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Superior Court Of California
Minute Order - CIVIL LAW AND MOTION
HONORABLE JAMES P. KLEINBERG

Calendar For: 11/02/12

Page: 1

Reporter: Reporter
Marcia Hunter

Clerk: Paula Bastian

Bailiff: Cesar Avalos

Dept: Dept 1

3. 09:00AM Case: 1-10-CV-180413 In Re McAfee, Inc. Shareholder Litigation ()
Type: Business Tort, Unfair Practice - UnlimitDate Filed: 08/19/10
SubType: Class Action
SV: 09/21/10 C: 1-10-CV-180420, C: 1-10-CV-180597, C:
1-10-CV-180928
Event: CV Mtn: Summary Jgmt *Tentative Adopted* Result Code:
Text: MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT [PER THE
SCHEDULING ORDER ENTERED ON 4/11/12] *See attached*

PLT-0002 Jack Arthur Colwell
Atty: Marc M. Umeda
Atty: Mark C. Gardy
Atty: Kathleen A. Herkenhoff
PLT-0003 Meryl Faulkner
Atty: David T. Wissbroecker
PLT-0001 Fred Greenberg
Atty: Marc M. Umeda
Atty: Mark C. Gardy
Atty: Kathleen A. Herkenhoff
PLT-0004 Gersh Korsinsky
Atty: Mark Punzalan
DEF-0008 Carl Bass
Atty: Rodney G. Strickland
DEF-0003 Jonathan Chadwick
Atty: Rodney G. Strickland
DEF-0009 Thomas E Darcy
Atty: Rodney G. Strickland
DEF-0005 Leslie G Denend
Atty: Rodney G. Strickland
DEF-0002 David G Dewalt
Atty: Rodney G. Strickland
DEF-0013 Intel Corp
Atty: Gibson Dunn & Crutcher LLP
Atty: Gibson Dunn & Crutcher LLP
Atty: Paul J. Collins
DEF-0001 McAfee, Inc.
Atty: Gibson Dunn & Crutcher LLP
DEF-0010 Jeffrey A Miller
Atty: Rodney G. Strickland
DEF-0012 Lorrie M Norrington
Atty: Rodney G. Strickland
DEF-0007 Denis J O'Leary
Atty: Rodney G. Strickland
DEF-0006 Robert W Pangia
Atty: Rodney G. Strickland
DEF-0004 Charles J Robel
Atty: Rodney G. Strickland

DEF-0011 Anthony Zingale
 Atty: Rodney G. Strickland
INT-0001 Central Laborers' Pension Fund

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1-10-CV-180928

Event: CV Appl: Counsel Pro Hac Vice Result Code:

Text: BY ROBERT C. WALTERS, on behalf of Defendants Intel
Corporation and McAfee, Inc.

*Tentative Adopted
See attached*

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Atty: Rodney G. Strickland

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DEF-0011 Anthony Zingale
Atty: Rodney G. Strickland
INT-0001 Central Laborers' Pension Fund

NO APPEARANCE () OFF CALENDAR ()
TENTATIVE RULING: () CONTESTED () NOT CONTESTED
() ADOPTED () AS AMENDED () SEE BELOW () SEE ATTACHED

as to the Sealing of records.

THE COURT ORDERS THIS CASE:

() SET FOR _____ ON _____ AT _____ DEPT _____
 CONTINUED TO 12-7-12 - Sealing of records AT 9:00am DEPT 1
() DISMISSED () WITH PREJUDICE () WITHOUT PREJUDICE () RE: _____
() NO SERVICE; REISSUED TO _____ AT _____ DEPT _____
() TEMPORARY RESTRAINING ORDER TO REMAIN IN EFFECT
() MOTION/PETITION () ARGUED () GRANTED () DENIED () OTHER _____

() DEMURRER () SUSTAINED () WITH _____ DAYS LEAVE TO AMEND () WITH LEAVE TO AMEND BY _____
() WITHOUT LEAVE TO AMEND () AS TO _____ CAUSE(S) OF ACTION
() OVERRULED _____ DAYS TO ANSWER OR PLEAD FURTHER () AS TO _____ CAUSE(S) OF ACTION

() TAKEN UNDER SUBMISSION; WRITTEN DECISION TO BE MAILED

() ORDER SIGNED () SERVED ON COUNSEL IN COURT () _____ TO PREPARE ORDER

() EXEMPTION: () ALLOWED () DISALLOWED () OTHER _____

() PAYMENT GRANTED \$ _____ PER _____ FROM _____ () CERTIFIED COPY OF MINUTES TO SHERIFF

() SWORN, EXAMINED AND DISCHARGED () PURGED OF CONTEMPT () ORDERED RELEASED

() BAIL: () APPLIED \$ _____ () EXONERATED \$ _____ () FORFEITED () OTHER _____

() BENCH WARRANT ORDERED FOR _____ BAIL \$ _____

() SET FOR () COURT TRIAL () JURY TRIAL ON _____ AT 8:45 AM. TIME ESTIMATE _____

() JURY DEMANDED BY _____ () JURY WAIVED BY _____

() TRIAL COUNSEL PLAINTIFF _____ DEFENDANT _____

() SETTLEMENT CONFERENCE ON () WEDNESDAY PRIOR TO TRIAL () ON _____

OTHER ORDERS: The documents shall remain sealed until the next hearing on 12-7-12.

Calendar line 3

Case Name: *In re McAfee, Inc. Shareholder Litigation.*

Case No.: 1-10-CV-180413

This is a consolidated shareholder class action¹ on behalf of the holders of McAfee, Inc. (“McAfee”) common stock against McAfee, Intel Corporation (“Intel”), and certain of McAfee’s officers and directors² for breach of fiduciary duty arising out of the sale of McAfee to Intel for the price of \$48 per share. The operative Consolidated Amended Complaint (“CAC”) alleges that on August 19, 2010, McAfee, Intel, and Intel’s wholly-owned subsidiary Jefferson Acquisition Corporation, entered into an Agreement and Plan of Merger in which Intel would acquire McAfee and operate it as a wholly-owned subsidiary of Intel for \$48 per share.³ Plaintiffs allege that the acquisition was unfair, contaminated by conflicts among McAfee’s CEO, defendant David DeWalt (“DeWalt”), and that the \$48 per share offer was “unfair and undervalued.”⁴ Plaintiffs further allege that DeWalt and management withheld material information about the acquisition from McAfee’s shareholders in various proxy statements filed with the Securities and Exchange Commission (“SEC”), including material information concerning the flawed sales process, conflicts of interest that burdened the Board, management and their advisors, McAfee’s intrinsic value and prospects going forward, material benefits that defendants and McAfee would secure only if the acquisition was consummated, and the data and inputs underlying the financial analysis supporting the fairness opinion of Morgan Stanley & Co. (“Morgan Stanley”)⁵ The CAC asserts a cause of action for breach of fiduciary duty against the Individual Defendants, and a cause of action for aiding and abetting against McAfee and Intel.

McAfee, Intel, and the Individual Defendants (collectively “Defendants”) now move for summary judgment.

Pro Hac Vice

The Application for Admission of Robert C. Walters to appear as counsel *pro hac vice* complies with the requirements set forth in California Rules of Court, rule 9.40 and is unopposed. The application is **GRANTED**.

Judicial Notice

¹ The consolidated actions include: *Greenberg v. McAfee, Inc.*, case no. 1-10-CV-180413 (lead), *Colwell v. McAfee, Inc.*, case no. 1-10-CV-180420, *Faulkner v. McAfee, Inc.*, case no. 1-10-CV-180597, and *Korsinsky v. Bass*, case no. 1-10-CV-180928. On October 13, 2010, Greenberg voluntarily withdrew as a named plaintiff. On October 6, 2011, Korsinsky filed an ex parte motion for voluntary dismissal, which was granted on October 18, 2011. On October 25, 2011, Colwell filed a request for voluntary dismissal without prejudice, which was granted on October 27, 2011. On January 13, 2012, the Court granted Central Laborers’ Pension Fund’s motion to intervene and motion for class certification.

² The nine individual McAfee Board members sued in the Consolidated Amended Complaint (other than David DeWalt) are (1) Thomas E. Darcy (“Darcy”), (2) Denis J. O’Leary (“O’Leary”), (3) Robert W. Pangia (“Pangia”), (4) Carl Bass (“Bass”), (5) Jeffrey A. Miller (“Miller”), (6) Anthony Zingale (“Zingale”), (7) Leslie G. Denend (“Denend”), (8) Lorrie M. Norrington (“Norrington”), and (9) Charles J. Robel (“Robel”) (collectively the “Individual Defendants”).

³ See Consolidated Amended Complaint (“CAC”) ¶ 3.

⁴ See CAC ¶¶ 4, 10.

⁵ See CAC ¶ 14.

Defendants request judicial notice of: (1) McAfee's Third Amended and Restated Certificate of Incorporation filed April 27, 2009 (Exh. A to RJN); (2) Certificate of Incorporation (Exh. B to RJN); (3) McAfee's Form 8-K filed Nov. 2, 2010 (Exh. C to RJN); (4) the fact that \$48 is the highest price at which a share of McAfee has traded since 1999, based on a graph depicting the stock price of McAfee since 1992 (Exh. D to RJN; Decl. Reed T. Nelson ¶5-6); (5) the fact that shares of McAfee traded at various prices on certain days (Decl. Nelson ¶ 7); (6) the fact that between August 18 and 19, 2010, McAfee's stock increased \$17.08, or 57% (Decl. Nelson ¶8); (7) the fact that Intel's stock closed at \$19.59 on August 18, 2010 and \$18.90 on August 19, 2010, and that between August 18 and 19, 2010, Intel's stock decreased \$0.69 or 3.5% (Decl. Nelson ¶ 9); (8) the fact that Yahoo! Inc.'s stock closed at \$15.84 per share on July 31, 2010 (Decl. Nelson ¶ 10); (9) the fact that Symantec Corporation's stock closed at \$15.19 per share on July 22, 2010 and closed at \$15.75 on July 31, 2010 (Decl. Nelson ¶ 11); and (10) the fact that TrendMicro, Inc.'s stock price closed at \$28.25 per share on July 22, 2010 and its stock price closed at \$29.68 per share on July 31, 2012 (Decl. Nelson ¶ 12).

The request is **GRANTED** as to McAfee's Third Amended and Restated Certificate of Incorporation and Certificate of Incorporation. Courts may take judicial notice of articles of incorporation filed with the Secretary of State. (See *Cody F. v. Faletti* (2001) 92 Cal.App.4th 1232, 1236, fn.2.) The request is **GRANTED** as to McAfee's Form 8-K. Judicial notice may also be taken of the fact that this document was filed with the SEC and that it says what it says. (See *StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 456-457 [judicial notice of proxy statement and registration statement filed with SEC]; Evid. Code § 452, subd. (h) [facts not reasonably in dispute].) The request is **DENIED** as to the facts regarding share prices because the request is not adequately supported by sources of reasonably indisputable accuracy.

Motion to Seal

The parties have lodged a number of documents under seal.

Defendants have filed unredacted versions of the following documents under seal: (1) Motion for Summary Judgment; (2) Separate Statement of Undisputed Material Facts; (3) Exh. J to the Declaration of Linda Lam (excerpts from the deposition of Carl Bass); (4) Lam Exh. K (excerpts from the transcript of the deposition of Lorrie Northington); (5) Lam Exh. P (excerpts from the transcript of the deposition of Charles J. Robel); (6) Lam Exh. R (excerpts from the transcript of the deposition of Robert Pangia); (7) Lam Exh. S (excerpts from the transcript of the deposition of Denis O'Leary); (8) Lam Exh. T (excerpts from the transcript of the deposition of David DeWalt); (9) Lam Exh. U (excerpts from the transcript of the deposition Renee James); (10) Lam Exh. V (excerpt of exhibit to the deposition of Donald Harbert); (11) Lam Exh. W (excerpts from the transcript of the deposition of Donald Z. Harbert); (12) Lam Exh. X (excerpts from the transcript of the deposition of Michael Wyatt); (13) Lam Exh. AA (excerpts from the transcript of the deposition of Jane Shaw); (14) Lam Exh. EE (excerpts from the transcript of the deposition of Gerhard Watzinger); (15) Lam Exh. FF (excerpts from the transcript of the deposition of Andy Bryant); (16) Lam Exh. JJ (excerpts from a presentation delivered on August 15, 2010 to the Intel Board of Directors Subcommittee); (17) Exh. D to the Declaration of Charles Robel (excerpt of the written discussion materials that Morgan Stanley provided to the McAfee Board); (18) Excerpts from the Declaration of Prasanna Mulgaonkar; (19) Excerpts from the Declaration of Anthony Jennings; (20) Excerpts from the Declaration of Donald Harbert; and (21) Reply in Support of Motion for Summary Judgment.

On August 3, 2012, Defendants filed a motion to seal, arguing the documents contain McAfee's confidential business information, including Intel's potential acquisition targets and negotiating strategies, specific analyses by Intel of portions of McAfee's business, Defendants' technologies under development and future products, and McAfee's communications with other potential acquirers including those companies' confidential business strategy information. Defendants argue all of this information is subject to the parties' protective orders entered in this matter, and the information could be exploited by their competitors.

"The court may order that a record be filed under seal only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) "Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 fn. 3; *NBC Subsidiary (KNBC-TV) vs. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46.) Financial information involving confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace and there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286.) Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian, supra*, 96 Cal.App.4th at p. 309.)

Here, Defendants sufficiently demonstrate that they have an overriding interest that overcomes the right of public access and supports sealing the records because the documents lodged under seal contain sensitive information relating to potential acquisition targets, including business strategies and confidential personnel information, and McAfee's internal valuations and projections, and technologies under development. Defendants would likely be prejudiced if the information is disclosed to Defendants' future acquisition targets and competitors, the redactions are narrowly tailored, and the Court believes no less restrictive alternative exists. Defendants' motion to seal is **GRANTED**.

Plaintiffs have also lodged their opposition papers "conditionally under seal pursuant to protective order." However, no party has filed a motion to seal the opposition papers. Under the parties' Stipulated Confidentiality Order in this case, filed October 22, 2010, any party that wants to file "Confidential Information" in court must give five days' pre-filing notice to the party who designated the documents confidential (the "Designating Party"), whereupon the Designating Party may either de-designate the documents or "apply for an order sealing the Confidential Information pursuant to California Rule of Court 2.551(b)(3)(B)." (Stip. Confid. Order at p. 8.) Under California Rules of Court, rule 2.551(b)(3)(A), if a party files, for purposes of adjudication, documents produced in discovery subject to a confidentiality

agreement or protective order, but that party does not intend to move to seal those documents, the party must still lodge them under seal, with redacted copies, and give notice to the other party that the documents will be placed in the public file unless a timely motion to seal is made. (See Cal. Rules of Court, rule 2.551(b)(3)(A).) If the party that produced the documents is given notice and fails to file a motion to seal the records within 10 days (or obtain an extension of time to file such motion), “the clerk must promptly remove all the documents...from the envelope...and place them in the public file.” (Cal. Rules of Court, rule 2.551(b)(3)(B).)

Here, although Plaintiffs did not file any notice of lodgment pursuant to Rule 2.552(b)(3)(A), the Stipulated Protective Order only requires five days’ pre-filing notice to the party who designated the materials confidential. Defendants have not moved to seal Plaintiffs’ opposition papers or otherwise claimed insufficient notice under the procedures of the Stipulated Protective Order. **Therefore, the unredacted opposition papers shall be placed in the public file.**

Parties’ Arguments

Defendants argue they are entitled to summary judgment because there is no triable dispute that the Individual Defendants satisfied their fiduciary duties to McAfee’s shareholders. First, Defendants argue that the Individual Defendants cannot be liable for monetary damages for breach of the duty of care under McAfee’s Third Amended and Restated Articles of Incorporation (Defs’ Sep. St. of Mat. Facts [“MF”] 172), and thus can only be liable to Plaintiffs for breach of the duties of loyalty or good faith. Regarding the nine directors other than DeWalt, Defendants argue they were outside, non-management, non-employee directors (Defs’ MF 19) who were well aware of the value of the company and the relevant market (Defs’ MF 37-38, 64, 160, 182), and had already vetted the universe of potential acquirers (Defs. MF 64, 65, 74). Defendants submit that upon receiving Intel’s initial offer of \$45 per share, the Individual Defendants on the McAfee Board retained competent financial and legal advisors (Morgan Stanley and Wilson Sonsini Goodrich & Rosati, P.C. [“Wilson Sonsini”]) whose advice the Board solicited and followed (Defs’ MF 52-56, 62, 84-85), the directors met on nine separate occasions to consider Intel’s offer (Defs’ MF 51), the directors attempted and succeeded in negotiating a higher offer (from \$45 to \$48 per share) (Defs’ MF 2, 48, 63, 70, 72, 106), and they approved the merger agreement on positive recommendations from independent proxy analysts (Defs’ MF 6, 15, 110). The merger was approved by the McAfee shareholders on November 2, 2010 (Defs’ MF 15). Defendants argue that the business-judgment rule insulates these nine Individual Defendants from liability for their risk-benefit decisions, and the reasonableness of the process is apparent from the result: a sales price that represented a 60% premium over McAfee’s pre-announcement stock price, supported by a Morgan Stanley fairness opinion and two independent proxy advisory firms that recommended the McAfee shareholders approve the transaction, which they did by a vote of over 99.9% (Defs’ MF 3, 4, 6, 15). Defendants argue that even if Plaintiffs rely upon an expert who uses more aggressive valuation methods to estimate the fair value of the stock at a higher price, this does not raise a triable issue of material fact as to whether the independent directors’ decision was within a range of reasonableness.

Defendants argue there is no triable issue of material fact regarding “synergies” allegedly unaccounted for in internal revenue and earnings projections because the “Patmos” project with Intel was a “skunk work project” that had “never been on a road map” for McAfee (Defs’

MF 137), the McAfee Board was already aware of Patmos and knew it had not resulted in any marketable project (Defs' MF 139, 149, 150), during negotiations, Intel was not willing to share quantified assessments of those synergies (Defs' MF 176, 177), and a portion of the strategic synergies were incorporated into Intel's negotiating range as a premium above the standalone discounted cash flow valuation of \$46 per share (Defs' MF 178).

Regarding the alleged "preclusive deal protection provisions," Defendants argue the "no shop" clause had a complementary "fiduciary out" provision that permitted McAfee to engage with other suitors, allowed the Board to change its recommendation in favor of the merger, and permitted McAfee to terminate the deal in response to a bona fide written unsolicited acquisition proposal that the company determined in good faith was reasonably likely to lead to a superior proposal (Defs' MF 118). Defendants argue the "matching rights" provision and "termination fee" are standard merger terms, and the termination fee only represented 3% of the total transaction price, which is reasonable under Delaware law.

Defendants further argue that DeWalt did not breach his duties of care or good faith, as the undisputed evidence shows he always attempted to negotiate a higher price for McAfee, consistent with the Board's philosophy to seek a stock sales price that "start[ed] with a 5" (Defs' MF 46, 47, 70, 72). Defendants argue that DeWalt kept the independent directors apprised of discussions with Intel as they occurred, and since the Board expected DeWalt to attempt to foster potential deals, there was no need for DeWalt to provide many details (Defs' MF 39). Defendants argue that DeWalt may have used some hyperbole or puffery in an attempt to impress Intel with McAfee's value and financial health (e.g, by identifying supposed "\$1B+ opportunities" for synergies), but these were consistent with an attempt to maximize the acquisition offer (Defs' MF 3, 16, 166-167), and they do not provide a basis for concluding that the more realistic projections used by McAfee's Board to evaluate the true strength of the business were not the best projections based on the information available at the time.

Defendants argue that DeWalt did not breach his duty of loyalty because he did not negotiate the terms of his employment agreement with Intel until August 12, 2010, three weeks after the McAfee Board voted to approve the \$48-per-share price (Defs' MF 110, 119), and the terms were reviewed by McAfee's Compensation Committee and fully disclosed to the shareholders (Defs' MF 124-127). Furthermore, because of his substantial McAfee stock holdings, DeWalt's own financial incentive was in line with the interests of all McAfee shareholders (Defs' MF 129-130). Defendants further argue that under Delaware law, management's expectation of employment with a new company is not, in itself, sufficient to establish a conflict of interest on the part of the directors in allowing the interested manager to negotiate the merger. Defendants argue there is no evidence that the nine independent directors were controlled or dominated by DeWalt.

Defendants argue they are entitled to summary judgment on Plaintiffs' disclosure claims because (1) the non-disclosures cannot give rise to monetary damages, since the November 2, 2010 vote has already occurred; (2) they cannot constitute actionable duty-of-care claims because of a clause in McAfee's charter eliminating personal liability for breaches of duty of care; and (3) the Proxy Statement disclosed all material facts relating to the transaction. According to Defendants, the Proxy Statement disclosed Intel and McAfee's ongoing business dialogue, beginning in early 2009, regarding a joint research project in the area of enhanced security (Defs' MF 134, 180), the material facts concerning negotiations after the June 11, 2010 offer were disclosed in detail (Defs' MF 181), the benefits that McAfee management

would receive from the merger (Defs' MF 183), including DeWalt's employment terms (Defs' MF 127). Defendants argue omissions about potential acquirers, McAfee's standalone value, and the data and inputs underlying Morgan Stanley's fairness opinion were not required under Delaware law.

Defendants argue there is no triable issue that the McAfee shareholders have been damaged, because under the "entire fairness" standard, the \$48 per share price was fair, and there is no evidence that Intel would have increased its offer above \$48, or that there were other buyers interested in McAfee at a higher price.

Defendants argue the aiding and abetting claim against McAfee and Intel fails because there is no underlying breach of fiduciary duties by the Individual Defendants.

In opposition, Plaintiffs argue there are triable issues of material fact regarding DeWalt's breaches of fiduciary duty because he concealed from the McAfee Board the fact that he and his team had been working with Intel between March and May 2010 through numerous meetings and daily emails and telephone conferences to help Intel build highly detailed financial models and calculate valuations of McAfee, giving Intel a strategic advantage over McAfee when the offer was finally made on June 11, 2010. According to Plaintiffs, the "Project Inca" meetings and merger synergies discussions with Intel were intended to facilitate Intel's eventual takeover of McAfee. Plaintiffs contend that during Project Inca, Intel and McAfee discussed billions of dollars in additional value from partnering McAfee's software expertise with Intel's hardware expertise, and during this process, DeWalt and members of McAfee management provided Intel with detailed internal information regarding business opportunities the two companies could exploit working together. (Pltfs' MF 201, 212, 215-216, 220-221, 244-247.) Plaintiffs submit that Intel, based on the information gleaned from Project Inca, formulated a valuation of McAfee of \$90+ per share (Pltfs' MF 244), and was also able to line up investment bankers, establish a board subcommittee, and create a comprehensive approach to their takeover offer. (Pltfs' MF 211, 237, 323.) According to Plaintiffs, a centerpiece of Project Inca was Patmos, a platform for running software outside the operating system, which McAfee believed was a "Billion Dollar" idea (Pltfs' MF 216, 316). Plaintiffs argue that due to DeWalt's concealment of Project Inca, the McAfee Board was "surprised" and "shocked" when they learned of Intel's interest in acquiring McAfee in June 2010, and they were forced to hastily convene meetings, hire advisors, and formulate valuations and a negotiating strategy. (Pltfs' MF 260-263, 267, 275.) Plaintiffs submit that no McAfee Board member was aware of Project Inca, or of the "Billion Dollar" ideas that had been shared with Intel in the months preceding the June 10 offer (Pltfs' MF 222, 264), and DeWalt sat silently while McAfee's financial advisors used "street numbers" to value McAfee, even though the "street" had no idea about the billions of dollars of additional value uncovered during Project Inca (Pltfs' MF 222, 295-296, 310-312). According to Plaintiffs, DeWalt lied during his deposition when he testified that he lacked knowledge whether McAfee had been asked to provide any internal information to Intel regarding prospects or projections between February 2010 and June 10, 2010, and whether in the June 10 meeting if there was any discussion of him keeping his management team on board post-merger. (Pltfs' MF 233, 255.)

Plaintiffs further argue that following McAfee's rejection of Intel's initial offer, Renee James of Intel asked DeWalt to commit to a price of \$50 per share, and thereafter she would seek final approval from the Intel Board, (Pltfs' MF 281, 282), but DeWalt, without discussing the matter with the McAfee Board or the company's advisors, rejected the offer, causing Intel to

freeze price negotiations for a period of time. (Pltfs' MF 283, 284.) Plaintiffs argue DeWalt did this to cause the McAfee Board to abandon the price range it had determined to be fair and settle for a lower price.

Plaintiffs further submit that the proxy materials submitted to the McAfee shareholders failed to disclose any information regarding Project Inca, the information DeWalt shared with Intel, the financial models constructed, or the billions of dollars of value confirmed in the March-May 2010 discussions. (Pltfs' MF 209, 264.)

Plaintiffs submit that DeWalt had a conflict of interest because by driving the sale of McAfee to Intel, DeWalt was able to secure millions of dollars in special retention and performance bonuses, as well as continued employment, and cement his reputation in the business world for building and selling businesses. (Pltfs' MF 194, 324.) Plaintiffs submit that pursuant to his employment agreement signed with Intel as part of the merger, DeWalt kept his base salary of \$950,000 per year, was promised an annual bonus of \$1,050,000, special retention bonuses of \$2,000,000 on the first and second anniversaries of the closing of the merger, performance incentive payments of \$2,000,000 in 2011 and \$2,000,000 in 2012, a one-year acceleration of his stock options, restricted stock units and other equity awards, and participation in Intel's equity award program going forward (Pltfs' MF 324), which far exceeded what DeWalt stood to gain from his McAfee stock holdings had he risked insisting on a higher merger price. (Pltfs' MF 335.) Plaintiffs submit these special payments are identical to those DeWalt secured for himself in his prior sale of a company called Documentum to EMC, and the special payments also compare favorably to the \$5 million in retention payments that Intel awarded to the CEO of Wind River in a substantially similar acquisition by Intel approximately a year before the McAfee acquisition. (Pltfs' MF 192, 337.)

Plaintiffs argue that under *Mills Acquisition Co. v. MacMillion, Inc.* (Del. 1989) 559 A.2d 1261 and *Cinerama, Inc. v. Technicolor, Inc.* (Del. 1995) 663 A.2d 1156, manipulation of a disinterested majority of the board by an interested director vitiates the majority's ability to act as a neutral decision-making body, precluding the protection of the business judgment rule.

Plaintiffs further argue that triable issues of material fact exist as to the Individual Defendants' breaches of fiduciary duty because they likewise violated their duties of loyalty by failing to protect against DeWalt's clear conflict of interest, since the McAfee Board knew from Intel's June 11, 2010 offer that Intel wanted to retain current management, and it was public knowledge that when DeWalt sold his prior company (Documentum), he received millions of dollars in special bonuses, and when Intel had previously acquired Wind River, it had paid millions in special bonuses to Wind River's CEO. (Pltfs' MF 190-192, 322, 337.) Plaintiffs argue that even though the employment agreement post-dated the McAfee Board's approval of the merger price, the mere possibility of future benefits creates a disloyalty issue. Plaintiffs argue that the McAfee Board should have taken steps to protect against the conflict (e.g., taking direct control, creating a special committee).

Analysis

"When a board of directors' loyalty is questioned, Delaware courts determine whether a conflict has deprived stockholders of a 'neutral decision-making body.' [Citation.]" (*Cinerama, Inc. v. Technicolor, Inc.* (Del. 1995) 663 A.2d 1156, 1170.) "The fact that some interested transactions are permitted under our corporate law demonstrates that they are not

inherently detrimental to a corporation. As long as a given transaction is fair to the corporation, and no confidential relationship betrayed, it may not matter that certain corporate officers will profit as the result of it. . . . The key to upholding an interested transaction is the approval of some neutral decision-making body. Under 8 Del. C. § 144, a transaction will be sheltered from shareholder challenge if approved by either a committee of independent directors, the shareholders, or the courts.’ [Citation.]” (*Ibid.*) “[A]s to the duty of loyalty, approval of a transaction by a board of which a majority of directors is disinterested and independent ‘brings it within the scope of the business judgment rule.’ [Citation.]” (*Ibid.*)

As a threshold matter, Delaware law applies to this motion. In general, disputes regarding the internal affairs of a corporation are governed by the state of incorporation. (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 442 [decision to declare dividends governed by law of state of incorporation].) Here, the CAC alleges that McAfee and Intel are Delaware corporations.⁶ The internal affairs of a corporation include “. . . mergers, consolidations and reorganizations. . . .” (Rest.2d, Conflict of Laws, § 302, com. (a); *Kamen v. Kemper Fin. Servs.* (1991) 500 U.S. 90, 101.) Here, the matter involves the fairness of the process and price per share resulting from the merger between Intel and McAfee.

The Court finds that Defendants carry their burden of demonstrating the absence of triable issues on the breach of fiduciary claims against the Individual Defendants. First of all, it is not disputed that McAfee’s charter contains an exculpatory provision in which directors are not personally liable for monetary damages for breach of fiduciary duty, except for breaching their duty of loyalty, for acts or omissions not in good faith, claims under section 174 of the Delaware General Corporation Law,⁷ or for any transaction from which the director derived an improper personal benefit. (See RJN Exh. A (McAfee Charter); Pltfs’ Opp. to Defs’ Sep. St. MF 172: “Undisputed.”) Such provisions, authorized by 8 Del. C. § 102(b)(7), generally shield directors from monetary liability for a breach of their duty of due care, but not for breach of their duty of loyalty. (*In re Ply Gem Indus., S’holders Litig.* (Del. Ch. 2001) 2001 Del. Ch. LEXIS 84, at *38, fn. 50.)

With regard to the Individual Defendants’ duties of loyalty, Defendants demonstrate that the Individual Defendants were highly-qualified and experienced outside, independent directors who retained financial and legal advisors, met multiple times during the nine-week period of negotiations, and already had a deep knowledge of McAfee, its industry, and other possible suitors. The McAfee Board rejected Intel’s \$45 initial offer and eventually obtained a \$48 price-per-share, which the Board considered in light of analyses by Morgan Stanley, the financial condition and outlook for McAfee’s business, as well as a formal fairness opinion issued by Morgan Stanley on August 18, 2010. (Defs’ MF 96-97, 106.) Defendants demonstrate that the \$48 price represented a 60% premium over the closing price of McAfee’s stock the day before the deal was announced, it was the highest price paid for a share of McAfee stock in more than ten years, and it was approved by 99.9% of the voting shares.

Defendants further demonstrate that DeWalt did not dominate or control the independent directors, since they retained and relied upon financial and legal advisors and met multiple times to consider Intel’s offer. Defendants demonstrate that DeWalt did not have a

⁶ CAC ¶¶ 14, 21.

⁷ 8 Del. C. § 174. Liability of directors for unlawful payment of dividend or unlawful stock purchase or redemption.

disqualifying conflict in negotiating with Intel because he did not begin to negotiate his employment terms with Intel until after the McAfee Board accepted the \$48 price-per-share offer, and his potential interest in the merger was fully disclosed to the independent directors and shareholders. “[A] material interest of ‘one or more directors less than a majority of those voting’ would rebut the application of the business judgment rule if the plaintiff proved that ‘the interested director controls or dominates the board as a whole or [that] the interested director failed to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction.’ [Citation.]” (*Cinerama, supra*, 663 A.2d at p. 1168.) As discussed above, Defendants demonstrate that the McAfee Board was not dominated or controlled by DeWalt, and his interest in the transaction (continued employment after the merger) was disclosed to the McAfee Board through Intel’s June 11, 2010 offer letter itself (Defs’ MF 122; Lam Exh. BB). Because a majority of non-interested directors approved the merger in good faith, Defendants sufficiently demonstrate that the McAfee shareholders were not deprived of a neutral decision-making body.

Plaintiffs’ position is that DeWalt breached his duty of loyalty by concealing the fact that he had divulged internal McAfee information to Intel in March-May of 2010, which gave Intel a tactical advantage over McAfee once the June 11, 2010 offer of \$45 per share was made. These discussions, nicknamed Project Inca, pertained to merger synergies and “\$1B+” opportunities that Plaintiffs contend were improperly withheld from the McAfee Board in considering Intel’s offer.

Setting aside DeWalt’s duty of loyalty for a moment, the Court finds that Plaintiffs fail to raise a triable dispute as to the other Individual Defendants. As discussed above, the Individual Defendants are exculpated for claims of breach of fiduciary duty except for breaching their duty of loyalty, for acts or omissions not in good faith, claims under section 174 of the Delaware General Corporation Law, or for any transaction from which the director derived an improper personal benefit. Plaintiffs must show that the Individual Defendants “intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties.” (*Lyondell Chem. Co. v. Ryan* (Del. 2009) 970 A.2d 235, 243.) Here, Plaintiffs do not claim the Individual Defendants lacked good faith, received an improper benefit, or are liable under 8 Del. C. § 174. Plaintiffs cite portions of *Mills* where the Delaware Supreme Court stated in dictum that the board’s “virtual abandonment of its oversight functions in the face of [management’s] patent self-interest was a breach of its fundamental duties of loyalty and care in the conduct of this action.” (*Mills, supra*, 559 A.2d at p. 1284, fn. 32.) However, there is nothing in the record to support the claim that the McAfee Board abandoned its oversight functions in the face of patent self-interest. Plaintiffs do not dispute the independence, qualifications and outside status of the independent directors (Pltfs’ Opp. to Defs’ Sep. St. MF 19-20, 23-32), the Board’s regular discussions and familiarity regarding potential acquirers (Pltfs’ Opp. to Defs’ Sep. St. MF 37, 38⁸) and McAfee’s potential value and strategic position in the market (Pltfs’ Opp. to Defs’ Sep. St. MF 41), and the Board’s knowledge of McAfee’s decade-long relationship with Intel (Pltfs’ Opp. to Defs’ Sep. St. MF 40). Nor do Plaintiffs dispute that DeWalt did not control or dominate the McAfee Board.

⁸ Plaintiffs attempt to dispute MF 38 by noting that several McAfee directors were “shocked” and “surprised” by the offer. However, in context, the evidence shows the directors were surprised at whether the deal made sense for Intel, not that Intel was a potential acquirer. (See Decl. Atwood, Exh. 22 (Carl Bass Depo. at p. 86:4-16), Exh. 8 (Robel Depo. at 40:18-42:11, 52:19-21).

Rather, the basis for Plaintiffs' opposition is that DeWalt deliberately deceived the McAfee Board by concealing material information regarding Project Inca from the McAfee Board. However, the blame for this deception would, at most, lie with DeWalt, not the Individual Defendants.

Plaintiffs suggest the McAfee Board should have appointed a special committee to handle further negotiations with Intel, but they cite no legal authority in support of such a requirement under the circumstances. Plaintiffs argue the McAfee Board knew that Intel wanted to retain current management, and it was public knowledge that DeWalt received millions in special bonuses when he sold his prior company. The latter point is simply irrelevant to the transaction and companies at issue. As for Intel's intention to retain current management, the Delaware Supreme Court noted in *Cinerama* that some interested transactions are permitted and "are not inherently detrimental to a corporation. As long as a given transaction is fair to the corporation, and no confidential relationship betrayed, it may not matter that certain corporate officers will profit as the result of it." (*Cinerama, supra*, 663 A.2d at p. 1170.) Delaware law does not necessarily prohibit a board from relying on an interested manager to negotiate a merger. (See *In re MONY Group Inc. S'holder Litig.* (Del. Ch. 2004) 852 A.2d 9, 20; *Ply Gem Industries Inc. S'holder Litig.* (Del. Ch. June 26, 2001) 2001 Del. Ch. LEXIS 84, at *41.) Thus, the mere knowledge that DeWalt would be retained after the merger did not trigger a duty on the part of the Individual Defendants to take control of the negotiations from DeWalt, so long as the transaction was fair to McAfee and no confidential relationship was betrayed. Plaintiffs cite no evidence suggesting the McAfee Board should have known about the secret Project Inca discussions, and in fact, Plaintiffs' position is that these discussions were concealed from the McAfee Board. It is undisputed that DeWalt's employment agreement was reviewed by the McAfee Compensation Committee prior to the approval of the merger agreement. (Pltfs' Opp. to Defs' Sep. St. MF 124.) The Court finds that no triable issue exists with regard to the breach of fiduciary duty claims against the Individual Defendants other than DeWalt.

As for DeWalt, the relevant question under *Mills* and *Cinerama* is whether the disinterested majority of the McAfee Board was manipulated by an interested director. However, the evidence shows that DeWalt did not have an expectation of continued employment, let alone the promise of millions of dollars in special bonuses, *at the time he was involved in Project Inca*. Although Plaintiff's MF 248 states: "DeWalt knew from his merger synergies discussions with Intel that he and his management team would be kept on post-merger", the evidence cited in Plaintiffs' Separate Statement does not support this material fact. Plaintiffs cite DeWalt's deposition testimony regarding merger synergies that were discussed between McAfee and Intel.⁹ However, there was no testimony about continued employment after the merger. Instead, the record shows that Intel's offer of continued employment to DeWalt did not arise until the June 11, 2010 offer letter, and the employment agreement was negotiated in August 2011 after McAfee accepted Intel's offer of \$48 per share. Plaintiffs do not sufficiently dispute that the specifics of DeWalt's compensation package, including salary and bonuses, were not discussed until August 12, 2010. (See Pltfs' Opp. to Defs' Sep. St. MF 121.)¹⁰ Thus,

⁹ See Depo. DeWalt at 47:20-48:4, Exh. 14 to Decl. R. Atwood in Opp. to Defs' MSJ.

¹⁰ Plaintiffs attempt to dispute this MF by arguing that during the June 10, 2010 meeting, James and DeWalt discussed DeWalt's post-merger employment at McAfee, and Intel's June 11, 2010 offer letter expressly indicated that Intel intended to retain McAfee management. Again however, DeWalt's continued employment does not, by itself, demonstrate a disqualifying conflict of interest, and Plaintiffs do not dispute that specific terms like salary and bonuses were not discussed earlier.

there is no basis in the evidence to accept Plaintiffs' position that DeWalt was acting in his own self-interest at the time of the Project Inca discussions, rather than out of a motivation to maximize share prices for the benefit of all McAfee shareholders.

Defendants maintain DeWalt actually concealed nothing and that he did inform McAfee's Chairman of the Board, Charles Robel, of the March 4, 2010 meeting with Intel. (Defs' MF 155.) Defendants submit that Board member Lorrie Norrington testified that "as part of the conversations about all of our strategic alternatives...Intel [was] in the ...set of...large companies that we were talking to that could...do everything from create a joint partnership all the way through purchase McAfee." (Defs' MF 157.) Plaintiffs dispute these assertions by arguing: (1) DeWalt did not notify the McAfee Board of any discussions between McAfee management and representatives of Intel concerning Intel's potential acquisition of McAfee occurring prior to June 10, 2010; (2) when DeWalt notified the McAfee Board of Intel's offer, they were "shocked" and "surprised"; and (3) when DeWalt received Intel's initial offer letter, the McAfee Board "hadn't even considered putting the company in play" and was "focused on running the business" (Plfts' MF 222, 260, 262).

The dispute here seems to be whether DeWalt should have disclosed the substance of specific communications during March-May 2010, and whether his failure to do so left McAfee at a strategic disadvantage in assessing the Intel offer. However, as discussed above, DeWalt was not an interested director during the March-May 2010 negotiations. Moreover, the evidence shows that DeWalt promptly communicated the June 11, 2010 offer to Robel, who then called a special meeting of the Board of Directors for June 12, 2010 (Defs' MF 50, 52-55, 58), and that McAfee proceeded to consider the offer for several weeks, with the assistance of financial and legal advisors. Plaintiffs submit no evidence to suggest that McAfee was at a strategic disadvantage due to DeWalt's failure to disclose specific details of the Project Inca discussions, especially since the Board already knew about Patmos, the history of McAfee and Intel's business partnerships, and synergies presented to the McAfee Board by Morgan Stanley in mid-June 2010. (See Defs' MF 40, 62-66.) The fact that members of the McAfee Board expressed initial surprise by Intel's June 11, 2010 offer (Plfts' Opp. to Defs' Sep. St. MF 260, 261) says nothing about whether McAfee was at a strategic disadvantage over the ensuing weeks in evaluating the offer from Intel.

Regarding the post-June 11 negotiations, Plaintiffs argue that DeWalt rejected James' offer without discussing the matter with the McAfee Board or the company's advisors to cause the McAfee Board to abandon the price range it had determined to be fair and settle for a lower price. However, this argument is difficult to reconcile with Plaintiffs' theory that DeWalt's main objective was to facilitate the sale of McAfee. Moreover, it is undisputed that in refusing James' \$50 offer, DeWalt sought a higher price in the "\$52 to \$54" range (Plfts' Opp. to Defs' Sep. St. MF 82). Thus, DeWalt's refusal cannot be reasonably construed as anything but negotiating for an authorized, higher amount, not an effort to drive McAfee's expectations lower.

Regarding the proxy disclosures, Plaintiffs do not address Defendants' point that any disclosure violation cannot be remedied by monetary damages or injunctive relief. "[A] breach of the disclosure duty leads to *irreparable harm*. . . [O]nce this irreparable harm has occurred--*i.e.*, when shareholders *have* voted without complete and accurate information--it is, by definition, too late to remedy the harm. . . [T]he right to cast an informed vote is 'peculiar' and specific and it cannot be adequately quantified or monetized." (*In re Transkaryotic*

Therapies, Inc. (Del. Ch. 2008) 954 A.2d 346, 360-361, original italics.) Both parties cite to the *In re Transkaryotic* case, where the Delaware Court of Chancery held that it could not “grant monetary or injunctive relief for disclosure violations in connection with a proxy solicitation in favor of a merger three years after that merger has been consummated and where there is no evidence of a breach of the duty of loyalty or good faith by the directors who authorized the disclosures.” (*Id.* at p. 362.) Here too, Plaintiffs have failed to raise a triable issue of material fact regarding the Individual Defendants’ breaches of their duty of loyalty or good faith, and it is nearly two years after the shareholder vote approving the transaction. Plaintiffs argue that summary judgment of the disclosure allegations cannot be granted because these allegations are a subset of the breach of fiduciary duty claim. However, the Court has already found the absence of a triable issue of material fact on the Individual Defendants’ duty of loyalty and good faith in approving the merger, which leaves the disclosure and deal protection allegations as the only remaining allegations to support the claim and prevent summary judgment.

Plaintiffs do not challenge Defendants’ motion regarding the deal protection provisions other than to argue that this issue (like the proxy disclosure issue) is not suitable for summary judgment because it is part of the breach of fiduciary duty claim. Plaintiffs dispute Defendants’ MF 118 “inasmuch as defendants omit reference to the termination fees that accompanied the ‘fiduciary out’ provision.” However, Plaintiffs do not substantively challenge the fairness or reasonableness of the termination fee provision.

For all of these reasons, the Court finds that Plaintiffs fail to raise a triable issue of material fact regarding the Individual Defendants’ and DeWalt’s breaches of fiduciary duty. Because the Individual Defendants and DeWalt are entitled to summary judgment on the breach of fiduciary duty claims, McAfee and Intel cannot be liable for aiding and abetting. (See *Manzo v. Rite Aid Corp.* (Del. Ch. 2002) 2002 Del. Ch. LEXIS 147, at *21-22.)

The motion for summary judgment is **GRANTED**.

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