IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE COMPUCOM SYSTEMS, INC.	)	Consolidated
STOCKHOLDERS LITIGATION	)	C.A. No. 499-N

MEMORANDUM OPINION AND ORDER

Submitted: June 1, 2005
Decided: September 29, 2005

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LAMB, Vice Chancellor.

I.

Former minority shareholders of a Delaware corporation bring this purported class action suit against the company, its directors, and the controlling shareholder alleging a breach of fiduciary duty in connection with the sale of the company to a third party on terms that treated all stockholders equally. The complaint alleges that, when the defendant directors sold the company, they were dominated and controlled by the majority shareholder and improperly agreed to sell the company for an inadequate price in order to satisfy the majority shareholder's pressing need for cash.

The defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted, in accordance with Rule 12(b)(6) of the Court of Chancery Rules. The issue presented is whether the complaint adequately alleges facts which, if true, would overcome the business judgment rule presumption that the directors acted in good faith and after a careful investigation when they voted to authorize the transaction.[1] The court finds that the well-pleaded allegations of fact found in the complaint, if true, could not support a reasonable inference that the

[1] The facts recited in this opinion are taken from the well-pleaded allegations of the complaint, unless otherwise noted, and are presumed to be true for the purpose of this motion.

board breached its fiduciary duties. Therefore, the defendants' motion to dismiss will be granted.

II.

The plaintiff brings this purported class action against CompuCom, its former board of directors, and CompuCom's former controlling shareholder, Safeguard Scientifics, Inc., alleging breach of fiduciary duty in connection with the sale of CompuCom to Platinum Equity Capital Partners, L.P. Specifically, the plaintiff alleges that the CompuCom board of directors failed to comply with its fiduciary duties when it structured a sale of the company to Platinum[2] under terms that are alleged to have improperly favored Safeguard, the majority shareholder, to the detriment of the minority shareholders. The plaintiff also alleges that the defendants sought to discourage CompuCom shareholders from pursuing their statutory right to an appraisal by disseminating a materially false and misleading proxy statement.

A. The Parties

CompuCom is a Delaware corporation with its principal executive offices located in Dallas, Texas. CompuCom is regarded as a leading IT service provider and has been profitable since its formation in 1987.

[2] Prior to the acquisition, CompuCom and Platinum were unaffiliated third parties.

CompuCom's controlling shareholder, Safeguard, is a corporation duly existing and organized under the laws of the Commonwealth of Pennsylvania, having its principal executive offices in Wayne, Pennsylvania. At the time of the disputed transaction, Safeguard owned approximately 48% of CompuCom's common stock and 100% of CompuCom's preferred stock. Due to a super voting provision in the preferred stock agreement, Safeguard held 51% of the voting rights of CompuCom's stock entitled to vote on the acquisition and 58% of the voting rights with respect to the election of CompuCom's directors.

The plaintiff in Civil Action No. 499-N, Central Laborer's Pension Fund, is a trust fund created to provide retirement and other benefits for approximately 14,000 active and inactive union laborers and their beneficiaries. The Pension Fund was a beneficial owner of over 72,000 shares of CompuCom stock.

B. The Sale Of CompuCom

The complaint alleges that the CompuCom board, acting at the behest of Safeguard, timed and structured the sale of CompuCom to benefit Safeguard, a company that was in serious need of cash. According to the complaint, Warren V. Musser, Safeguard's founder and former CEO, personally invested and caused Safeguard to invest millions of dollars in risky Internet and technology companies. When the Internet bubble burst, the value of Safeguard's and Musser's investments in those companies plummeted, leaving Musser in dire straits. Making matters worse, in September 2000, Safeguard guaranteed Musser's margin loans on the failing investments. In May 2001, when Musser was unable to pay back the margin loans, Safeguard bailed him out, loaning him $26.5 million. On January 1, 2003, this loan became payable, but Musser did not have sufficient assets to satisfy the outstanding balance due.[3] Thus, allegedly to end the embarrassment of being unable to collect on a loan against its founder and former CEO, coupled with the need for cash to fund its operating costs and ongoing corporate transactions,[4] Safeguard began liquidating investment assets in companies in which Musser also invested, which included

[3] Pl.'s Second Am. Class Action Compl. ("Compl.") ¶ 48. "Safeguard's loans to Musser bear interest at a default annual rate of 9% and became payable on January 1, 2003 . . . . According to Safeguard's March 2004 Annual Report to Shareholders, based on the information then available to Safeguard, Safeguard has concluded that Musser may not have sufficient personal assets to satisfy the outstanding balance due under the loan when the loan became full recourse against Mr. Musser on April 30, 2006."

[4] Due to Musser's failed investment strategies at Safeguard, the value of Safeguard's assets fell from approximately $1.65 billion on December 31, 2000 to $836 million on December 31, 2003. Its shareholders' equity fell from $904.4 million on December 31, 2000 to $236.2 million on December 31, 2003.

CompuCom, at “fire sale” prices.[5] This provided the impetus for the sale of CompuCom.

On August 1, 2002, the CompuCom board organized a Special Committee comprised of four purportedly independent directors, Richard F. Ford, Edwin L. Harper, Anthony J. Paoni, and Edward N. Patrone, to sell Safeguard’s shares of CompuCom, or, in the alternative, put CompuCom up for sale. The Special Committee was charged with evaluating indications of interest received from potential acquirers, reviewing CompuCom’s strategic alternatives, and making recommendations to the full board of directors. In connection with this sale process, the Special Committee retained Houlihan Lokey Howard & Zukin Financial Advisors, Inc. as its financial advisor to render a fairness opinion to the Special Committee on any proposed transaction. In addition, the Special Committee independently selected and retained legal and financial advisors to assist the committee in considering strategic alternatives available to CompuCom. The company retained Broadview International LLC to act as the financial adviser to the full board.

[5] Compl. ¶ 49. In May 2003, Safeguard sold its interest in Pac-West Telecom and collected approximately $1 million from Musser, who also owned an interest in Pac-West, which was applied towards the unpaid balance of Musser’s loan. Additionally, in April 2004, Safeguard received a total of $4.5 million in net cash proceeds from Musser as a result of the sale of Safeguard’s and Musser’s interest in Sanchez Computer Associates.

After over 18 months of exploring various strategic alternatives, the Special Committee had not located a suitable deal.

The complaint does not discuss the committee's efforts over those 18 months and does not allege any specific defect in the sale process pursued by the Special Committee. In fact, the complaint makes no allegations at all about any deficiencies in the actions of the Special Committee in the sale of CompuCom. Instead, the complaint focuses on attacking the independence of the committee members.

In February of 2004, the CompuCom board added two members, Michael J. Emmi and John D. Loewenberg, to the Special Committee. At this time, negotiations with Platinum were underway. On March 24, 2004, Platinum proposed to pay $5 per share in cash to the non-Safeguard common stockholders, $4.50 in cash for the shares of CompuCom common stock held by Safeguard, and $8 million for the shares of CompuCom preferred stock, all of which was held by Safeguard. This offer was rejected by Safeguard and the Special Committee. Then, on May 27, 2004, CompuCom and Platinum entered into an Agreement and Plan of Merger (the "Merger Agreement") which provided that each outstanding share of CompuCom's common stock, in a non-discriminatory manner, would be converted into the right to receive $4.60 in cash, and each outstanding share of CompuCom's preferred stock would be converted into the right to receive the par value of the preferred ($15 million in the aggregate), plus accrued and unpaid dividends. The total consideration for the transaction was valued at $254 million, of which Safeguard received approximately $128 million.

Houlihan Lokey and Broadview made formal presentations to the Special Committee and the CompuCom board stating their opinion that the proposed merger consideration of $4.60 in cash for the common stock was fair to CompuCom's public stockholders.[6] Houlihan Lokey's and Broadview's fairness opinions were supported by a number of financial analyses that were disclosed in the proxy statement distributed to CompuCom's stockholders in connection with the merger. After reviewing the terms of the Merger Agreement and Houlihan Lokey's fairness opinion, the Special Committee unanimously resolved to recommend the Merger Agreement to the full board. Thereafter, in reliance on the Special Committee's recommendation and Broadview's fairness opinion, the board unanimously approved the Merger Agreement.

The complaint attacks the adequacy of the acquisition price. First, the plaintiff alleges that the deal provided no premium to the public shareholders for their shares of common stock. Indeed, the price of $4.60 in cash per

[6] Compl. ¶ 77.

common share paid by Platinum represented a discount to CompuCom's closing price of $4.84 on May 27, 2004, the day before the proposed acquisition was announced.[7] As negotiations were in progress, however, the public trading price for CompuCom's shares ranged from as low as $4.16 to as high as $5.99.[8] Second, the plaintiff points to CompuCom's profitability at the time of the acquisition, alleging that CompuCom had more than $264 million in current assets, including cash, cash equivalents, and inventory, and approximately $400 million in total assets on its balance sheet. According to the complaint, "the Company has been profitable each of its seventeen years of operation."[9] Lastly, the plaintiff alleges that the unfair terms of the acquisition raised the "ire of the investment community."[10] To support this contention, the plaintiff cites to news articles in which portfolio managers called the acquisition an "unappealing proposition . . . at a price for a stock that's extremely undervalued" and a deal "so out of whack that it fails to pass the smell test."[11]

Although the complaint attacks the adequacy of the deal price, it does not claim that the Merger Agreement contained strong lock-ups or other deal

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[7] Compl. ¶ 75.
[8] *Id.*
[9] Compl. ¶ 2.
[10] Compl. ¶ 80.
[11] Compl. ¶¶ 80-84.

protection provisions that prevented the emergence of a competing bid. [12] Indeed, the complaint refers to the fact that, although Safeguard agreed to vote in favor of the merger, its obligation to do so was conditioned on the approval of its own stockholders. From this allegation, it is obvious that any superior competing proposal could have succeeded. Nonetheless, the complaint fails to allege that any higher or better alternative to the Platinum proposal ever emerged.

On July 15, 2004, the company issued a definitive proxy statement that solicited its shareholders' approval of the merger. Then, on August 19, 2004, several weeks after the filing of the amended complaint in this action, the defendants issued a supplement to the proxy statement and postponed the shareholder meeting and vote. The proxy supplement was issued to "avoid any argument that the proxy statement should have included factual information on the issues identified by the plaintiffs."[13] The proxy

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[12] The Platinum/CompuCom Merger Agreement contained a break-up fee in which CompuCom agreed to pay a termination fee of $8.88 million to Platinum if the CompuCom board of directors canceled the sale of CompuCom, or, in the alternative, CompuCom was to pay Platinum's fees and expenses incurred in the transaction up to $4 million if the merger was terminated because either CompuCom's or Safeguard's shareholders did not approve the merger. The Merger Agreement also contained a "No Solicitation" provision prohibiting any CompuCom employee, director, officer, accountant, lawyer or other representative from engaging in discussions with any third party concerning the sale of CompuCom to an alternative purchaser—including potential alternative purchasers who express an interest in making a superior offer to Platinum's—until and unless a third party's interest is reduced to a written proposal, communicated to Platinum, and Platinum is given two days to meet or exceed the proposal.

[13] Compl. ¶ 8.

supplement provided additional disclosures about, among other things, the relationship between Safeguard and CompuCom's Special Committee members and information regarding the board's efforts to find alternative value-maximizing transactions. Thereafter, on September 9, 2004, the company issued a press release announcing the merger had been approved by the company's stockholders.

C. The Individual Defendants

Before the transaction at issue, CompuCom had an 11-member board of directors consisting of defendants J. Edward Coleman, Anthony L. Craig , Michael J. Emmi, Richard F. Ford, Edwin L. Harper, Delbert W. Johnson, John D. Loewenberg, Warren V. Musser, Anthony J. Paoni, Edward N. Patrone, and M. Lazane Smith. The complaint alleges that,

> Safeguard has used its voting power to pack CompuCom's 11 member Board of Directors, and the so called "Special Committee," that ostensibly was created to evaluate the Proposed Acquisition on behalf of the minority shareholders of CompuCom, with individuals dominated and controlled by Safeguard.[14]

The plaintiff contends that the CompuCom board and the Special Committee were beholden to Safeguard, and thus dominated and controlled by it, based on numerous connections between the individual defendant directors and

[14] Compl. ¶ 2.

Safeguard.[15] The complaint makes specific factual allegations that at least a majority of its 11 directors served as directors and/or officers of Safeguard, had other substantial associations with Safeguard's affiliates and/or subsidiaries, and/or previously served on multiple Safeguard portfolio company boards in which Safeguard held large equity interests.

First, as to the five non-Special Committee director defendants, Coleman, Smith, Musser, Craig, and Johnson, the plaintiff alleges that they were dominated and controlled by Safeguard because they were placed on the CompuCom board through Safeguard's voting power. In addition, Coleman and Smith obtained a new employment agreement and other monetary benefits as a result of the acquisition.[16] Musser was the founder and former chairman of Safeguard, and Craig was the current president, chief executive officer, and director of Safeguard. Johnson served as an executive of Safeguard for 30 years and as a director emeritus of Safeguard and was chairman of the board and chief executive officer of Pioneer Metal Finishing, a former division of Safeguard.

Second, as to the six Special Committee members, the plaintiff contends that, while the members were not at the time employed by Safeguard, they were sufficiently connected to Safeguard to make them

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[15] Compl. ¶ 45.

[16] Coleman received over $5 million and Smith received over $2 million as a result of the acquisition.

beholden to Safeguard. Specifically, the plaintiff alleges that between May 1993 and April 2000, Special Committee directors Paoni, Patrone, Ford, Emmi, and Loewenberg purchased, or were given the opportunity to purchase, shares in the initial public offerings of several Safeguard portfolio companies.[17] These IPO allocation benefits allegedly enabled the directors to receive profitable financial opportunities through their association with Safeguard. Additionally, Harper was an employee of Fortis, Inc., which had a business relationship with DocuCorp, a company in which Safeguard formerly held a significant equity interest. Paoni held outside directorships with two portfolio companies of Safeguard, Arista Knowledge Systems, Inc., and e-Certify, and was vice chairman of DiamondCluster International, Inc., a company previously taken public by Safeguard. Emmi served on the Safeguard board of directors from 1998 to 2002 and was a director of Metallurg, Inc., a majority-owned subsidiary of Safeguard. Loewenberg is alleged to have served as an advisor to Safeguard through an independent consulting firm, JDL Enterprises, where he is the managing partner. Moreover, Loewenberg previously served on boards of directors of several

[17] Compl. ¶ 8. These companies included: Artemis International Solutions Corporation, Cambridge Technology Partners, Inc., Coherent Communications Systems Corporation, Chroma Vision Medical Systems Inc., DocuCorp, DTP, eMerge Interactive, Inc., Internet Capital Group, Inc., OAO Technology Solutions, Inc., Pac-West Telecom, Inc., Sanchez, and USDATA Corporation.

companies in which Safeguard at one time owned substantial equity interests.[18]

III.

The standard for dismissal pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted is well established. A motion to dismiss 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.[19] That determination is generally limited to the factual allegations contained in the complaint. In considering this motion, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[20] All facts of the pleadings and inferences that can reasonably be drawn therefrom are accepted as true.[21] However, a trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences.[22]

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[18] Loewenberg was a director of DocuCorp International, Inc., Diamond Technology Partners, Inc., and Sanchez Computer Associates, companies in which Safeguard formerly maintained significant equity positions.

[19] *Kohls v. Kenetech Corp.*, 791 A.2d 763, 767 (Del. Ch. 2000).

[20] *Grobow v. Perot*, 539 A.2d 180, 188 n.6 (Del. 1988).

[21] *Id.*

[22] *In re Lukens Inc. Shareholders Litig.*, 757 A.2d 720,727 (Del. Ch. 1999).

IV.

The court begins its analysis with the presumption of the business judgment rule. At the core of Delaware corporate law is the presumption that, in making a business decision, the directors of a corporation act on an informed basis, in good faith, and in the honest belief that the action taken is in the best interest of the company.[23] "Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption."[24] In this way, the business judgment rule serves to promote the role of the board, and not the court, as the ultimate manager of the business and affairs of the corporation.[25]

When a board of directors determines to put the corporation up for sale, its responsibility is to endeavor to secure the highest value reasonably attainable for the stockholders.[26] Thus, when the CompuCom board, at the suggestion of Safeguard, undertook to find a buyer for the whole enterprise, the CompuCom board and the Special Committee were charged with getting the maximum value reasonably attainable for the stockholders. "This obligation is a contextually-specific application of the director's duty to act

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[23] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[24] *Id.*
[25] 8 *Del. C.* § 141(a).
[26] *McMillan v. Intercargo Corp*., 768 A.2d 492, 502 (Del. Ch. 2000) (citing *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*, 506 A.2d 173, 182 (Del. 1986)).

in accordance with their fiduciary obligations, and there is no single blueprint that a board must follow to fulfill its [*Revlon*] duties."[27] Rather, the court must take into account the relevant circumstances to determine whether the CompuCom board and the Special Committee acted faithfully and with due diligence. If the court concludes that the facts do not support an inference of disloyalty or lack of due care, the board's actions are entitled to the protections of the business judgment rule.

The plaintiff asserts that it has pleaded facts sufficient to rebut the presumption of the business judgment rule, and that this court should refuse dismissal at this stage of the proceedings. The court disagrees. Taking the plaintiff's allegations as true, the plaintiff has not alleged sufficient facts to support a reasonable inference that the CompuCom board and the Special Committee were dominated and controlled by Safeguard. Similarly, the plaintiff's factual allegations contained in the complaint do not overcome the presumption that the CompuCom board acted on an informed basis, in good faith, and in an honest belief that the Platinum transaction was in the best interest of CompuCom and all its shareholders.

A. Sale Of CompuCom

The plaintiff's factual allegations that the defendant directors breached their fiduciary duties in the sale of CompuCom are threefold:

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[27] *Id.*

(1) that the board orchestrated a "fire sale" in order to address Safeguard's desperate need for cash; (2) that the board, at the behest of Safeguard, refused to accept less consideration for Safeguard's controlling shares than was to be paid for the shares owned by the public stockholders; and (3) that the $4.60 sale price was inadequate.

Generally speaking, a controlling shareholder has the right to sell his control share without regard to the interests of any minority shareholder, so long as the transaction is undertaken in good faith.[28] The same has long been true as a general proposition when a parent chooses to negotiate for the sale of a subsidiary corporation to an independent third party. The reasons for the law's tolerance of such sales is clear—as the owner of a majority share, the controlling shareholder's interest in maximizing value is directly aligned with that of the minority.

In *McMullin v. Beran*, the Delaware Supreme Court held that in the context of such a transaction, the board of the subsidiary corporation cannot entirely abdicate its responsibilities to its minority shareholders.[29] It cannot, as the board did in that case, simply leave everything to the management of a

[28] *See Harris v. Carter*, 582 A.2d 222, 234 (Del. Ch. 1990) (stating that "it is [a] principle [of Delaware law] that a shareholder has a right to sell his or her stock and in the ordinary case owes no duty in that connection to other shareholders when acting in good faith").
[29] 765 A.2d 910, 919 (Del. 2000).

different corporation.[30] As discussed in *McMullin,* the Chemical board delegated full control of the sales process to the controlling shareholder, ARCO. ARCO hired an investment bank, solicited bids, and reviewed and rejected bids. The Chemical board permitted ARCO to *unilaterally* initiate, structure, and negotiate the merger agreement without establishing any procedural safeguards to protect the interests of the Chemical minority shareholders.[31] The Chemical board also did not conduct a critical assessment of the third party transaction, nor did it make an independent determination as to whether the transaction maximized value for all shareholders.[32]

Such neglect is inconsistent, the Supreme Court explained, with the important bonds of fiduciary duty that tie directors to those who rely on them for protection from potentially overbearing controllers. When faced with such a transaction, therefore, this court has a duty to test the actions of

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[30] *See In re Siliconix Inc.*, 2001 Del. Ch. LEXIS 83, at *29-30 (Del. Ch. June 19, 2001). *McMullin* teaches, *inter alia*, that in the context of a merger of a subsidiary with a third party (thereby effecting a complete sale of the subsidiary) where the controlling shareholder wants the merger to occur and the minority shareholders are powerless to prevent it: (i) the directors of the subsidiary have an 'affirmative duty to protect those minority shareholders' interests;' (ii) the board cannot 'abdicate [its] duty by leaving it to the shareholders alone' to determine how to respond; and (iii) the board has a duty to assist the minority shareholders by ascertaining the subsidiary's value as a going concern so that the shareholders may be better able to assess the acquiring party's offer and, thus, to assist in determining whether to pursue appraisal rights.

[31] *McMullin*, 768 A.2d at 921 (emphasis added).

[32] *Id*. at 920.

the board against the business judgment rule. The business judgment rule's presumption may be rebutted by an allegation of a breach of the duty of due care, as when a board is rushed or uninformed. More important for the instant case, however, the presumption that the board acted in good faith can be rebutted if the court finds that the plaintiff has alleged sufficient facts that, if true, permit a reasonable inference that (1) the board was dominated by the controlling shareholder, and (2) this domination led the board to accommodate the controller rather than act in the best interest of all the subsidiary's shareholders. The latter test may be met, for example, by precisely the kind of allegation made in *McMullin*—that the subsidiary board allowed the parent to independently negotiate a deal uniquely advantageous to itself, without regard to conflicting the interests of the subsidiary's minority shareholders.[33]

Unlike *McMullin*, the complaint itself reveals that the board of CompuCom undertook its fiduciary duty of care with all the seriousness and diligence that was required. The CompuCom board formed a Special Committee of outside directors to negotiate the sale with Platinum.[34] This

[33] *Id.*

[34] *Id.* at n.48 The Supreme Court in *McMullin* criticizes the board for not involving the company's Special Committee in the sale process when it states, "[t]he Board failed, however, to authorize the Special Committee to protect and enhance the interests of the Company and its public shareholders in connection with the subsequent sale of the Company to Lyondell . . . . The Board's failure to empower the Special Committee to actively participate in the sale of the Company is inexplicable."

Special Committee evaluated indications of interest received from potential acquirers, reviewed CompuCom's strategic alternatives, negotiated the deal with Platinum, and made recommendations to the full CompuCom board. All this was done with the aid of independently selected and retained legal and financial advisors. The CompuCom board reasonably relied on Houlihan Lokey's and Broadview's fairness opinions, which concluded that the $4.60 in cash consideration for CompuCom common stock was fair to the CompuCom public stockholders. These fairness opinions were supported by a number of financial analyses.

Moreover, the CompuCom board did not hastily approve a transaction about which it was not fully informed. In *McMullin*, the board met once to consider the transaction.[35] Here, by contrast, the plaintiff itself concedes that the sale of CompuCom was the culmination of a multi-year process, beginning in 2002 and coming to agreement in 2004, in which the Special Committee explored various strategic alternatives to maximize stockholder value.[36] Thus, the plaintiff's claim that the CompuCom board orchestrated a "fire sale" and rashly sold CompuCom for a discounted price rings particularly hollow.[37]

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[35] *Id*. at 922.
[36] Compl. ¶ 58.
[37] Compl. ¶ 49. The plaintiff also claims that the board breached its fiduciary duties by agreeing to equal consideration amongst the common stockholders. Specifically, the complaint alleges that

Nor can the court infer that the price of the challenged merger was so inadequate as to overcome the business judgment rule. It is not enough to argue that the financial press published objections to the adequacy of the $4.60 price.[38] Nor is the fact that the final price per share was below the market price on the day of sale enough to rebut the business judgment presumption. As the plaintiff concedes in its complaint, the public trading price for CompuCom's shares ranged from as low as $4.16 (9.6% below the offer price) to as high as $5.99 (30.2% above the offer price) during the period that negotiations were underway with Platinum. Simply put, the mere fact that the deal price was 24 cents below a market price buffeted by the force of entirely predictable volatility does not state a claim for breach of

> Safeguard originally agreed to structure the transaction in such a way that it received less per-share consideration than CompuCom's non-Safeguard shareholders (with those non-Safeguard shareholders to receive at least $5 per share for their CompuCom stock), but through its control of the special committee, Safeguard was able to obtain a larger share of the total merger consideration, ultimately getting the same $4.60 per share as the Company's non-Safeguard shareholders. Compl. ¶ 60.

This claim, that the minority shareholders were entitled to more per share consideration than Safeguard, the controlling shareholder, is not supported by Delaware law. *Mendel v. Caroll*, 651 A.2d 297, 305 (Del. Ch. 1994) ("The law has acknowledged . . . the legitimacy of the acceptance by controlling shareholders of a control premium.); c.f. *Paramount Communications v. QVC Network*, 637 A.2d 34, 45 (Del. 1994) (*Revlon* requires an auction because "an asset belonging to public stockholders [a control premium] is being sold and may never be available again.").

[38] To support this allegation, the plaintiff points to the market price of CompuCom prior to the announcement of the transaction and news articles in the *Wall Street Journal* in which portfolio managers called the acquisition an "unappealing proposition . . . at a price for a stock that's extremely undervalued." Compl. ¶ 80.

fiduciary duty. Moreover, if the plaintiff was dissatisfied with the price, it could have exercised its appraisal remedy.

Lastly, the plaintiff does not contend that the Merger Agreement contained any strong lock-ups or other deal protection measures that would unduly impede a bidder willing to pay a higher price from coming forward.[39] The plaintiff also does not allege that a better offer was available. Not surprisingly, after several years of actively seeking to sell the company, no higher bid emerged. Stated briefly, the well-pleaded allegations do not support a reasonable inference that the CompuCom directors were inadequately informed, acted irrationally, or did not fulfill their obligation to seek the best value reasonably available to the stockholders.[40]

Because the plaintiff has not alleged sufficient facts to show that the CompuCom board neglected its duty of care in the sale transaction, the plaintiff must alternatively show that the Compucom board was dominated and controlled by Safeguard to such an extent as to overcome the business judgment presumption. A party alleging domination and control of a company's board of directors bears the burden of proving such control by

[39] Compl. ¶¶ 64-65; *See Paramount*, 637 A.2d at 49.

[40] The court notes that the CompuCom Restated Certificate of Incorporation contains an exculpatory provision pursuant to Section 102(b)(7). The complaint does not contest the existence or authenticity of CompuCom's 102(b)(7) provision. As to the plaintiff's duty of care claim, the plaintiff does not allege conduct on the part of the Special Committee members that could be viewed as rising to the level of gross negligence or bad faith. *See In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003).

showing a lack of independence on the part of the directors.[41] In assessing director independence, the court is called upon to apply a subjective "actual person" standard, instead of an objective "reasonable director" standard in making its determination.[42] An independent director is one whose decision "is based on the corporate merits of the subject before the board rather than extraneous considerations or influence,"[43] while a director who is not independent is "dominated or otherwise controlled by an individual or entity interested in the transaction."[44] Control over individual directors is established by facts demonstrating that "through personal or other relationships the directors are beholden to the controlling person"[45] or so under their influence that "their discretion would be sterilized."[46]

Based on the aforementioned standard and the main factual allegations in the plaintiff's complaint, the court cannot reasonably infer that the Special Committee directors were improperly influenced or controlled by Safeguard. First, as to the alleged IPO allocation benefits, the complaint does not explain why having received these benefits in years past would constitute a disabling conflict for the members of the Special Committee. The complaint

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[41] *Odyssey Partners, L.P. v. Fleming Co.*, 735 A.2d 386, 407 (Del. Ch. 1999).
[42] *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995).
[43] *Aronson*, 473 A.2d at 816.
[44] *In re Maxxam, Inc.*, 659 A.2d 760, 773 (Del. Ch. 1995).
[45] *Aronson*, 473 A.2d at 815.
[46] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

does not address how much the IPO opportunities were worth, why the members of the Special Committee received them, and which (if any) of the members of the Special Committee actually invested in the IPOs. The complaint simply does not allege that these IPO allocation benefits were material to the directors. Moreover, the complaint does not allege that Safeguard *gave* the members of the Special Committee the IPO opportunities. Instead, the complaint simply repeats the words of the proxy supplement and then alleges that the Special Committee members were able to purchase shares in these IPOs "through their relationship with Safeguard."[47] This bare allegation, without more, is insufficient to reasonably infer that the Special Committee lacked independence from Safeguard.[48]

Second, as to the directors' connections to Safeguard, it is significant that, at the time the sale to Platinum was negotiated, none of the members of the Special Committee had employment relationships with CompuCom, Safeguard, or Platinum.[49] The plaintiff does not allege that any of the

[47] Compl. ¶¶ 8, 88.

[48] One can certainly imagine a situation where receiving the current opportunity to invest in an IPO would be sufficient to prove, or at least raise a reasonable inference of, a lack of independence. For example, a complaint alleging that the opportunity was extremely valuable, or that the director was in desperate need of cash, or some combination of the two.

[49] The plaintiff quotes *McMullin* as controlling precedent; however, *McMullin* found that 8 of the 12 Chemical directors were not independent because 6 of the Chemical directors were currently employed by ARCO, to wit, ARCO's chief financial officer and executive vice-president, another ARCO executive vice-president, and 4 senior vice-presidents of

Special Committee board members received special benefits as a result of the transaction or were given improper incentives to favor Safeguard. Instead, the plaintiff claims that the Special Committee lacked independence because a majority of the Special Committee members served as directors and executives in companies in which Safeguard *formerly* held an equity interest.

The court recognizes that under certain circumstances, professional, financial, and personal relationships of directors may preclude a finding of independence.[50] However, the plaintiff's factual allegations do not meet the relevant standard.[51] According to *Tremont*, "the independence or not of the member of a special committee is a question of fact that turns not simply upon formality but upon the reality of the interests and incentives affecting

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ARCO. The remaining 2 directors were alleged to have prior affiliations with ARCO as officers of other ARCO subsidiaries. Unlike *McMullin*, the complaint here does not allege that any of the Special Committee members were employed by Safeguard when the Platinum transaction was consummated.

[50] See *Krasner v. Moffet*, 826 A.2d 277, 283 (Del. 2003) (finding that at the pleading stage, the plaintiff's allegations that two directors were interested when they "received substantial income from other entities within the interlocking directorates of Freeport-McMoRan companies and arguably had an interest in appeasing the MOXY and FSC insiders who also served" with them "on the boards of other Freeport companies" was sufficient to sustain an inference of interestedness).

[51] *Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). (stating that "to create a reasonable doubt about an outside director's independence, a plaintiff must plead facts that would support the inference that . . . the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director"). Although *Beam* involved a review of the sufficiency of the plaintiff's allegations under Rule 23.1, the Supreme Court's interpretation of the type of relationship required to rebut the presumptive independence of an outside director provides insight in the context of this dismissal motion brought pursuant to Rule 12(b)(6).

the independent directors."[52] Here, the plaintiff does not allege that these former business relationships were material to the directors or that Safeguard has or ever had an ability to influence or exert any control over these directors.[53] "Our cases have determined that personal friendships, without more; *outside business relationships*, without more . . . are each insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment."[54] Thus, the court cannot infer that Safeguard had the ability to influence and impair the business judgment of these directors because they formerly served as outside directors for companies in which Safeguard held an equity interest.

The plaintiff makes additional allegations about Emmi and Loewenberg, the directors added to the Special Committee in 2004. In particular, Emmi was a non-management director of Mettullurg, Inc., which was a majority-owned subsidiary of Safeguard, and he was also a former director of Safeguard from 1999 to 2002. Loewenberg served as an advisor to Safeguard through an independent consulting firm, JDL Enterprises, of which he was the managing partner.

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[52] *Kahn v. Tremont*, 1992 Del. Ch. LEXIS 165, 1992 WL 205637 *3 (Del. Ch. Aug. 21, 1992), *rev'd on other grounds,* 694 A.2d 422 (Del. 1997).

[53] *Official Comm. Of Unsecured Creditors of Integrated Health Servs. v. Elkins*, Del. Ch. C.A. No. 20228, Noble, V.C. (Aug. 24, 2004) ("General allegations of domination over a Board are simply not sufficient under Delaware law to state a tradition duty of loyalty claim.").

[54] *Cal. Pub. Employee's Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (emphasis added).

The allegation that Emmi was a director of another majority-owned subsidiary of Safeguard does not support an inference that he was dominated and controlled by Safeguard in the transaction to sell CompuCom. The complaint does not allege that Emmi received material compensation for serving as a director, that Emmi felt beholden to Safeguard, or that Emmi was conflicted in his loyalties with respect to the challenged board action.[55] In addition, the fact that Emmi was a former non-management Safeguard director does not mean he could not assert independent judgment in this transaction. Therefore, the court concludes that the plaintiff's allegations are insufficient to rebut Emmi's presumptive independence from Safeguard.

The complaint does not allege sufficient facts as to Lowenberg to support an inference that he was dominated and controlled by Safeguard. The plaintiff does not allege what compensation Loewenberg and/or JDL Enterprises obtained for Loewenberg's advisory services, nor does the complaint allege that such fees constituted such a large part of his or the firm's income so as to be material to Loewenberg or JDL Enterprises. The plaintiff merely states conclusory allegations which do not support a reasonable inference that Loewenberg lacked independence.

In summary, the court finds that the factual allegations do not suffice to rebut the business judgment rule's presumption of director independence.

[55] *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch. Mar. 28, 2003).

The plaintiff has not alleged facts sufficient to establish that the Special Committee lacked the independence to consider objectively whether the transaction was in the best interest of CompuCom and all of its shareholders.

Furthermore, the complaint does not contain enough well-pleaded factual allegations to support a reasonable inference that Safeguard's, the Special Committee's, or the CompuCom board's interests were not aligned with the plaintiff. The plaintiff's theory that Safeguard improperly forced an immediate sale of CompuCom at a "fire sale price" because of its desperate need for cash simply does not hold water, especially since the process of finding a suitable transaction dragged on for more than two years. Nor does the complaint allege that Safeguard or any other holder of CompuCom's common stock received different consideration for its shares in the merger. The plaintiff does not allege that Safeguard received any special benefits in the transaction at the expense of the minority shareholders. In other words, the plaintiff does not adequately allege that the merger was anything other than an arms-length transaction with an unaffiliated third party pursuant to the goal of maximizing shareholder value by attaining the best possible price.[56]

[56] The plaintiff just makes a blanket statement in the complaint that "the Acquisition is the product of a hopelessly flawed process that was designed to ensure the sale of CompuCom to one buyer and one buyer only, on terms preferential to Platinum and to subvert interests of the plaintiff and the other public stockholders of CompuCom." Compl. ¶ 73.

It appears that the plaintiff is merely expressing its disagreement with the business judgment of the members of the CompuCom board regarding the merits of the Merger Agreement. This does not provide a basis for liability. Thus, for all of the foregoing reasons, the court concludes that the complaint does not allege sufficient facts of a violation of the defendants' fiduciary duties to overcome the presumption of the business judgment rule.

B. Misleading Proxy

Finally, the plaintiff claims that the defendants sought to discourage the CompuCom shareholders from pursuing its statutory right to an appraisal by failing to adequately disclose all material information to CompuCom's shareholders.[57] The operative complaint (which is the second amended complaint) contains allegations regarding the defendants' alleged failure to make adequate disclosures in the original proxy statement distributed to CompuCom's stockholders. That complaint also acknowledges that, after the filing of the first amended complaint, CompuCom issued a proxy supplement that addressed several, if not all, of the plaintiff's non-disclosure allegations, disclosing information about the Special Committee directors' ties to Safeguard and the CompuCom board's efforts to find alternative value-maximizing transactions.[58] What the operative complaint does not do

[57] Compl. ¶ 98.
[58] Compl. ¶¶ 85-88.

is explain why the disclosures made in the proxy supplement are insufficient to cure the alleged disclosure violations the plaintiff previously advanced with respect to the original proxy statement. The plaintiff's brief in response to the motion to dismiss also makes little effort to argue for the continued existence of any material issue relating to the proxy materials.[59] Indeed, a review of the complaint and all the relevant proxy materials leads the court to conclude that the proxy supplement cured whatever well pleaded disclosure claims the plaintiff originally alleged.

V.

For the foregoing reasons, the defendants' motion to dismiss pursuant to Rule 12(b)(6) is GRANTED. IT IS SO ORDERED.

[59] The plaintiff argues in its brief in opposition to the defendants' motion to dismiss that the Broadview and Houlihan Lokey fairness opinions were materially inadequate, without any specification, because they failed to adequately disclose the work performed and analysis underlying their opinions. After reviewing the proxy, the court cannot infer that the defendants did not adequately disclose the underlying analysis of their opinions.