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NATURE AND STAGE OF PROCEEDINGS

In 2005, Board of Directors of i2 Technologies Inc. ("i2") approved the sale of i2's wholly-owned subsidiary Trade Services Corporation ("TSC") to its management for $3 million. Less than six months after the deal closed, the buyer rejected an $18.5 million offer for TSC as too low, and eventually sold it in 2007 for more than $25 million.

The beneficiary of the directors' largesse was Trade Service Holdings LLC ("TSH"), the principal owner of which was Anthony Dubreville ("Dubreville"), the i2 Vice President in charge of the division that included TSC. The i2 Board had placed Dubreville in charge of the TSC sale process, even though it knew he was interested in leading a management acquisition of TSC. When the i2 Board approved the TSC sale, it also knew: (i) Dubreville had not solicited interest from the most likely buyers; (ii) at least one strategic buyer had not been contacted despite its recent expression of interest in purchasing TSC for $25 million; (iii) projections underlying the valuation analyses purportedly supporting the sale price had been revised downward from projections conveyed to the Board for business purposes before the sale process had begun; (iv) these revisions to the projections had been made by Dubreville and his TSC management team, some of whom were participants in TSH; (v) the unrevised projections demonstrated the inadequacy of the sale price; and (vi) all the projections overstated TSC's expenses, which meant that TSC was worth more than any of the projections suggested. In short, i2's Board knowingly sold TSC to an i2 insider for a fraction of its fair market value. In so doing, i2's Board acted in bad faith.

Plaintiff John McPadden Sr. utilized a Section 220 books and record demand to investigate the TSC sale. He subsequently initiated this action derivatively to recover for i2 the losses it sustained as a result of this bad faith conduct by its directors and Dubreville.

Defendants have moved to dismiss plaintiff's complaint. As will be shown, plaintiff has copiously pleaded particularized facts which demonstrate actionable bad faith conduct by defendants.

STATEMENT OF FACTS[2]

i2 sells supply chain management software and related consulting services (¶19). i2 had a division known as the Content and Data Services Division ("CDSD"), which included TSC and another subdivision known as CDS (¶16). Dubreville was the i2 Vice President in charge of CDSD (¶16).

TSC occupied a niche market unrelated to i2's main line of business. (¶¶2, 19, 52.) TSC's business is providing subscription databases that price plumbing and electrical parts and supplies, primarily in digital form or secondarily through printed catalogs. These databases are used by plumbing and electrical contractors to formulate bids, or by distributors to track manufacturers' products. TSC provided a relatively stable source of revenue, with over 18,000 customers generating revenues in excess of $15 million annually. (¶2.)

i2 acquired TSC and a related company in January 2001 for $100 million. At that time, Dubreville was CEO and President of TSC; he continued in charge of TSC under i2. (¶¶3, 22-23.) As a condition of the i2 acquisition, TSC had to sell several of its businesses, including a printing company called Trade Printing Services that printed the catalogs TSC sold. Dubreville and TSC's founder, James Simpson ("Simpson"), purchased this printing business. Thereafter, Dubreville contracted TSC's printing to Trade Printing Services at inflated prices (¶23).

In 2002-2003, VisionInfoSoft/Material Express.com ("VIS/ME") was a competitor of TSC. VIS/ME's Chairman, Earl Beutler ("Beutler"), and VIS/ME President and CEO, John Evans ("Evans") had been senior executives at TSC during the 1980s. Dubreville had been employed at TSC at that time, and had worked under Evans and Simpson. (¶¶3, 20.) In June

[2] This Statement of Facts is taken from plaintiff's Complaint which serves as the record on this motion, *e.g. Vanderbilt Income and Growth Associates, LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996). References are to paragraphs of the Complaint.

2002, Dubreville caused TSC to sue VIS/ME for copyright infringement. While the litigation was pending, VIS/ME made persistent inquiries about purchasing TSC, apparently for the purpose of resolving the lawsuit. In July 2002, Beutler sent certified letters to then directors Sidhu, Cash, Crandall, Wadhwani, and Jordan, informing them that VIS/ME had made several inquiries regarding its interest in acquiring TSC, expressing VIS/ME's "strong interest" in such a transaction, and suggesting VIS/ME was prepared to outbid other offerors. (¶¶28, 29.)

After a télephone call from i2 Vice President Mike Short ("Short"), Beutler wrote Short a letter dated July 27, 2002, which stated:

> With the recent challenges at i2 Technologies, we decided to once again inquire about the possibility of our purchasing [TSC]. We contacted Bill Beecher [i2's CFO] via e-mail, but received no response. We had also heard rumors that i2 was considering a sale of [TSC] (in fact, we have learned that Anthony Dubreville announced to [TSC] employees that he was planning to purchase the company; he then filed what we believe to be a meritless lawsuit against our companies so that he could use the i2 resources to weaken a competitor and then purchase a stronger company). For this reason, we contacted the i2 Board Members in the event such a sale was being discussed. Clearly, because of the overlap between our customers and products, we would gather the most value from such an acquisition. We have access to financial resources that would make this well worth i2 pursuing.

In September 2002, Short emailed Beutler stating that i2 was not interested in selling TSC at that time. (¶¶30, 32.)

On January 17, 2003, Beutler sent a letter to defendant director Sidhu and i2 CFO Bill Beecher stating that VIS/ME would be willing to pay up to $25 million for TSC. The letter further stated that there was huge organizational overlap between TSC and VIS/ME, and that Beutler believed the combined operations would produce an additional $10 million in cash flow for the merged entities within 18 months. Beutler emphasized that the deal could be structured in a way that would provide i2 with all the strategic benefit of the TSC content and requested a meeting. The i2 Board then discussed TSC at a meeting on January 23, 2003, which Beecher attended. (¶¶33, 34.)

TSC and VIS/ME settled their copyright infringement dispute in mid-2004. VIS/ME agreed to pay quarterly licensing fees to TSC, totaling approximately $500,000 per year. TSC received its first quarterly payment in October 2004. (¶28.)

In November 2004, i2 conducted a review of its CDSD division which Dubreville headed and which included TSC. For this review, CDSD personnel prepared a presentation (the "FY '05 AOP") which projected TSC's FY '05 revenue of $16 million, an increase of 2% over FY '04, and FY '06 revenue of $16.8 million. The FY '05 AOP stated that operational costs reflected on TSC's accounting records included costs attributable to the other business unit in CDSD (i.e. CDS), and recommended a restructuring of the internal reporting system to better track business unit performance. (¶¶37-38.)

In December 2004, i2's Board decided to sell TSC. By this time, Dubreville, who had long been interested in purchasing TSC, had already discussed with i2 the possibility of leading a management buyout of the unit. Dubreville was also aware that VIS/ME had expressed interest in buying TSC for up to $25 million, and called Evans of VIS/ME, whom Dubreville had known for years, to ask for a copy of Beutler's January 17, 2003 letter. (¶¶4, 26, 36, 39, 40, 41).

A document was prepared to convey information on TSC to prospective purchasers – the "January 10, 2005 TSC Offering Memorandum." This Memorandum included projections as follows:

	FY '05	**FY '06**	**FY '07**
Revenues	$16 million	$17 million	$18 million
EBITDA	$1.2 million	$1.7 million	$2.2 million

Notes to the financial statements in the January 10, 2005 TSC Offering Memorandum warned that the projections "were prepared by the management of [TSC] and involved a significant element of subjective judgment and assumptions, which may or may not be correct," in part because "the pro forma financial information was derived from the financial records" of TSC which included expenses of other i2 business units. (¶39.)

At a February 1, 2005 i2 Board meeting, the directors received a presentation from an investment banking firm i2 had engaged, Sonenshine Partners ("Sonenshine"). Among the options listed in the Sonenshine presentation was selling the business "for $4.2M to TSC employees." The Board also received the January 10, 2005 TSC Offering Memorandum, and and projections used therein, which were as follows:

	FY '05	**FY '06**	**FY '07**
Revenue	$16.0 M	$17.0 M	$18.0 M
EBITDA	$1.2 M	$1.7 M	$2.2 M
Free Cash Flow	$0.9 M	$1.4 M	$1.9 M

(¶¶5, 40.)

Directors Sidhu, Clemmer, Cash, Crandall and McGrath were present at the February 1, 2005, i2 Board meeting and, among other things, discussed Dubreville's interest in buying TSC. Nonetheless, the Board decided to put Dubreville in charge of the sale process. Handwritten notes from the meeting indicate that a goal for the transaction was selling TSC for "1X revenue" and "a multiple of cash flow." (¶¶40, 41, 46, 47.)

In mid-February 2005, the January 10, 2005 Offering Memorandum was altered to use projections which were significantly reduced:

	FY '05	FY '06	FY '07
Revenue	$14.7 M	$15.5 M	$16.0 M
EBITDA	$0.6 M	$0.75 M	$0.9 M
Free Cash Flow	$0.2 M	$0.35 M	$0.6 M

Dubreville used this February 15th version of the offering memorandum ("February 15, 2005 TSC Offering Memorandum") to solicit bids for TSC. (¶42.)

Dubreville's efforts to market TSC were limited. Dubreville did not solicit interest from any of TSC's direct competitors, who were its most likely buyers because any of them could have generated incremental profit by adding TSC's customer base to its own while reducing costs, including the cost of management such as Dubreville. In particular, Dubreville did not solicit interest from VIS/ME which he and at least three directors (Sidhu, Cash and Crandall) knew had indicated a strong interest in buying TSC and was already making royalty payments which would total approximately $2 million over the four-year course of its settlement agreement with TSC. While Dubreville did contact Reed Elsevier Inc. ("Reed Elsevier"), he did not contact Thomson Corporation ("Thomson"), Reed Elsevier's largest competitor, because Dubreville knew that Beutler and Evans of VIS/ME had contacts at Thomson which make it likely that they would become aware that TSC was for sale. The i2 Board knew that Dubreville did not solicit interest from TSC competitors and that no one else did either. Indeed, the reports the Board received from Sonenshine identified TSC's competitors, and did not include any competitor on lists of potential buyers contacted. Since i2 was not in TSC's line of business, it had no reason not to sell TSC to a TSC competitor. (¶¶3, 4, 19, 34, 43, 52.)

The minimal process Dubreville structured produced three offers for TSC:

a. An electronic parts distributor named IHS offered $12 million for the entirety of i2's CDSD division of which $4.3 million was allocated to TSC. i2 did not want to bundle these two businesses for sale, and rejected IHS's offer. In 2006 IHS purchased CDS (the CDSD business unit in addition to TSC) for approximately $29 million.

b. Another offer was from an entity named Sunrise Ventures, the principal in which was Simpson, Dubreville's former boss at TSC and his partner in Trade Printing Services. Sunrise Ventures offered $1.8 million for TSC.

c. The third offer was from TSH, of which Dubreville was a principal owner. TSH offered to buy TSC for $2 million in cash and $1 million in software licensing agreements, with TSH keeping all outstanding receivables and repayments. The offer also contemplated that TSC would sublease only half its existing office space, that i2 would pay for TSC's relocation within its building, and that i2 would bear the costs of the office space that TSC would not use. (¶¶16, 43, 45, 46, 50, 64.)

In advance of an April 18, 2005 meeting of the i2 Board, the Board received a Sonenshine prepared document entitled "Project Infinity: Generating Value in a Business in Transition." ("Infinity" was Sonenshine's code word for i2.) Among other things, this document contained the following:

a. It identified TSC as a non-core business and noted that it had a "minimal customer overlap with i2's core business.

b. It set forth "initial sale process" projections taken from the January 10, 2005 TSC Offering Memorandum, and "reforecast by management" projections taken with some modification from the February 15, 2005 TSC Offering Memorandum. The source of the projections was credited as "[TSC] Financial Projections," making clear to the Board that the projections were prepared by TSC's management.

c. The report made clear that no TSC competitors were contacted in the sale process.

d. On a chart titled "Additional Parties to Contact," Sonenshine did not list TSC competitors, but it did suggest it had industry contacts which could be pursued.

e. The report set forth market multiples Sonenshine had developed. It applied these multiples to the projections in the January 10, 2005 TSC Offering Memorandum to develop a valuation range for TSC from $6 to $10.8 million. It also applied the multiples to the "reforecast by management" projections from the February 15, 2005 TSC Offering Memorandum to develop a TSC valuation range from $3 to $7 million.

A Sonenshine representative discussed this information with the Board at the April 18, 2005 meeting, including the valuation ranges it had developed. After discussion, the Board authorized management to move forward with discussions to sell TSC to TSH. (¶¶52-53.)

Less than one week later, on April 22, 2005, Dubreville, on behalf of TSH, and defendant director McGrath, signed a letter of intent for i2 to sell TSC to TSH for $2 million in cash and $1 million in the purchase of a license from i2. TSH would keep all the outstanding receivables and sublease only the space TSC needed, approximately half the space it was presently occupying. The transaction was to close no later than June 30, 2005 provided i2 could receive a fairness opinion, but if such an opinion could not be obtained, i2 could terminate the agreement upon payment to TSH of a breakup fee between $352,000 and $787,000. The transaction price was at the lowest end of the Sonenshine valuation range using the projections reforecast by TSC's management – i.e. the very people who comprised TSH and were the buyers – and less than half of the midpoint of the valuation range using the projections that had been presented to the Board in the FY '05 AOP and then included in the January 10, 2005 TSC Offering Memorandum, i.e. before TSC's management reduced the projections. The transaction price did not come close to the 1X revenues goal or even to the $4.2 million price noted at the February 1, 2005 Board meeting. Nothing in the Sonenshine materials indicates that the Board or its advisor made an effort to consider the understatement of TSC's EBITDA due to the overstatement of its expenses, which had been expressly noted in the FY '05 AOP and the January 10, 2005 TSC Offering Memorandum.[3] (¶¶37-39, 52-56.)

The i2 Board formed a so-called special committee composed of Cash and Crandall, who both knew of VIS/ME's earlier expressions of interest to buy TSC, and Clemmer, Waterhouse, Bradley and Wilson. The Special Committee, however, did not meet until June 21, 2005 when it received Sonenshine's "preliminary presentation." The Special Committee did not negotiate the terms of the transaction, which were already fixed. Sonenshine's preliminary presentation was followed by an "advisory presentation" to the Special Committee and the i2 Board on June 23, 2005. A chart included in the latter report showed that TSC revenues of $13 million supported a sale price of $2.8 to $3.9 million, while revenues of $15 million supported a sale price of $5.1 to

[3] For example, the 50% reduction in TSC's lease expenses alone saved TSC approximately $50,000 a month, but apparently no analysis was made of the effect on TSC's EBITDA of its paying for twice as much space as it needed, an overpayment made clear by the very terms of the transaction.

$7.1 million, and revenues of $17 million supported a sale price of $7.2 to $10.1 million. (¶¶57-59.) The FY '05 AOP, which the Board had received a few months earlier, had projected 2005 revenues of $16 million (¶37).

On June 28, 2005, both the Special Committee and the Board approved the sale of TSC to TSH. In doing so, the Board purported to rely on a fairness opinion Sonenshine delivered. Even a cursory review of this fairness opinion would have raised questions about its integrity.

a. The fairness opinion used "seller projections" and "buyer projections" in a discounted cash flow valuation analysis, but these two sets of projections were both lower than the projections used in the January 10, 2005 TSC Offering Memorandum which the Board had received. They were obviously created after Dubreville had offered to buy TSC and were solely for the purpose of supporting the transaction. The buyer projections were similar to those in the February 15, 2005 TSC Offering Memorandum and to the "reforecast by management" projections from Sonenshine's April 14, 2005 presentation. The seller projections, which had never before been presented to the Board, were even more pessimistic than the buyer projections, and were divided into "likely" and "unlikely" scenarios. In the "likely scenario projections" TSC's 2005 revenue was $13.5 M with EBITDA of ($0.7 M), 2006 revenue was $11 M with EBITDA of ($1.3 M), and 2007 revenue was $8 M with EBITDA of ($3.2 M). In the "unlikely scenario projections," TSC's 2005 revenue was $14.5 M with EBITDA of ($0.55 M), 2006 revenue of $14.2 M with EBITDA of ($0.0), and 2007 revenue was $14 M with EBITDA of ($0.1 M). The ultimate source of these projections was TSC's management (i.e. the buyers). (¶¶40, 60a.)

b. The fairness opinion relied on TSC financial statements as a basis for a market multiples valuation of TSC which resulted in valuations extremely favorable to the buyer. The Board, however, knew that TSC was a part of the CDSD division, was not managed as a separate enterprise, and had no audited financial statements. The Board had reviewed the FY '05 AOP and the January 10, 2005 TSC Offering Memorandum, both of which had noted that the TSC financial statements included costs of CDS. As a result, the Board knew that the assumptions used throughout the fairness opinion that TSC had razor thin margins and generated little or no EBITDA were inaccurate. Further, the Board reviewed the terms of the letter of intent, which plainly states that TSC would sub-lease only the 25,000 sq. ft. of office space TSC actually needed (effectively reducing TSC's overhead with the savings going directly to TSC's bottom line), and that i2 would pay for TSC's relocation from the second floor to the first floor of the building housing its offices, which pointedly raised an additional issue of excess costs reducing TSC's EBITDA. Nowhere in the fairness opinion did Sonenshine consider the unreliability of costs shown in TSC's "pro forma" financial statements, or the material effect this reduction of lease costs would have to TSC's earnings. (¶60b.)

c. TSC's financial statements obviously failed to address other issues significant to value. TSC's historical quarterly results show a decline in print revenues from \$5.2 million in 2002 to \$3.8 million in 2004, yet print services and production costs were \$2.5 million in 2002, \$2.7 million in 2003, and \$2.45 million in 2004. No explanation is given how print revenues and customer subscriptions could decline 27% but the costs of printing could simultaneously increase or remain constant. TSC's facilities' costs for 2002, 2003, and 2004 were a staggering \$1.8 million (a tremendous cost for a business with approximately 115 mostly cubicle-based employees), yet were projected to drop to \$1 million or less due to the lease renegotiation. Together, these inconsistencies are a possible source of \$1-2 million additional EBITDA. Based on the multiples Sonenshine used, each million dollar increase in EBITDA would have resulted in an approximately \$6 million increase in the value of TSC. Further, nothing in the financial statements stated that the salaries of TSC's upper management had been apportioned between CDS and TSC. Dubreville and the other members of TSC's management were collectively paid hundreds of thousands of dollars in salaries and bonuses annually to run

CDSD, which included both TSC and CDS. The failure to fairly apportion salaries between TSC and CDS was obvious and plainly had an adverse effect on TSC's financial performance. (¶60.)

d. The fairness opinion listed the companies Dubreville contacted in his efforts to market TSC and then listed "Examples of Other Potential Suitors." The list, however, failed to include any of TSC's competitors, which would logically have interest and be willing to pay for TSC. A list of competitors was included later in the report. The report made plain the sale process had not sought bidding interest from TSC's competitors. (¶60d.)

e. IHS, a large electronics parts manufacturer, was very interested in acquiring CDS's electronic parts database business, but not TSC's plumbing and electrical supply database business alone. IHS offered to buy CDS and TSC together for $12.2 M, or CDS alone for $8 M. IHS's offer was communicated to the Board on April 18, 2005, to the Special Committee on June 21, 2005, to the Board again on June 23, 2005 through Sonenshine's Preliminary Advisory Analysis, and in the June 28, 2005 fairness opinion. The Board knew that CDS was a business comparable to TSC but with lower revenue ($11.9 million for FY '04 vs. TSC's $15.5 million) and a negative EBIT, contrasted to TSC's positive EBIT. The IHS offer for CDS represented 0.7X sales. TSC, by contrast, was being sold for 0.2X sales. If TSC were valued using at least the same sales multiple as the IHS offer for CDS implied, TSC would be valued at approximately $10.8 M, more than triple the transaction price. (¶60f.)

The TSC sale was first publicly discussed in i2's Form 10-Q for the period ended September 30, 2005:

> On July 1, 2005, we completed the sale of Trade Service Corporation (TSC), which was operated as a part of our content and data services business, for approximately $3.0 million. **This transaction led to a gain on sale, net of write-offs of associated assets and liabilities, of approximately $2.2 million**. We received the final $0.3 million installment of the purchase price on October 1, 2005. The sale was to a group of investors led by TSC's then-current management team. [Emphasis supplied].

(¶62.)

Immediately after the sale of TSC, i2 began its efforts to sell CDS, and retained Sonenshine as an advisor. CDS's total operating revenue had declined precipitously from $25.4 million in 2001 to $11.3 million in 2004. (For the same period, TSC's revenue had gone from $20.1 million to $15.5 million). CDS had posted a negative EBIT throughout 2001-2004, while TSC had not. Nonetheless, in its sale process, CDS was forecasted to have a positive EBIT of $1.9 million on revenue of $10.9 million. In early 2006, i2 sold CDS to IHS for over $29 million, or approximately 2.7X sales. CDS's sale price was consistent with the sales multiple for businesses in the information industry, which usually sell for 1-3X sales. The price i2 obtained for TSC was approximately 0.2X sales. (¶¶63-64.)

In the fall of 2005, Dubreville offered to sell TSC to VIS/ME. In December 2005, after discussions with Dubreville, VIS/ME offered $18.5 million for TSC. Although only months earlier he had purchased TSC for merely $3 million, Dubreville rejected this six-fold price increase as insufficient. In 2007, Dubreville caused TSH to sell TSC for more than $25 million. Dubreville did not achieve a significant turnaround of TSC's business, and its revenues remained essentially the same as for 2005. Dubreville simply generated accurate financial statements, which took into account accurate printing costs, appropriately allocated expenses and management salaries and the leasing of an appropriate sized work space, thereby resulting in EBITDA that supported a substantially higher valuation of the business. (¶¶6, 65.)

ARGUMENT

I. THE COMPLAINT ALLEGES SPECIFIC FACTS STATING A CLAIM THAT THE i2 BOARD ACTED IN BAD FAITH IN APPROVING THE TSC SALE TO DUBREVILLE AND HIS TSC MANAGEMENT COLLEAGUES FOR A GROSSLY UNDERVALUED PRICE

Plaintiff's claim, while necessarily complex factually, is analytically simple. Plaintiff asserts that the i2 Board's approval of the TSC sale to the division's management was not a good faith business decision. If the pleaded facts support that assertion, (a) plaintiff has stated a viable claim because the failure to act in good faith is a breach of the fiduciary duties of both care and loyalty, *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006); *Ryan v. Gifford*, 918 A.2d 341, 357-8 (Del. Ch. 2007); (b) demand would be excused under the second prong of *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) because the decision would not be a valid exercise of business judgment, *e.g., Stone v. Ritter, supra*; *Ryan v. Gifford*, 918 A.2d at 354-5; and (c) the claim would not be exculpated by i2's Section 102(b)(7) provision since it seeks relief for "acts or omissions not in good faith...." Analysis of defendants' motion then largely collapses to the question of whether the factually specific allegations of the complaint are sufficient to permit the inference that TSC's directors consciously disregarded their duties, *Stone v. Ritter,* 911 A. 2d at 369; *In Re Walt Disney Co. Derivative Litigation,* 906 A. 2d 27, 64-67 (Del. 2006), in approving the sale of TSC to Dubreville and his cohorts.[4]

In that analysis, plaintiff benefits from well known pleading standards. At this early stage of the litigation, all well-pleaded allegations of the Complaint must be taken as true, and all inferences must be viewed in the light most favorable to plaintiff. *Wal-Mart Stores v. AIG Life Ins. Co.*, 860 A.2d 312, 318 (Del. 2004). Defendants' motion must be denied unless it appears with "reasonable certainty" that plaintiff would not be "entitled to relief under any set of facts

[4] Count I of the Complaint is also asserted against defendant Dubreville. As an i2 officer, he also owed the corporation fiduciary duties. *E.g. In re Walt Disney Co. Derivative Litigation,* 906 A.2d at 49. Because Dubreville personally benefited from the transaction, Count I as to him asserts a typical self-dealing claim for the breach of the duty of loyalty. Defendants' Brief does not contend otherwise and makes no effort to dispute that Count I viably states a claim against Dubreville. Also, since Dubreville was not a director, he cannot claim the protection of i2's Section 102(b)(7) provision.

that could be proven." *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002). *See VLIW Tech LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (motion to dismiss must be denied unless plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof." (Citation omitted).

The same liberal pleading standard governs defendants' 102(b)(7) exculpation theory. That is, a complaint may be dismissed on Section 102(b)(7) grounds only if the sole theory of relief the pleaded facts support is a breach of the duty of care. *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001). What theory of relief the facts support, however, is evaluated under usual Court of Chancery Rule 12(b)(6) standards. *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001); *In re LNR Property Corp. Shareholders Litigation*, 896 A.2d 169, 178-179 (Del. Ch. 2005); *Alidina v. Internet.com Corp.*, 2002 WL 31584292 (Del. Ch.) at *8.

Plaintiff's Rule 23.1 pleading obligation is different. A derivative plaintiff must plead demand futility with factual particularity. *Aronson v. Lewis*, 473 A 2d at 812; *Ryan v. Gifford*, 918 A.2d at 352, n.23. In this context, particularity means specificity, for example, as to acts, contents of documents and analyses. *Ryan v. Gifford*, 918 A.2d at 355. "Nevertheless, this Court is required to draw reasonable inferences and need not be blind to probability." *Id.* at 355, n.34. *See Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (Court draws "all reasonable inferences from the complaint's non-conclusory factual allegations" in plaintiff's favor.) For demand futility purposes, however, it is not bad faith that must be pleaded with particularity, but only lack of business judgment in the challenged transaction, i.e. gross negligence. *Aronson v. Lewis*, 473 A.2d at 812.

Accordingly, defendants' task on this motion is to demonstrate that the Complaint does not allege facts that, notwithstanding the benefit of all reasonable inferences, (a) demonstrate gross negligence with particularity, and (b) "plausibly suggest" bad faith conduct by i2's directors in their approval of the TSC sale, *Desimone v. Barrows*, 924 A.2d at 929. As will be shown, defendants cannot sustain this burden. Plaintiff's Section 220 investigation has facilitated a complaint replete with factual specifics as to acts, dates, documents, analyses and communications that, at a minimum, plausibly suggest that i2's directors consciously disregarded their fiduciary responsibilities in approving the i2 sale. *Stone v. Ritter*, 911 A.2d at 370.

Directors' fiduciary responsibility in an asset sale has been frequently stated. They are responsible for obtaining a fair and adequate price for corporate assets. *E.g., Gimbel v. The Signal Companies Inc.*, 316 A.2d 599, 611 (Del. Ch. 1974), *aff'd on other grounds*, 316 A.2d 619 (Del. 1974); *Mitchell v. Highland-W.Glass Co.*, 167 A. 831, 833 (Del. Ch. 1933); *Allaun v. Consol. Oil Co.*, 147 A.2d 257, 260-61 (Del. Ch. 1929); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 493-94 (Del. Ch. 1923). *See Wilmington Trust Company v. Coulter*, 200 A.2d 441, 448 (Del. 1964) (". . .ordinarily speaking, when selling trust assets a Trustee is required to obtain the best price obtainable. . . ."). The facts alleged in plaintiff's Complaint plausibly suggest a "reckless indifference to or a deliberate disregard of the interests" of i2 and its shareholders, *Allaun v. Consol. Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929), in both the process used to sell TSC and the price obtained for it.

i2's Board knowingly put the fox in charge of the hen house. The Complaint specifically alleges that the Board knew that Dubreville wanted to buy TSC but nonetheless tasked him to conduct the sale process (¶¶4, 36, 40, 41, 46, 47). The Special Committee did not supervise his efforts or conduct any negotiations, with him or any other prospective purchaser. Indeed, it did not even meet until well after the Board had approved a letter of intent to sell TSC to Dubreville's TSH entity. (¶¶53, 54, 56, 58.) The sale process was, as a practical matter, over by that time. This Court has appropriately criticized corporate boards which allowed a sale processes to be controlled by interested officers. *See In re Lear Corporation Shareholder Litigation*, 926 A.2d 94, 115-17 (Del. Ch. 2007); *In re SS&C Technologies Inc. Shareholders Litigation*, 911 A.2d 816, 820 (Del. Ch. 2006). *In re LNR Property Corp. Shareholders Litigation*, 896 A.2d at 178. *See also In re NetSmart Technologies Inc. Shareholders Litigation*, 924 A.2d 171, 199 (Del. Ch. 2007) (sale process deemed inadequate in part because the process was well underway before the special committee began its work). Only a few months ago, Vice Chancellor Strine articulated the underlying concern:

> Although I do not embrace the notion that persons suffering from conflicts are invariably incapable of putting them aside, I cannot ignore the reality that American business history is littered with examples of managers who exploited the opportunity to work both sides of a deal.

In re Lear Corporation Shareholders Litigation, 926 A.2d at 116-117. *See also In re NetSmart Technologies Inc. Shareholders Litigation*, 924 A.2d at 198 (CEOs "are more interested" in doing deals that leave them as CEOs).

The Board also knew that its obviously conflicted sales person in chief, *see In re LNR Property Corp. Shareholders Litigation*, 896 A.2d at 178, "failed to take actions which a reasonably prudent businessman would have taken in order to obtain the best available price" for TSC -- specifically, he did not "investigate and become informed as to alternatives" to a sale to him. *Thomas v. Kempner*, 1977 WL 2586 at *2 (Del. Ch.). The Sonenshine materials the Board received plainly told the directors that the sale process had not solicited interest from TSC's competitors. (¶¶43c, 52, 53, 60a.). Reasonable businessmen in the shoes of i2's directors would know that TSC's competitors would have incentive to acquire it – they could expand their market by acquiring TSC's customer's base and reduce costs by eliminating management and duplicative jobs and processes.

At least three of the Board members in 2005 – Sidhu, Cash and Crandall -- knew that VIS/ME had expressed interest in acquiring TSC (¶29). The Complaint further alleges that one director, Sidhu, along with CFO Beecher, had received a letter from VIS/ME suggesting a price of up to $25 million for TSC (¶33), and that the Board had discussed TSC within a week of that letter, with both Sidhu and Beecher present (¶34). These specifically alleged facts reasonably permit the inference that the Board as a whole was aware that VIS/ME was interested in buying TSC and had suggested a $25 million price. *Desimone v. Barrows*, 924 A.2d at 943; *Saito v. McCall*, 2004 WL 3029876 (Del. Ch.). Indeed, VIS/ME's communications constituted information material to directors' performance of their duties and the recipients of those communications, if acting in good faith, should have conveyed them to their Board colleagues. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 (Del. 1983). All the directors knew from the Sonenshine materials the Board received that no one had contacted VIS/ME to see if its interest remained. The agreement between TSC and VIS/ME settling the copyright infringement suit required VIS/ME to make quarterly payments totaling $500,000 per year for a four-year period beginning October 2004 (¶¶28, 43a.). By the time TSH bought TSC in June 2005, only three quarterly payments had been made, which would leave VIS/ME with a remaining payment obligation of $1.6 million. Thus, it was obvious to the i2 directors that VIS/ME could easily offer a higher price. For example, at $4.2 million (the price for a sale to management suggested in Sonenshine's February 1, 2005 Board presentation, ¶40), or 40% more than TSH was paying, TSC would "cost" VIS/ME only $2.6 million, or $400,000 less than VIS/ME was paying. Yet the i2 directors approved the sale to Dubreville without even asking VIS/ME if it remained interested in TSC.[5]

Taken together, these specific facts demonstrate that the process that i2's Board employed to sell TSC could not generate fair market value for that subsidiary, and that the i2 Board was well aware of that deficiency.

The Complaint also pleads specific facts demonstrating that the approximately $3 million price TSH paid was a steal. The Complaint explicitly alleges that only months after the sale to TSH closed, VIS/ME offered $18.5 million for TSC, which Dubreville rejected as too low (¶¶6, 65). Defendants' brief ignores this allegation, because it directly contradicts their argument that the pleaded facts do not show that TSC was sold for a fraction of its value. The allegation that

[5] The fact that only a few months later, VIS/ME offered $18.5 million for TSC (¶65) demonstrates that it would

within six months a knowledgeable buyer offered Dubreville *six times* more than he had paid – *and he rejected that offer as inadequate* – is a specific fact powerfully demonstrating that the sale to TSH was severely underpriced. No more is needed, but the Complaint nonetheless provides additional specifics.

In November 2004, CDSD, under Dubreville's direction, prepared the FY '05 AOP to give the Board information necessary to its review of this division. The FY '05 AOP included projections for TSC that, among other things, included an admonition that TSC's costs were overstated because in the company's internal bookkeeping, costs for CDS were allocated to TSC accounts. (¶¶37, 38.) This document plainly conveyed to i2's directors that TSC's EBITDA and net income were better than shown on the projections. A similar warning was included in the January 10, 2005 TSC Offering Memorandum, which i2's Board reviewed (¶39). When the sale process began, however, the February 15, 2005 TSC Offering Memorandum included projections adjusted downward by TSC's management, i.e. Dubreville and his management colleagues who were interested in buying TSC. That projections deemed appropriate for a board review of TSC's business were reduced by interested purchasers for use in marketing TSC to others at least permits the inference that TSC was not being marketed in a manner designed to achieve the highest value available.[6] *Thomas v. Kempner, supra.* Since the Board had received all these projections (¶¶39, 40, 52, 59, 66), it knew they were revised *by prospective purchasers* to paint a pessimistic picture of TSC. The Board thus knew that the offers i2 received would not approximate TSC's value.

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have responded favorably to such an inquiry.

[6] By contrast, when i2 marketed CDS for sale, it used projections that forecast marked improvement in CDS's business (¶64).

When the Board received Sonenshine's valuation materials, only the reduced February projections generated values that brought the $3 million sale price within the range of fairness, and then only at the lowest end of the range. When the EBITDA multiples derived from the Sonenshine analysis were applied to the FY '05 AOP projections, the resulting value of TSC was from $6 million to $10.8 million (¶52g). Even these projections understated TSC's EBITDA because of the cost allocation issue of which the directors had been informed (¶¶37-39). Thus, Sonenshine's analyses demonstrated, if anything, that TSC was worth more than $3 million.

The Complaint pleads other facts demonstrating that even the FY '05 AOP projections included in the January 10, 2005 TSC Offering Memorandum were understated. The Complaint alleges that Dubreville had caused TSC to lease twice the amount of space it needed (¶35a.) If the Board had not been aware of that fact, the terms of the sale of TSC to TSH made it manifest – one of the terms was that TSC post-sale would be responsible for paying the rent on only the space it actually occupied. (¶¶50, 56.)[7]

In 2005, IHS offered to buy CDS for $8 million, which represented 0.7X sales. This offer was communicated to the i2 Board on April 18, 2005; to the Special Committee on June 21, 2005 and June 23, 2005 through Sonenshine's Preliminary Advisory Analysis, which was provided to all the directors who are defendants; and again in Sonenshine's June 28, 2005 fairness materials. The Board knew that the business of the Dubreville managed CDS was comparable to TSC, but with smaller revenues and negative EBIT, as contrasted with TSC's positive EBIT (notwithstanding the overstatement of its expenses). A 0.7X sales multiple applied to TSC implied a value of $10.8 million. (¶60(f).) IHS's 2005 offer for CDS further demonstrates that the transaction severely undervalued TSC. Confirmation came less than a year later when i2 sold CDS to IHS for 2.7X sales, which is consistent with 1-3X sales multiples common for businesses in the information industry. (¶64.) In contrast, the price Dubreville's TSH entity paid for TSC was approximately 0.2X sales. *Id.*

This plethora of specifically alleged facts in the Complaint more than plausibly suggests that TSC was worth far more than $3 million, and that i2's directors knew so when they approved TSC's sale to Dubreville and his management team. Plaintiff has more than adequately pleaded a claim of conscious disregard of directoral responsibilities, which renders demand futile and cannot be exculpated at the pleadings stage of the case.

Defendants' response to almost thirty pages of specific factual detail in plaintiff's complaint is to obfuscate. One tactic is to create straw men of isolated facts divorced from the whole fabric of allegations demonstrating that the Board knew the TSC sale was woefully underpriced. For example, defendants characterize the failure to seek bids from buyers which had every reason to pay more than TSH as "the nub of the Complaint" (Defendants' Brief ("D.Br.") at 10), when that is one fact, albeit an important one, in a larger mosaic. They mischaracterize the thrust of the complaint as Dubreville's defrauding the Board (D.Br. at 24); while Dubreville certainly did not act with the candor and integrity required of a fiduciary, the thrust of the complaint is specific factual allegations of information the Board received demonstrating that TSC was worth far more than $3 million and that the TSC sale process was window dressing. *See* pp. 17-22, *supra*. These same facts undermine any value to defendants of their purported "reliance" on Sonenshine's fairness opinion. D.Br. at 18. Defendants can benefit from Sonenshine's work only if they relied on it in good faith, but the pleaded facts plausibly suggest they could not do so. Defendants argue that plaintiff offers no motive for defendants'

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[7] The Complaint also alleges that, for personal gain, Dubreville was overcharging TSC for printing services (¶35b).

conduct (D.Br. at 25), but motive is not an element of plaintiff's claim and their argument is nothing more than an invitation for the Court to weigh the "evidence", which is impermissible on this motion.

Most striking, however, is what is not in defendants' brief. They make no attempt to address the specific factual allegation that within six months of acquiring TSC, Dubreville received and rejected an offer of six times more than TSH had paid for it. This fact trumps any "particularized allegations about contemporaneous sales of comparable companies" (D.Br. at 20) that might have been pled.[8] This VIS/ME offer is contemporaneous by any standard and it is not for a company arguably comparable to TSC, but rather for TSC itself. That allegation alone more than plausibly suggests that TSC was sold for a fraction of its value.

This case is indeed one of the "extreme cases in which, despite the appearance of independence and disinterest, a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review." *Greenwald v. Batterson*, 1999 WL 596276 (Del. Ch.) at *7, cited at D.Br. 18. At this stage of the litigation, plaintiff's burden is not to prove that i2's board approved the TSC sale in bad faith, but simply to allege specific facts that plausibly suggest that conclusion. As detailed above, the Complaint fully satisfies that requirement.

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[8] The Complaint does plead that the sale of CDS is a contemporaneous sale of a comparable company, and that the price obtained for it demonstrates TSC was worth far more than $3 million (¶64).

II. PLAINTIFF'S UNJUST ENRICHMENT CLAIM IS BASED ON FIDUCIARY MISCONDUCT THAT OCCURRED BEFORE ANY CONTRACT EXISTED

Plaintiff has also stated a derivative claim for unjust enrichment directed solely against Dubreville. Defendants move to dismiss this claim, inaccurately asserting that this claim is based on a contract. As will be shown, this argument is simplistic and inaccurate, and contradicted by other portions of defendants' brief.

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity or good conscience." *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988). The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. *Jackson National Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999). "A constructive trust is proper when 'a defendant's fraudulent, unfair or unconscionable conduct causes him to be unjustly enriched at the expense of another to whom he owed some duty.'" *Id.* at 393-394, citing *Dodge v. Wilmington Trust Co.,* 1995 WL 106380 (Del. Ch.).

Defendants do not even attempt to argue that the allegations of the Complaint fail to satisfy these criteria. Indeed, it would be difficult for them to do so in light of their assertion that the "thrust of the Complaint posits that Dubreville defrauded the Board. . . ." D.Br. at 24. In that very section of their brief, defendants summarize well the allegations detailing Dubreville's self-serving behavior, which included:

- he caused TSC to incur unnecessary expenses to make it appear less valuable (¶¶43, 45);
- he participated in reforecasting TSC's projections to make it appear less valuable to potential buyers (¶¶40, 42, 60a);
- he intentionally failed to contact potential buyers likely to be interested in TSC, specifically competitors and VIS/ME (¶¶4, 43);

- he did not contact Thomson Corporation about purchasing TSC because VIS/ME had contacts at Thomson and would likely learn about TSC's availability if Thomson became aware of it (¶43b);
- he arranged for his business partner Simpson to submit a lowball offer for TSC so his entity's offer would look better (¶43c); and
- he misrepresented facts concerning an offer (¶45).

As defendants' brief states "the Complaint spins a tale of subterfuge, allegedly perpetrated by Dubreville, to dupe i2's Board into selling TSC at a bargain." D.Br. at 24. This conduct occurred while Dubreville was a TSC officer (¶¶4, 16) and therefore owed fiduciary duties of care and loyalty to the corporation. *In re Walt Disney Co. Derivative Litigation, supra,* 906 A.2d at 49. His misconduct ultimately enriched him by the profit he obtained on TSH's sale of TSC (¶65), while i2 lost the current value of TSC (¶64). Importantly, Dubreville's nefarious conduct occurred not only while he was a fiduciary, but *before* there was a contract for the sale of TSC.

Nonetheless, defendants assert that "i2, as a party to the contract with Dubreville, has no claim of unjust enrichment against Dubreville." D.Br. at 14. An immediate problem with this argument is that it is factually inaccurate. i2 did not have a contract "with Dubreville." Rather, the contract was with TSH, an entity in which, to be sure, Dubreville had a major stake, but nonetheless a contract with an entity that is a legally different person than Dubreville. (¶¶16, 50, 51, 56, 61.)

Even if, however, the contract were with Dubreville, it would not protect him from an unjust enrichment claim. Apparently defendants believe that a contract resulting from pernicious behavior that predates the contract protects profits obtained through that behavior from disgorgement under an unjust enrichment theory. That proposition is self-refuting.

The doctrinal contract based limitation on an unjust enrichment claim is that a "party cannot seek recovery under an unjust enrichment theory if the contact 'is the measure of [the] plaintiff's right'". *IDBiomedical Corporation v. TM Technologies Inc.*, 1995 WL 130743 at *15

(Del. Ch.), quoting *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979). On the facts pleaded here, the "measure" of i2's right is the fiduciary obligation Dubreville owed it during the process leading to the contract for the sale of TSC. This type of "fiduciary-deficient behavior" gives rise to an unjust enrichment claim, notwithstanding the existence of a contract between the parties. *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654, 672 fn.24 (Del. Ch. 2006). To state the proposition differently, an unjust enrichment claim is viable unless the defendant's "obligations are governed exclusively by contract." *Cantor Fitzgerald LP v. Cantor*, 1998 WL 326686 at *6 (Del. Ch.).

Here, Dubreville's fiduciary misconduct that exposes him to an unjust enrichment claim is not governed by a contract at all. The conduct at issue occurred before there ever was a contract, and is governed by the fiduciary obligations he assumed as an i2 Vice President. Indeed, the contract he obtained through his fiduciary deficient behavior became the means of his unjust enrichment, and the fruits of that contract should be disgorged as unjust enrichment.

CONCLUSION

In specific, detailed factual allegations, plaintiff's Complaint describes a transaction that may reasonably be viewed as resulting from lack of good faith business judgment. The fact that a contract results from a fiduciary's self-dealing cannot protect him from disgorgement of his ill-gotten gains. For the reasons set forth above, defendants' motion to dismiss should be denied in its entirety.

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January 11, 2008