IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MARY MORGAN, Plaintiff, v. H. BARRY CASH, DONALD FORTENBERRY, SKIP GLASS, DENNIS J. GORMAN, SUSAN M. NASH, TERRY ROCK, and EMC CORPORATION, a Massachusetts Corporation, Defendants.	)	C.A. No. 5053-VCS

MEMORANDUM OPINION

Date Submitted: May 5, 2010
Date Decided: July 16, 2010

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STRINE, Vice Chancellor.

I. Introduction

This case involves a dispute between Mary Morgan, a former common stockholder of a small software company, Voyence, Inc., and Voyence's acquiror, EMC Corporation. Morgan complains that the Voyence directors breached their fiduciary duties by failing to take reasonable steps to maximize stockholder value in a sale of the corporation.[1] As a result of that alleged failure, says Morgan, the Voyence directors approved a cash merger that distributed consideration only to Voyence's preferred stockholders, and not to the common stockholders. Morgan alleges that the Voyence directors — each of whom held preferred stock or were designees of preferred stockholders — accepted a low offer from EMC in order to benefit themselves at the expense of Voyence's common stockholders. The capital structure of Voyence provided that the common stockholders would only receive merger consideration after the preferred stockholders received their full liquidation preference. Because the consideration offered by EMC was not sufficient to provide the preferred stockholders with their full liquidation preference, EMC's merger with Voyence extinguished the common stockholders' position without them receiving a dime.

Along with a breach of fiduciary duty claim against Voyence's erstwhile directors, Morgan has also brought a claim against EMC for aiding and abetting the Voyence board's alleged breach. Morgan alleges two ways in which EMC was complicit in the Voyence board's breach of fiduciary duty in connection with the merger: (1) EMC

[1] *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985) (defining directors' duty in a sale of control context as the duty to take reasonable steps to achieve the highest value reasonably available for stockholders).

attempted to buy off the Voyence management's support for its offer by promising them employment with the post-merger entity; and (2) EMC exploited conflicts of interest between the Voyence's directors, who all held preferred stock or were appointees of preferred stockholders, and Voyence's common stockholders.

Because reasonable inferences drawn from the facts alleged in Morgan's complaint cannot sustain either of those two theories, I grant EMC's motion and dismiss Morgan's aiding and abetting claim for two reasons. First, other than the unremarkable fact that EMC offered Voyence's management modest compensation packages to stay on after the merger, Morgan's complaint points to no other facts suggesting that there was an unseemly quid pro quo between EMC and the Voyence directors, whereby the Voyence board accepted a low merger price in exchange for improper personal benefits.

Second, as to the theory that EMC exploited conflicts within Voyence's board for its benefit and to the detriment of the Voyence shareholders, Morgan has only alleged that EMC knew that Voyence's directors were all preferred stockholders or designees of preferred stockholders. No other facts suggesting collusion between EMC and the Voyence directors are found in the complaint. Indeed, the complaint repeatedly acknowledges that EMC and Voyence negotiated at arm's length over the deal.

As an arms length bidder, EMC had no duty to pay more than market value simply because only by paying an above-market price would proceeds be available to Voyence's common stockholders. A bidder is entitled to negotiate price, and the bare allegation that the bidder paid consideration that did not result in payments to the target's common stockholders provides, in itself, no rational basis to infer that the bidder was complicitous

in a breach of fiduciary duty. Here, the complaint pleads no basis to believe that EMC knew that Voyence was worth materially more than EMC paid or any factual basis that Voyence was in fact worth materially more than EMC paid; indeed, the complaint's facts suggest that several other logical buyers had been contacted about the chance to buy Voyence and never made an offer. It is not a status crime under Delaware law to buy an entity for a price that does not result in a payment to the selling entity's common stockholders. But that is in essence all that the plaintiffs allege that EMC did wrong. Therefore, Morgan's aiding and abetting claim against EMC is dismissed, leaving her to proceed with her claims against Voyence's directors, which are not addressed in this opinion.

II. Factual Background

These are the facts as pled in the complaint and the documents it incorporates.

A. In 2000, Voyence Is Formed, And Preferred Stock Is Distributed To Voyence's Investors

Voyence was incorporated in 2000 with the objective of developing software products to improve the design and management of complex distributed networks.[2] Like many start-up companies, Voyence needed capital and therefore sought out additional investors. Eventually, three investors — Canaan Partners, InterWest Partners, and CenterPoint Ventures — provided Voyence with capital. In return for their investments, those three investors were issued shares of preferred stock and given the right to designate a director apiece to the Voyence board. Those investors each appointed one of

[2] Compl. ¶ 21.

its own partners to be its designee to Voyence's board — defendants H. Berry Cash, Skip Glass, and Terry Rock. In addition to these three directors, defendant Dennis Gorman, who also held Voyence preferred stock, was named Chairman. Therefore, four of the five members of the Voyence board who approved the transaction were individuals who either held preferred stock personally, or were the designees of preferred stockholders.[3] Voyence's chief executive officer, defendant Susan Nash, was also given a seat on the board. Although she did not hold preferred stock, the complaint indicates that Nash was married to a partner at InterWest Partners.[4]

B. Voyence Looks For An Acquiror And Enters Into Negotiations With EMC

From its inception, one of Voyence's goals was to add sufficient value to its corporate customers' software solutions so that the customer might be interested in acquiring Voyence.[5] By early 2006, Voyence had identified seven potential acquirors,[6] and by March 2007, Nash and the Voyence board were in discussions with at least six potential buyers, including Hewlett-Packard Company ("HP"), IBM, Computer

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[3] Defendant Gorman owned 155,571 shares of Voyence Series 1 Preferred Stock, 13,736 shares of Voyence Series 2 Preferred Stock, and 92,761 of Voyence Series 3 Preferred Stock. *Id*. at ¶ 12. Defendant Cash was a designee of InterWest Partners, which owned preferred stock in Voyence through various funds. *Id*. at ¶ 9. Cash also personally held 28,823 shares of Voyence Series 1 Preferred Stock and 15,761 shares of Voyence Series 3 Preferred Stock. Defendant Glass was a designee of Canaan Partners, which held 2,085,084 shares of Voyence Series 2 Preferred Stock and 1,786,665 of Voyence Series 3 Preferred Stock. *Id*. at ¶ 11. Defendant Rock was a designee of CenterPoint Ventures, which held 1,153,846 shares of Voyence Series 1 Preferred Stock, 290,885 shares of Voyence Series 2 Preferred Stock, and 793,882 shares of Voyence Series 3 Preferred Stock. *Id*. at ¶ 14.

[4] *Id*. at ¶ 13.

[5] *Id*. at ¶ 29.

[6] *Id*. at ¶ 30.

Associates, BMC, Microsoft, and EMC.[7] In April 2006, Nash allegedly told Voyence's financial advisor, Wachovia Capital Markets LLC ("Wachovia"), that EMC was "our favorite candidate to acquire us."[8] But, at the same time, Nash pressed HP, which had a right of first refusal to buy Voyence if Voyence retained an investment bank for the purpose of selling the company,[9] to bid at least $50 million for the company, and hoped to trigger a bidding contest between HP and EMC.[10] HP, which then had a market capitalization of roughly $87 *billion* and could therefore easily afford a $50 *million* acquisition,[11] declined to make an offer, and instead acquired one of Voyence's close competitors in July 2007.[12]

Eventually, EMC made an offer to acquire Voyence for a price between $48 million to $52 million in cash.[13] Voyence's board and advisors allegedly did not reach out at that time and seek offers from any of the other potential bidders who had been contacted earlier, and Wachovia eventually informed the Voyence board that EMC appeared to be the only potential purchaser for the company in the near future.[14] EMC

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[7] *Id*. at ¶ 33.
[8] *Id*. at ¶ 34.
[9] *Id*. at ¶ 35.
[10] *Id*. at ¶¶ 33, 38-39.
[11] HP's April 2006 market capitalization was estimated using HP's 2006 annual report and historical pricing data. *Compare* Hewlett-Packard Company, Annual Report (2006), http://media.corporate-ir.net/media_files/irol/71/71087/pdf/ HP_2006AR.pdf *with* http://finance.yahoo.com/q/hp?s=HPQ&a=03&b=1&c=2006&d=03&e=30&f=2006&g=d. At oral argument, Morgan's counsel agreed that HP had the resources to buy Voyence if it had wanted to. *See Cash v. Morgan*, C.A. No. 3053-VCS, at 34 (Del. Ch. May 5, 2010) (TRANSCRIPT).
[12] Compl. ¶ 40.
[13] *Id*. at ¶ 43.
[14] *Id*. at ¶ 44.

raised its offering price to $53 million after Voyence made a counter-proposal.[15] For the next two months — August and September 2007 — the parties conducted due diligence and further negotiated the terms of the merger agreement.[16]

In October 2007, EMC revised its offer downward to $40 million after it became apparent that Voyence would not meet its third quarter revenue projections.[17] The complaint alleges that "EMC was tough on Voyence for missing its 3Q 2007 revenue estimates,"[18] and was "being a tough negotiator and seizing upon an opportunity to drive a harder bargain."[19] Rather than pursuing other alternatives, the Voyence board chose to continue to negotiate with EMC despite the drop in its offer price, and attempted to raise the offering price to between $42 million and $45 million.[20]

Eventually, EMC agreed to acquire the company for $42 million.[21] The complaint alleges that, at the $42 million price, Voyence's preferred stockholders "had agreed to a slight 'hair-cut'" amounting to an approximate 10% reduction to their liquidation preferences, and that the common stockholders would receive nothing.[22] The complaint also alleges that EMC knew that, at that offer price, Voyence's common stockholders would not receive any of the merger's consideration.[23]

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[15] *Id*. at ¶¶ 45-47.
[16] *Id*. at ¶ 52.
[17] *Id*. at ¶¶ 53-56.
[18] *Id*. at ¶ 55.
[19] *Id*. at ¶ 56.
[20] *Id*. at ¶¶ 58, 61.
[21] *Id*. at ¶ 72.
[22] *Id*. at ¶ 76.
[23] *Id*. at ¶¶ 60, 115.

At the same time, during October 2007, the Voyence board revised bonus payments under the company's compensation plan, increasing the shares of the Voyence bonus pool for Nash and Donald Fortenberry, Voyence's chief financial officer, by 5% — from 35% to 40% for Nash, and from 8% to 14% for Fortenberry.[24] There are no facts pled in the complaint suggesting that EMC was in any way involved with this increase in Nash and Fortenberry's bonuses.[25]

C. Voyence And EMC Agree To A Deal That Apportions No Merger Consideration To Voyence's Common Stockholders

On October 26, 2007, the merger was consummated with the support of written consents filed by the preferred stockholders,[26] and Voyence became a wholly-owned subsidiary of EMC. Under the terms of the merger agreement, Voyence's common stock was cancelled and retired without payment of any consideration upon consummation of the merger. Also as part of the deal, Nash and Fortenberry were promised employment positions at EMC.[27] In particular, Nash was given a base salary of $215,000, a bonus up to $90,000, options to purchase EMC stock valued at $78,200, and a restricted stock grant valued at $115,000.[28] At oral argument, Morgan's counsel conceded that the compensation packages were "[i]n the same ballpark" as to what Nash and Fortenberry were making at Voyence before the merger.[29]

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[24] *Id*. at ¶¶ 67, 69.
[25] *See Morgan*, C.A. 3053-VCS, at 41 (Del. Ch. May 5, 2010) (TRANSCRIPT) (Morgan's counsel conceding that the complaint does not allege that EMC was involved in the restructuring of Voyence's bonus pool).
[26] Compl. ¶ 83.
[27] *Id*. at ¶¶10, 13.
[28] *Id*. at ¶ 71.
[29] *Morgan v. Cash*, C.A. 5053-VCS, at 42 (Del. Ch. May 5, 2010) (TRANSCRIPT).

Shortly thereafter, Morgan, a former Vice President of Worldwide Operations at Voyence and a holder of 162,263 shares of Voyence common stock,[30] filed a statutory appraisal action in this court seeking a valuation of her common shares. Then, over two years later, Morgan filed this equitable fiduciary duty action, challenging EMC's acquisition of Voyence on two grounds. In the complaint's first count, Morgan argues that Nash, Fortenberry, and the members of Voyence's board of directors, who stood to personally profit from the transaction, violated the duty of loyalty they owed Voyence's common stockholders because they failed to fulfill their so-called *Revlon* duties[31] and approved the transaction with EMC that gave no consideration to the common stockholders in order to line their own pockets.

In the complaint's second count, Morgan argues that EMC aided and abetted the Voyence board's breach of its fiduciary duties. Morgan presents two theories to support this aiding and abetting claim: (1) EMC's offer of employment to Nash and Fortenberry following the consummation of the merger induced them to support EMC's lowered offer price;[32] and (2) EMC knew that the Voyence directors were the designees of preferred stockholders, or held preferred stock themselves, and exploited the conflict of interest between these directors and common stockholders.[33]

EMC has moved to dismiss count two of Morgan's complaint, arguing that Morgan has failed to state a claim upon which relief can be granted. Therefore, the

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[30] Compl. ¶ 8.
[31] *See Revlon*, 506 A.2d at 182.
[32] *See supra* page 8.
[33] *See supra* page 7.

question before me is whether it is reasonable to infer that EMC aided and abetted Voyence's alleged breach of fiduciary duty based on the two theories Morgan puts forth. In other words, this opinion only considers the sustainability of Morgan's allegations against EMC, and not Morgan's claims that Voyence's directors breached their fiduciary duties.

III. Legal Analysis

A. Legal Standard

The standard for dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted is well established. The motion will be granted if it appears with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the pleading.[34] In considering a motion to dismiss under Rule 12(b)(6), the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[35]

For her claim against EMC to survive a motion to dismiss, Morgan's complaint must allege facts that satisfy the four elements of an aiding and abetting claim: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty . . . (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the

[34] *See Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001); *Romero v. Career Educ. Corp.,* 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005); *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).
[35] *See Malpiede*, 780 A.2d at 1083; *Grobow v. Perot*, 539 A.2d 180, 187 n.6 (Del. 1988).

breach."[36] As to the requirement that a third party "knowingly participated" in the alleged fiduciary breach, this court has stated:

> "[I]t is necessary that the plaintiffs make factual allegations from which knowing participation may be inferred in order to survive a motion to dismiss. For example, knowing participation may be inferred where the terms of the transaction are so egregious or the magnitude of the side deals is so excessive as to be inherently wrongful. In addition, the Court may infer knowing participation if it appears that the defendant may have used knowledge of the breach to gain a bargaining advantage in the negotiations. The plaintiff's burden of pleading knowing participation may also be met through direct factual allegations supporting a theory that the defendant sought to induce the breach of fiduciary duty, such as through the offer of side payments intended as incentives for the fiduciaries to ignore their duties.[37]

And, the Delaware Supreme Court has explained that a bidder's attempt to reduce the merger price through arm's-length negotiations cannot give rise to liability for aiding and abetting, although a bidder may be liable to the target's stockholders if the bidder attempts to exploit conflicts of interest in the board or conspires with the board to breach a fiduciary duty.[38]

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[36] *Malpiede*, 780 A.2d at 1096 (citations omitted).

[37] *In re Telecommunications, Inc. S'holders Litig*., 2003 WL 21543427, at *2 (Del. Ch. July 7, 2003) (internal citations omitted).

[38] *Malpiede*, 780 A.2d at 1097-98 ("Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach. Under this standard, a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting, whereas a bidder may be liable to the target's stockholders if the bidder attempts to create or exploit conflicts of interest in the board. Similarly, a bidder may be liable to a target's stockholders for aiding and abetting a fiduciary breach by the target's board where the bidder and the board conspire in or agree to the fiduciary breach.") (citations omitted); *see also In re Gen. Motors (Hughes) S'holder Litig*., 2005 WL 1089021, at *24 (Del. Ch. May 4, 2005) ("This Court has consistently held that 'evidence of arm's-length negotiation with fiduciaries negated a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.") (citations omitted); *In re Frederick's of Hollywood, Inc. S'holders Litig*., 1998 WL 398244, at *4 (Del. Ch. July 9, 1998) ("[A]n offeror who conducts arm's-length negotiations

B. EMC Did Not Aid And Abet The Voyence Board's Alleged Breach Of Fiduciary Duties By Bargaining For A Lower Merger Price

I take Morgan's two theories of how EMC knowingly participated in the Voyence directors' alleged breach in turn. First, I address whether Morgan has pled facts sufficient to infer that EMC diverted funds to Voyence's management in return for their support for EMC's lowered offer price. Second, I address whether Morgan has pled facts sufficient to infer that EMC attempted to exploit conflicts of interest within Voyence's board, which was comprised of directors who were designees of preferred stockholders. Neither argument is supported by the factual allegations in the complaint.

1. Morgan Has Alleged No Facts Suggesting That EMC Offered Voyence's Management Personal Benefits In Exchange For Support For A Lower Merger Price

Morgan's complaint contains no facts plausibly indicating that EMC participated in an alleged breach of fiduciary duties by inducing Voyence's management to support its lowered offer. As to the increases in Nash and Fortenberry's bonuses, there is no indication in the complaint that EMC was involved in those increases.[39] For example, it is not alleged that EMC pressed the board to make those increases in exchange for Nash and Fortenberry's support for EMC's $40 million bid. The only fact in the complaint supporting Morgan's theory that EMC bought off Voyence's management is that EMC extended offers of employment to Nash and Fortenberry.[40] But the compensation packages EMC offered were hardly eyebrow-raising, and were comparable to what both

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leading to an acquisition agreement cannot be said to be knowingly participating in an alleged breach of fiduciary duty by the target board.").

[39] *See supra* page 7.

[40] *See supra* page 8.

executives had been making at Voyence before the merger.[41] Therefore, it is implausible that those offers were part of a quid pro quo whereby Nash and Fortenberry favored EMC's bid in exchange for the post-merger employment contracts.[42] Nor is there any allegation that EMC diverted proceeds to them that would have otherwise been paid as merger consideration. Furthermore, retaining management is a routine occurrence for the obvious reason that an acquiror often wants to keep existing management in order to ensure that the acquired assets continue to be managed optimally.[43] To view the retention of management on reasonable terms with suspicion would only undermine business practices that often facilitate the difficult transitions required when two businesses merge.

Finally, there is no factual basis pled in the complaint to infer that the Voyence board was influenced materially by Nash and Fortenberry's opinion. The complaint only suggests that Nash was involved in soliciting bids from potential acquirors, but pleads no facts indicating that, after receiving their compensation packages, Nash or Fortenberry particularly swayed the board's decisionmaking. In other words, even if EMC had

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[41] *See supra* page 8.
[42] *Cf. Golaine v. Edwards*, 1999 WL 1271882, at *7-9 (Del. Ch. Dec. 21, 1999) (finding that a $20 million payment made to certain directors of the target company was "quite immaterial" in light of the $8.3 billion deal value, and was therefore insufficient, absent other indications of wrongdoing, to support a claim that the directors' "negotiation of a $20 million fee . . . tainted the merger's final terms in a way that injured [the target's] other stockholders").
[43] *See In re Digital Island Sec. Litig.*, 223 F. Supp. 2d 546, 555 (D. Del. 2002) (noting that "it is rather common for an acquiring company to ask that the target company's officers remain employed with the merged entity or acquiring company.") (citations omitted); *Golaine*, 1999 WL 1271882, at *4 (noting that it is "rather common" for "management insiders, advisors, and the largest stockholders of the target [to] receive some benefits not shared with all the target stockholders, such as golden parachutes, advisory and consulting fees, new employment contracts, or additional merger consideration").

bought off Nash and Fortenberry — which, as discussed above, is an assertion the pled facts do not support — there is no reason in the complaint to believe that it mattered in a material way to the Voyence board.[44]

2. Morgan Has Not Alleged Facts Suggesting That EMC Exploited Conflicts Of Interest Within Voyence's Board

Morgan's second argument is that EMC exploited conflicts of interest within the Voyence board to the detriment of Voyence's common stockholders. Morgan primarily relies upon two cases — this court's decisions in *Gilbert v. El Paso Co.*[45] and *Zirn v. VLI Corp.*[46] — as support for its argument that EMC exploited conflicts of interest within the Voyence board and therefore participated in a breach of fiduciary duty. In *Gilbert*, this court refused to dismiss an aiding and abetting claim against a tender offeror, where the offeror approached the target's management and negotiated the terms of a friendly take-over when it became clear that the tender offeror would acquire control of the company.[47] The court found that the complaint adequately alleged that, "in the face of inevitable defeat, [the target's directors] abandoned their resistance [to a reduced tender offer] in order to fashion a better deal for themselves at the expense [of the target's stockholders who had already tendered their shares]."[48] Based on those allegations, the court stated that "because the valuable concession [of more favorable tender offer terms], which

[44] In fact, the complaint indicates that the Voyence board's executive committee had Nash and Fortenberry leave the room during its deliberations over whether to accept EMC's bid. Compl. ¶ 61.
[45] 490 A.2d 1050 (Del. Ch. 1984), *aff'd* 575 A.2d 1131 (Del. 1990).
[46] 1989 WL 79963 (Del. Ch. July 17, 1989).
[47] 490 A.2d at 1056-58.
[48] *Id*. at 1056.

greatly [affected the target's] shareholders who had already tendered their shares, was extracted in exchange for other terms which clearly benefitted only [the target's] management and not its shareholders, it cannot be said, as a matter of law, that [the acquiror] was merely engaged in arm's-length negotiations."[49] The result was similar in *Zirn*, where this court refused to dismiss an aiding and abetting claim against a tender offeror because the complaint adequately alleged that the acquiror was aware that the target's directors were exposed to potential fiduciary duty liability, and that the acquiror used that potential liability as leverage in negotiations to secure an outcome benefiting the acquiror and the target's directors at the expense of the target's stockholders.[50]

But *Gilbert* and *Zirn* differ materially from this case because, in both of those cases, the complaint alleged facts suggesting how and why the acquiror actually used its knowledge of the target board's conflicts to collude with the target board at the expense of the target's shareholders. That is, the term "exploit" as used in this context connotes the "unjust" or "improper" use of someone else for profit.[51] Thus, "exploit" refers to a situation, as in *Gilbert* and *Zirn*, where a bidder gets a fiduciary to trade away his trust for personal advantage as a means to further the bidder's aims.

Here, Morgan's complaint is silent. First, there are no facts in the complaint indicating why accepting a lower offer was clearly in the Voyence directors' self-interest, much less that it was known by EMC. Morgan has not pled any facts that give reason to

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[49] *Id*. at 1057.
[50] 1989 WL 79963, at *6-7.
[51] *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 438 (1988) (defining "exploitation" as "an unjust or improper use of another person for one's own profit or advantage").

infer that EMC would have expected the Voyence directors to have been anything other than delighted to take a higher bid from HP or any other potential bidder because a higher bid would have allowed them to capture their full liquidation preference.[52]

Second, Morgan has not pled any facts showing that EMC actually attempted to exploit the Voyence board's alleged conflicts. The most plausible explanation for EMC's behavior based on the facts in the complaint is that EMC dropped its offer price in October 2007 out of concern over Voyence's inability to meet its own revenue projections, not because it was somehow attempting to exploit Voyence's allegedly conflicted board.[53] EMC owed fiduciary duties to its own stockholders to use EMC's funds prudently, of course, and was not obligated to offer an inflated price for Voyence when it could acquire the company for less through honest bargaining. HP's decision to waive its right of first refusal to acquire Voyence, which a company of HP's size could have easily done at the initial $53 million price Voyence was asking, and to acquire one of Voyence's closest competitors,[54] further suggests that the market had genuine doubts about Voyence's value.[55]

Morgan has presented no factual basis to presume that EMC lowered its offer for reasons other than those legitimate concerns. All Morgan alleges is that EMC was aware that the Voyence directors were designees of preferred stockholders and therefore

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[52] Indeed, a higher bid would also have benefitted Nash, who held approximately 66,000 shares of Voyence common stock. Compl. ¶ 70.
[53] *See supra* pages 6-7.
[54] *See supra* pages 5-6.
[55] Indeed, HP even had a designated observer who attended, but did not vote at, Voyence board meetings. Compl. ¶ 25. Therefore, HP likely had intimate familiarity with Voyence's business. If Voyence had been a bargain at $42 million, or even $53 million, HP would have known it, and could have easily snatched it up.

potentially conflicted, and that EMC's alleged awareness alone is adequate basis for an aiding and abetting claim. But, Morgan's own complaint makes it clear that EMC and Voyence were bargaining at arm's-length by alleging that: (1) EMC was a "tough negotiator" who drove a "hard[] bargain;"[56] (2) Voyence planned to leverage a bid from HP into an increased offer price from EMC;[57] and (3) Voyence rejected EMC's initial offer and demanded more money.[58] Morgan now asks the court to overlook her own pled facts showing that EMC was negotiating at arm's length, and nevertheless surmise — without any factual basis — that EMC was somehow subtly exploiting the board's conflicts. That speculation must be rejected because drawing reasonable inferences in Morgan's favor, as is required under the Rule 12(b)(6) analysis, does not give this court license to conjure up a reality on behalf of the plaintiff that the plaintiff has failed to establish by pleading facts that support an inference that that reality plausibly existed. Morgan has pled no facts that allow me to infer that the Voyence board was so radioactively conflicted that any contact with that board to do a deal — even arm's-length negotiating — was aiding and abetting wrongdoing.

To hold that a claim for aiding and abetting against a bidder is stated simply because a bidder knows that the target board owns a material amount of preferred stock, knows that the target's value is in a range where a deal might result in no consideration to the common stockholder, and that the bidder nonetheless insists on a price below the level that yields a payment to the common stockholders would set a dangerous and

[56] *See supra* pages 6-7.
[57] *See supra* page 5.
[58] *See supra* page 6.

irresponsible precedent. The reality is that there are entities whose value is less than the value to which its preferred stockholders and bondholders are due in a sale. If our law makes it a presumptive wrong for a bidder to deal with a board dominated by preferred stockholder representatives, then value-maximizing transactions will be deterred. It is hardly unusual for corporate boards to be comprised of representatives of preferred stockholders, who often bargain for representational rights when they put their capital up in risky situations. Notably, those capital investments often end up benefiting common stockholders by helping corporations weather tough times. What Morgan asks is that this court hold that the mere fact that a bidder knowingly enters into a merger with a target board dominated by preferred holders at a price that does not yield a return to common stockholders creates an inference that the bidder knowingly assisted in fiduciary misconduct by the target board. That is not and should not be our law, particularly when the plaintiff cannot even plead facts suggesting that the bidder was paying materially less, or in this case even anything at all less than, fair market value.

In summary, Morgan's argument fails because *Malpiede*'s requirement that the third party knowingly *participate* in the alleged breach — whether by buying off the board in a side deal, or by actively exploiting conflicts in the board to the detriment of the target's stockholders — is there for a reason.[59] That rule protects acquirors, and by extension their investors, from the high costs of discovery where there is no reasonable factual basis supporting an inference that the acquiror was involved in any nefarious activity. That rule also aids target stockholders by ensuring that potential acquirors are

[59] *Malpiede*, 780 A.2d at 1096.

not deterred from making bids by the potential for suffering litigation costs and risks on top of the considerable risk that already accompanies buying another entity, particularly ones that may have a checkered financial and performance history. To allow an aiding and abetting claim to survive based on nothing more than an allegation that the acquirer bargained for a price that resulted in no payment to the common and in a less than full payout of the preferred stock's liquidation preference with a target board would obliterate the requirement that a plaintiff plead facts supporting an inference that the bidder knowingly aided a breach of fiduciary duty and expose bidders exercising their right to bargain to the expense of full discovery.[60] That is, the long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting[61] helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism.[62] The DGCL's many provisions facilitating M&A transactions reflects the underlying assumption that social welfare can be improved by M&A transactions reached by parties bargaining at arm's-length.[63] Under our law, both the bidder's board and the

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[60] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) (noting that Federal Rule of Civ. Proc. 12(b)(6) operates to prevent a plaintiff with "a largely groundless claim" from "tak[ing] up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value" (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

[61] *See supra* note 38.

[62] *See generally* PETER HALL & DAVID SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 30 (2000) (noting that "[i]nter-company relations in liberal market economies [such as the United States] are based, for the most part, on standard market relationships and enforceable formal contracts").

[63] For a classic treatment of the idea that a robust market for corporate control promotes social welfare, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. OF POL. ECONOMY 110, 112-14 (1965).

target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement. To allow a plaintiff to state an aiding and abetting claim against a bidder simply by making a cursory allegation that the bidder got too good a deal is fundamentally inconsistent with the market principles with which our corporate law is designed to operate in tandem.

IV. Conclusion

For the reasons stated above,[64] EMC's motion to dismiss is GRANTED and Count II of Morgan's complaint is DISMISSED with prejudice. IT IS SO ORDERED.

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[64] Morgan also alleges that EMC knowingly participated in the Voyence board's alleged failure to disclose material information about the merger to Voyence's stockholders. The Voyence board sent the company's stockholders a notice on November 1, 2007, shortly after the board approved the merger. Compl. ¶ 88. According to the complaint, that notice was deficient in a number of material respects. *Id.* at ¶ 90. Notably, the complaint does not allege that EMC was involved in the dissemination of the notice: Count I, which alleges breach of the duty to disclose, is only against the individual defendants, and not EMC; and Count II, which is against EMC, does not mention the notice or that EMC aided and abetted a breach of the duty to disclose.

Nevertheless, in her answering brief to EMC's motion to dismiss, Morgan argued that EMC knowingly participated in the Voyence board's disclosure violations. Morgan Ans. Br. 22-24. That allegation must be rejected because, by failing to raise this allegation in her complaint, Morgan has waived the claim — a plaintiff cannot use her briefing to rewrite her complaint. *McGowan v. Ferro*, 2002 WL 77712, at *4, n. 27 (Del. Ch. Jan. 11, 2002) ("Arguments contained in a brief, however, cannot cure a defect caused [by] the failure to allege critical facts in the complaint."). If Morgan realized after the fact that she wanted to allege that EMC participated in the alleged disclosure violations, then she could have moved to amend her complaint. She did not do so, and therefore must abide by the choice she made.