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Delaware Court of Chancery Grants Summary Judgment Dismissing Breach of Fiduciary Duty Claims In Absence of Evidence of Directors' "Conscious Disregard" of Fiduciary Duties

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In In re Answers Corp. Shareholders Litigation, C.A. No. 6170-VCN, 2014 WL 463163 (Del. Ch. Feb. 3, 2014), the **Delaware Court of Chancery** (Noble, V.C.) granted summary judgment in favor of defendants in a stockholder class action for breach of fiduciary duty arising out of the merger of Answers Corporation ("Answers" or the "Company") with AFCV Holdings, LLC ("AFCV"). Because the undisputed material facts showed that a disinterested majority of the Board of Directors approved the transaction, plaintiffs were required to offer evidence that the Board consciously acted in bad faith or was controlled by an interested party to survive summary judgment. Plaintiffs were unable to do so. The *Answers* decision highlights the high burden stockholder plaintiffs face to proceed with breach of fiduciary duty claims where a merger is approved by an independent/non-controlled board, even where the sale process may have been flawed. As the court explained, there is a vast difference between "a flawed inadequate effort to carry out fiduciary duties and a conscious disregard for them."

Answers was a publicly traded Delaware corporation focused on the questions and answers space online. Approximately 90% of the website's traffic and 75% of its revenue came from Google. In March 2010, AFCV, a portfolio company of a private equity firm with a focus on social media and online information resources, submitted an expression of interest to members of the Answers board concerning a possible business combination. In September 2010, AFCV sent Robert Rosenschein, the Company's CEO, a letter of intent proposing to acquire Answers for between $7.50 and $8.25 per share. The Board eventually obtained an offer of $10.25 per share, but refused to grant AFCV exclusivity while it continued to evaluate other alternatives and strategic buyers.

While negotiations were proceeding, the Company's financial conditions improved significantly when Answers announced its fourth quarter results for 2010. In January 2011, the financing committee of the Board recommended attempting to increase the offer price beyond the pending $10.25 per share, but to accept that amount if no further concessions on price were obtained. AFCV responded with its best and final offer at $10.50 per share. After noting that there were no other offers of the table and recognizing that Google continued to significantly threaten the Company's core business, the Board unanimously approved the proposed transaction.

Shortly after the announcement of the merger agreement, several stockholder plaintiffs filed complaints in the Delaware Court of Chancery challenging the transaction. Plaintiffs alleged that Rosenschein (and two other directors) were conflicted and controlled the negotiation process. Plaintiffs also alleged that the members of the Board breached its fiduciary duties by acting in bad faith to sell Answers before its rising stock price would exceed AFCV's offer by (1) purposefully engaging in a limited shopping process, (2) failing to act in the interest of the Company's public stockholders after circumstances had changed to indicate the offer price was too low and (3) exerting willful blindness by ignoring alternatives to the AFCV transaction.

The court granted defendants' motion for summary judgment. The court recognized that a disinterested majority of the Board approved the transaction. Thus, to survive summary judgment, plaintiffs were required to show that the Board consciously acted in bad faith or that it was controlled by an interested party. Plaintiffs failed to do so. The directors submitted evidence that they fielded a variety of unsolicited offers and participated in numerous meetings where they discussed transaction alternatives. Despite discussions with at least seven other possible acquirers, nobody else made a credible offer to acquire Answers. The directors also caused the Company's financial advisor to perform a market check. Moreover, the directors actively negotiated with AFCV on price. This evidence undermined any assertion of bad faith.

The court discounted plaintiffs' contention than an email where a director stated that the value of Answers could be as much as $1.50 higher than AFCV's $10.25 offer price showed "bad-faith" by recognizing that the Board had plausible business concerns regarding the stability and future success of the Company tied to its reliance upon Google for traffic and revenues. Plaintiffs also ignored the fact that the Board secured additional merger consideration as a result of the Company's improving financial condition. As the court explained:

> Plaintiffs' proffered evidence does not create a genuine issue of material fact. Evidence based upon a few isolated quotes stating the deal was accelerated or reflecting one director's belief, or perhaps mere bargaining position, of the Company's value does not state a claim for bad faith in this context. Such considerations are within the purview of a disinterested Board . . . . [N]o allegations have been made concerning the Board's motives for favoring AFCV as a bidder or presenting some other motive for failing to maximize shareholder value.

Ultimately, although plaintiffs argued a "variety of ways in which they believe the process could have been better conducted, they offer no evidence of that extreme set of facts required to show that the board utterly failed to comply with its duties."

The court also rejected plaintiffs' claim that Rosenschein and two other directors dominated and controlled the Board to such a degree as to render it not independent.

The decision in *Answers* confirms that stockholders bear a high burden when challenging a disinterested/non-controlled board's decision to approve a strategic transaction. When faced with non-exculpated duty of loyalty claims, Delaware courts will accept a less-than-optimal shop process as long as the directors did not act with a "conscious disregard" of their duty under*Revlon, Inc. v.*

MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986) to maximize stockholder value in a change-in-control transaction.

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