IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

NEW JERSEY CARPENTERS PENSION FUND, Individually and On Behalf of All Others Similarly Situated,	:	
Plaintiff,	:	
v.	:	**C.A. No. 5334-VCN**
INFOGROUP, INC., ROGER SIBONI, BILL L. FAIRFIELD, VINOD GUPTA, BERNARD W. REZNICEK, CLIFTON T. WEATHERFORD, GEORGE KRAUSS, GARY MORIN, THOMAS L. THOMAS, JOHN STAPLES III, and LEE D. ROBERTS,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: June 21, 2011
Date Decided: September 30, 2011
Revised: October 6, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff, a former shareholder of *info*GROUP, Inc. ("*info*GROUP" or the "Company"), brings its Second Amended Class Action Complaint (the "Complaint") asserting, on behalf of themselves and their fellow former shareholders, that the merger (the "Merger") of *info*GROUP into a subsidiary of CCMP Capital Advisors, LLC ("CCMP"), pursuant to an agreement entered on March 8, 2010, was the product of breaches by the then-directors of *info*GROUP of the fiduciary duty of loyalty. Defendants have moved for partial and full dismissal. They contend that (1) the allegations of the Complaint do not, under Court of Chancery Rule 12(b)(6), state a claim upon which relief may be granted and (2) the Plaintiff lacks standing to pursue its claim, which can be asserted, if at all, only in a derivative action and not through a direct action.

The Court concludes in this Memorandum Opinion that the claim which the Plaintiff seeks to assert is individual in nature and that the Plaintiff has alleged sufficiently that the merger was not approved by a disinterested and independent majority of the directors. Additionally, although the Plaintiff acknowledges that it is not asserting certain claims the dismissal of which has been sought by Defendants, for purposes of avoiding confusion, those claims are dismissed. Accordingly, with that limited exception, the Court denies Defendants' motions to dismiss.

II. PARTIES

Plaintiff New Jersey Carpenters Pension Fund was a shareholder of *info*GROUP at all times relevant to this action.

The individual defendants were all directors of *info*GROUP.

Defendant Vinod Gupta ("Gupta") was a director of the Company and the beneficial owner of approximately 37% of the Company's outstanding common stock. He is also the founder of *info*GROUP, and served as Chief Executive Officer ("CEO") and Chairman of the Board ("Chairman") before the period relevant for purposes of this lawsuit. In addition to voting in favor of the Merger as a member of the board of directors (the "Board"), he entered into a voting agreement in which he agreed to vote his shares in favor of the Merger.

The remaining individual defendants (the "Board Defendants") consist of the other members of the Board during the relevant time period: Bill L. Fairfield ("Fairfield), Roger Siboni ("Siboni"), Bernard W. Reznicek ("Reznicek"), George Krauss ("Krauss"), Clifton T. Weatherford ("Weatherford"), Gary Morin ("Morin"), Thomas L. Thomas ("Thomas"), John Staples III ("Staples"), Lee D. Roberts ("Roberts"). In addition to serving as a director, Fairfield was the Company's CEO. Siboni served as Chairman beginning in July 2009, when Reznicek stepped down from that position. Siboni, Morin, and Thomas composed the special mergers and acquisitions committee (the "M&A Committee") that was formed to review *info*GROUP's strategic alternatives, and ultimately, recommended the Merger. Morin chaired the M&A Committee.

*info*GROUP was an international marketing solutions provider incorporated under the laws of Delaware, with its principal offices located in Omaha, Nebraska.

III. BACKGROUND[1]

The Complaint alleges that a seemingly disinterested (aside from Gupta) and independent Board came under the control of Gupta, a fellow Board member and the Company's founder and largest shareholder. Gupta's alleged power over the Board arose not from financial dependence, business relationships, or interlocking board memberships, but from a pattern of threats aimed at other Board members and unpredictable, seemingly irrational actions that made managing the Company difficult and holding the position of director undesirable. Having achieved the necessary level of domination, Gupta forced the Merger on the Company at an inopportune time and utilizing a flawed and inadequate sales process. This sale was allegedly orchestrated so that Gupta could obtain desperately needed liquidity;

[1] Unless otherwise noted, the factual background is taken from the Complaint, the well-pleaded allegations of which, for present purposes, must be taken as true. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2011 WL 3612992, at *5 (Del. Aug. 18, 2011). In certain instances, the Court will rely upon *info*GROUP's Definitive Proxy Statement (Schedule 14A) filed on May 28, 2010 (the "Proxy") for facts not alleged in the Complaint. While, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon to prove the truth of their contents. *Orman v. Cullman,* 794 A.2d 5, 15-16 (Del. Ch. 2002). Consideration of the Proxy is appropriate in this case, as it is both integral to and incorporated into the Plaintiff's complaint.

he is not alleged to have obtained any other additional financial benefit different from the merger price paid to other shareholders.

A. *Gupta's Need for Liquidity*

As alleged by the Plaintiff, Gupta's need for liquidity derived largely from past legal actions, whose relevance in the current proceeding pertains primarily to his motivation for allegedly forcing the sale of *info*GROUP. In 2007, Gupta settled derivative claims arising from a series of allegedly self-interested transactions that utilized Company funds.[2] The resulting settlement order directed Gupta personally to reimburse $9 million to *info*GROUP over a five year period. At the time the Complaint was filed, $4.6 million of this amount was still outstanding, and it was due by January 2013. Under the terms of the settlement, Gupta also agreed to step down as CEO and Chairman of *info*GROUP.

The Securities and Exchange Commission ("SEC") also launched an investigation into Gupta's actions. A settlement of the SEC's efforts was announced on March 17, 2010, a little more than one week after the Board approved the Merger and Gupta entered into a voting agreement with CCMP. The settlement required Gupta to pay $5,190,400 of disgorgement plus interest to *info*GROUP and a $2,240,700 civil penalty to the SEC. Gupta was also barred for life from acting as an officer or director of any public company, and by the time

[2] *See In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963 (Del. Ch. 2007).

the settlement was announced, Gupta had already resigned from the Board. Furthermore, the settlement required Gupta to vote his shares in the same proportion as other shareholders, although he secured a carve-out from this requirement allowing him to enter into a voting agreement with CCMP in connection with the Merger.

At the time the Complaint was filed, Gupta owed over $12 million as a result of the derivative and SEC settlements. Gupta also had debt exceeding $13 million related to several loans taken out to buy *info*GROUP stock. This alleged liquidity crunch was exacerbated by the facts that Gupta had not received a salary since leaving his job as CEO under the terms of the derivative settlement, and that he did not hold investments that provided him with "meaningful cash."[3]

Beyond Gupta's multi-million dollar debts and his decreased cash inflow, his desire for liquidity also, allegedly, stemmed from his plans to launch a new business. Reportedly, Gupta had been contemplating starting a new business for two years before the sale of *info*GROUP, and within two months of the sale, Gupta announced that he was founding a new online business, Database101.com. According to press reports, Gupta plans to fund this business entirely with his own money. Further, he reportedly expects the company to grow quickly, reaching

[3] More than half of Gupta's net wealth was invested in *info*GROUP, which had ceased paying a dividend. *See* Compl. ¶ 32-33. When asked, Gupta could not identify investments that provided him with "meaningful cash." *Id.* at ¶ 31.

$100 million in revenues within three to four years, and expanding from 50 to 200 or 300 employees within a few years.

Gupta's need for liquidity was no secret to the Board. The Board repeatedly discussed Gupta's liquidity problems, and Fairfield even contacted Raymond James & Associates Inc. to discuss the possibility that Gupta could sell his shares in a block transaction in order to ease "the pressure on [the] Gupta family."[4] Furthermore, the M&A Committee specifically discussed Gupta's liquidity problems and how they might impact the Company.

Gupta's need for liquidity and its connection to the sale of *info*GROUP was laid bare in late 2008 when he engaged his personal bankers, Blackstone Advisory Services L.P. ("Blackstone"), to facilitate either his purchase of *info*GROUP or the sale of his stock. In an email to Blackstone regarding a possible sale of his shares, Gupta explained: "Objective is liquidity for the [Gupta] family thru sale of Info stock directly or indirectly."[5]

Gupta eventually abandoned his efforts to purchase the Company due to the unavailability of financing. This left him with only one option to achieve his desired liquidity: sale of *info*GROUP to a third-party. It is alleged that sale of the

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[4] *Id.* at ¶ 38 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 27 (Email from Fairfield to Joseph Estes of Raymond James dated Oct. 13, 2009 and reply from Estes to Fairfield dated Jan. 13, 2010)).

[5] *Id.* at ¶ 36 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 26 (Email from Gupta to A.J. Agarwal of Blackstone dated May 6, 2009)).

entire company, as opposed to a sale of only his shares, was highly advantageous to Gupta, since the size of his position rendered it illiquid. In order to consummate a block sale of his shares, it was expected that Gupta would have to accept a significant liquidity discount. Likewise, selling his shares into the market was not an attractive option, as selling such a large number of shares would exert downward pressure on the share price. Thus, for Gupta, the sale of *info*GROUP was the best option to fulfill his need for liquidity, regardless of whether the timing, price, or process employed were in the best interests of the Company's other shareholders.

B. *Gupta's Efforts to Force a Sale*

The Complaint alleges that the catalyst for the eventual sale of *info*GROUP came in the form of Gupta's "rogue activities,"[6] at a time when *info*GROUP's future prospects were improving and the market was ill-suited for a sale, and that the Board eventually capitulated to Gupta's demands for a sale after succumbing to pressure exerted through a pattern of threats and bullying. In early 2009, in response to Gupta's unauthorized press release encouraging a sale (discussed below), then-Chairman Reznicek issued a press release stating that market conditions would make it difficult to obtain a good price for the Company, and that the Board was confident in the Company's current plan. This plan included cutting

[6] *Id.* (quoting Fairfield Dep. Tr. at 42).

unnecessary and inefficient costs, the consolidation of a "loose confederation" of entities, and measures aimed at increasing organic growth. Even Evercore Partners Inc. ("Evercore"), which the Board retained to help the Company explore strategic alternatives, initially noted that "it's highly credible at this point not to pursue a sales transaction in [this] environment."[7]

Despite *info*GROUP's improving prospects and a soft M&A market, Gupta issued a press release on December 18, 2008, recommending that the Company explore its strategic alternatives, including a possible sale of the company. This press release was issued without Board approval, and other Board members were not pleased with Gupta's actions. Soon after the press release, Gupta advised the Board that "it is clear that the company needs to be sold . . . as it will provide a path to exit."[8]

Gupta's campaign for a sale employed some rather indelicate methods of persuasion. As alleged in the Complaint, Gupta repeatedly threatened other Board members with lawsuits if they did not take actions to sell the company. Gupta also told the Board that he had uncovered evidence of financial fraud at the Company, and that he had "a strong feeling that some of the directors will be sued again, even

[7] *Id.* at ¶ 45 (quoting Sobol Dep. Tr. at 19-20).
[8] *Id.* at ¶ 36 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 25 (Memorandum from Gupta to the Board dated Dec. 22, 2008)).

personally for not acting in the shareholders [sic] best interest [sic]."[9] Throughout 2009, Gupta also denigrated and called for the firing of the Company's management, including then-CEO and Board member Fairfield. This conduct allegedly drove down the morale and performance of management.

The Board was allegedly negatively impacted by Gupta's threats and erratic behavior. Morin described Gupta as "generally disruptive" at Board meetings, resulting in inefficiency and frustration on the part of other Board members.[10] Due to Gupta's behavior, Weatherford threatened to resign from the Board, and Reznicek did resign his position as Chairman because of Gupta. Ultimately, as alleged by the Plaintiff, the Board was simply overwhelmed by Gupta. An email exchange between Thomas and Roberts gives voice to this concern. In his email, Thomas noted: "Though I agree with you that it is a full board decision, we are certainly the ones with the most in depth perspective as to opinions. The others, Bernie, George, Bill, John Staples, have history and may be tired for a lot of reasons or just to get rid of the Vin [Gupta] overhang." Roberts then responded: "Good points and I agree. One of my greatest concerns is the majority of the board

[9] *Id.* at ¶ 51 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 35 (Email from Gupta to the Board dated June 14, 2009)).
[10] *See id.* at ¶ 68 (quoting Morin Dep. Tr. at 37).

including Tom W. just want to 'dump the company and run.' I can understand based on the pain, trauma, time and everything else how people could get there."[11]

C. *The Sale of* info*GROUP*

On December 22, 2008, in response to Gupta's unauthorized press release earlier that day, the Board announced that the Company would retain Evercore as the financial advisor to the independent directors to help them analyze the Company's strategic alternatives.[12] On January 29, 2009, the Board, at least "in part" as a response to Gupta's pressure, recommended that the M&A Committee be formed to address proposals to acquire the Company. The next day, the Board approved the formation of the M&A Committee comprised of purportedly independent directors Morin, Siboni, and Thomas.[13] Morin was appointed as the chair of the M&A Committee.[14]

The Board instructed Evercore to begin preparing the necessary information and materials to conduct a formal transaction process on August 25, 2009. On September 29, 2009, the Board gave final approval to commence the sales process.

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[11] *Id.* at ¶ 76 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 62 (Email from Thomas to Roberts, Morin, and Siboni dated Jan. 26, 2010 and reply from Roberts to Thomas, Morin, and Siboni dated Jan. 26, 2010)). This exchange is hardly dispositive of the question of whether the Board was under the control of Gupta, and very well could show that the Board was diligent in fulfilling its fiduciary duties by assessing every risk facing the Company in the proposed merger. Of course, for purposes of a motion to dismiss, the Court must draw all reasonable inferences in favor of the non-moving party, and will do so when considering this allegation.
[12] Proxy at 17.
[13] *Id.* at 18.
[14] *Id.*

From October 1, 2009, through October 5, 2009, Evercore contacted potential strategic and financial buyers, including CCMP and Vector Capital ("Vector"). Initial bids were submitted on or shortly after November 3, 2009, and based upon these bids, certain parties were invited to participate in the second round of bidding.

On February 12, 2010, Vector submitted an offer of $8 per share. It provided a debt financing commitment letter from Bank of America ("BofA") and requested an additional three weeks to complete its due diligence. Vector sought exclusivity in negotiating with *info*GROUP, a request that was denied. Vector later relented on its request for exclusive negotiations.

The same day, CCMP submitted its offer of $8.40 per share. It similarly provided a debt financing commitment letter from BofA and requested *one* additional week to complete its due diligence. Like Vector, CCMP sought and was denied exclusivity in negotiating with *info*GROUP.

The M&A Committee determined that Vector's offer was inferior, not only in terms of price, but also because of the additional due diligence requested, its request for exclusivity, unfavorable merger terms, and the fact that its debt commitment letter was more preliminary than CCMP's letter. Evercore swiftly informed CCMP that it was the high bidder, and encouraged it to finish due diligence quickly so a definitive agreement could be executed.

The Board then authorized the M&A Committee to negotiate with CCMP on a non-exclusive basis, and to inform Vector that its proposal was inferior and the Company would be moving forward with a different bidder. Vector reacted to this news on February 17, 2010, by retracting its request for exclusivity, assuring Evercore that its financing was as secure as CCMP's financing, and challenging the claim that its merger terms were at all onerous. Vector further stated that it might be able to raise its price, if granted the additional due diligence it had requested. Allegedly, Vector was told by Evercore not to bother.[15]

On March 3, 2010, CCMP lowered its bid to $7.60, purportedly based upon preliminary February 2010 revenue results, limited evidence regarding the Company's ability to achieve the 2010 budget, BofA's revised debt commitment, and the discovery of additional tax liabilities through due diligence. A few days later, on March 7, 2010, the Company agreed to accept an offer of $8.00 per share from CCMP. The CCMP offer provided *info*GROUP with a 21-day "go shop" period, but included a termination fee and matching rights that allowed CCMP to match any competing superior offer within five days of receiving the required notification of such a proposal from *info*GROUP.

Later on March 7, the Board unanimously approved the transaction and Merger Agreement, and authorized the M&A Committee to prepare the definitive

[15] Compl. ¶ 61.

documents. The next day, March 8, the Merger Agreement was entered and Gupta signed a voting agreement (the "Voting Agreement"), under which he agreed to vote his shares in favor of the Merger. The Merger was announced on March 8, 2010. The *info*GROUP shareholders approved the Merger on June 29, 2010, and it closed on July 1, 2010.

D. *Alleged Deficiencies in the Sales Process and Unfair Price*

The Plaintiff alleges that there were several deficiencies in the sales process, and that *info*GROUP's shareholders ultimately received an unfair price. First, it is alleged that not all bidders were treated equally, and, specifically, that CCMP was favored in the bidding process and Vector disadvantaged. For example, during the second round of bidding, only CCMP was provided with the Company's customer data and given permission to contact its customers in order to perform direct customer due diligence. Vector asked for this type of customer due diligence and was denied it. Vector also requested and was denied details of the pending SEC settlement with Gupta that were provided to CCMP. Further, CCMP's eventual ownership was seemingly treated as a foregone conclusion. For example, on February 22, 2010, the Company permitted CCMP to meet with the Company's managers as a "passing of the baton."[16] Finally, after CCMP lowered its bid, the

[16] *Id.* at ¶ 60 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 59 (Email from Fairfield to Vignesh Rajendran of Evercore dated Feb. 21, 2010)).

Board failed to pursue a potentially higher offer from Vector, despite overtures from Vector on March 4 and March 7.

Gupta's actions are also alleged to have disrupted the sales process. Beyond the threats aimed at the Board and management, Gupta is alleged to have disrupted the sales process by influencing the list of potential bidders, conducting unsupervised negotiations, and leaking confidential information about the sale to various parties.

First, Gupta influenced the list of potential bidders. In September 2009, the M&A Committee sought Gupta's comments on the proposed sale contact list. He responded that "ADS" should be added to the list and "Dolan Media" removed. These changes were ultimately made.

Gupta also spoke to many bidders without Board supervision. Gupta spoke with Vector, CCMP, Silver Lake, D&B, and Apex Capital, among other bidders, often without the supervision of the Board, the M&A Committee, or Evercore. Gupta persisted in this behavior even after the Board asked him to stop. Gupta justified this conduct by explaining that it was acceptable, so long as he was acting as a shareholder, not a director.

Further, Gupta is alleged to have leaked confidential information to third parties. These leaks include a leak of the Vector interest letter to a large *info*GROUP shareholder and possible improper communications with the sole analyst covering the Company, Carter Malloy of Stephens Inc. In both cases, the Board suspected that Gupta was the source of the leak. Similarly, the Board suspected that Gupta was the source for a leaked story that appeared in the *Omaha World Herald*. As a result of this story and the related market reaction, Evercore reported on November 5, 2009, that a few potential bidders were unwilling to proceed with the process.

The Plaintiff also alleges that there were many material misrepresentations and omissions in the Company's proxy. The alleged disclosure deficiencies are the same that were before this Court in the Plaintiff's previous motion for a preliminary injunction. Broadly speaking, the alleged disclosure deficiencies relate to Gupta's alleged improper and disloyal activities, information regarding Evercore's fairness opinion, and the alleged unequal and unfair treatment of Vector in its efforts to make a bid for the Company.

Finally, the Plaintiff alleges that as a result of Gupta's self-interested actions and the inadequate sales process conducted by a disloyal Board, the Company's shareholders received an unfair price for their shares. In support of this contention, the Plaintiff notes that the final sales price of $8.00 per share was below the market price of $8.16 per share just prior to the announcement of the Merger.

IV. THE CONTENTIONS

The Plaintiff alleges that Gupta used his status as a director and the Company's largest shareholder to obtain the liquidity he needed at the expense of the other *info*GROUP shareholders. It contends that Gupta was interested in the Merger due to his desire for liquidity, and that his conduct tainted the merger process and denied *info*GROUP's shareholders a fair price for their stock. The Plaintiff further alleges that the Board Defendants succumbed to Gupta's control after being cowed by his threats and hostile, erratic behavior, and as a result, they breached their duty of loyalty by approving a merger that provided Gupta with a unique financial benefit at the expense of other shareholders.

In response, the Board Defendants argue that this Court resolved the question of whether the alleged disclosure deficiencies were material when it denied the Plaintiff's request for a preliminary injunction. They further maintain that even if this Court were to find that there were material disclosure violations, money damages would not be an appropriate remedy for these violations. Finally, the Board Defendants argue that to the extent the Plaintiff is asserting a claim against them for Gupta's post-merger actions—namely, his creation of a new business that is "striking similar" to *info*GROUP—this claim must fail. They contend that the Plaintiff makes no allegations that any of the Board Defendants were aware of Gupta's plans or that otherwise link any of the Board Defendants to

Gupta's post-merger activities. They further maintain that the allegations describe, at best, a claim for a misappropriation of a corporate opportunity, a claim that could only be brought by *info*GROUP and for which the Plaintiff has no standing to bring as a derivative action, since it is no longer a shareholder of *info*GROUP.

Gupta joins the Board Defendants in the above arguments addressing the Plaintiff's disclosure claims and claims relating to Database101.com. Gupta further contends that the Plaintiff's complaint does not contain specific factual allegations to support a claim that Gupta breached his fiduciary duties, either by tainting the sale process or by "tipping" a favored bidder.[17] Gupta also argues that, to the extent the Plaintiff is asserting a claim against Gupta for disclosure violations in the Proxy, Gupta cannot be held liable, since the Proxy was not filed until after Gupta resigned from the Board. Similarly, Gupta contends that any claim related to his creation of a competing business must fail, as Database101.com was not launched until after he had left the Board. Finally, Gupta maintains that the Plaintiff's loyalty claim is derivative in nature, and thus,

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[17] *See Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1282-84 (Del. 1989). Both of these contentions seek to challenge the Plaintiff's duty of loyalty claim. As discussed below, the Court finds that the Plaintiff has pled sufficient facts that, if accepted as true along with all reasonable favorable inferences, support a duty of loyalty claim based upon the theory that Gupta was interested in the Merger and the Board Defendants lacked independence. Since the Plaintiff's loyalty claim ultimately survives this motion to dismiss, the Court will not now rule on various alternative ways a loyalty claim could be framed or articulated.

the Plaintiff lost standing to assert this claim when its status as a shareholder of *info*GROUP was terminated as a result of the Merger.[18]

V. ANALYSIS

A. *Applicable Standard*

As was recently reaffirmed by the Delaware Supreme Court, the pleading standards governing a motion to dismiss are minimal.[19] When considering a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court "should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[20]

B. *Loyalty Claim*

The Plaintiff asserts that the Board breached its duty of loyalty to the shareholders in connection with its approval of the Merger, and that as a consequence of this breach, Gupta received a unique financial benefit, liquidity, at the expense of other *info*GROUP shareholders. Gupta seeks full dismissal of the Plaintiff's duty of loyalty claim; the Board Defendants do not join him in seeking

[18] *See Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984).
[19] *Cent. Mortg. Co.*, 2011 WL 3612992 at *5.
[20] *Id.*

full dismissal of this claim. In their briefs, Gupta and the Plaintiff disagree about how this claim should be characterized and the precise grounds upon which it is being brought.[21] Semantics aside, two important points are abundantly clear. First, the Plaintiff brings forth a claim that Gupta and the Board Defendants approved the Merger in breach of their duty of loyalty. The crux of this claim is that, at the time the Merger was approved, Gupta was an interested director and the remaining directors were controlled by him, and thus, not independent. Second, Gupta seeks full dismissal of this loyalty claim under Rule 12(b)(6). With this basic framework in mind, the Court will assess the Plaintiff's loyalty claim and Gupta's challenge to it under the standards for dismissal under Rule 12(b)(6).

1. <u>Business Judgment Rule and Entire Fairness</u>

The business judgment rule is at the foundation and core of Delaware corporate law.[22] The rule is a presumption that directors of a corporation act "independently, with due care, in good faith and in the honest belief that [their] actions were in the stockholders' best interests."[23] Since the board is presumed to have acted properly, the burden is on the plaintiff challenging the decision to establish facts rebutting this presumption.[24]

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[21] *See* Pl.'s' Opp'n Br. at 3, 28-29, 36-37.
[22] *Binks v. DSL.net, Inc.*, 2010 WL 1713629, at *5 (Del. Ch. April 29, 2010) (quoting *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005)).
[23] *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996).
[24] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

One way to overcome this burden is to allege facts which, if accepted as true, establish that a majority of the individual board members had "a financial interest in the transaction or were dominated or controlled by a materially interested director."[25] If such facts are sufficiently alleged, the business judgment rule is rebutted and entire fairness standard of review is applicable.[26] Notwithstanding the effects of any procedural safeguards utilized in approving the transaction, the initial burden of proving the entire fairness of the transaction is borne by the defendants.[27] Thus, a "plaintiff can survive a motion to dismiss under Rule 12(b)(6) by pleading facts from which a reasonable inference can be drawn that a majority of the board was interested or lacked independence with respect to the relevant decision."[28]

2. Director Gupta

A director is considered interested in a transaction if he receives "a personal financial benefit from a transaction that is not equally shared by the stockholders."[29] This benefit must have been material to the director.[30] A benefit was material when it was significant enough "in the context of the director's

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[25] *Orman*, 794 A.2d at 22 (quoting *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 979 (Del. Ch. 2000)).
[26] *See id.*
[27] *See Orman*, 794 A.2d at 20.
[28] *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *6 (Del. Ch. July 24, 2009) (citing *Orman*, 794 A.2d at 22-23).
[29] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).
[30] *Orman*, 794 A.2d at 23.

economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest."[31]

The Plaintiff alleges that Gupta was materially interested in the Merger because it provided him with desperately needed liquidity. Liquidity has been recognized as a benefit that may lead directors to breach their fiduciary duties.[32]

As alleged by the Plaintiff, this need for liquidity arose from a confluence of factors. On one side of the ledger were debts and investments that required cash. The Plaintiff asserts that, at the time the Complaint was filed, Gupta owed an amount exceeding $12 million under the SEC and derivative settlements, and over $13 million related to loans used to buy *info*GROUP shares.[33] Furthermore, it is reasonable to infer from the original and outstanding derivative settlement balances pled in the Complaint, that Gupta had reimbursed the Company approximately

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[31] *In re General Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. 1999). Furthermore, it should be noted that "material" is not a magic word that must be recited in a complaint before this Court will question a director's interest. *Orman*, 794 A.2d at 23. A finding of interest may be made "so long as facts are pled from which a reasonable inference can be drawn that the benefit received from a challenged transaction by that director to the exclusion of the shareholders generally is material to him." *Id.* Thus, if the facts alleged and favorable inferences drawn from them could support a finding that Gupta's liquidity benefit was material to him, it is of no consequence that the Plaintiff did not specifically recite the word "material" in relation to this purported benefit.

[32] *See McMullin v. Beran*, 765 A.2d 910, 922-23 (stating that "[o]ne can reasonably infer from the factual allegations in McMullin's Amended Complaint that the Chemical Board compromised its deliberative process by seeking to accommodate ARCO's immediate need for cash" and finding that the plaintiff's loyalty allegations challenged the independence of the "ARCO conflicted" board members whose loyalty to ARCO may have led them to sacrifice potential shareholder value in order to obtain immediate cash for ARCO).

[33] Compl. ¶ 29.

$4.4 million in recent years under the terms of the derivative settlement,[34] which would have further depleted his available cash. Finally, as alleged by the Plaintiff, Gupta's plans to start a new business were another reason he needed to raise cash.[35] As contended by the Plaintiff, Gupta launched Database101.com shortly after the Merger, and had been planning to start a new business for two years;[36] thus, it is reasonable to infer that he would have been contemplating its funding during the time in question. Based upon the well-pleaded facts that Gupta plans to self-fund this new venture and expects rapid growth,[37] it is also reasonable to infer that he would anticipate a need for a significant amount of cash to fund the company's launch and expansion over the next few years.

While Gupta's cash requirements were allegedly quite large, the Plaintiff asserts that he had no discernible, significant sources of cash inflow. It alleges that he has not received a salary since he was forced from his role as *info*GROUP's CEO in 2008, and was no longer receiving dividends from his *info*GROUP stock.[38] The Plaintiff also asserts that, when asked, Gupta was unable to identify "any investments that provide him with meaningful cash";[39] from this the Court infers that he had no such investments because, otherwise, one would reasonably be

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[34] *See id.* at ¶ 26.
[35] *Id.* at ¶ 40.
[36] *Id.* at ¶¶ 40, 43.
[37] *See id.* at ¶ 41.
[38] *Id.* at ¶¶ 31, 33.
[39] *Id.* at ¶ 31.

expected to be able to identify any investments one holds that provide "meaningful cash."

The Plaintiff further alleges that Gupta could not obtain the necessary magnitude of liquidity, absent a sale of the entire Company or a willingness to accept a significant liquidity discount on the sale of his block of shares.[40] As recounted in the Complaint, Gupta's plainly stated "objective" when working with Blackstone to find a buyer for the Company was "liquidity for the [Gupta] family thru sale of Info stock directly or indirectly."[41]

In order to be considered interested, a director need not merely receive *a* benefit, but must receive a *material* benefit.[42] Gupta ultimately received over $100 million in cash for the sale of his shares in the Merger.[43] Accepting the Plaintiff's well-pleaded factual allegations as true, the Court cannot find as a matter of law that receipt of $100 million in cash by a man purportedly in desperate need of liquidity is immaterial. In a similar—yet somewhat different—scenario, the Court stated: "I think it would be naïve to say, as a matter of law, that $3.3 million is immaterial."[44] Similarly, it would naïve to say, as a matter of law, that $100

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[40] *Id.* at ¶ 53.
[41] *Id.* at ¶36 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 26 (Email from Gupta to A.J. Agarwal of Blackstone dated May 6, 2009)).
[42] *See Orman*, 794 A.2d at 23.
[43] Compl. ¶ 8.
[44] *Orman*, 794 A.2d at 31. These two scenarios are not directly comparable because in *Orman* the director's company was to receive $3.3 million if the merger was consummated and nothing if it was not. In the instant case, Gupta would have owned a valuable asset—either *info*GROUP

million in cash is immaterial to a man in need of liquidity. In addition to the size of the benefit received by Gupta, the alleged ultimate use of the cash also supports a reasonable inference that this benefit was material to him. As alleged by the Plaintiff, Gupta used some of this money to start a new business. If this new business is successful—and, as alleged by the Plaintiff, Gupta himself strongly believes it will be[45]—it is reasonable to infer that it can provide a long-term solution to Gupta's liquidity problems by providing him with a salary and dividends.

The Plaintiff's well-pleaded facts also support an inference that the liquidity benefit received by Gupta was a personal benefit not equally shared by other shareholders. All shareholders, including Gupta, received $8 per share in cash for their shares.[46] There are no allegations that Gupta received any additional compensation as a result of the Merger from, for example, side deals, a golden parachute, or compensation as an executive under *info*GROUP's new owner. As

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stock or cash—regardless of whether the deal went through. Instead, the Merger provided him with liquidity, which, accepting the Plaintiff's well-pled facts as true, was a benefit he sorely needed. But, the basic premise regarding materiality is the same. Just as a $3.3 million fee contingent on a merger cannot be easily dismissed as immaterial, neither can receipt of $100 million in cash contingent on a merger when it is to be received by a person desperately seeking liquidity.

[45] *See* Compl. ¶ 41.

[46] Proxy at 59. In addition to shares of common stock, Gupta also owned options entitling him to 224,999 shares of common stock upon their exercise. Compl. ¶ 8. According to the Complaint, all of these options had vested by the time the Merger was consummated. *See id.* Aside from liquidity, the Plaintiff makes no allegations that Gupta received any improper benefit resulting from his ownership of these options.

explained above, the Plaintiff alleges that Gupta received a benefit in the form of liquidity for his large and, allegedly, illiquid stake in the Company.

While all of the shareholders received cash in the Merger, *liquidity* was a benefit unique to Gupta. As alleged in the Complaint, the illiquidity of Gupta's position resulted from its size,[47] approximately 34% of the Company's common stock.[48] The Company's second largest shareholder held less than 6% of its stock.[49] While not an insignificant stake, these holdings were far smaller than Gupta's, and the holdings of the remaining shareholders were even smaller yet. These well-pleaded facts support a reasonable inference that, with the exception of Gupta, *info*GROUP's other shareholders held relatively small, liquid positions. Thus, while the other shareholders did receive cash, liquidity was not a benefit to them, as it was to Gupta, because their investment in *info*GROUP stock was already a relatively liquid asset prior to the Merger.

As discussed above, it is reasonable to infer that Gupta suffered a disabling interest when considering how to cast his vote in connection with the Merger, which would provide him with over $100 million in cash.

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[47] *See* Compl. ¶ 53 (discussing the liquidity discount required for Gupta to sell his shares in a block trade due to the size of his stake and his inability to sell his shares into the market due to his "significant holdings").
[48] *Id.* at ¶ 33.
[49] *Id.* at ¶ 79.

3. Board Defendants

As defined by the *Aronson* court, "independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[50] These extraneous considerations and influences may exist when the challenged director is controlled by another.[51] Control may be shown by the pleading of facts that establish "that the directors are . . . so under their influence that their discretion would be sterilized."[52] Control may also occur where a director is in fact dominated by another party, and domination can occur through force of will.[53]

Gupta's control over the Board Defendants is not alleged to have stemmed from their financial dependence upon him or any sort of close familial or business relationships. Instead, he is alleged to have dominated the Board Defendants through a pattern of threats that could, arguably, have intimidated the Board Defendants. As alleged in the Complaint, Gupta repeatedly threatened the Board Defendants with lawsuits if they did not take actions to sell the company.[54] Gupta also reported to the Board Defendants that he had uncovered evidence of financial fraud at the Company, and that he had "a strong feeling" some directors would be

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[50] *Aronson*, 473 A.2d at 816.
[51] *Orman*, 794 A.2d at 24.
[52] *Id.* (quoting *Rales*, 634 A.2d at 936).
[53] *Id.* at 25 n. 50.
[54] Compl. ¶ 48.

sued for not acting in the shareholders' best interests.[55] Also, throughout 2009 Gupta denigrated and called for the firing of the Company's management, including then-CEO and Board member Fairfield.[56]

Taken as true, one may reasonably infer from these allegations that Gupta sought to intimidate the Board Defendants, and in doing so, dominate them, so that they would capitulate to his demands to sell the Company. The Plaintiff has alleged that Gupta's conduct did, indeed, have a significant impact on other members of the Board. Allegedly, Reznicek resigned as Chairman and Weatherford threatened to resign from the Board altogether as a result of Gupta's behavior.[57] Furthermore, in an email exchange between Board Defendants Thomas and Roberts, the two voice concerns that others on the Board may "be tired for a lot of reasons or just [want] to get rid of the Vin [Gupta] overhang," or may even "want to 'dump the company and run'" due to "the pain, trauma, time and everything else."[58]

Keeping in mind that on a motion to dismiss under Rule 12(b)(6) the Court must "accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations . . . as 'well-pleaded' if they provide the defendant notice of

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[55] *Id.* at ¶ 51 (quoting Transmittal Aff. of Kent A. Bronson, Ex. 35 (Email from Gupta to the Board dated June 14, 2009)). *See also id.* at ¶ 90 (citing various other instances in which Gupta raised the specter of legal actions against the Board).
[56] *Id.* at ¶ 48.
[57] *Id.* at ¶ 49.
[58] *Id.* at ¶ 76.

the claim, [and] draw all reasonable inferences in favor of the plaintiff,"[59] it is reasonable to infer that Gupta dominated the Board Defendants through a pattern of threats aimed at intimidating them, thus rendering them non-independent for purposes of voting on the Merger.[60]

Having found that the Plaintiff pleaded sufficient factual allegations to support a reasonable inference that a majority of the Board was interested or lacked independence, Gupta's motion to dismiss the Plaintiff's loyalty claim under Court of Chancery Rule 12(b)(6) is denied.

C. *Disclosure Claims*

Gupta and the Board Defendants seek dismissal of any and all disclosure claims. At oral argument, the Plaintiff acknowledged that it is no longer bringing a separate disclosure claim,[61] and that the factual allegations regarding the allegedly

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[59] *Cent. Mortg. Co.*, 2011 WL 3612992 at *5.

[60] The Board did create a purportedly independent committee, the M&A Committee, to review proposals to acquire the Company. Compl. ¶ 52. According to the Proxy, the M&A Committee ultimately recommended the Merger to the full board of directors. Proxy at 34. As previously noted, the M&A Committee was composed of Siboni, Morin, and Thomas, all Board Defendants and members of the Board. As members of the Board, they were subjected to the threats and intimidating behavior described above. As previously noted, one may reasonably infer that the Board Defendants were dominated by Gupta, and thus, not independent for purposes of voting for the Merger. This reasonable inference of non-independence extends to Siboni, Morin, and Thomas in their capacity as M&A Committee members; therefore, for present purposes, the Court need not consider the effect the approval by an independent committee would have had on this transaction.

[61] The Plaintiff seems, at times, to be reluctant to give up its disclosure claims. It asserts that the Court, after trial, could determine that certain of its disclosure claims were material. Pl.'s Br. at 4. A blunderbuss reference to prior briefs, without any focus, does not suffice to rebut a motion to dismiss that is otherwise not contested.

deficient disclosures are set forth in support of its loyalty claim.[62] Thus, the disclosure claims are dismissed.[63]

D. *Claims Based on Gupta's Post-Merger Activities*

Gupta and the Board Defendants seek dismissal of any claims against them based upon Gupta's post-merger activities. In its brief opposing the Defendants' motions to dismiss, the Plaintiff acknowledges that it is not making a claim against the Board Defendants or Gupta based upon Gupta's founding of Database101.com or any other of Gupta's post-merger activities.[64] The Plaintiff further explains that it included allegations regarding these activities in its Complaint because Gupta's post-merger actions are probative of his interest in the Merger, namely, liquidity, which was allegedly needed, in part, to fund Database101.com.[65] Accordingly, claims related to Gupta's post-merger activities, if there are any, are dismissed.

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[62] *See* Oral Arg. on Mots. to Dismiss Tr. 27-30 (June 21, 2011).

[63] This, contrary to the Plaintiff's suggestion, is not a matter of striking certain factual allegations. Instead, it is an effort to clarify what claims have been asserted and remain for resolution. Facts that do not on their own establish liability may, nonetheless, still inform and assist the decision-making process.

[64] *See* Pl.'s Opp'n Br. 2 (explaining that the paragraphs in the Complaint referring to Gupta's conduct after the Merger are "allegations (not claims)"); *id.* at 24 ("But these are not actual claims for relief pleaded in the [Complaint].").

[65] *See id.* at 2-3 (alleging that Gupta's founding of a new business after the Merger "shows Gupta's ***motive*** for harassing and threatening the Board into pushing through the Merger . . ." (emphasis in original) and stating that the founding of Database101.com relates to Gupta's need for liquidity); *id.* at 26 ("Gupta's actions after he 'resigned' from the Board…are probative [of] his ***motive*** for harassing and threatening the Board into selling *info*GROUP, which was to gain liquidity" (emphasis in original)).

E. *Direct or Derivative Claim*

Ultimately, the viability of the Plaintiff's claim depends upon whether it is direct or derivative. If it is derivative, as argued by Gupta, then the Plaintiff lost standing to pursue the claim when the Merger was accomplished. The analysis of whether a claim is direct or derivative is performed using the two-pronged test set forth by *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[66] Under this test, the Court must consider "(1) who suffered the alleged harm—the corporation or the suing stockholders, individually—and (2) who would receive the benefit of any recovery or other remedy."[67]

The first prong is analyzed by asking: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?"[68] In the instant case, the Plaintiff directly challenges the merger, and alleges that the merger was invalid due to the fact that a majority of the Board was interested or lacked independence. As such, it is a clear case of a direct claim: "A stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even

[66] 845 A.2d 1031 (Del. 2004).
[67] *Id.* at 1033.
[68] *Id.* at 1036 (quoting *Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004)).

after the merger at issue has been consummated."[69] Furthermore, the alleged wrong here was suffered by the shareholders, whose company was sold in an allegedly tainted transaction.

The second prong "should logically follow" the first,[70] and this case is no exception. If the Plaintiff's loyalty claim succeeds, it is the shareholders who would be entitled to compensatory damages for the value they lost when the Company was improperly sold. As described above, both prongs of the *Tooley* test indicate that the Plaintiff's claim is direct, and accordingly, Gupta's motion to dismiss on the grounds that it is derivative fails.

VI. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are granted in part and denied in part.[71] An Order will be entered in accordance with this Memorandum Opinion.

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[69] *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245 (Del. 1999).

[70] *Tooley*, 845 A.2d at 1036.

[71] To the extent that the Complaint may be read as an attempt to allege either a separate disclosure claim or a claim based on Gupta's post-*info*GROUP business efforts, those claims are dismissed.