Clients&FriendsMemo

Delaware Court of Chancery Allows Merger-Based Breach of Fiduciary Duty Claims to Proceed Against Target Company CEO, Financial Advisor, and Acquirer Stemming from Sale of Presidio, Inc.

March 1, 2021

On January 29, 2021, Vice Chancellor Laster of the Delaware Court of Chancery refused to dismiss a shareholder class action stemming from the 2019, $2.2 billion sale of Presidio, Inc., an IT solutions provider specializing in digital infrastructure and cloud and security solutions, to BC Partners Advisors L.P. ("BCP"), a private-equity firm. In *Firefighters' Pension System of the City of Kansas City v. Presidio, Inc.*,[1] a shareholder of Presidio filed suit against Presidio's CEO, its board of directors, Apollo Global Management LLC (Presidio's controlling shareholder, owning approximately 42% of its outstanding common stock), LionTree Advisors, LLC (financial advisor to both Presidio and Apollo), and the acquiror, BCP.

The shareholder claimed that Apollo, Presidio's CEO, and LionTree all favored—out of their own self-interests—a sale to BCP rather than a more competitive sales process. Apollo was allegedly seeking an exit from its investment in Presidio and favored a quick sale to BCP rather than a drawn-out bidding war. Presidio's CEO allegedly favored steering the sale to BCP because BCP had promised him a lucrative post-sale pay package. As for LionTree, it allegedly was motivated by ongoing, lucrative relationships with both BCP and Apollo and tipped off BCP to another incoming bid so that BCP could stave-off a bidding war. The shareholder claimed that, as a result, Apollo, Presidio's CEO, and the board breached their fiduciary duties and that LionTree and BCP aided and abetted the fiduciary duty breaches.

The parties defended the merger on the grounds that the stockholder vote approving the merger "cleansed" the transaction under the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings, LLC*;[2] and that Apollo, while a controller, was not a conflicted controller, so the presence of a controlling shareholder did not demand a higher level of scrutiny. A number of the parties also sought refuge in the exculpatory "raincoat" provision in Presidio's charter (which eliminates the monetary liability of directors for breaches of due care), claiming that they, at most, had failed to

[1] No. 2019-0839-JTL, 2021 WL 298141 (Del. Ch. Jan. 29, 2021).

[2] 125 A.3d 304 (Del. 2015).

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properly supervise the sales process. Finally, the parties contended that even if the transaction were subject to the normal heightened *Revlon* standard that applies to cash-out mergers, the board ultimately acted reasonably and consistent with those duties.

The court, however, held that inadequate disclosures prevented *Corwin* from applying and concluded that the claims against Cagnazzi (Presidio's CEO), LionTree, and BCP were actionable, non-exculpated claims. On the other hand, the court dismissed the claims against all members of the board (except Cagnazzi) and Apollo, finding that the board members were exculpated from liability on due-care claims by the "raincoat" provision in Presidio's charter and that the allegations in the complaint did not sufficiently suggest that Apollo was compromised by a supposed interest in a fast exit. Of particular note to private-equity investors, the court rejected the plaintiff's argument that there is an inherent, disabling conflict between the investment goals of private-equity investors and other company shareholders of the sort that would automatically trigger heightened scrutiny when a private-equity investor holds a controlling stake.

The court also determined—on a rarely-discussed aspect of deal litigation—that just because a transaction may fail to withstand heightened *Revlon* scrutiny or an entire fairness review, that does not automatically mean that the individual directors (or those who aid or abet them) are monetarily liable for approving it. Those heightened standards of review, the court said, provide a "framework for evaluating whether the transaction . . . should be respected in *equity*," and while a transaction that falls short of those standards might entitle shareholders to "transaction-based relief, such as an injunction, rescission, or an equitable modification of the transaction's terms," flunking those standards of review "does not lead ineluctably to liability for the fiduciaries who made the decision."[3] While recognizing that Delaware law is not entirely settled on this point, the court suggested the weight of authority is that monetary liability cannot attach absent an individualized breach of duty: a breach of loyalty, bad faith, or a non-exculpated breach of the duty of care.

The decision lowers the temperature of some recent decisions, such as *In re PLX Technologies Inc. Shareholders Litigation*,[4] which suggested that certain types of investors, like activists, inherently may be prone to liquidity-driven conflicts (*i.e.*, conflicts arising from a significant shareholder's desire to realize short-term gains). The court acknowledged that liquidity interests can lead a director or controller to breach a fiduciary duty by placing such concerns ahead of the interests of company shareholders, but stressed that Delaware courts tend to be "reluctant to find [that] a liquidity-based

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[3] *Presidio*, 2021 WL 298141, at *18.

[4] 2018 WL 5018535 (Del. Ch. Oct. 16, 2018); *see also* Jason Halper et al., *Corporate Governance Litigation & Regulation: A Periodic Review and Predictions for the Remainder of 2019*, Cadwalader, Wickersham & Taft LLP (May 23, 2019), https://www.cadwalader.com/resources/clients-friends-memos/corporate-governance-litigation--regulation--a-periodic-review-and-predictions-for-the-remainder-of-2019#_ftn122.

conflict" in and of itself raised the prospect of a breach of duty[5] and rejected the attempt to do so here against Apollo.[6]

At the same time, *Presidio* marks the latest in a line of decisions where financial advisors to sellers have faced liability for allegedly tainting the adequacy of a sales process.[7] And while the court made clear that a plaintiff confronts a stringent standard to hold a director monetarily liable for a flawed process, its refusal to dismiss claims that Presidio's CEO was compromised by his personal interest in a lucrative pay package echoes our prior warnings that directors and officers must be on guard for that type of conflict.[8]

Background

Prior to the transaction, Apollo was Presidio's controlling shareholder. Apollo owned approximately 42% of Presidio's outstanding common stock and had the ability to appoint four of the nine board members. In May 2019, Apollo began to consider a sale of the company and engaged LionTree to serve as Presidio's financial advisor for the sale.[9] In an effort to find a buyer, Apollo, LionTree, and Presidio's CEO Cagnazzi met with two private equity firms, BCP and Clayton Dubilier & Rice, LLC ("CD&R").[10] Both firms expressed an interest in acquiring the company but, as opposed to BCP, CD&R was unlikely to retain Presidio's existing management because CD&R already owned a portfolio company with an existing successful management team in the same industry. That meant

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[5] *Presidio, Inc.*, 2021 WL 298141, at *22.

[6] *Id.* at *26.

[7] *See, e.g.*, *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015); *In re Del Monte Foods Co. Shareholder Litigation*, 25 A.3d 813 (Del. Ch. 2011); *see also* Jason Halper et al., *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, Cadwalader, Wickersham & Taft LLP (July 8, 2019), https://www.cadwalader.com/resources/clients-friends-memos/a-24-stockholder-of-seller-and-sellers-board-must-face-fiduciary-duty-claims-due-to-flawed-sales-process-and-inadequate-merger-related-disclosures--another-merger-challenge-demonstrates-the-limits-of-corwin#_ftnref1; Gregory Patti et al., *Del Monte Decision Enjoins Shareholder Vote and Deal Protections; Holds Buyer Potentially Responsible for Aiding and Abetting Seller Board's Fiduciary Breach*, Cadwalader, Wickersham & Taft LLP (Feb. 18, 2011), https://www.cadwalader.com/resources/clients-friends-memos/del-monte-decision-enjoins-shareholder-vote-and-deal-protections-holds-buyer-potentially-responsible-for-aiding-and-abetting-seller-boards-fiduciary-breach.

[8] *See* Jason Halper et al., *Director who led merger negotiations, without disclosing details of a lucrative pay package he was offered to lead the post-merger company, must face fiduciary duty claims*, Cadwalader, Wickersham & Taft LLP (July 15, 2020), https://www.cadwalader.com/resources/clients-friends-memos/director-who-led-merger-negotiations-without-disclosing-details-of-a-lucrative-pay-package-he-was-offered-to-lead-the-post-merger-company-must-face-fiduciary-duty-claims#_ftnref1.

[9] *Presidio, Inc.*, 2021 WL 298141, at *3.

[10] *Id.* at *4.

that if CD&R's bid prevailed, Cagnazzi (and two of his brothers, who were also in management at Presidio) most likely would not be employed by the post-transaction entity.[11]

In July 2019, the Presidio board of directors authorized LionTree to engage with BCP, but declined to contact CD&R to discuss a sale since, plaintiff alleged, LionTree misleadingly told the Board that CD&R was focused on closing another pending acquisition and was not focused on yet another transaction in the near-term.[12] Following a presentation by Presidio to BCP and subsequent discussions the following week, BCP made an initial offer to acquire Presidio for $15.60 per share.[13] The board countered BCP's offer with a price of $16.25 per share and insisted that a "go-shop" provision be included in as part of a potential transaction.[14] In response, BCP increased its offer to $16.00 per share, and the parties agreed to a go-shop phase and a no-shop phase.[15] The parties entered into a merger agreement containing those terms on August 14, 2019.[16]

The go-shop provision authorized Presidio to "solicit, initiate, propose or induce the making, submission, or announcement of" a bid from other interested buyers.[17] The provision also contained a "no-shop" period in which Presidio could continue to negotiate with certain parties who made a qualifying bid prior to the end of the go-shop period (an "Excluded Party").[18] If Presidio opted to terminate the agreement with BCP during the go-shop period to pursue a superior offer, Presidio was required to pay BCP a termination fee of $18 million.[19] If Presidio opted to terminate the merger agreement during the no-shop period, the fee jumped to $40 million, unless the merger agreement was terminated to pursue a superior offer made by an Excluded Party, in which case Presidio would only have to pay the $18 million fee.[20]

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[11] *Id.*

[12] *Id.* at *5.

[13] *Id.*

[14] *Id.* at *6.

[15] *Id.*

[16] *Id.* at *7.

[17] *Id.* at *8.

[18] *Id.*

[19] *Id.*

[20] *Id.*

The same day the merger agreement was executed, LionTree approached 52 potential buyers, including CD&R.[21] CD&R expressed an interest in acquiring Presidio, and quickly entered into a confidentiality agreement with Presidio and obtained access to a data room to conduct its diligence.[22]

As a result of that outreach, and still during the go-shop period, CD&R offered to acquire Presidio for $16.50—a bid sufficient to qualify CD&R as an Excluded Party with which Presidio could continue to negotiate even after the end of the go-shop period and into the no-shop period.[23] CD&R communicated its expectation that the details of its offer would remain confidential between CD&R and Presidio, other than the merger agreement's requirement that CD&R's identity—and nothing more—be made known to BCP.[24] Shortly before the existence of CD&R's offer was communicated to BCP, LionTree, unbeknownst to Presidio's board, tipped BCP about the details of CD&R's higher bid.[25] BCP immediately began preparing a new bid, and armed with the tip from LionTree, submitted an offer topping CD&R's bid by a mere 10 cents. Seeking to ramp up the pressure on Presidio to close, BCP coupled its topping bid with a demand that Presidio increase the termination fee even for an Excluded Party to $41 million[26] and imposed a 24-hour deadline for Presidio to accept the offer.[27] Within the 24-hour window, CD&R again topped BCP's bid with an offer of $17.00 per share, but conditioned the offer on the completion of due diligence. The board, supposedly concerned with the uncertainty of CD&R's offer, accepted BCP's offer. The parties announced the amended merger agreement on September 26, 2019.[28]

Shortly thereafter, stockholder Firefighters' Pension System of the City of Kansas City filed suit on behalf of a class of Presidio stockholders, alleging that Cagnazzi and the board breached their fiduciary duties and that BCP aided and abetted those breaches.[29] The stockholder quickly sought a preliminary injunction to enjoin the merger.[30] After hearing oral argument, the court denied the application, finding that the stockholder had failed—on a limited preliminary injunction record—to establish a likelihood of success or that the balance of the equities favored enjoining the merger,

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[21] *Id.* at *9.

[22] *Id.*

[23] *Id.* at *10.

[24] *Id.*

[25] *Id.* at *11.

[26] *Id.* at *12.

[27] *Id.*

[28] *Id.* at *14.

[29] *Id.*

[30] *Id.*

rather than putting it to a vote.[31] The special meeting of the stockholders proceeded on November 6, 2019, and the merger was approved by more than 85% of the vote.[32]

After the merger closed, the same shareholder amended its complaint to seek damages from Cagnazzi, the Presidio board, Apollo, LionTree, and BCP, alleging that Cagnazzi, the board, and Apollo (as the controlling stockholder) breached their fiduciary duties of loyalty and care and that LionTree and BCP aided and abetted those breaches.[33]

The Delaware Court of Chancery dismissed the claims against the board and Apollo, but refused to dismiss the claims against Cagnazzi, LionTree, and BCP.[34]

Takeaways

1. Directors overseeing a sale must not let personal interests taint the board's process. The court found that the transaction, a cash-out merger, was subject to enhanced scrutiny, Delaware's intermediate level of review applicable to potentially conflicted transactions.[35] The shareholder's claims in this case were "paradigmatic *Revlon* claim[s]"—claims that "a conflicted fiduciary who is insufficiently checked by the board . . . tilts the sale process toward his own personal interests in ways inconsistent with maximizing stockholder value."[36] When enhanced scrutiny applies, directors are required to take steps reasonably calculated to obtain the best price for stockholders. Therefore, to survive a motion to dismiss, a plaintiff must allege that the board did not act reasonably in conducting the sales process.

   Noting that the sale process—without the "divergent interests" pled in the complaint—would have fallen within the "range of reasonableness," the court faulted Cagnazzi, BCP, and LionTree for tainting that process because Cagnazzi and LionTree allegedly "steered" the process towards a deal with BCP, unchecked by the rest of the board.

2. Directors must attempt to uncover and check potential self-interested motivations on the part of officers leading merger negotiations to favor particular bidders. According to the Court, Cagnazzi "had self-interested reasons to secure a transaction with BCP," namely, the

[31] *Id.*

[32] *Id.*

[33] *Id.* at *15.

[34] *Id.* at *54.

[35] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

[36] *In re Mindbody, Inc. Stockholders Litig.*, No. 2019-0442-KSJM, 2020 WL 5870084, at *13 (Del. Ch. Oct. 2, 2020).

opportunity to stay on as CEO, keep his brothers in their jobs, and keep most of his stock.[37] While the court criticized Cagnazzi as well as the Board's failure to adequately supervise the sales process by addressing this potential for self-interested conduct, the need for it to have done so was well established under Delaware decisions confronting similar CEO conduct.[38]

3. The conduct of financial advisors will be closely scrutinized in challenges to the adequacy of a sales process. LionTree, for its part, allegedly was motivated by its existing relationships with both BCP and Apollo, which it did not wish to disrupt by allowing CD&R to elbow into the process. For example, the complaint alleged that LionTree had a belief that Apollo favored a quick deal with BCP, and therefore was incentivized to pursue that transaction over others offering greater consideration to shareholders. LionTree was advising Apollo on another multi-billion dollar acquisition around the time of this merger, while also serving as a co-investor on another multi-billion deal (for which it also served as financial advisor). Indeed, in the two years prior, LionTree had earned nearly $16 million from Apollo in fees and commissions. Likewise, LionTree had a history with BCP, having earned approximately 3.75 million Euros in advisory fees over the previous two years. Moreover, given its established relationship with Cagnazzi, LionTree was in a position to receive continued future business from Cagnazzi as CEO of the post-transaction entity. The court noted that, while "[p]ushing for a competitive process involving CD&R might earn LionTree a little more money in the short run . . . it would not serve LionTree's interests in the long run [because the new entity would have] no incumbent relationship with LionTree."[39] The court concluded that, accepting as true the allegations in the complaint, the board failed to "make a meaningful effort to oversee LionTree" because it did not require LionTree to divulge all material information about its relationships and potential conflicts of interest or adequately investigate those potential conflicts until after the merger agreement was signed.

This case serves as another reminder[40] of the importance for directors, early in the process, to identify any conflicts—or potential conflicts—among those involved in the process, including directors and officers involved in the negotiations and financial or other advisors. Investment banks in particular tend to play a "central role" in the process, so "directors must act reasonably to identify and consider the implications of the investment banker's . . .

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[37] *Presidio, Inc.*, 2021 WL 298141, at *32.

[38] *Id.*

[39] *Id.*

[40] *See also* Halper et al., *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, *supra* note 6; Halper et al., *Director who led merger negotiations, without disclosing details of a lucrative pay package he was offered to lead the post-merger company, must face fiduciary duty claims*, *supra* note 7.

potential conflicts."[41] The fact that a financial advisor does not have "the type of blatant buy-side conflict of interest present in [the] *RBC*, *Del Monte*, and *El Paso*" cases[42] does not mean the financial advisor is free of conflicts that can taint a sales process. As the court held here, "LionTree's interests were more subtle, but no less self-interested."[43]

4. Courts will carefully scrutinize directors' rationale for preferring one bidder over another, particularly where the rejected suitor offers a higher price. The court observed that other aspects of the sale process that would ordinarily not, on their own, give rise to a breach were nonetheless relevant to the overall inference that the sale process was tainted. In particular, the court viewed the board's stated reasons for criticizing CD&R's offer as having "an air of pretext."[44] The board claimed to have been concerned with CD&R's ability to secure debt financing and the potential for delay because of a supposed need for CD&R to seek approval for the transaction from the Committee on Foreign Investment in the United States (CFIUS), which BCP, as a London-based firm, had to do.[45] But as the court pointed out, CD&R had provided a fifty-eight page draft debt commitment letter from Credit Suisse and there was no need for CD&R to seek CFIUS approval, because unlike BCP, it was based in New York.[46]

5. Courts are particularly skeptical of board or financial advisor conduct that creates information asymmetries benefitting a favored bidder at the expense of other bidders. LionTree's tip to BCP concerning the amount of CD&R's bid "cast[] a dim light on the sale process as a whole." The tip allegedly put BCP in the driver's seat, allowing it to neatly top CD&R's bid by a mere 10 cents, while coupling that bid with an attempt at a knockout blow in the form of a demand for a higher termination fee and a twenty-four hour ultimatum. That strategy succeeded in preventing CD&R from sparking a bidding war by allegedly causing the board to insist that CD&R materially strengthen its offer within BCP's 24-hour time limit (when CD&R otherwise would have had eight days remaining to negotiate under the go-shop/no-shop provisions) and agree to increase the termination fee from $18 million to $40 million,

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[41] *Presidio, Inc.*, 2021 WL 298141, at *36. The court emphasizes the importance of identifying conflicts for investment bankers because "[i]nvestment banking is also a business that is grounded in relationships." *Id.* at *42.

[42] *Presidio, Inc.*, 2021 WL 298141, at *40; *see also RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015) (finding a conflict existed where the financial advisor engaged to lead a sale process sought to use its position as sell-side advisor to secure buy-side financing roles); *In re Del Monte Foods Co. Shareholder Litig.*, 25 A.3d 813 (Del. Ch. 2011) (finding that a financial advisor for a sell-side company was conflicted where the advisor steered the transaction towards a buyer that would retain the advisor to secure buy-side financing); *In re El Paso Corp. Shareholder Litig.*, 41 A.3d 432 (Del. Ch. 2012) (finding that a CEO, charged with negotiating the sale of his company, was conflicted where he had an interest in keeping the purchase price low to pursue a deal with the buy-side to acquire a portion of the company).

[43] *Presidio, Inc.*, 2021 WL 298141, at *32.

[44] *Id.* at *35.

[45] *Id.* at *10-11.

[46] *Id.*

which ultimately caused CD&R to walk away from a deal. These allegations, coupled with the other alleged sales process flaws discussed above, were sufficient to suggest that the transaction failed to satisfy enhanced scrutiny.

6. A controller's interest in achieving a liquidity event so as to monetize its investment in and of itself is insufficient to establish a disabling conflict, especially where the controller receives the same consideration as unaffiliated common stockholders. Plaintiff urged the court to deem Apollo a conflicted controller on the basis that Apollo had a disabling "liquidity-driven conflict" that caused it to favor a quick deal with BCP over a longer, competitive sales process.[47] The stockholder claimed Apollo had invested in Presidio for longer than the fund's "average investment horizon," Apollo publicly described its investment as maturing, and it already had liquidated more than 21 million shares in four secondary offerings.[48] Although observing that these allegations had "some color at the pleading stage," the court ultimately was unpersuaded that these allegations sufficed to permit an inference that Apollo was willing to sacrifice a higher price for a deal.[49] The decision thus offers a level of comfort to private-equity firms and other controlling stockholders that generalized allegations about their investment horizons and trading activity is not enough to suggest a disabling conflict with the interests of other shareholders.

   Defendants also argued that the "*Synthes* safe harbor"[50]—that a controller does not have a conflict of interest when it receives the same consideration as all of the stockholders—triggered business-judgment-rule review. The court concluded that *Synthes* conflicted with *Corwin* "by bestowing the protections of the business judgment rule without the fully informed stockholder vote that *Corwin* deemed crucial." Even so, the absence of diverging consideration to the controller is relevant to the analysis: the court found that when a controller receives the same consideration as other stockholders, the controller will likely bargain for the maximum shareholder value, and therefore, "a court should be reluctant to second guess the transactional outcome in the transactional justification context or allow a complaint that seeks to impose liability on the controller to get past the pleading stage in a liability setting." Accordingly, as discussed below, the court ultimately dismissed the claims against Apollo.

7. *Corwin* cleansing denied, again. Defendants argued that Delaware's most deferential standard of review, the business-judgment-rule, should apply to the transaction on the alternative ground that it was "cleansed"—under the Delaware Supreme Court's 2015

[47] *Id.* at *22.

[48] *Id.* at *23-24.

[49] *Id.* at *24-26.

[50] 50 A.3d 1022 (Del. Ch. 2012).

decision in *Corwin*—by virtue of an uncoerced vote of fully informed disinterested stockholders approving the transaction and the absence of a conflicted controller.[51] The court rejected defendants' invocation of *Corwin* on the basis that the vote approving the transaction was not fully informed because stockholders were unaware of LionTree's tip to BCP—a fact that the court concluded could be material to the shareholders' evaluation of the sale process. While Presidio had tried to moot that claim by disclosing that LionTree had one-on-one discussions with BCP during which it "confirmed that [CD&R]s Proposal offered a substantial economic improvement over the Merger Consideration," that supplemental disclosure omitted the fact that LionTree told BCP the exact price that CD&R offered—a key piece of information, in the court's view, that "enable[d] BCP to start work immediately on a revised proposal to acquire the Company for just 10¢ higher than CD&R's offer." The court further concluded that the supplemental disclosure created a "misleading impression" that the board had contemporaneously known about the tip, when in fact the board did not learn about it until after the deal was signed. At the pleadings stage, the court concluded that these omissions supported a reasonable inference that the disclosure was materially misleading and the stockholder vote was therefore not fully informed.[52] The *Presidio* decision is the latest in a line of cases where the Delaware courts have tempered the force of *Corwin* by finding that a stockholder vote was not fully informed.[53]

8. <u>A challenged transaction that fails to satisfy a heighted standard of review does not automatically result in personal liability for the fiduciaries who approved the transaction</u>. While finding that the sale process was flawed, the court dismissed duty of loyalty claims against the directors other than Cagnazzi and Apollo because plaintiff failed to allege facts permitting an inference that those defendants advanced a self-interest adverse to the stockholders' interest or otherwise acted in bad faith. The board did not know about the tip, and though "insufficiently careful in supervising LionTree," the exculpatory provision

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[51] 125 A.3d 304 (Del. 2015); Halper et al., *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, *supra* note 6; Halper, *Director who led merger negotiations, without disclosing details of a lucrative pay package he was offered to lead the post-merger company, must face fiduciary duty claims*, *supra* note 7.

[52] The court gave short shrift to defendants' argument that the court had rejected plaintiff's disclosure-related allegations in denying plaintiff's motion for preliminary injunction, noting that a denial of an injunction is not dispositive on a motion to dismiss. The court explained that, when considering a motion for injunctive relief "a plaintiff must demonstrate… a reasonable probability of success on the merits" in order to obtain the "extraordinary remedy" of a preliminary injunction. In contrast, the standard for overcoming a motion to dismiss is significantly more plaintiff-friendly and only requires a showing that the claims are reasonably conceivable, rather than likely to succeed. *Presidio, Inc.*, 2021 WL 298141, at *28-29.

[53] *See, e.g.*, *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702 (Del. 2020); *Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc.*, 2019 WL 2564093 (Del. Ch. June 21, 2019); *Morrison v. Berry*, 191 A.3d 268 (Del. 2018); *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018); *see also* Halper et al., *Corporate Governance Litigation & Regulation: A Periodic Review and Predictions for the Remainder of 2019*, *supra* note 3; Halper, *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, *supra* note 6.

prevented plaintiff from pursuing a duty of care violation on that claim. Likewise, because Apollo was not conflicted, the only viable claims against the Apollo-appointed directors implicated exculpated duty of care claims. As discussed further below, the court found there were insufficient allegations supporting a breach of the duty of care, or gross negligence, against Apollo. The court observed that "at best" the sale process fell outside of the range of reasonableness, but "unreasonableness does not equate to recklessness," and therefore, the directors other than Cagnazzi and Apollo were not liable.

The court, however, found that plaintiff sufficiently pled facts supporting claims for aiding and abetting breaches of fiduciary duty against LionTree and BCP, and a claim for breach of fiduciary duty against Cagnazzi. At the pleadings stage, the court held that plaintiff adequately alleged facts supporting a reasonable inference that: (i) LionTree manipulated the sale process, including by tipping BCP and belatedly disclosing potential conflicts; (ii) BCP knew LionTree's tip was wrongful, but exploited its superior knowledge by increasing the burdens on CD&R through the 24-hour response deadline and increased termination fee; and (iii) Cagnazzi coordinated with LionTree to "steer the sale process" in favor of BCP, his preferred acquirer, creating a reasonable inference that he breached his duty of loyalty to Presidio. Importantly, the court also found that the "collectively selective effort to keep the tip secret until this litigation" supported a reasonable inference of a civil conspiracy.

9. <u>There remains an open question of whether a controlling stockholder is entitled to indirect exculpation when its designated board members are covered by a company's exculpation provision</u>. In addressing Apollo's liability for its alleged breach of the duty of care, the court recognized that Apollo's five board representatives were covered by the company's exculpation provision, precluding monetary liability claims against the directors for breaches of the duty of care.[54] The court raised the question of whether or not Apollo as the controlling stockholder was entitled to the same exculpation.[55] Vice Chancellor Laster observed that there is a conflict between the caselaw and relevant statutes—notably that at least one court has held that a controlling stockholder could not be held liable for a breach if its board representatives were exculpated, while the Delaware exculpation statute expressly applies only to directors.[56] The court ultimately dismissed the claims against Apollo for failing to plead facts that support an inference of gross negligence, and thus did not decide whether Apollo may be entitled to indirect exculpation.[57]

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[54] *Presidio, Inc.*, 2021 WL 298141, at *48.

[55] *Id.*

[56] *Id.* at *49 (citing *Shandler v. DLH Merchant Banking, Inc.*, 2010 WL 2929654, at *16 (Del. Ch. July 26, 2010)); 8 Del. C. § 102(b)(7)).

[57] *Id.* at *50.

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