EFiled: Nov 30 2017 12:36PM EST
Transaction ID 61408622
Case No. 12553-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER VAN DER FLUIT, Individually and on Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	C.A. No. 12553-VCMR
DANIEL YATES, ALEX LASKEY, JON SAKODA, MARK McLAUGHLIN, DIPCHAND NISHAR, GENE RIECHERS, MARCUS RYU, OC ACQUISITION LLC, OLYMPUS II ACQUISITION CORPORATION and ORACLE CORPORATION,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 22, 2017
Date Decided: November 30, 2017

Peter B. Andrews, Craig J. Springer, and David M. Sborz, ANDREWS & SPRINGER LLC, Wilmington, Delaware; Stuart A. Davidson and Christopher Martins, ROBBINS GELLER RUDMAN & DOWD LLP, Boca Raton, Florida; David T. Wissbroecker and Edward Gergosian, ROBBINS GELLER RUDMAN & DOWD LLP, San Diego, California; *Attorneys for Plaintiff.*

Thomas A. Beck, Blake Rohrbacher, and Susan M. Hannigan, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; *Attorneys for Defendants.*

MONTGOMERY-REEVES, Vice Chancellor.

This case arises from Oracle's acquisition of Opower, Inc. through a tender offer and subsequent merger. Plaintiff argues that the transaction results from an unfair deal orchestrated by a controlling stockholder. Defendants respond that Opower did not have a controlling stockholder and the business judgment rule applies to my judicial review of the acquisition because fully informed, uncoerced stockholders tendered a majority of their shares in the transaction. Defendants also contend that Plaintiff fails to state non-exculpated claims for breach of fiduciary duty or aiding and abetting.

I conclude that Plaintiff fails to adequately plead the existence of a controller. Plaintiff, however, pleads facts suggesting that Opower's stockholders were not fully informed when tendering their shares, which precludes application of the business judgment rule as articulated in *Corwin v. KKR Financial Holdings LLC*.[1] Nonetheless, Plaintiff fails to state non-exculpated claims against the Opower board or Oracle. Accordingly, I grant Defendants' Motion to Dismiss.

I. BACKGROUND

The facts in this opinion derive from Plaintiff's Verified Amended Class Action Complaint (the "Complaint") and documents incorporated by reference.[2]

---

[1] 125 A.3d 304 (Del. 2015).

[2] On a motion to dismiss, the Court may consider documents outside the pleadings if "(1) the document is integral to a plaintiff's claim and incorporated in the complaint

A. Parties and Relevant Non-Parties

Non-party Opower, Inc. ("Opower" or the "Company") was a Delaware corporation headquartered in Arlington, Virginia. Before the transaction challenged in this case, Opower common stock was publicly traded on the New York Stock Exchange under the symbol OPWR.[3]

Plaintiff Peter van der Fluit was a stockholder of Opower at all relevant times.

Defendants Daniel Yates, Alex Laskey, Jon Sakoda, Mark McLaughlin, Dipchand Nishar, Gene Riechers, and Marcus Ryu were directors of Opower at all relevant times (collectively, the "Director Defendants").[4] Additionally, Yates was co-founder, CEO, and Chairman of the board of Opower.[5] Laskey was co-founder and President of Opower.[6] Sakoda is a partner at New Enterprise Associates ("NEA"), a venture capital fund focused on technology investments.[7] Riechers

---

or (2) the document is not being relied upon to prove the truth of its contents." *Allen v. Encore Energy P'rs*, 72 A.3d 93, 96 n.2 (Del. 2013).

3 Compl. ¶ 17.

4 *Id.* ¶¶ 18-24.

5 *Id.* ¶ 18.

6 *Id.* ¶ 19.

7 *Id.* ¶ 20.

previously served as a consultant to Opower.[8] Nonparty MHS Capital ("MHS") was an early seed investor in Opower.[9]

Defendant Oracle Corporation, a Delaware corporation headquartered in California, is a software company.[10] Oracle Corporation common stock is publicly traded on the New York Stock Exchange under the symbol ORCL.[11] Defendant OC Acquisition LLC, a Delaware limited liability company, is a wholly-owned subsidiary of Oracle Corp.[12] Defendant Olympus II Acquisition Corporation, a Delaware corporation, is a wholly-owned subsidiary of OC Acquisition LLC (Oracle Corp., OC Acquisition LLC, and Olympus II Acquisition Corporation, collectively, "Oracle").[13] The parties used OC Acquisition LLC and Olympus II Acquisition Corporation as vehicles for the Opower acquisition.

---

8 *Id.* ¶ 21.

9 *Id.* ¶ 31.

10 *Id.* ¶ 26.

11 *Id.*

12 *Id.* ¶ 27.

13 *Id.* ¶ 28.

B. Pertinent Facts

Opower provides cloud-based software to the utility industry.[14] Yates and Laskey cofounded the Company in 2007.[15] Opower raised at least $65.5 million from venture capital investors, including NEA and MHS.[16] On November 24, 2010, Yates, Laskey, NEA, MHS, and all other holders of preferred stock at that time entered into an Amended and Restated Investor Rights Agreement (the "Investor Rights Agreement").[17] In 2011, Riechers served as a consultant to Opower, receiving $82,000 in cash and an option to buy 28,000 shares of Opower common stock.[18]

In March 2014, Opower and Oracle entered into a confidentiality agreement to discuss the possibility of a transaction, but the parties ceased negotiations before Opower's Initial Public Offering ("IPO").[19]

---

14 *Id.* ¶ 30.

15 *Id.* ¶ 31.

16 *Id.*

17 Defs.' Reply Br. Ex. H, at 1.

18 Pl.'s Opp'n Br. 3-4.

19 Compl. ¶ 40.

Opower conducted its IPO on April 4, 2014.[20] The stock opened at $23.00 per share.[21] As of the IPO, Yates controlled 22.4% of the Company, Laskey 17.4%, NEA 21.8%, and MHS 8.3%.[22] Yates served as CEO, and Laskey as President.[23] The board was composed of Yates as Chairman, Laskey, Riechers, Sakoda, and Harry Weller, an NEA partner.[24] Yates called the IPO "'a very clean fundraise' without any of the strings attached to an investment from the private markets." Yates also said that he "wanted to put a bunch of money in the bank, so we didn't have to worry and we could run forward with our vision."[25] The Registration Statement provided that the IPO proceeds would be used for "investing further in our sales and marketing and research and development efforts."[26]

---

20 *Id.* ¶ 33.

21 *Id.* ¶ 37.

22 *Id.*

23 *Id.* ¶ 34.

24 *Id.*

25 *Id.* ¶ 40 (quoting Kasra Kangarloo, *One year after the IPO: 4 things that have changed for Opower*, WASHINGTON BUSINESS JOURNAL, Apr. 10, 2015, http://www.bizjournals.com/washington/blog/techflash/2015/04/one-year-after-the-ipo-4-things-that-have-changes.html).

26 *Id.* ¶ 43 (quoting Opower, Registration Statement (Form S-1) 7 (Mar. 3, 2014)).

Following the IPO, the Company initially performed well on revenue metrics but struggled with profitability and margins.[27] The Company's public disclosures emphasized the goal of long-term profitability but noted that the Company did not expect to be "profitable in the near future."[28] The filings through March 7, 2016 stated that Opower planned to use the IPO proceeds to invest in sales and marketing and research and development.[29]

In May 2014, Opower re-engaged discussions with Oracle.[30] By September 2014, Oracle and Opower began to consider the possibility of a merger but these discussions ended in October 2014.[31] In April 2015, Opower partnered with Oracle's Utility Global Business Unit, which "enabled the 'integration of the Company customer insights into utility systems powered by Oracle, and Oracle's operational insights into the Company's customer engagement platform.'"[32]

---

27 *Id.* ¶ 35-36.

28 *Id.* ¶ 42.

29 *Id.* ¶ 44.

30 *Id.* ¶ 41.

31 *Id.* ¶ 41, 45.

32 *Id.* ¶ 45 (citation omitted).

On August 12, 2015, Weller resigned from the Opower board without explanation.[33] In September 2015, Opower and Oracle agreed to resume discussions about a possible merger in early 2016.[34] At the end of 2015, Opower management announced a 7.5% reduction in the workforce and downward revisions to revenue projections for 2016.[35] Matt Maurer, Opower's Communications Vice President, said that the Company would undertake the workforce cuts in an effort to improve profitability.[36] A news article published after the challenged transaction said that the workforce "cuts now look [like] they were preparation for an Oracle acquisition—not an attempt at organic profitability."[37]

On March 28, 2016, Oracle submitted a bid to buy Opower for between $9 and $10 per share.[38] The board engaged Qatalyst Partners as a financial advisor for the transaction.[39] Qatalyst discussed with the Opower board "Oracle's history of

---

33 *Id.* ¶ 46.

34 *Id.* ¶ 47.

35 *Id.* ¶ 48.

36 *Id.*

37 *Id.* (quoting Stephen Lacey, *Oracle Is Buying Opower for $532 Million. Here's Why the Deal Could Be Good for Both Companies*, GREENTECH MEDIA, May 2, 2016, https://www.greentechmedia.com/articles/read/oracle-acquires-opower).

38 *Id.* ¶ 49.

39 *Id.* ¶ 50.

previous strategic transactions and the typical accelerated timing of the process relating to a potential strategic transaction with Oracle, including Oracle's track record of success in consummating its announced deals on a relatively short time frame."[40]

From March 30 to April 15, 2016, Qatalyst conducted a market check of potential buyers.[41] Qatalyst created a list of fourteen strategic buyers that it believed "most likely to be interested in a strategic transaction with the Company."[42] After deciding that there was a low probability that a financial buyer could submit a competitive bid, Opower did not pursue interest from financial buyers, turning away repeated offers from an interested financial buyer referred to as "Party A."[43] Opower entered into confidentiality agreements with four of the fourteen strategic parties Qatalyst contacted.[44] Opower shared nonpublic information and held management meetings with three of these parties.[45]

---

40 *Id.* (quoting Defs.' Opening Br. Ex. A, at 13-14).

41 Defs.' Opening Br. Ex. A, at 14.

42 Compl. ¶ 49 (quoting Defs.' Opening Br. Ex. A, at 14).

43 Defs.' Opening Br. Ex. A, at 14.

44 *Id.*

45 *Id.*

Following the initial round of management meetings with potential buyers, Opower and Qatalyst discussed the various transaction possibilities on April 5, 2016. Opower decided that the initial Oracle offer was too low, and that it should seek a price increase to $11.00 per share.[46] On April 6, Qatalyst relayed the counteroffer to Oracle.[47]

The four companies that signed confidentiality agreements with Opower each withdrew from the process between April 7 and April 15, 2016.[48] One potential buyer dropped out over concerns of Opower's size and growth prospects.[49] Another determined that it was not interested in a strategic transaction with Opower.[50] The third party withdrew from the process because "it did not believe it could move quickly enough to acquire a company the size of" Opower.[51] The final potential bidder stated that it "would not be able to review the opportunity internally until the following week and then it would take another couple of weeks to develop its view

---

46 *Id.*

47 *Id.* at 15.

48 *Id.* at 16.

49 *Id.* at 15.

50 *Id.* at 16.

51 *Id.*

on the appropriate valuation of" Opower.[52] After Qatalyst informed the party of the more accelerated timetable to make an offer for a strategic transaction, the party declined and withdrew.[53]

On April 14, 2016, Oracle offered $10.30 per share, and as a result of the offer, Opower gave Oracle the right to exclusive negotiations.[54] Director Defendants then negotiated with Oracle. The deal terms included (1) a $20 million termination fee and up to $5 million in expense reimbursement;[55] (2) the right for Yates, Laskey, and other members of management to convert a portion their unvested Opower options into comparable unvested Oracle options;[56] and (3) a waiver by Yates and Laskey of 10% of their portion of the merger compensation unless and until each has worked one full year at Oracle.[57] Yates, Laskey, NEA, and other stockholders also entered into agreements to tender their shares to Oracle (the "Tender and

---

52 *Id.*

53 *Id.*

54 Compl. ¶ 52.

55 *Id.* ¶ 54.

56 Defs.' Opening Br. Ex. A, at 5.

57 *Id.* at 7.

Support Agreements").[58] Qatalyst gave a fairness opinion in support of the deal on May 1, 2016.[59]

On May 16, 2016, Opower filed a proxy disclosing the transaction process and the deal terms.[60] Opower's stockholders overwhelmingly tendered their shares in response to the offer. On June 13, 2016, Oracle's tender offer expired and Opower became a wholly-owned subsidiary of Oracle following a two-step merger pursuant to 8 *Del. C.* § 251(h).[61]

In two post-merger interviews, Yates reflected on how Opower viewed the possibility of an Oracle deal before the transaction. In a 2016 interview, Yates said a "couple of years ago . . . an investor told me: 'You are either going to have to turn into Oracle or you have to get acquired by Oracle.'"[62] This article also notes that Yates and Rodger Smith, Senior Vice President and General Manager of Oracle Utilities, "have known each other for four or five years."[63] In another 2016

---

58 *Id.* at 4.

59 *Id.* at 17.

60 Compl. ¶ 58.

61 Pl.'s Opp'n Br. 1.

62 Stephen Lacey, *Oracle and Opower Explain Why They Joined Forces – And What It Means for Utility Software*, GREENTECH MEDIA, June 23, 2016, http://www.greentechmedia.com/articles/read/Oracle-and-Opower-Explain-Why-They-Joined-Forces.

63 *Id.*

interview, Yates stated, "[i]t was clear to us and our investors, earlier this year and over the last couple of years as we've evolved, that merging with Oracle was a faster way to reach our product vision and was going to be right for our customers and shareholders."[64]

C. Procedural History

Plaintiff filed the Complaint on October 25, 2016, and Defendants moved to dismiss on November 21, 2016. The parties presented oral argument on August 22, 2017.

II. ANALYSIS

Plaintiff argues that the entire fairness standard of review applies because the transaction allegedly involved an interested controller and, separately, because the transaction was not approved by a disinterested and independent board majority. In the alternative, Plaintiff contends that enhanced scrutiny applies and argues that the board breached its duties under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[65] Defendants respond that the business judgment rule applies because fully informed, uncoerced stockholders tendered a majority of their shares in a transaction

---

64 Robert Walton, *Oracle, Opower leaders say acquisition is logical outcome of industry consolidation*, UTILITYDRIVE, July 13, 2016, http://www.utilitydive.com/news/oracle-opower-leaders-say-acquisition-is-logical-outcome-of-industry-conso/422509/.

65 506 A.2d 173 (Del. 1986).

that does not involve an interested controlling stockholder. Defendants further contend that even if they are not entitled to dismissal under *Corwin v. KKR Financial Holdings LLC*,[66] the Complaint fails to plead a breach of duty by the board or aiding and abetting claims against Oracle. I conclude that while the Complaint states a disclosure violation, barring application of *Corwin*, Plaintiff fails to plead non-exculpated claims against Director Defendants or knowing participation by Oracle. Thus, I dismiss the claims.

A. Motion to Dismiss Standard of Review

In considering a motion to dismiss under Court of Chancery Rule 12(b)(6), "(i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; [and] (iii) the Court must draw all reasonable inferences in favor of the non-moving party."[67] "[D]ismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'"[68] While I must draw all reasonable inferences in Plaintiff's favor, I need

---

66 125 A.3d 304 (Del. 2015).

67 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

68 *Id.* (quoting *Savor*, 812 A.2d at 896-97).

not "accept as true conclusory allegations 'without specific supporting factual allegations.'"[69]

B. *Corwin* Does Not Apply Here

In *Corwin*, the Delaware Supreme Court held that "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[70] In analyzing this holding, the Court of Chancery explained that "the Supreme Court did not intend to suggest that every form of transaction that otherwise may be subject to entire fairness review was exempt from the potential cleansing effect of stockholder approval."[71] Instead,

> "[i]n the absence of a controlling stockholder *that extracted personal benefits*," if a majority of the Company's disinterested stockholders approves the transaction with a fully informed, uncoerced vote, then the business judgment rule applies "even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors."[72]

---

69 *Id.* (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

70 125 A.3d 304, 309 (Del. 2015).

71 *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *6 n.28 (Del. Ch. Jan. 5, 2017) (citing *Larkin v. Shah*, 2016 WL 4485447, at *10 (Del. Ch. Aug. 25, 2016)).

72 *In re Merge Healthcare Inc.*, 2017 WL 395981, at *6 (Del. Ch. Jan. 30, 2017) (quoting *Larkin*, 2016 WL 4485447, at *1) (alteration in original).

Where the business judgment rule applies pursuant to *Corwin*, claims are dismissed absent a showing of waste.[73]

In *In re Volcano Corp. Stockholder Litigation*, the Court extended the holding in *Corwin* to transactions involving a tender offer followed by a two-step merger under 8 *Del. C.* § 251(h).[74] In particular, the Court held that the policy reasons addressed in *Corwin* dictate that "the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect under *Corwin*."[75]

Here, Oracle acquired Opower through a tender offer followed by a two-step merger. The first-step tender offer expired on June 13, 2016, with approximately 87.8% of the Company's outstanding shares tendered.[76] On June 14, 2016, the merger was consummated under 8 *Del. C.* § 251(h).[77] Plaintiff has not argued that

---

73 *Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016).

74 143 A.3d 727 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (TABLE).

75 143 A.3d at 747.

76 Defs.' Opening Br. Ex. A, at 2.

77 *Id.*

stockholders were coerced into tendering their shares,[78] waste occurred, or a majority of disinterested Opower stockholders did not tender their shares. Thus, in order to avoid dismissal under *Corwin*, Plaintiff must plead that (1) a controlling stockholder extracted personal benefits or (2) stockholders were not fully informed when tendering their shares.

1. Plaintiff fails to plead that Opower had a controlling stockholder

Under Delaware law, a stockholder is a controller "where the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but '*exercises control* over the business affairs of the corporation.'"[79] Stockholders "can collectively form a control group where those shareholders are connected in some legally significant way—e.g. by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal."[80] "The law does not require a formal written agreement, but there must be some indication of an actual agreement. Plaintiffs must allege more than mere

---

78 Plaintiff mentions coercion once in the entire Complaint. Compl. ¶ 2 ("The Buyout was the product of a conflicted, unfair, and inherently coercive process."). More is required.

79 *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 991 (Del. Ch. 2014) (quoting *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994)).

80 *Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012).

concurrence of self-interest among certain stockholders to state a claim based on the existence of a control group."[81]

Plaintiff argues that this transaction should be judged under the entire fairness standard—and that *Corwin* does not apply—because a "'Control Group' constitut[ing] a legally connected 'controlling stockholder' under Delaware law" participated in the merger and "extracted unique personal benefits through the Buyout that were not shared with Opower's unaffiliated stockholders."[82] Plaintiff begins by alleging that the controlling stockholder group was "a group of tech-entrepreneurs and venture capitalists" that "included the Company's co-founders, defendants Daniel Yates . . . and Alex Laskey . . . and two VCs that were early investors in Opower: New Enterprise Associates . . . and MHS Capital."[83] Plaintiff then identifies two documents in an attempt to show that this control group was bound together in a legally significant way. The first, the Investor Rights Agreement,[84] is a pre-IPO document that gives registration and informational rights to early stage investors. Yates, Laskey, NEA, MHS, and all other holders of

---

81 *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *15 (Del. Ch. Oct. 24, 2014) (citations omitted).

82 Pl.'s Opp'n Br. 13.

83 Compl. ¶¶ 2-3.

84 Defs.' Reply Br. Ex. H.

preferred stock at the time of the Series C round were signatories to the agreement.[85] Plaintiff also points to the Tender and Support Agreements,[86] in which certain Opower stockholders agreed to tender their shares to Oracle as part of the merger. Yates, Laskey, NEA, and several other individuals entered into these agreements on the same day as the merger agreement.[87] MHS was not party to the Tender and Support Agreements.

Plaintiff fails to plead that either MHS or NEA is a member of an alleged control group. The Investor Rights Agreement to which MHS and NEA are signatories contains no voting, decision-making, or other agreements that bear on the transaction challenged in the instant case. In addition to the Investor Rights Agreement, NEA representative Sakoda served on the Opower board, and NEA entered into the Tender and Support Agreements. But Plaintiff does not explain why Sakoda's presence on the board binds NEA together with Yates, Laskey, and MHS as members of an alleged control group. Further, the Tender and Support Agreements include a list of separate stockholders, each of whom has decided to sell shares to Oracle. Plaintiff pleads no facts to suggest and offers no explanation for why these agreements evidence the presence of a control group rather than a

---

85 *Id.* at 1.

86 Pl.'s Opp'n Br. 14.

87 Defs.' Opening Br. Ex. A, at 4.

"concurrence of self-interest among certain stockholders."[88] Moreover, Plaintiff offers no explanation for why NEA and MHS are members of an alleged control group while the numerous other signatories to these agreements are not.[89] NEA and MHS simply appear to be early venture capital investors selected by Plaintiff as an attempt to increase the stock ownership of the purported group. Plaintiff fails to plead that NEA or MHS are part of a control group.

I turn now to Yates and Laskey. The pair founded the company and "held almost 30% [of outstanding Opower stock] at the time of the" transaction.[90] Other than cursory statements regarding their "control,"[91] Plaintiff alleges no facts showing Yates and Laskey acting together or controlling the company with a minority stake, as opposed to simply working with a "concurrence of self-interest."[92] Plaintiff does not offer any facts about the personal relationship between Yates and Laskey.

---

88 *In re Crimson*, 2014 WL 5449419, at *15 (finding no control group despite "voting agreements in favor of the Merger").

89 Indeed, the signatories to the Investor Rights Agreement included all investors as of the Series C round.

90 Pl.'s Opp'n Br. 15.

91 *See, e.g.*, Compl. ¶ 7 ("While the Company's former stockholders patiently held on to their shares, the Controlling Stockholders *wielded their control* over the Company and the Board to force Opower into a transaction with Oracle that was riddled with conflicts and self-dealing.").

92 *In re Crimson*, 2014 WL 5449419, at *15.

Plaintiff does not detail the working relationship between Yates and Laskey. Plaintiff does not argue that Yates and Laskey voted together or operated Opower in unison. Plaintiff does not provide instances where Yates and Laskey dominated the board or the operations of the Company.[93] In short, the Complaint does not plead facts sufficient to show meaningful connections between Yates and Laskey or managerial control of Opower.[94]

Plaintiff relies heavily on two cases to attempt to plead the existence of a controller. At the motion to dismiss stage in *Frank v. Elgamal*, this Court found that the plaintiff sufficiently pled the existence of a controller where four individuals

---

93 Plaintiff notes that Yates and Laskey were both party to the Investor Rights Agreement and the Tender and Support Agreements. But as noted above, neither of those agreements evidence an alliance to run Opower in unison.

94 For examples of a controller with a minority stake exercising managerial control under Delaware law, see, *e.g.*, *Kahn*, 638 A.2d at 1114 (finding 43.3% stockholder to be a controller where the stockholder "dominat[ed] [the company's] corporate affairs" by threatening the board with references to the size of his stake in the company, after which the board capitulated to the stockholder's position and refused to renew certain management compensation contracts); *Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340, at *13 (Del. Ch. May 7, 2014) (finding 48% stockholder to be a controller where that stockholder also held 82% of the company's debt—which was in default—and the board took unreasonable actions significantly favoring the stockholder such as applying a 20-30% discount to a discounted cash flow analysis used to justify a self-tender offer); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 913 (Del. Ch. Aug. 20, 1999) (finding 49% stockholder to be a controller where that stockholder also held an option to purchase 2% more of the outstanding stock, owned all of the company's debt, and successfully threatened the board into reducing the per share merger price from $1.30 to $0.30).

"acting in concert . . . contemporaneously . . . (1) agreed to vote his shares of . . . stock in favor of the Merger, (2) exchanged some of his . . . stock for an interest in the post-Merger entity, and (3) accepted employment with the post-Merger entity."[95] But the four individuals in *Frank* found to constitute a controller for purposes of a motion to dismiss held 71.19% of the outstanding stock.[96] Yates and Laskey owned less than 30% at the time of the transaction. Thus, even if allegations that Yates and Laskey entered into the Investor Rights Agreement and Tender and Support Agreements, exchanged unvested Opower options, and accepted employment with Oracle are sufficient to state a reasonable claim that those parties are a group under *Frank*, Plaintiff must still show managerial control, which Plaintiff fails to show.

Plaintiff also relies on *In re Cysive, Inc. Shareholders Litigation*.[97] At the post-trial stage in *Cysive*, this Court found a controller where an individual stockholder held 35% of the outstanding stock and had a "subordinate" on the board and family members as executives at the company.[98] "[T]he record [showed] that [the controller, subordinate, and family members were] close allies . . . who ha[d]

---

95 2012 WL 1096090, at *8.

96 *Id.* at *1.

97 836 A.2d 531 (Del. Ch. 2003).

98 *Id.* at 535.

benefited in material ways from [the stockholder's] managerial control of Cysive."[99] Moreover, the controller held "a large enough block of stock to be the dominant force in any contest Cysive election," such that if he became "dissatisfied with the independent directors, his voting power positions him well to elect a new slate more to his liking without having to attract much, if any, support from public stockholders."[100] The controller in *Cysive* was "Chairman and CEO of Cysive, and a hands-on one, to boot. He [was], by admission, involved in all aspects of the company's business, was the company's creator, and ha[d] been its inspirational force."[101] The controller's "practical control [was] . . . evidenced by the presence of two of his close family members in executive positions at the company, and the fact that his sister ha[d] also worked at the company in the past."[102] The controller's actions and relationship with the company demonstrated "day-to-day managerial supremacy."[103] In the instant case, Plaintiff does not allege a subordinate of either

99 *Id.* at 552.

100 *Id.* at 551-52.

101 *Id.* at 552.

102 *Id.*

103 *Id.*

Yates or Laskey on the board, family members working at Opower,[104] a block of stock sufficient to be the dominant force in a contested election, day-to-day managerial supremacy, or facts to show in sync behavior within the Company sufficient to infer that Yates's and Laskey's stock holdings should be combined for the controller analysis.

Thus, Plaintiff fails to plead the existence of a controller at Opower.

2. Stockholders were not fully informed when tendering their shares

Plaintiff argues that *Corwin* does not apply because Opower stockholders were not fully informed when tendering their shares. "For stockholder approval of any corporate action to be valid, the [approval] of the stockholders must be fully informed."[105] Evaluating "[w]hether shareholders are 'fully-informed'" as to a particular transaction depends on whether those stockholders were apprised of "all material information."[106] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding"

---

104 Plaintiff points to the son of an MHS limited partner employed at Opower, but Plaintiff does not plead facts showing that employee is subordinate to Yates and Laskey. Moreover, MHS was not part of a control group.

105 *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 999 (Del. Ch. 2014).

106 *Solomon v. Armstrong*, 747 A.2d 1098, 1127-28 (Del. Ch. 1999) (quoting *Santa Fe*, 669 A.2d at 66).

whether to approve the challenged transaction.[107] "Stated another way, there must be 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available.'"[108] Although "a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction,"[109] it is "sensible that a plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document."[110] Then, "the burden would fall to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote."[111]

Plaintiff claims that Defendants failed to "disclose the identity of the individuals who led the sales outreach process and whether it was, in fact, Yates and

---

107 *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (internal quotation marks omitted).

108 *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) (quoting *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997)).

109 *In re Volcano Corp. S'holder Litig.*, 143 A.3d at 748.

110 *In re Solera*, 2017 WL 57839, at *8.

111 *Id.* This Court in *Solera* noted that "[t]he logic of this approach is borne out by the reality that this is how ratification defenses in corporate sale transactions have been litigated in practice since *Corwin* was decided." *Id.*

Laskey."[112] The proxy makes clear that various individuals were involved in the deal process, but does not identify the specific Opower representatives involved at key stages of the negotiations.[113] Under Delaware law, stockholders are "entitled to know that certain of their fiduciaries ha[ve] a self-interest that [is] arguably in conflict with their own."[114] The proxy, as written, does not allow stockholders to determine whether the Opower negotiators were Yates and Laskey, who each received post-transaction employment and the conversion of unvested Opower options into unvested Oracle options, or other members of the Opower board who received only cash consideration. The vague language regarding the identities of the negotiators prohibited Opower stockholders from determining the interests of those fiduciaries who negotiated the deal on behalf of the stockholders, which I find to be

---

112 Compl. ¶ 58(c).

113 Defs.' Opening Br. Ex. A, at 11-18 (describing a broad range of "members of . . . management," "representative(s)" of different organizations, and "advisors" involved at each stage of the transaction process).

114 *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. Dec. 1, 1987). *See also In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) ("Put simply, a reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders."); *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 860 n.157 (Del. 2015) (same); *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *13 n.74 (Del. Ch. Mar. 31, 2017) (same); *In re Rural Metro Corp.*, 88 A.3d 54, 105 (Del. Ch. 2014) (same); *In re Del Monte Foods Co. S'holder Litig.*, 25 A.3d 813, 832 n.3 (Del. Ch. 2011) (same).

a material disclosure violation. Thus, Defendants are not entitled to dismissal under *Corwin*.[115]

C. Plaintiff Fails to State Non-Exculpated Claims Against Defendants

A plaintiff who "seek[s] only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct—be it *Revlon*, *Unocal*, the entire fairness standard, or the business judgment rule."[116] Here, Opower's charter contains a provision adopted pursuant to 8 *Del. C.* § 102(b)(7) that exculpates the board from monetary liability for duty of care violations.[117] Thus, for the claims asserted against Director Defendants to survive the Motion to Dismiss, Plaintiff here must allege a non-exculpated breach of the duty of loyalty. "In the context of a sales process, a plaintiff can plead that a board breached its duty of loyalty by alleging non-conclusory facts, which suggest that a majority of the board was either interested in the sales process or acted in bad faith in conducting the sales process."[118] A director is "interested where he or she

---

115 Plaintiff alleges other purported disclosure violations, but I need not address them because one violation is sufficient to prevent application of *Corwin*.

116 *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1175-75 (Del. 2015) (citations omitted).

117 Defs.' Opening Br. Ex. G, at 5.

118 *In re Answers S'holder Litig.*, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012).

will receive a personal financial benefit from a transaction that is not equally shared by the stockholders."[119] "A director acts in bad faith where he or she 'intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his [or her] duties.'"[120] Plaintiff offers five arguments regarding loyalty violations: (1) Yates and Laskey favored Oracle in the bidding process;[121] (2) Director Defendants sold "Opower in order to maximize their own pre-IPO investments rather than maximize shareholder value for the Company's unaffiliated stockholders;"[122] (3) the market check lasted two weeks;[123] (4) the termination fee was "an unusually high 4.699%";[124] and (5) despite the "conflicts of interest that tainted a majority of the Board, the Board fail[ed] to appoint an independent committee."[125] All fail.

---

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

120 *Id.* (quoting *Lyondell Chem. v. Ryan*, 970 A.2d 235, 243 (Del. 2009)).

121 Pl.'s Opp'n Br. 46.

122 *Id.* at 45.

123 *Id.* at 46-47.

124 *Id.* at 47.

125 *Id.* at 46. I note that while some disclosure allegations may state non-exculpated claims, *see, e.g.*, *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 597 (Del. Ch. 2007), Plaintiff in the instant case does not make that argument.

1. Plaintiff fails to sufficiently plead that Yates and Laskey favored Oracle in the bidding process

Plaintiff argues that Opower failed to disclose its "long-held desire for an Oracle acquisition."[126] Plaintiff points to pre-transaction interactions between Oracle and Opower. Opower had several discussions with Oracle over the years, including some about whether a potential acquisition might be beneficial to both sides, but the early conversations did not go far.[127] Opower and Oracle had a single business partnership, announced in April 2015, which "integrat[ed] . . . Company customer insights into utility systems powered by Oracle, and Oracle's operational insights into the Company's customer engagement platform."[128] The general manager of Oracle's utility business "kn[ew] [Yates] for four or five years."[129] But Plaintiff does not plead any facts to support his conclusory assertion that these early conversations reflected some deep-seated favoritism towards Oracle, that the business partnership actually was just the first stage towards an inevitable acquisition, or that a vaguely-worded acknowledgement of "knowing someone" in the same business field meant an unspoken promise to sell one's company to

---

126 Compl. ¶ 58(a).

127 *Id.* ¶¶ 40-41, 47.

128 Defs.' Opening Br. Ex. A, at 12.

129 Lacey, *Oracle and Opower Explain Why They Joined Forces*, *supra* note 61.

Oracle.[130] In short, Plaintiff fails to plead facts sufficient to infer that Director Defendants favored a sale to Oracle.

2. Plaintiff fails to sufficiently plead that Director Defendants sold Opower to maximize pre-IPO investments

Plaintiff argues that Director Defendants sold Opower to "maximize their . . . pre-IPO investments" instead of stockholder value for the company.[131] Plaintiff's contention hinges on the mathematical fact that an investor's profits in Opower vary depending on the price initially paid for the stock. An investor who bought at a lower price pre-IPO stands to make more than an investor who bought at a higher price post-IPO. Plaintiff asserts that this allowed Director Defendants to sell Opower at a lower price.

---

130 Plaintiff also cites two articles published post-acquisition in an attempt to demonstrate that Yates favored a sale to Oracle. In a 2016 interview, Yates stated, "a couple of years ago . . . an investor told me: 'You are either going to have to turn into Oracle or you have to get acquired by Oracle." Lacey, *Oracle and Opower Explain Why They Joined Forces*, *supra* note 61. In another 2016 interview, Yates said, "[i]t was clear to us and our investors, earlier this year and over the last couple of years as we've evolved, that merging with Oracle was a faster way to reach our product vision and was going to be right for our customers and shareholders." Walton, *supra*, note 63. These interviews only demonstrate that Yates was aware pre-merger that Opower operated in a field with a large, highly acquisitive company and that being acquired by such a company could be highly synergistic. Plaintiff does not explain why these post-merger articles demonstrate a deeply hidden improper desire to sell Opower to Oracle.

131 Pl.'s Opp'n Br. 7.

Yates, Laskey, NEA, and MHS held substantial portions of Opower's outstanding stock at the time of the sale to Oracle, providing substantial incentive to secure the maximum price possible in the Oracle transaction. Yates and Laskey owned roughly fourteen million shares of Opower stock between them at the time of the transaction;[132] every dollar more of deal consideration meant an additional $14 million for the pair. Plaintiff fails to plead any facts to suggest that Director Defendants were anything but fully incentivized to maximize the sale price of Opower, other than the fact that some invested pre-IPO.[133] Moreover, Plaintiff's reasoning would imply that simply pointing out that a defendant had invested pre-IPO—or indeed, *at any price lower than some group of stockholders*—is sufficient to challenge that defendant's motivations in a sale process. I do not understand this to be the law of Delaware. Plaintiff also points to a price target from "four analysts

---

132 Defs.' Opening Br. Ex. A, at 6.

133 Plaintiff points to *In re Answers* to contend that Director Defendants sought liquidity. Pl.'s Opp'n Br. 20 (citing *In re Answers S'holder Litig.*, 2012 WL 1253072, at *7 (Del. Ch. Apr. 11, 2012)). But the stock of the company in *In re Answers* was "thinly traded," 2012 WL 1253072, at *1, and Plaintiff makes no such allegation about Opower stock. Moreover, a need for liquidity could only "constitute a disabling conflict of interest . . . [where the] circumstances . . . involve[d] a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012). Again, Plaintiff pleads no facts to infer a "fire sale" need for liquidity.

from Cowen and Company" set "two months before defendants announced the deal" in an effort to show that Director Defendants did not achieve the best sale price for Opower.[134] These allegations fail to plead that Director Defendants accepted an otherwise lower bid for an improper purpose, such as having achieved "enough" profit on pre-IPO investments.

3. Plaintiff fails to sufficiently plead that the market check was unreasonable

Plaintiff challenges the market check conducted by Opower, alleging that the two-week market check was unreasonably rushed to ensure that Oracle emerged as the winner of the fourteen potential bidders contacted. Plaintiff cites two cases to support this proposition. *Chen v. Howard-Anderson* involved a 24-hour market check of seven potential bidders conducted over the July 4th holiday weekend.[135] The email to the potential bidders did not mention the name of the company for which they might bid.[136] Five parties responded that "they were interested, but . . . the time frame was too short."[137] The sixth party stated that it was "in the midst of

---

134 Compl. ¶ 55. *See In re CompuCom Sys., Inc. S'holder Litig.*, 2005 WL 2481325, at *7 (Del. Ch. Sep. 29, 2005) (stating that "[i]t is not enough to argue that the financial press published objections to the adequacy of the" deal consideration).

135 87 A.3d 648, 675 (Del. Ch. 2014).

136 *Id.*

137 *Id.*

an internal evaluation," and the seventh party did not respond in time.[138] This case is not analogous to *Chen*.

In re Answers, on the other hand, concerned a two-week market check.[139] But in that case, the plaintiff pled specific, non-conclusory allegations that the market check was indeed unreasonably rushed. In particular, the plaintiff there alleged that the company's banker warned the board that the two-week market check, "coincid[ing] with the December holidays," was not a "real" market check.[140] "The Complaint [in *Answers*] also allege[d] that [the company's banker] told the Board that 'time is not a friend to this deal with continued out performance and a looming q4 earnings call,' and that, in response, the Board sped up the sales process."[141] No such non-conclusory allegations are present in the instant case. Instead, the proxy describes a seventeen-day market check process involving fourteen technology and industrial utilities companies. Four companies progressed to the confidentiality agreement stage, and three companies met with management.[142] At the end of the process, the other potential bidders each made clear that a competing bid would not

---

138 *Id.*

139 2012 WL 1253072, at *2.

140 *Id.*

141 *Id.*

142 Defs.' Opening Br. Ex. A, at 13-14.

be forthcoming, either at all or within a reasonable time frame.[143] Plaintiff has not pled facts sufficient to reasonably infer that this process demonstrates a breach of the duty of loyalty.

4. Plaintiff fails to sufficiently plead that the termination fee was unacceptably high

Plaintiff argues that the termination fee was unacceptably high, but this claim is based on a miscalculation. Plaintiff contends that the termination fee was 4.699%.[144] Plaintiff states that the termination fee was $20 million plus $5 million of expense reimbursement, compared to a deal value of $523 million.[145] But the merger agreement specifies that any expense reimbursements are "credited against any obligation of the Company to pay the Termination Fee,"[146] so that the maximum that Opower could pay out at termination would be $20 million. Opower had 53,592,014 shares outstanding at the time of the transaction, and a deal price of $10.30 per share implies a total deal value of roughly $552 million, not $523

143 *Id.* 16.

144 Compl. ¶ 54.

145 *Id.*

146 Defs.' Opening Br. Ex. A, at 66.

million.[147] This means the termination fee was capped at 3.62%, a number in line with Delaware case law.[148]

5. Plaintiff fails to sufficiently plead that conflicts of interest tainted a majority of the Opower board

Plaintiff argues that the board failed to establish a special committee despite "conflicts of interest that tainted a majority of the Board."[149] I note that Plaintiff's contentions in this case closely resemble those in *Goodwin v. Live Entertainment, Inc.*[150] At the summary judgment stage, then-Vice Chancellor Strine first analyzed "whether the . . . defendants breached their *Revlon* duties."[151] "So-called *Revlon* duties are only a specific application of directors' traditional fiduciary duties of care and loyalty in the context of control transaction."[152] *Revlon* requires directors to "obtain[] the highest price for the benefit of the stockholders."[153] "[T]here is no

---

147 *Id.* at 1.

148 *See, e.g., In re 3Com S'holder Litig.*, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (noting that "provisions such as these [which includes a termination and reimbursement fee representing over 4% of the equity value of the merger] are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty").

149 Pl.'s Opp'n Br. 46.

150 *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265 (Del. Ch. Jan. 25, 1999).

151 *Id.* at *21.

152 *In re Answers*, 2012 WL 1253072, at *6.

153 *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986).

single blueprint that a board must follow to fulfill its duties."[154] Instead, the board must take a reasonable course of action under the circumstances presented. This Court concluded that there was "[no] genuine issue of material fact regarding" the *Revlon* analysis.[155]

Thereafter, this Court examined whether a board with a purportedly interested majority acted outside of its business judgment. In discussing the burdens under the business judgment rule, then-Vice Chancellor Strine stated, "[w]here a board approves a transaction with a third party and a shareholder plaintiff attempts to rebut the [business judgment] rule on the basis of an alleged self-interest on the part of certain board members, the . . . plaintiff's burden to rebut the presumption requires him to make two showings."[156] First, "the plaintiff must proffer evidence that those members of the board had a material self-interest in the challenged transaction[,] . . . [but] [e]vidence of self-interest alone is not enough. Rather, there must be evidence of a substantial self-interest suggesting disloyalty, such as evidence of entrenchment motives, vote selling, or fraud."[157] Second,

---

154 *Lyondell*, 970 A.2d at 242-243 (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

155 *In re Answers*, 2012 WL 1253072, at *8.

156 *Id.* at *25.

157 *Id.* (citations omitted).

> the plaintiff must show that those materially self-interested members either: a) constituted a majority of the board; b) controlled and dominated the board as a whole; or c) i) failed to disclose their interests in the transaction to the board; ii) and a reasonable board member would have regarded the existence of their material interests as a significant fact in the evaluation of the proposed transaction.[158]

I first examine whether Plaintiff in the instant case has stated *Revlon* claims against the Opower board.[159] Plaintiff contends that purported favoritism towards Oracle, the two-week market check, the termination fee, and the lack of an independent committee to handle the allegedly interested board demonstrate that Plaintiff did not "seek the highest value reasonably available"[160] for Oracle.[161] As discussed above, the arguments regarding purported favoritism, the market check, and the termination fee fail. And as discussed below, Plaintiff fails to plead that a

---

158 *Id.* (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995)).

159 I note that *Corwin* states, "*Unocal* and *Revlon* are primarily designed to give stockholders and the Court the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available." 125 A.3d at 312 (citation omitted). While this might be read to suggest that *Revlon* does not apply at this stage of litigation, I need not decide the standard of review, because I conclude that Plaintiff fails to state claims under either enhanced scrutiny or the business judgment rule.

160 *In re Answers*, 2012 WL 1253072, at *8.

161 Pl.'s Opp'n Br. 47-48.

majority of the board was interested or non-independent. Instead, Director Defendants negotiated a 30-51% premium for Opower stockholders.[162] Moreover, Director Defendants' transaction process involved: (1) retaining counsel;[163] (2) obtaining a fairness opinion from a financial advisor;[164] (3) conducting a market check involving fourteen strategic buyers;[165] (4) entering into confidentiality agreements with four of those potential buyers;[166] (5) meeting and exchanging nonpublic information with potential buyers;[167] (6) discussing various transaction possibilities at numerous meetings;[168] and (7) having 87.8% of the Company's outstanding shares tendered.[169] Plaintiff fails to state a *Revlon* claim.

I turn now to whether the Complaint gives a reason to doubt the business judgment of Director Defendants. Opower's board contained seven directors at the time of the Oracle transaction: Yates, Laskey, Sakoda, Riechers, McLaughlin,

---

162 Defs.' Opening Br. Ex. A, at 18.

163 *Id.* at 11.

164 *Id.* at 21.

165 *Id* at 14.

166 *Id.*

167 *Id.*

168 *Id.* at 12-18.

169 *Id.* at 2.

Nishar, and Ryu. Plaintiff makes no allegations of self-interest in the transaction against McLaughlin, Nishar, and Ryu. Plaintiff attacks Sakoda's disinterestedness by arguing that he was an NEA partner and that NEA was part of control group.[170] As Plaintiff fails to plead that a control group existed, nothing in the Complaint challenges Sakoda's self-interest. Plaintiff also argues that "Riechers['s] . . . [status as] a paid consultant to Opower prior to the IPO [for which he] received $82,000 and an option to purchase 28,000 shares of Opower common stock" makes him non-independent.[171] Riecher's consulting work took place in 2011, and the Oracle transaction occurred in 2016. Plaintiff offers no explanation for why or how this payment from five years ago would make Riechers beholden to an interested party. Plaintiff also fails to allege that Riechers was interested in this transaction. Thus, Plaintiff does not plead that a majority of the Opower board was interested in the transaction.

Regarding Yates and Laskey, Plaintiff points to their post-transaction employment with Oracle[172] and the conversion of unvested options as evidence of self-interest.[173] I first note that at least one case in this Court has found a board

---

170 Compl. ¶ 58(d).

171 Pl.'s Opp'n Br. 36.

172 Compl. ¶ 58(b).

173 Pl.'s Opp'n Br. 31-32.

disinterested in a sale of the company where a majority of the board is disinterested, but certain directors received post-transaction employment and acceleration of options as part of the deal.[174] Regardless of whether these terms reflect the type of self-interest sufficient at the motion to dismiss stage to suggest disloyalty, Plaintiff fails to plead that Yates and Laskey controlled Opower, and no allegations in the Complaint indicate that Yates and Laskey dominated the board such that they could force the otherwise disinterested and independent directors to approve unfair terms. Plaintiff offers nothing to suggest that the board was uninformed about Yates's and Laskey's post-transaction employment or the rollover of unvested options. Regarding post-transaction employment plans, the proxy explains that, other than an agreement to waive 10% of Yates's and Laskey's portions of the merger consideration unless and until each worked at Oracle for one year, no specific employment agreements had been reached.[175] Moreover, Plaintiff points out that, on a "date that **predated** . . . the [proxy]," Opower "filed documents with the SEC [stating that Opower is] . . . 'committed to keeping Opower innovative and nimble, with **our own** . . . **leadership** . . . **teams**" post-transaction.[176] In light of these

---

174 *See, e.g.*, *In re OPENLANE, Inc.*, 2011 WL 4599662, at *5 (Del. Ch. Sep. 30, 2011).

175 Defs.' Opening Br. Ex. A, at 8.

176 Pl.'s Opp'n Br. 34 (quoting Opower, Written Communication (Form 14D-9C) Ex. 99.3 (May 2, 2016)).

disclosures, Plaintiff does not plead that Laskey and Yates hid these plans from the board.

Similarly, as part of the merger agreement, the Company created a "Company Compensatory Awards" plan, which addressed the treatment of compensation to Opower officers, including the conversion of certain unvested Opower options into unvested Oracle options at a set conversion ratio.[177] Plaintiff does not contend that the board was unaware of Yates and Laskey's options arrangements. Plaintiff fails to show that interested directors comprised a majority of the board, dominated the other directors, or failed to inform the other directors of their alleged conflicts. Thus, Plaintiff fails to plead non-exculpable claims against Opower directors, and I dismiss the count against Director Defendants.[178]

D. Plaintiff's Aiding and Abetting Claim Against Oracle Fails

Plaintiff asserts an aiding and abetting claim against Oracle. "To state a valid aiding and abetting claim, Plaintiffs must allege '(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, . . . (3) knowing participation in

---

177 Defs.' Opening Br. Ex. A, at 5.

178 *See, e.g.*, *Goodwin*, 1999 WL 64265, at *25-26 (dismissing claims arising from the sale of a company to a third party buyer where there were "triable issue[s] of fact regarding whether . . . expectations [of post-transaction employment and remuneration of certain officers who were also directors] constituted a material interest in the merger not shared by the stockholders," but a majority of the board was disinterested and independent, and the plaintiff did not show that the officers dominated the board or failed to disclose their interests).

that breach by the defendants, and (4) damages proximately caused by the breach.'"[179] Plaintiff points to (1) Yates and Laskey's post-transaction employment and options rollover, (2) Oracle's discussions with Opower before and after the IPO, (3) Opower's reduction in force, and (4) Oracle seeking "accelerated" timing of the transaction.[180] Even with reasonable inferences in Plaintiff's favor, these contentions fail to allege knowing participation by Oracle in an alleged breach of fiduciary duty by Opower's board, and I dismiss the aiding and abetting count.

III. CONCLUSION

For the foregoing reasons, I conclude Plaintiff fails to plead the existence of controller, but Plaintiff pleads facts suggesting that Opower's stockholders were not fully informed when tendering their shares, which bars application of the *Corwin* doctrine. Plaintiff, however, fails to state non-exculpated claims against the Opower board or aiding and abetting claims against Oracle. Thus, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

---

179 *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 750 (Del. Ch. 2016) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001)).

180 Pl.'s Opp'n Br. 56.