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Case No. 1577-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GLOBIS PARTNERS, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1577-VCP
	)	
PLUMTREE SOFTWARE, INC., JOHN KUNZE, JOHN DILLON, RUPEN DOLASIA, DAVID PRATT, JAMES RICHARDSON, BERNARD WHITNEY and BEA SYSTEMS, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 29, 2007
Decided: November 30, 2007

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PARSONS, Vice Chancellor.

Plaintiff brings this action directly against certain directors of Plumtree Software, Inc., Plumtree itself, and BEA Systems, Inc. for breach of fiduciary duties in connection with a merger of Plumtree with and into BEA. The action is currently before the Court on Defendants' motions to dismiss for failure to state a claim. For the reasons stated in this Memorandum Opinion, I grant Defendants' motions to dismiss.

I. BACKGROUND

A. The Parties

Plaintiff, Globis Capital Partners, L.P., was the owner of common stock of Plumtree.[1] Plaintiff brings this action on its own behalf and as a class action on behalf of all common stockholders of Plumtree.

Defendant Plumtree is a Delaware corporation headquartered in San Francisco, California. Plumtree was engaged in the development, marketing, and sale of software products used in the deployment of World Wide Web applications. Plumtree's Enterprise Web Suite combined portal, content management, collaboration, integration, and search technologies.

Defendant BEA is an enterprise infrastructure software company headquartered in San Jose, California. BEA provides "standards-based platforms to accelerate the secure flow of information and services."[2]

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[1] 2d Amend. Class Action Compl. ("Complaint") ¶ 1. The facts herein are drawn from the well pled allegations in the Complaint and certain documents the Complaint incorporates by reference.

[2] *Id.* ¶ 3.

Defendant John Kunze was President, Chief Executive Officer, and a Director of Plumtree. Defendants John Dillon, Rupen Dolasia, David Pratt, James Richardson, and Bernand Whitney, together with Kunze, comprised the entire six-member Plumtree Board that approved the merger.[3] I will refer to these individuals collectively as the Individual Defendants.

B. FACTS

1. BEA's acquisition of Plumtree

BEA's courtship of Plumtree began in December 2004 when Alfred Chuang, chairman and chief executive officer of BEA, called Kunze and continued until mid-2005.[4] Matters progressed, and by January 10, 2005, Plumtree and BEA signed a confidentiality agreement. Plumtree, with the assistance of its financial advisor, shopped itself around to other strategic buyers without generating any interest. By late March 2005, BEA communicated to Kunze an expectation of an offer between $5.35 to $5.50 per share. On March 31, 2005, Plumtree's board formed a mergers and acquisitions committee, composed of Dolasia, Richardson, and Kunze. By mid-April, Kunze conveyed to BEA that Plumtree would proceed with a business transaction at a price of $6.50 per share. Shortly thereafter, BEA informed Plumtree it had a $5.50 ceiling, and the negotiations ceased for a few months.

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3 *See* Plumtree Software, Inc., Proxy Statement, at 33-34 (Sept. 19, 2005) (hereinafter "Merger Proxy" or "Proxy").

4 *Id.* at 16-22.

In June, Chuang of BEA called Kunze to express interest at $6.00 per share. By the end of the month, Kunze offered to sell Plumtree to BEA for $6.10 per share. BEA accepted that offer subject to satisfactory due diligence and contractual negotiations.

2. The GSA contract issue

In February 2005, Plumtree discovered that, in connection with some sales in 2004, it had failed to comply with the "Price Reductions" clause of a master purchasing agreement (the "GSA contract") it had with the United States General Services Administration ("GSA").[5] As a result, Plumtree offered the GSA a temporary price reduction.

An internal Plumtree investigation, commenced in the second quarter of 2005, concluded the company probably would have to compensate the GSA.[6] During the quarter ending June 30, 2005, Plumtree recorded a $1.5 million contingent contract reserve for the estimated compensation.[7] The final amount ultimately due to the GSA has not been determined.[8]

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5 Plumtree derived a significant portion of its software license and service revenue from government entities. A master purchasing agreement with the GSA typically involves an agreement whereby the GSA obtains a favorable price for a supplier's products, which other governmental entities can then reference when actually purchasing the supplier's goods or services. *See* Compl. ¶ 16.

6 The compensation was expected to be either in the form of future price discounts to the GSA or a damage payment. *See id.* ¶ 18.

7 Plumtree "commenced an internal investigation into this matter and, with the assistance of special legal counsel and forensic accountants, concluded that it was probable that a damage payment or future discounts off of the GSA price list was due to the GSA under the referenced GSA contract pursuant to the 'Price

3. BEA renegotiates the Merger price

On July 8, 20005, after being informed of the ongoing investigation relating to Plumtree's failure to comply with the "Price Reduction" clause in the GSA contract, BEA reduced its offer to $5.50 per share. A few days later, Plumtree countered with a price of $5.60, which BEA accepted. BEA later withdrew its offer pending resolution of the GSA contract investigation.

On August 8, 2005, Plumtree publicly disclosed the GSA contract investigation, and the expected $1.5 million contingent liability relating to the contract. Shortly thereafter, BEA offered $5.45 per share. Kunze counter offered $5.50 and BEA accepted. On August 22, 2005, after the Board voted unanimously in favor of the Merger, Plumtree and BEA executed the Merger Agreement.[9] The final price of $5.50 represented a 17.8% premium over the closing price on August 19, 2005 (the trading day immediately preceding execution of the Merger Agreement) and a 48.2% premium over the closing price on July 25, 2005.[10] The total transaction was valued at $200 million.

Reductions' clause." Plumtree Form 10-Q, at 10 (June 30, 2005) (hereinafter "10-Q").

8 "The final amount of the potential contract damages or future discounts off of the GSA price list under the 'Price Reductions' clause is subject to the outcome of settlement discussions and final resolution with the GSA." *Id.*

9 Merger Proxy at 21.

10 *Id.* at 22.

4. Benefits to Individual Defendants

Globis alleges the Individual Defendants received substantial benefits as a result of the Merger that induced them to approve it at an inadequate price. Kunze had 133,334 unvested options, of which half were accelerated as a result of the merger, while the rest were rolled into BEA options.[11] Kunze also was cashed-out of 1,380,162 vested options having a weighted-average exercise price of $1.36. In addition, he received six months of health and welfare benefits, as well as a severance payment of $150,000. Each of the other Individual Defendants was cashed out of his vested options and had his unvested options accelerated.[12] BEA also agreed to maintain, for a period of six years after the Merger's effective date, the then Plumtree directors and officers' liability insurance policy covering acts and omissions occurring before consummation of the Merger.[13]

5. Financial advisor's Fairness Opinion

On March 31, 2005, the Plumtree Board engaged Jefferies Broadview, a division of Jefferies & Company, Inc. (collectively "Jefferies"), to act as its financial advisor for an undisclosed fee.[14] On the date of the Merger, August 22, 2005, Jefferies orally opined the proposed Merger was fair; Jefferies' written opinion ("Fairness Opinion") was attached to the Merger Proxy sent to the shareholders in connection with their vote.

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[11] *Id.* at 34.

[12] *See id.* at 33-35, 52 (describing the benefits received by the Individual Defendants as well as their holdings of Plumtree shares).

[13] *Id.* at 34.

[14] Jefferies' fee was partially based on a successful completion of the Merger. *See id.* at 30.

In rendering its Fairness Opinion, Jefferies, among other things: analyzed historical and prospective Plumtree financial statements; interviewed management; conducted analysis of comparable companies; conducted analysis of comparable prior mergers and acquisitions; and assisted in negotiations between BEA and Plumtree.[15] The Fairness Opinion included the following financial analyses: Public Company Comparables Analysis, Transaction Comparables Analysis, Transaction Premiums Paid Analysis, and a Present Value of Future Share Price Analysis.

Globis claims the disclosures in the Proxy regarding the Fairness Opinion, among other things, were deficient in numerous respects. The Analysis, *infra*, relating to those alleged deficiencies contains additional details about the disclosures in the Merger Proxy regarding the Opinion and its underlying valuation analyses.

C. Procedural History

On August 23, 2005, the day after the Merger's public announcement, Globis filed this shareholder class action lawsuit. In September 2005, after Defendants had moved to dismiss the complaint, Globis filed an amended complaint and moved for expedited proceedings, which Defendants opposed. Globis ultimately abandoned its motion based on concurrent settlement discussions. Those discussions, however, did not succeed.

On October 20, 2005, Plumtree held a special meeting of stockholders at which they approved the Merger. The Merger became effective the same day.

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[15] *Id.* at 24.

On November 7, 2005, Plumtree and the Individual Defendants moved to dismiss this action under Court of Chancery Rule 12(b)(6). On October 6, 2006, they amended their motion to add Plumtree's Charter's 8 *Del. C.* § 102(b)(7) provision as an additional ground for dismissal. BEA filed its motion to dismiss on the same day.

Rather than preparing an answering brief, Plaintiff filed its Second Amended Class Action Complaint on January 16, 2007 (the "Complaint"). On February 5, 2007, Defendants moved to dismiss that Complaint as well. Extensive briefing and oral argument followed.

D. Claims and Defenses

Globis brings this action directly against Plumtree, the Individual Defendants, and BEA. The Complaint asserts three separate claims.

First, Globis alleges the Individual Defendants breached their fiduciary duties to Plumtree's shareholders by approving the Merger at an inadequate price. Globis alleges the "[D]efendants embarked on a scheme to unload [Plumtree] on a third-party at a cheap price and, in so doing, secure for themselves valuable financial perquisites."[16] The scheme ensured "Plumtree executives would not be exposed to any personal liability, i.e., through derivative lawsuits or otherwise, seeking redress for the Company's GSA contract problems."[17] As a result, according to Globis, "[D]efendants' GSA contract-related wrongdoing cost Plumtree's shareholders at least $0.60 per share" -- the

16 Compl. ¶ 21.

17 *Id.*

difference between the price BEA and Plumtree initially agreed upon and the final price.[18]

Second, Globis claims the Individual Defendants breached their duties to the shareholders by disseminating a materially false and misleading Merger Proxy resulting in an insufficiently informed Merger vote. And third, Plaintiff claims BEA knowingly aided and abetted the Individual Defendants' breaches of fiduciary duty.

Defendants contend Globis has failed to plead sufficient facts to overcome Delaware's business judgment rule. They argue there can be no duty of loyalty violation because Plaintiff has neither alleged the Individual Defendants lacked independence, nor pled with sufficient particularity that fear of litigation based on the GSA contract problems caused them to approve the Merger or that the receipt of certain financial benefits rendered a majority of the Board interested in the Merger. In addition, Defendants deny the existence of any disclosure violations because Globis' criticisms largely concern the merits of the information disclosed and not the disclosure's adequacy. Finally, Defendants seek dismissal of the aiding and abetting claim against BEA because there is no viable underlying claim, and no allegation of knowing participation by BEA.

II. ANALYSIS

A. Standard for Motion to Dismiss

The standard for dismissal for failure to state a claim upon which relief may be granted is well established. A motion to dismiss pursuant to Rule 12(b)(6) will be

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18 *Id.* ¶ 24.

granted if it appears with reasonable certainty the plaintiff could not prevail on any set of facts that can be inferred from the pleadings. In considering a motion to dismiss, the Court is required to assume the truthfulness of all well-pled allegations of fact in the complaint.[19] All facts alleged in the pleadings and inferences that can reasonably be drawn from them are accepted as true. The court need not accept, however, inferences or conclusions of fact unsupported by allegations of specific facts. That is, a trial court is required to draw only reasonable inferences in the nonmovant's favor.[20] "[A] complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."[21]

B. Does the Complaint Adequately Plead the Individual Defendants Breached their Fiduciary Duties to Plumtree's Shareholders when they Approved the Merger?

Globis alleges the Individual Defendants agreed to sell Plumtree to BEA for an inadequate price, breaching their fiduciary duties to Plumtree's shareholders. Globis claims the Defendants' (unspecified) GSA contract-related wrongdoing cost Plumtree's shareholders at least $0.60 per share, or an aggregate loss of over $26 million.[22] The

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19 *See Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988).

20 *See Hendry v. Hendry*, 2006 Del. Ch. LEXIS 99, at *40 (May 26, 2006).

21 *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).

22 Defendants deny the damages are as substantial as Globis alleges. The primary basis for the GSA claim appears to be that Plumtree failed to provide in 2004 certain price reductions required by the GSA contract. Plumtree's actions arguably inflated its revenues for 2004. Thus, according to Defendants, the original Merger price was not reflective of Plumtree's true value, and the

Directors, however, are protected by the business judgment rule. Plaintiff must allege sufficient facts to support a reasonable inference that the Directors breached their fiduciary duties, and thereby overcome that presumption and change the standard of review from business judgment to entire fairness.

1. Business judgment rule

"The affairs of Delaware corporations are managed by their board of directors, who owe to shareholders duties of *unremitting* loyalty."[23] This case relates to a complete sale of Plumtree to BEA, an unrelated strategic buyer. Under *Revlon*, when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available.[24]

Directors are protected by the deferential business judgment rule, which "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[25] "It applies when that decision is questioned and the analysis is primarily a process inquiry. Courts give deference to directors' decisions reached by a

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disclosure of the GSA contract issue predictably led to a reduction in the Merger price. *See* Transcript of argument on Defendants' mots. to dismiss held on June 29, 2007 ("Tr.") at 9-10.

23 *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 Del. Ch. LEXIS 120, at *10 (Aug. 15, 2007) (emphasis in original) (citing *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998)).

24 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 n.16 (Del. 1986); *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1994).

25 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself."[26]

The burden is on the party challenging the decision to establish facts rebutting the presumption.[27] The party must allege facts creating a reasonable doubt that (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[28]

If a plaintiff fails to rebut the business judgment rule, "a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'"[29] If the rule is rebutted, the burden shifts to the defendant directors to prove the "entire fairness" of the transaction to the shareholder plaintiff.[30]

2. Has Plaintiff pled sufficient facts to subject the Merger decision to entire fairness review?

Globis makes no colorable allegation the Individual Defendants violated their duty of care in the context of their approval of the Merger, but does allege two breaches of the Individual Defendants' duty of loyalty. The Complaint states in pertinent part:

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26 *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997) (citations omitted).

27 *Aronson*, 473 A.2d at 812 (citing *Puma v. Marriott*, 283 A.2d 693, 695 (Del. Ch. 1971)).

28 *Id.* at 815.

29 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

30 *Emerald Partners v. Berlin*, 787 A.2d 85, 91 (Del. 2001); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

> By entering into the agreement with BEA on the heels of the GSA contract issue, at an inadequate price, the Plumtree Board breached its fiduciary duties to Plumtree's shareholders. Furthermore, by shielding their personal liability from future derivative actions and by obtaining valuable benefits for themselves, the Individual Defendants have harmed Plumtree's shareholders in connection with the BEA merger.[31]

Restated, Globis alleges the Individual Defendants were interested in the transaction due to (1) their exposure to personal liability resulting from derivative claims relating to the GSA contract and (2) valuable benefits they obtained as a result of the Merger. Globis makes no allegation the Individual Defendants, aside from Kunze who was the chief executive officer, lacked independence.[32]

A director is considered interested when he will receive a personal financial benefit from a transaction that is not equally shared by the stockholders,[33] or when a corporate decision will have a materially detrimental impact on a director, but not the corporation or its stockholders.[34]

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31 Compl. ¶ 47.

32 Nothing in the Complaint suggests any of the Directors is under the control of another. In fact, as Defendants note, five members of the six-member Board were neither officers nor employees of Plumtree. *See* Merger Proxy at 34 (listing Dillon, Dolasia, Pratt, Richardson, and Whitney as "Non-Employee Directors"); *see also* Defs.' Br. In Support of their Mots. to Dismiss ("DOB") at 14. Plaintiff's answering brief and Defendants' reply brief on the motions to dismiss are referred to as "PAB" and "DRB," respectively.

33 *Aronson v. Lewis*, 473 A.2d 805, 812 (1984).

34 *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

a. Has Globis pled sufficient facts to support an inference that the Directors approved the Merger to evade litigation related to the GSA contract?

Globis alleges that "[b]y entering into the agreement with BEA on the heels of the GSA contract issue, at an inadequate price, the Plumtree Board breached its fiduciary duties" and "shield[ed] their personal liability from future derivative actions . . . ."[35] The Court understands Globis to mean, under *Lewis v. Anderson*,[36] the Merger eradicated shareholders' standing to pursue derivative claims against the Individual Defendants.[37]

The nature of Globis' pleading is unclear. One possibility is that Globis purports to state a claim for relief on the theory the Merger was pretextual and constituted a fraud perpetrated merely to deprive shareholders of standing to bring a derivative suit.[38] Another possibility is Globis intends its allegation to show the Individual Defendants were interested in the Merger and, therefore, the Court should review it under the entire fairness standard. Under at least the first possibility and, perhaps, both, Globis is alleging

35 Compl. ¶ 47; *see id.* ¶ 21.

36 477 A.2d 1040, 1046 (Del. 1984).

37 The Supreme Court in *Lewis v. Anderson* required are: "[i]n the context of a corporate merger, . . . a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but that he must also maintain shareholder status throughout the litigation." *Id.*

38 Assuming that is the case, a question might be raised as to whether Globis' pretextual merger claim is direct, as he asserts, or derivative. Because none of the parties address this issue in their briefing, and the resolution of it would not change the outcome, the Court assumes, without deciding, that Globis could pursue such a claim directly.

the Merger was fraudulent, and must plead those allegations with particularity pursuant to Rule 9(b).[39]

The issue of whether a threat of personal liability is sufficient to find directors interested in a transaction typically arises in the context of determining interestedness for demand futility. There, "the mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors."[40] This is because the risk of litigation exists whenever a board decides to sell the company.[41] Plaintiffs are entitled to a reasonable inference of interestedness, however, where a complaint indicates a "substantial likelihood" liability will be found.[42] "The standard is difficult to meet, and the vast majority of plaintiffs' allegations fail to rise to this considerable level."[43]

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39 The two exceptions to the rule in *Lewis v. Anderson* are: "(1) where the merger itself is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." *Id.* at n.10.

Subsequent case law has confined the fraud exception to cases in which the merger was "perpetrated merely to deprive shareholders of the standing to bring a derivative action." *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 354 (Del. 1988); *Lewis v. Ward*, 852 A.2d 896, 899 (Del. 2004). Under *Ward*, this narrow fraud exception must be pled with particularized facts pursuant to Rule 9(b). 852 A.2d at 905. *See also* discussion at 15 n.47, *infra*.

40 *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (quoting *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984)).

41 *Malpiede v. Townson*, 780 A.2d 1075, 1085 (Del. 2001).

42 *Rales*, 634 A.2d at 936; *Aronson*, 473 A.2d at 815.

43 *In re infoUSA, Inc. S'holders Litig.*, 2007 Del. Ch. LEXIS 123, at *58 (Aug. 13, 2007).

Under *Lewis v. Ward*, Globis must plead: (1) the Individual Defendants faced substantial liability; (2) the Individual Defendants were motivated by such liability; and (3) the Merger was pretextual.[44] The Court addresses each element in turn.

1. Has Globis adequately pled the Individual Defendants faced a substantial likelihood of liability from claims relating to the GSA contract?

Globis must plead with particularity the Individual Defendants faced a substantial likelihood of liability from their alleged breach of fiduciary duty relating to the GSA contract. Yet, Globis' Complaint fails to identify which fiduciary duty it claims the Individual Defendants breached,[45] and does not state the underlying actions (or inaction) regarding the GSA contract for which the Individual Defendants might face liability. Instead, Globis conclusorily argues "there is a substantial likelihood that the directors could or would be found liable for causing, directly or indirectly, such a massive loss in the worth of the Company."[46] Globis' inability to articulate what it accuses the Defendants of doing wrong dooms this aspect of his claim not only under Rule 9(b), but also under Rule 8(a)'s more relaxed pleading requirements.[47]

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44 *Ward*, 852 A.2d at 906 (*Ward* requires "well-pled facts suggesting that the liability [the director defendants] faced was so substantial as to have motivated them to cause [the corporation] to enter into a pretextual merger . . . at a sub-optimal price . . . .") (quoting *Lewis v. Ward*, 2003 Del. Ch. LEXIS 111, at *21-22 (Oct. 29, 2003)); s*ee also Aronson*, 473 A.2d at 815.

45 At argument, Plaintiff admitted it has not "alleged whether it's an oversight claim or a direct involvement claim." Tr. at 28.

46 PAB at 14.

47 Even if Globis' allegation the Individual Defendants were interested because of their liability emanating from the GSA contract does not represent a claim for

Globis makes no allegation the Individual Defendants took any direct action involving the overcharges on the GSA contract, or were even aware of the overcharges until their discovery in February 2005.

Instead, Globis conclusorily argues that if the directors did not know about problems that ultimately resulted in a $20 million reduction in the price of Plumtree, "then the inference is clear that they were grossly negligent . . . ."[48] In effect, Globis contends that a change in market value, in and of itself, supports a reasonable inference of gross negligence on the part of the Individual Defendants. In *In re Syncor Int'l Corp. S'holders Litig.*, this court found a similar reduction of merger consideration after the disclosure of corporate misconduct to be "merely a coincidental, indirect consequence of [the misconduct] that resulted from the awkward timing of the disclosure."[49] Merely stating Defendants were "grossly negligent" without alleging any particularized fact to support that conclusion is insufficient. Thus, the Complaint provides no basis to support an inference the Individual Directors faced a substantial likelihood of liability as to any action they took, or did not take, directly related to the GSA contract problem.

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fraud, Globis' conclusory Complaint would still be insufficient because it does not even meet the notice pleading requirements of Rule 8(a).

48 PAB at 14.

49 857 A.2d 994, 998 (Del. Ch. 2004). "The change in the terms of the then-pending merger agreement simply reflected a change in the market value of [the company] resulting from the public disclosure of [the director's] alleged misconduct and [the acquirer's] ability to bargain for a better deal." *Id.*

Seemingly making a *Caremark* duty of oversight claim,[50] Globis also argues that the "directors *had* to know" about the GSA contract overcharges.[51] Consistent with our caselaw, I find this argument unpersuasive.[52]

A claim under Delaware's failure of oversight theory "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[53] Reaffirming *Caremark*, the Supreme Court recently stated:

> *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.[54]

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50 *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996). "Generally where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation . . . only a sustained or systematic failure of the board to exercise oversight -- such as an utter failure to attempt to assure a reasonable information and reporting system exists -- will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971.

51 PAB at 13 (emphasis added).

52 *See Desimone v. Barrows*, 924 A.2d 908, 940 (Del. Ch. 2007) ("Delaware courts routinely reject the conclusory allegation that because illegal behavior occurred, internal controls must have been deficient, and the board must have known so.").

53 *Caremark*, 698 A.2d at 967.

54 *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citations omitted).

Globis does not allege either that Plumtree had no system of controls that would have prevented the GSA overcharges or that there was a sustained or systematic failure of the board to exercise oversight." Due to Plaintiff's failure to plead specific facts, the Court cannot reasonably infer the Individual Defendants faced a substantial likelihood of liability for a breach of their duty of oversight when they approved the Merger.

The paucity of factual allegations in the Complaint precludes the Court from reasonably inferring the Individual Defendants faced a substantial likelihood of liability from their actions, or inaction, related to the GSA contract overcharges.[55] Thus, Globis failed to meet the first requirement for pleading a claim for a pretextual merger under *Lewis v. Ward*.

2. Has Globis pled with particularity *Ward's* two other requirements?

The two other *Ward* requirements are interrelated -- Globis must plead with particularity the Individual Defendants were motivated to enter the Merger to avoid liability, and the Merger was pretextual (*i.e.*, its purpose was solely to avoid liability).

The Court cannot infer the Individual Defendants were motivated principally by potential derivative litigation when they decided to sell the company to BEA. The merger process started with an initial communication from BEA to Plumtree in December 2004, before Plumtree's February 2005 discovery of the GSA contract issue. There is no allegation the Individual Defendants considered any potential claim against themselves before February 2005. Nor does the Complaint allege there were any pending or

[55] The Court notes Globis did not make a books and records demand under 8 *Del. C.* § 220 before filing its Complaint.

threatened lawsuits relating to the GSA problem or other facts that would support an inference of motivation.

Similarly, the Court cannot infer the Merger was pretextual. A pretextual merger is one that was not entered into for any valid purpose;[56] Globis must allege there was no alternative valid business purpose for the Merger. Here, Plaintiff makes no such allegation. In fact, and to the contrary, Globis alleges only that the Merger occurred at too cheap a price, and not that it was consummated without any legitimate business purpose.

For all of these reasons, the Court concludes Globis has failed to plead with particularity under Rule 9(b), or even under Rule 8(a)'s less stringent requirements, the Individual Defendants faced a substantial likelihood of liability arising out of the GSA contract that caused them to consummate the Merger at a suboptimal price.

b. Has Globis sufficiently pled the Individual Defendants were interested in the Merger based on the financial benefits they received?

To rebut the presumption of the business judgment rule protecting the Board's decision to sell Plumtree for $5.50 per share, Globis claims the Individual Defendants were "interested" and "unfairly receiv[ed] improper financial benefit as a result of the Merger."[57] The benefits include the cashing-out of directors' vested options, severance

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56 *See Lewis v. Ward,* 2003 Del. Ch. LEXIS 111, at *22 (Oct. 29, 2003) ("[T]he fraud exception to *Lewis v. Anderson* requires a showing that the *sole basis* . . . to enter the merger was to divest the plaintiff of derivative standing.") (emphasis added).

57 PAB at 15 (punctuation omitted); Compl. ¶ 47.

pay, acceleration of some unvested Plumtree stock options and conversion of others into options for BEA stock, and indemnification rights.[58] Ultimately, the issue before this Court is whether the additional compensation was "so substantial as to have rendered it improbable that the board could discharge their fiduciary obligations in an even-handed manner."[59]

There is no bright-line rule for determining whether additional, merger-related compensation constitutes a disabling interest. In *Staples*, the court found that a one-time profit of $187,000 per director was, while not a "trifle," insufficient to sustain plaintiff's burden of proving the prospects of such a one-time gain of this sort would be a material consideration.[60] In *Orman v. Cullman*,[61] two directors were found to have had disabling interests. The court found one to be beholden to the controlling shareholder group for renewal of his $75,000 consulting contract, while the other director had a company that stood to receive $ 3.3 million in fees if the merger closed.[62] The allegations in Globis' Complaint, however, are such that they do not require the Court to draw fine distinctions.

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58 Globis also highlights the compensation received by several non-Defendant Plumtree executives. *See* Compl. ¶¶ 28-29; PAB at 15-17. The Court does not see the relevance of these non-Defendants or the benefits they received.

59 *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 951 (Del. Ch. 2001) (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 618 (Del. Ch. 1999)).

60 *See id.* (noting the directors were "persons of means and reputation").

61 794 A.2d 5 (Del. Ch. 2002).

62 *Id.* at 30-31.

The benefits received by the nonemployee Directors were their indemnification rights, acceleration of their unvested options, and cash-out of their vested options. There is no basis for inferring the receipt of indemnification benefits is material, or likely to taint the Individual Defendants' judgment.[63] The accelerated vesting of options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price.[64] The value of the accelerated option increased incrementally with the acquisition price -- each additional penny BEA had to pay for a Plumtree share raised the value of the accelerated option and share equally.[65] Thus, the acceleration of the unvested stock options was not a financial benefit accruing only to the Directors in the sense previously discussed in *Staples* and *Orman*.[66] Finally, the Individual Defendants' cashing-out of the options already vested is not a personal financial benefit not equally shared by the stockholders.

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63 "Normally, the receipt of indemnification is not deemed to taint related director actions with a presumption of self-interest. That is because indemnification has become commonplace in corporate affairs . . . and because indemnification does not increase a director's wealth." *In re Sea-Land Corp. S'holders Litig.*, 642 A.2d 792, 804 (Del. Ch. 1993) (citations omitted).

64 *See Krim v. ProNet, Inc.*, 744 A.2d 523, 528 (Del. Ch. 1999).

65 *See* Merger Proxy at 34 ("The dollar value of accelerated stock options is calculated based upon $5.50 per share minus the exercise price, rounded to the nearest dollar.").

66 Globis makes no allegation of impropriety as to the terms of the Directors' option plan itself. On the contrary, the accelerated vesting appears to be an entitlement as part of existing compensation agreements. *See id.* at 40 ("Except as otherwise provided by existing contractual agreements . . . , the merger will not cause any unvested options to have their vesting schedules accelerated.").

Arguably, the acceleration of unvested options could be viewed as an inducement to effectuate the Merger. The following table demonstrates, however, that the Directors' share and vested option holdings were significant enough that it would not have been in their self-interest to forego the additional 60 cents of consideration Globis attributes to the GSA contract issue to obtain the relatively minor benefits of acceleration.

	Vested Options[67]	**Other Plumtree Shareholdings**[68]	**Value of Additional 60 Cents**[69]	**Value of Acceleration of Unvested Options**[70]
Dillon	85,000	55,000	$84,000	$17,000
Dolasia	105,000	86,050	$114,630	$17,700
Pratt	40,667	-	$24,400	$32,700
Richardson	84,444	10,300	$56,846	$32,393
Whitney	135,000	-	$81,000	$17,700

Furthermore, Globis has not provided any facts from which this Court could find the acceleration of the unvested options, even when viewed separately, was substantial enough to infer interest. Without addressing Kunze, the five outside Directors constitute a clear, disinterested majority of Plumtree's six-member Board.

Referring to Kunze, Globis argues "it is beyond cavil that the aggregate benefit of the accelerated options, the rolled-over options, the severance benefits, the

67 *See id.* at 35.

68 *See id.* at 51-52.

69 The cash-out of the vested options was equivalent to "a cash payment equal to the excess of [$5.50] over the exercise price of the stock option multiplied by the number of shares of Plumtree common stock subject to the option . . . ." *Id.* at 35.

70 *See id.* at 34.

indemnification agreement, and the [six] year D&O coverage were material . . . ."[71] Even assuming Globis was correct, which it is not, and such benefits were sufficient for the Court to infer Kunze was interested in the transaction, Kunze is only one member of a six person Board. The other five uninterested Individual Defendants constitute a clear majority.

Globis has failed to plead facts adequate to show that even Kunze's interest was disabling. Kunze's $150,000 severance payment, and $144,835 options acceleration were immaterial in light of his more than 1.3 million vested options. Kunze's predominant economic self-interest was to maximize the value of his shares and options ownership.

Because Globis fails to plead sufficient facts to support its conclusory allegation the Individual Defendants acted out of self-interest in the Merger, their decision to have Plumtree engage in the Merger is protected by the business judgment rule. For purposes of Defendants' motions to dismiss, the Plumtree Board is presumed to have agreed to the Merger "on an informed basis, in good faith and in the honest belief that the [Merger] was in the best interests of [Plumtree]."[72]

The Court therefore holds that Globis has failed to state a claim against any of the Defendants based on its allegation that they breached their fiduciary duties by agreeing to sell Plumtree to BEA for an inadequate price.

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[71] PAB at 18.

[72] *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

C. Does the Complaint Adequately Plead a Disclosure Violation?

Plaintiff contends the Individual Defendants breached their fiduciary duty by disseminating a "materially false and misleading Proxy," resulting in an uninformed shareholder vote.[73] In particular, Plaintiff argues Jefferies' "various analyses were flawed and in no way validated the proposed transaction."[74] Plaintiff also contends the Proxy "lacked any meaningful information" as to Jefferies' fees, failed to disclose material information regarding the background and negotiation of the transaction, and failed to provide any meaningful projections of Plumtree's future performance.[75]

Defendants respond that Plaintiff's critique of Jefferies' analyses is not really a disclosure claim, but rather a claim that Jefferies performed an improper analysis.[76] Defendants further dispute the materiality of the alleged omissions relating to Jefferies' Fairness Opinion. In the alternative, Defendants argue that even if the Complaint states a legally cognizable disclosure claim (which they deny), Article Six of Plumtree's

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73 For its claims of inadequate disclosure, Globis must satisfy Rule 8(a)'s "short and plain statement" pleading requirement to survive Defendants' motions to dismiss under Rule 12(b)(6).

74 Compl. ¶ 33. Plaintiff disputes the validity of Jefferies' Comparable Company Analysis, Comparable Transaction Analysis, and Present Value of Future Share Price Analysis. *Id.* ¶¶ 34-37.

75 *Id.* ¶¶ 38-42; PAB at 19. In its brief, Globis also complains the Merger Proxy omitted "material information about Plumtree's contract with the GSA." PAB at 19. The Complaint, however, does not identify the information regarding the GSA contract Globis claims should have been disclosed. Thus, this aspect of Globis' claim is wholly conclusory and properly dismissed.

76 The Fairness Opinion appears at Appendix C of the Merger Proxy and Jefferies' analyses are discussed at pages 24-30 of the Proxy.

Certificate of Incorporation exculpates the Individual Defendants from personal liability in accordance with 8 *Del. C.* § 102(b)(7).

1. Standard

It is well-recognized "that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[77] "This fiduciary disclosure obligation involves the affirmative duty to provide information, the duty to be materially accurate and complete with respect to the information that is provided, and the duty to be entirely fair by fully disclosing material information."[78] "The essential inquiry is whether the alleged omission or misrepresentation is material."[79]

Delaware has adopted the United States Supreme Court's definition of materiality:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused a reasonable investor to change his vote. What the standard does contemplate is 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. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable

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77 *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *see also Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 137-38 (Del. 1997); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996).

78 *Feldman v. Cutaia*, 2006 Del. Ch. LEXIS 70, at *31-32 (Apr. 5, 2006) (citations omitted).

79 *Arnold v. Soc'y for Sav. Banc.*, 650 A.2d 1270, 1277 (Del. 1994).

> investor as having significantly altered the "total mix" of information made available.[80]

"[M]ateriality is to be assessed from the viewpoint of the 'reasonable' stockholder, not from a director's subjective perspective."[81]

"The burden of demonstrating materiality rests with the plaintiffs."[82] "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."[83]

"Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information."[84] Similarly, "while directors do not have to provide information that is simply 'helpful,' once they take it upon themselves to disclose information, that information must not be misleading."[85]

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80 *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting *Northway* standard as law of Delaware).

81 *Arnold*, 650 A.2d at 1277.

82 *Nebel v. Southwest Banc.*, 1995 Del. Ch. LEXIS 80, at *15 (July 5, 1995).

83 *Malpiede v. Townson*, 780 A.2d 1075, 1086-87 (Del. 2001) (citation omitted).

84 *Arnold*, 650 A.2d at 1280; *In re MONY Group Inc. S'holder Litig.*, 852 A.2d 9, 25 (Del. Ch. 2004).

85 *MONY Group*, 852 A.2d at 24-25 (citing *In re Staples Inc. S'holders Litig.*, 792 A.2d 934, 954 (Del. Ch. 2001)).

Delaware courts have stated a preference for having this type of proxy-related disclosure claim brought as one for a preliminary injunction before the shareholder vote, as opposed to many months after. "An injunctive remedy specifically vindicates the stockholder right at issue -- the right to receive fair disclosure of the material facts necessary to cast a fully informed vote -- in a manner that later monetary damages cannot and is therefore the preferred remedy, where practicable."[86] This preference stems from the inherent difficulties in fashioning an appropriate remedy for disclosure violations significantly after the fact.

2. Globis' criticisms of the disclosures as to Jefferies' analysis

As this court stated in *Netsmart*:

> When stockholders must vote on a transaction in which they would receive cash for their shares, information regarding the financial attractiveness of the deal is of particular importance. This is because the stockholders must measure the relative attractiveness of retaining their shares versus receiving a cash payment, a calculus heavily dependent on the stockholders' assessment of the company's future cash flows.[87]

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[86] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 208 n.115 (Del. Ch. 2007) (quoting *Staples*, 792 A.2d at 960). The court in *Netsmart*, while discussing the benefits of an injunction used to remedy an apparent disclosure violation, noted that such an approach "ensures that greater effect can be given to the resulting vote down the line, reducing future litigation costs and transactional and liability uncertainty." *Id.* at 208. The court in *Staples* noted, "Delaware case law recognizes that an after-the-fact damages case is not a precise or efficient method by which to remedy disclosure deficiencies. A post-hoc evaluation will necessarily require the court to speculate about the effect that certain deficiencies may have had on a stockholder vote . . . ." *Staples*, 792 A.2d at 960.

[87] *Netsmart*, 924 A.2d at 200.

Directors must give stockholders financial information material to their decision.[88] "Stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely."[89] This duty does not require the directors to provide financial information merely "helpful or cumulative to other information that was provided," and the duty does not extend to the provision of information to permit stockholders to make "an independent determination of fair value."[90] In addition, there "is no 'checklist' of the sorts of things that must be disclosed relating to an investment bank fairness opinion."[91]

Globis alleges the Jefferies analyses referred to in the Merger Proxy were "flawed and in no way validated the proposed transaction."[92] First, Globis argues Jefferies' Public Company Comparables Analysis was unreasonable because the index it used was limited to software companies with between $50 and $250 million in revenue. Plaintiff contends the index should have included only integration software companies, regardless of revenue size. Second, Plaintiff criticizes Jefferies' Transaction Comparables and

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88 *Staples*, 792 A.2d at 954.

89 *In re CheckFree Corp. S'holders Litig.*, 2007 Del. Ch. LEXIS 148, at *8 (Nov. 1, 2007) (quoting *In re Pure Res. Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002)); *see also Netsmart Techs.,* 924 A.2d at 204.

90 *Staples*, 792 A.2d at 954 (citing *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000)).

91 *CheckFree*, 2007 Del. Ch. LEXIS 148, at *9.

92 Compl. ¶¶ 33-36.

Transaction Premiums Paid Analyses because they included deals that were not publicly disclosed or had not yet closed. After eliminating such transactions, Globis argues the revenue multiple would have been higher, resulting in an implied value for Plumtree stock materially greater than the $5.50 merger price. Furthermore, Plaintiff cites a competing bank's research report that developed a merger price of $10.76.

This court addressed a similarly substantive attack on proxy statement analyses in *In re JCC Holding Co. Shareholder Litigation.*[93] There, as part of the plaintiffs' attack on the adequacy of the disclosure, they disputed parts of the valuation analyses' accuracy. The plaintiffs challenged the comparability of the companies used in the comparable-companies analysis. They did not contend the proxy failed to "fairly describe the actual analysis [the investment bank] undertook" or that "the proxy statement disclosed erroneous data . . . upon which [the investment bank] unwittingly relied."[94] The court held, "[t]his kind of quibble with the substance of a banker's opinion does not constitute a disclosure claim."[95]

Here, as in *JCC Holding*, Plaintiff's "only beef is that [the investment bank] made mistakes in subjective judgment, even though those judgments were disclosed to the [target] stockholders."[96] The Merger Proxy enabled Globis to make the substantive

[93] 843 A.2d 713, 718 (Del. Ch. 2003).

[94] *Id.* at 721.

[95] *Id.*

[96] *Id.*

criticisms it did in the Complaint. Stockholders who disagreed with Jefferies' analyses had sufficient information to make an informed decision. Plumtree's board's "duty was simply to make fair disclosure of the material facts in its possession bearing on the fairness of the merger it was putting before the stockholders. By setting forth a fair summary of the valuation work [Jefferies] in fact performed, the board met its obligation under our law."[97]

3. Alleged omissions in the Proxy

Plaintiff alleges several material omissions in the Merger Proxy. First, Plaintiff notes the discount rate used in the Present Value of Future Share Price Analysis was not disclosed, arguing it was "especially important because Jefferies had failed to perform a discounted cash flow analysis of the transaction."[98] Second, Plaintiff labels a material omission the Proxy's failure to state Jefferies' fees -- it only noted they were "customary." Third, Plaintiff argues that the Proxy was materially false and misleading because it did not provide a justification for using different sets of companies for the different comparable analyses. Fourth, Globis asserts Defendants should have disclosed additional details on the private transactions used in Jefferies' analyses. Fifth, Plaintiff accuses Defendants of omitting certain material facts related to the background and negotiation of the transaction. Sixth, Plaintiff contends the absence of "meaningful

97 *Id.* at 722.

98 Compl. ¶ 37.

projections of [Plumtree's] future performance and product pipeline" was a material omission.[99]

None of these claimed omissions is actionable as a matter of law. Plaintiff's conclusory statement, "[w]ithout this information, Plumtree shareholders were unable to determine the true value of Plumtree," does not meet its burden of proving materiality.[100] "Omitted facts are not material simply because they might be helpful."[101] "[A] disclosure that does not include all financial data needed to make an independent determination of fair value is not *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis."[102] Given the extensive disclosure of the critical features, purposes, and likely effects of the Merger, none of the omitted information could have been viewed by a reasonable shareholder as significantly altering the total mix of information made available to her. "[A] reasonable line has to be drawn or else disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their

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99 *Id.* ¶ 42.

100 PAB at 19.

101 *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

102 *In re CheckFree Corp. S'holders Litig.*, 2007 Del. Ch. LEXIS 148, at *8 (Nov. 1, 2007) (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 Del. Ch. LEXIS 65, at *16 (May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006)).

purpose."[103] The omissions Globis complains about fall into four categories which I address in more detail below.

a. Omissions from Jefferies' analysis

In terms of the Jefferies analyses, Globis contends Defendants should have disclosed the discount rate used, the reasons for using different sets of comparable companies in different analyses, and additional details regarding the private companies used in the analyses. Globis has not shown, however, how the Proxy is not "a fair summary of the substantive work performed by [Jefferies]."[104] At best, Globis' allegations suggest only that such omitted information would have been helpful in valuing Plumtree's stock. Delaware law does not require stockholders be "given all the financial data they would need if they were making an independent determination of fair value."[105]

The Merger Proxy states that Jefferies' summary of the Present Value of Future Share Price included as part of its calculation a "discount[] based on the Capital Asset Pricing Model using the median capital-structure adjusted beta for the public company comparables."[106] The Proxy attributes no special importance to this particular analysis.[107]

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103 *TCG Sec., Inc. v. Southern Union Co.*, 1990 Del. Ch. LEXIS 12, at *22 (Jan. 31, 1990) (finding details concerning the bank's valuation methodology to be immaterial).

104 *In re Pure Res. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002).

105 *Skeen*, 750 A.2d at 1174.

106 Merger Proxy at 29.

Globis has not alleged sufficient facts to support a reasonable inference that the omission of the discount rate was material enough to alter the total mix of information presented to the shareholders. Globis makes no argument for why the omission of the exact rate, when its derivation was disclosed, alters the total mix of information. The omission of a discount rate in this context does not constitute, *per se*, a disclosure violation.

As to the justification for using different companies in different sets of comparables for the Public Company Comparables and Transaction Premiums Paid Analyses, it is easily inferred from the Merger Proxy. The Proxy indicates that the comparable companies used in the Public Company Comparables were ongoing public companies at the time, while those used in the Premiums Paid analysis necessarily included companies that had since been acquired.[108] Globis may disagree with Jefferies' judgment, but such a substantive dispute does not support a finding of a breach of the duty of disclosure.

Globis further argues Defendants' omission of the private company transaction details was material because it otherwise could not confirm the accuracy of Jefferies' analysis.[109] This is not a cognizable claim. Delaware law does not require disclosure of all the data underlying a fairness opinion such that a shareholder can make an independent determination of value. As in *CheckFree*, the Merger Proxy "notes exactly

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107 The Proxy instead notes, "Jefferies Broadview did not explicitly assign any relative weights to the various factors and analyses considered." *Id.* at 25.

108 *Id.* at 25, 27-28.

109 Compl. ¶ 40.

the comparable transactions and companies [Jefferies] used."[110] Globis does not allege Jefferies in fact used different private companies than those disclosed.

b. Jefferies' compensation

The Merger Proxy stated that Jefferies' fees were "customary" and partially contingent, but did not provide further details.[111] Without a well-pled allegation of exorbitant or otherwise improper fees, there is no basis to conclude the additional datum of Jefferies' actual compensation, *per se*, would significantly alter the total mix of information available to stockholders.

c. Projections of Plumtree's future performance

Plaintiff complains about Defendants' omission of projections of Plumtree's future performance and product pipeline, but provides no substantive argument as to the projections' materiality.[112]

This court has found omissions of certain projections of corporations' future profits to be material if they were reliable.[113] Conversely, unreliable projections may in

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110 *See In re CheckFree Corp. S'holders Litig.*, 2007 Del. Ch. LEXIS 148, at *9 (Nov. 1, 2007) (finding sufficient a proxy statement that "details the various sources upon which [the bank] relied in coming to its conclusions, explains some of the assumptions and calculations management made to come to its estimates, notes exactly the comparable transactions and companies [the bank] used, and describes or otherwise discloses management's estimated [financials] . . . ."). Here, the Proxy listed all transactions used in the Transaction Comparable and Transaction Premiums Paid Analyses. *See* Merger Proxy at 26-28.

111 *See* Merger Proxy at 30.

112 Compl. ¶ 42; PAB at 19.

113 *See In re PNB Holding Co. S'holders Litig.*, 2006 Del. Ch. LEXIS 158, at *58 (Aug. 18, 2006).

fact be misleading.[114] In explaining why Jefferies considered a Discounted Cash Flow analysis inappropriate for its valuation, Plumtree stated it only had "very limited intermediate and long-term visibility."[115] Plaintiff does not allege Plumtree in fact had reliable projections or any other facts that reasonably would call into question the veracity or adequacy of this aspect of Plumtree's disclosure. Rather, Globis' Complaint focuses more on challenging Jefferies' judgment that the available forecasts were unreliable and unhelpful.[116] Such criticisms do not constitute a sufficient basis for a breach of disclosure claim.

d. Background of the Merger

Finally, Globis asserts various omissions relating to the background and negotiation of the transaction.[117] Once defendants travel down the road of partial

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114 *See CheckFree*, 2007 Del. Ch. LEXIS 148, at *11 (citing *PNB Holding*, 2006 Del. Ch. LEXIS 158, at *58).

115 Merger Proxy at 29. The Proxy further stated, "[g]iven the inability to develop reliable long-term forecasts and the uncertainty in forecasting the product mix, operating performance, future cash flows and sustainable long-term growth rate for Plumtree, Jefferies Broadview considered a discounted cash flow analysis inappropriate for valuing Plumtree." *Id.*

116 *See In re JCC Holding Co. S'holder Litig.*, 843 A.2d 713, 718 (Del. Ch. 2003) (finding no disclosure violation where the corporation "did not have reliable recent long-term projections from which [the bank] could perform a [discounted cash flow] valuation analysis.").

117 Specifically, Globis claims the following should have been disclosed: (1) the Board's reasons for forming the mergers and acquisitions committee; (2) the reasons why between December 2004 and March 2005 Plumtree executives met with BEA executives to discuss the Merger without explicit Board authorization; and (3) which other companies were contacted as alternative merger partners. *See* Compl. ¶ 41.

disclosure of the history leading up to a merger, they have an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.[118] Such a full and fair characterization does not require, however, that Plumtree give its shareholders a "play-by-play description of merger negotiations."[119]

As to why the Plumtree Board formed a special mergers and acquisitions committee, there was no material omission. The Merger Proxy states that the Board formed the committee "to further explore a possible business combination transaction between Plumtree and BEA, as well as other third parties that presented a strategic complement to Plumtree's business."[120] Plaintiff has pled no facts suggesting that statement is false or misleading, or that a more fulsome description of the Board's motivation for forming a special committee would be material. At best, the motivation would be merely background information in terms of the shareholders' decision to approve the Merger.

Similarly, Globis claims Plumtree should have disclosed "*why*," between December 2004 and March 2005, Plumtree executives entered into merger negotiations and a confidentiality agreement without explicit Board approval. This type of rhetorical question does not present a valid disclosure claim. Rather than claim the executives

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118 *Arnold v. Soc'y for Sav. Banc.*, 650 A.2d 1270, 1280 (Del. 1994). Here, although BEA was the only bidder for Plumtree, the Merger Proxy contains more than five pages describing the Merger negotiations. *See* Merger Proxy at 16-21.

119 *Skeen v. Jo-Ann Stores, Inc.*, 1999 Del. Ch. LEXIS 193, at *23 (Sept. 27, 1999), *aff'd*, 750 A.2d 1170 (Del. 2000).

120 Merger Proxy at 16.

acted without authority, or that they or the Board breached its fiduciary duty, Globis seeks to convert what appears to be a substantive complaint into an inadequate disclosure claim.

Globis further argues the identity of the third parties contacted as potential merger partners was material and should have been disclosed. It argues the Plumtree shareholders needed that information "to determine whether the Company was reliably shopped to maximize shareholder value."[121] Globis' allegation is simply conclusory. For example, there is no indication of director malfeasance (*e.g.*, that there was in fact no good faith search for alternative acquirers), or other allegation suggesting the additional information sought by Plaintiff would have altered significantly the total mix of information, and not merely have been helpful. *See* Merger Proxy at 16-21.

In summary, therefore, I conclude none of the omissions or other breaches of the duty of disclosure alleged by Globis satisfies the requirements for stating a claim.

4. Plumtree's Section 102(b)(7) provision

Even if the Complaint adequately pleads a violation of the Individual Defendants' duty of disclosure, the only relief Globis seeks is money damages. In view of that fact, Defendants contend Plumtree's Section 102(b)(7) provision, Article Six of its Certificate of Incorporation,[122] insulates the Individual Defendants from personal liability resulting

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[121] Compl. ¶ 41.

[122] Article Six of Plumtree's Certificate of Incorporation states in pertinent part:

> No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of

from the alleged disclosure violations. Globis argues Article Six does not preclude its disclosure claims because the Complaint contains well-pled assertions of Defendants' bad faith and breach of their duty of loyalty.

Under 8 *Del. C.* § 102(b)(7), stockholders may exonerate directors from personal liability for certain breaches of their fiduciary duty by inserting such a provision in the company's certificate of incorporation. Section 102(b)(7) applies to violations of a director's duty of disclosure.[123] There are two pertinent exceptions, however. Section 102(b)(7) may not exculpate directors for breaches of their duty of loyalty, or for acts (or omissions) taken in bad faith.[124] In *Zirn*, the Supreme Court found that "[a] good faith

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> fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the GCL as the same exists or may hereafter be amended. . . . Any repeal or modification of this Article SIXTH shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification with respect to acts or omissions occurring prior to such repeal or modification.

DOB Ex. B (Plumtree Cert. of Incorp., Art. 6).

123 *See Arnold*, 650 A.2d at 1287; *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 n.20 (Del. 1997).

124 *See* 8 *Del. C.* § 102(b)(7)(i)-(ii); *see also Loudon*, 700 A.2d at 142 n.27 ("[W]e have exempted directors from liability for good faith, unselfish breaches of fiduciary disclosure obligations pursuant to exculpatory charter provisions authorized by 8 *Del. C.* § 102(b)(7).").

erroneous judgment as to the proper scope or content of required disclosure implicates the duty of care rather than the duty of loyalty."[125]

Thus, any failure to disclose violating a Director's duty of loyalty, or made in bad faith, would not be protected under Article Six of Plumtree's Certificate. There is nothing in the Complaint, however, from which the Court reasonably could infer any of the alleged breaches was anything other than a good faith, erroneous judgment as to the proper scope of disclosure. Thus, Section 102(b)(7) provides an alternative basis for dismissing Globis' claim the Individual Defendants breached their fiduciary duty of disclosure.

D. Aiding and Abetting

Under Delaware law, a valid claim for aiding and abetting a breach of fiduciary duty requires: (1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.[126] As this Court has determined that the Complaint fails to state a claim for

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[125] *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 (Del. 1996) (citing *Arnold*, 650 A.2d at 1287-88 & n.36)); *see also O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 914-15 (Del. Ch. 1999) ("[B]reach of the fiduciary duty of disclosure implicates only the duty of care when the factual basis for the alleged violation suggests that the violation was made as a result of a good faith, but nevertheless, erroneous judgment about the proper scope or content of the required disclosure."); *Orman v. Cullman*, 794 A.2d 5, 41 (Del. Ch. 2002).

[126] *Twin Bridges LP v. Draper*, 2007 Del. Ch. LEXIS 136, at *86-87 (Sept. 14, 2007).

any underlying breach of fiduciary duty, BEA cannot be liable for aiding and abetting such a breach. Thus, Globis' aiding and abetting claim also must be dismissed.

III. CONCLUSION

For the reasons stated, the Court grants Defendants' motions to dismiss in all respects.

IT IS SO ORDERED.