstanding, the Court cannot locate a single allegation that Young personally engaged in any persistent course of conduct within the physical boundaries of the State of Delaware anywhere in Binks's lengthy Amended Complaint.[118] Thus, the Court will not exercise personal jurisdiction over Young.

L. *Moving Defendants' Final Motions and Binks's Request for Leave to Amend*

The Moving Defendants also seek to dismiss all claims against certain corporate entities on grounds that no claims were asserted against these Defendants other than fiduciary duty claims that cannot stand, and, with respect to a subset of these companies, on the grounds that they no longer exist as corporate entities. The Moving Defendants also seek to dismiss claims against the present and former directors of DSL on the grounds that they are shielded from monetary liability by DSL's § 102(b)(7) charter provision. In light of the Court's preceding conclusions dismissing all claims that could have ensnared these entities, there is no need to consider these arguments separately. To avoid any confusion, however, it is clear, and the Court so concludes, that no viable claims against any of the Moving Defendants remain.

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[117] Pl.'s Answering Br. in Opp'n at 23.

[118] Binks suggests that MegaPath's recent agreement to provide telecommunications services to DuPont, whose headquarters are located in Delaware, could provide the necessary jurisdictional hook for Young, and suggests that he could easily amend the Amended Complaint to add such allegations. However, the existence of a business relationship between a defendant's employer and a company located within the State's boundaries, by itself, cannot provide the necessary contacts to satisfy our long-arm statute and the demands of due process.

Taking into account the various deficiencies in the Amended Complaint identified by the Moving Defendants in their motion to dismiss, Binks requests leave to further amend the Amended Complaint to remedy such defects, and suggests that he would be successful on many of the claims dismissed here if given the opportunity to plead additional facts against the Moving Defendants. Binks's request is denied. He has already been granted leave to amend the Amended Complaint once before, and the current version is a narrative more than 100 pages long. The Court is skeptical that what the Amended Complaint lacks is a larger body of factual allegations. Furthermore, there is no reason to believe that any of the dismissed claims would be salvageable if simply framed differently.[119]

IV. CONCLUSION

For the foregoing reasons, the Moving Defendants' motion to dismiss is granted. An implementing order will be entered.

[119] *See* Ct. Ch. R. 15(aaa). In short, Binks has not shown good cause why the dismissal of all claims against the Moving Defendants should not be with prejudice.