

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

\_\_\_\_\_ x

MOTION DATE: 5-20-10  
SUBMITTED: 5-27-10  
MOTION NO.: 007-MD  
008-MG  
009-MOT D

IN RE ALLION HEALTHCARE, INC.  
SHAREHOLDERS LITIGATION

\_\_\_\_\_ x

LABATON SUCHAROW, LLP  
Attorneys for Plaintiffs  
140 Broadway  
New York, New York 10005

LEVI & KORSINSKY, LLP  
Attorneys for Plaintiffs  
30 Broad Street, 15<sup>th</sup> Floor  
New York, New York 10004

JASPAN SCHLESINGER, LLP  
Attorneys for Plaintiffs  
300 Garden City Plaza, 5<sup>th</sup> Floor  
Garden City, New York 11530

ALSTON & BIRD, LLP  
Attorneys for Defendants Gary P. Carpenter  
and Willard T. Derr  
90 Park Avenue  
New York, New York 10016

AKERMAN SENTERFITT, LLP  
Attorneys for Defendants H.I.G. Capital,  
LLC, Brickell Bay Acquisition Corp.,  
Michael P. Moran, Flint D. Besecker, Kevin  
D. Stepanuk, William R. Miller, Gary P.  
Carpenter, Willard T. Derr and Allion  
Healthcare, Inc.  
335 Madison Avenue, Suite 2600  
New York, New York 10017

**YOUNG CONAWAY STARGATT &  
TAYLOR, LLP**

**Attorneys for Defendants Michael P. Moran,  
Flint D. Besecker, Kevin D. Stepanuk,  
William R. Miller and Allion Healthcare,  
Inc., 1000 West Street, 17<sup>th</sup> Floor  
Wilmington, Delaware 19801**

**FOX ROTHSCHILD, LLP**

**Attorneys for Defendants Raymond A.  
Mirra, Jr. and Paralex, LLC  
2000 Market Street, 20<sup>th</sup> Floor  
Philadelphia, PA 19103**

Upon the following papers numbered 1 to 30 read on these motions to dismiss ; Notice of Motion and supporting papers 1-9; 14-16; 21-23 ; Notice of Cross Motion and supporting papers      ; Answering Affidavits and supporting papers 10; 17; 24 ; Replying Affidavits and supporting papers 11-13; 18-20; 25-26 ; Other 27-30 ; it is,

**ORDERED** that the motion by the defendants Michael P. Moran, William R. Miller, Gary P. Carpenter, Willard T. Derr, Kevin D. Stepanuk, Flint D. Besecker, and Allion Healthcare, Inc., for an order pursuant to CPLR 3211(a) (1) and (7), dismissing the complaint insofar as it is asserted against them, is denied; and it is further

**ORDERED** that the motion by the defendants H.I.G. Capital, LLC, and Brickell Bay Acquisition Corp. for an order pursuant to CPLR 3211(a) (1) and (7), dismissing the complaint insofar as it is asserted against them, is granted; and it is further

**ORDERED** that the motion by the defendants Paralex, LLC, and Raymond A. Mirra, Jr., for an order pursuant to CPLR 3211(a) (1) and (7), dismissing the complaint insofar as it is asserted against them, is granted as to the defendant Raymond A. Mirra, Jr., and the motion is otherwise denied.

**FACTUAL BACKGROUND**

The defendant Allion Healthcare, Inc. ("Allion" or the "Company") is a publicly traded Delaware corporation with principal executive offices in Melville, New York. It is a national provider of specialty pharmacy and disease-management services focused on HIV/AIDS patients, specialized biopharmaceutical medications, and services to chronically ill patients.

In April 2008, Allion purchased Biomed America, Inc. (“Biomed”), for \$99.4 million in cash and stock. As a result, the former Biomed stockholders (the “Rollover Shareholders”) became the owners of approximately 41% of Allion’s outstanding common stock, and the defendant Parallelex, LLC (“Parallelex”), which was one of the former Biomed stockholders, became Allion’s largest shareholder with 27.5% of the outstanding shares of Allion’s common stock.<sup>1</sup> The defendant Raymond A. Mirra, Jr. (“Mirra”) is the former president of Biomed and the sole owner and manager of Parallelex. Upon consummation of the sale of Biomed, the Rollover Shareholders and Allion entered into a stockholders’ agreement (the “Stockholders’ Agreement”) dated April 4, 2008, which permitted the Rollover Shareholders to designate two directors to Allion’s six-member board of directors (the “Board”) in 2008, 2009, and 2010. The Rollover Shareholders designated the defendants William R. Miller (“Miller”), and Kevin D. Stepanuk (“Stepanuk”) to the Board in June 2008.

After Allion acquired Biomed in 2008, the defendant Fint D. Besecker (“Besecker”), who was a member of Allion’s Board, purchased a 6% ownership interest in Parallelex from Mirra. In May 2009, at Besecker’s request, Mirra repurchased Besecker’s ownership interest in Parallelex for a gain of \$920,000 to Besecker.

In January 2009, the Board contemplated selling the Company and retained Raymond James & Associates, Inc. (“Raymond James”) as its financial advisor in connection therewith. Allion executed confidentiality agreements with 51 potential buyers. However, as of April 3, 2009, the deadline that Allion had set for proposals, it received only five preliminary written proposals. Each proposal provided for the purchase of all of Allion’s outstanding common stock for cash at prices ranging from \$4.66 to \$6.00 per share. Notwithstanding the April 3<sup>rd</sup> deadline, Allion received three additional proposals (two written and one oral) a few days after the deadline had passed. The additional proposals provided for the purchase of all of Allion’s outstanding common stock for cash at prices ranging between \$4.25 and \$6.50 per share.

On April 13, 2009, Raymond James, Alston & Bird (Allion’s legal advisor), the Board, and Allion’s Chief Financial Officer Russell J. Fichera (“Fichera”) met to review the eight preliminary proposals. The Board agreed to allow five of the potential buyers to move forward in the process. The Board directed Raymond James to request improved proposals from the two who had submitted the lowest price ranges and to obtain a written proposal with more specific terms from the one who had submitted an oral proposal. The Board created an informal negotiating committee (the “Negotiating Committee”) comprised of the defendants Gary Carpenter (“Carpenter”) and Besecker to review, evaluate, negotiate, and recommend to the Board any potential transaction involving a change in control of the Company.

Allion provided the six highest bidders with access to confidential financial, legal, and operational information, as well as a draft of a proposed merger agreement. The defendant

---

<sup>1</sup>Except Parallelex, none of the former Biomed shareholders are parties to this action.

H.I.G. Capital, LLC (“H.I.G.”), a Delaware private equity firm, who had neither entered into a confidentiality agreement with Allion nor submitted a preliminary proposal to Raymond James, was given access to the same information as the six highest bidders after it indicated its desire to participate in the process. H.I.G. submitted the ninth preliminary proposal on April 20, 2009, which contemplated an all-cash purchase of all of Allion’s outstanding common stock at a price range of \$5.50 to \$6.00 per share. On April 27, 2009, Allion received the tenth and final preliminary written proposal, which provided for a purchase price of between \$7.00 and \$7.50 per share.

The two lowest bidders withdrew from the bidding process. At the direction of the Negotiating Committee, the defendant Michael P. Moran (“Moran”), Allion’s chairman of the Board, president, and chief executive officer, and Fichera made presentations regarding the Company’s business to the eight remaining potential buyers. Additionally, Raymond James notified such potential buyers of the procedures for submitting a final offer and set a deadline for final offers of May 18, 2009. During the weeks prior to May 18, 2009, all of the remaining potential buyers except H.I.G. notified Raymond James of their decision to withdraw from the process.

H.I.G. purportedly believed that it could not complete a transaction on economically acceptable terms without a substantial percentage of Allion’s stockholders agreeing to rollover their equity. Accordingly, H.I.G. met with Mirra to discuss the Company’s business before the May 18<sup>th</sup> deadline. On May 20, 2009, H.I.G. submitted a letter to Paralex outlining a proposed structure for a transaction in which the Rollover Shareholders would be required to exchange their shares of Allion common stock for equity interests in the surviving entity. H.I.G. submitted a written confirmation of its proposal to Raymond James to purchase Allion’s outstanding common stock for between \$5.50 and \$6.00 per share in cash if H.I.G. and Mirra reached a suitable arrangement regarding Mirra’s continued involvement in the Company.

On May 21, 2009, the Board allegedly met with Fichera, Raymond James, and Alston & Bird to review the terms of H.I.G.’s proposal. After considering the potential roles of Mirra and Allion’s management in any transaction with H.I.G., the Board appointed a special committee comprised of the defendants Willard T. Derr (“Derr”) and Carpenter (the “Special Committee”) to review, evaluate, negotiate, and recommend for approval by the Board a potential transaction involving a change in control of the Company, including the proposed acquisition by H.I.G.

The Special Committee directed Raymond James to instruct H.I.G. to refine its bid. In the negotiations that followed, during which H.I.G. met with Mirra, an understanding was reached. The Special Committee and H.I.G. executed a letter of intent on June 24, 2009, which provided for a purchase price of \$6.00 per share in cash, subject to an exclusivity period of 30 days with two 15-day extensions upon H.I.G.’s reaffirmation of its final proposal. On the same day, the Board executed a written consent permitting H.I.G., Mirra, and some of Mirra’s affiliates

and associates to discuss the terms under which they would be willing to participate in a transaction between Allion and H.I.G.

Negotiations with H.I.G. continued until the end of August 2009, when the Special Committee directed Raymond James to request H.I.G. to provide the Committee with its best and final offer on September 1, 2009. On that date, H.I.G. submitted a revised proposal of \$6.50 per share. Despite the increase in H.I.G.'s bid, the Special Committee recommended to the Board that the negotiations with H.I.G. be terminated due to the lack of financing for a potential transaction with H.I.G., an increase in the trading price of the Company's stock, and the continued positive performance of the Company's business.

On September 17, 2009, Moran met with H.I.G. to discuss resuming negotiations. H.I.G. told Moran that it was prepared to increase its proposal to \$7.00 per share, that it had lending sources for the potential transaction ready to proceed, and that it was willing to eliminate any financing contingency. H.I.G. also met with Paralex on September 17, 2009. Paralex advised H.I.G. that it would be willing to explore participating in a rollover transaction if H.I.G. revised its proposal to \$7.00 per share. The Board authorized the Special Committee to negotiate with H.I.G. again less than a week later.

The parties reached an agreement on October 18, 2009, providing for the sale of Allion's stock to H.I.G. for \$6.60 per share in cash and for the Rollover Shareholders to receive a 29.2% interest in the surviving corporation. After reviewing the terms of the proposal, the Special Committee recommended that the Board approve the final terms of the proposed merger agreement, and Raymond James delivered its opinion to the Board that the transaction was fair from a financial point of view to Allion's unaffiliated public shareholders. The Board unanimously approved the offer.

On January 11, 2010, three weeks after Allion filed its final proxy, Allion's shareholders approved the merger at a special meeting of stockholders. On that date, there were 28,700,248 shares of the Company's common stock issued and outstanding. Present in person or by proxy at the meeting were the holders of 25,357,973 shares of the issued and outstanding shares entitled to vote. Of the 25,357,973 total shares present at the meeting, 99.18% voted in favor of the merger, and .72% voted against it. No shareholder demanded an appraisal, and the merger closed on January 13, 2010.

## **PROCEDURAL HISTORY**

On October 20, 2009, the plaintiff Denise Fowler, an Allion shareholder, commenced this action challenging the Allion merger on her own behalf and on behalf of all others similarly situated. On October 27, 2009, another action challenging the Allion merger was filed in the Delaware Chancery Court by the Virgin Islands Government Employees' Retirement System ("VIGERS"). Two days later, on October 29, 2009, Steamfitters Local Union 449

(“Steamfitters”) filed a second action in the Delaware Chancery Court challenging the Allion merger. That action was subsequently withdrawn and recommenced in this court. By an order of this court dated November 18, 2009, and re-dated on December 17, 2009, this action and the Steamfitters action were consolidated. On November 2, 2009, Union Asset Management Holding AG filed a third action in the Delaware Chancery Court challenging the Allion merger. On November 16, 2009, the Delaware Chancery Court granted an unopposed motion for class certification by VIGERS and Union Asset Management Holding AG.

The amended consolidated complaint in this action alleges, inter alia, that the Allion merger unfairly favored the Rollover Shareholders, who collectively owned 41% of Allion’s common stock, and that the price Allion’s unaffiliated public shareholders received for their shares (\$6.60 per share) was undervalued. Specifically, the plaintiffs allege that Moran, Besecker, Carpenter, Derr, Miller, and Stepanuk (the “Director Defendants”) breached their fiduciary duties to the plaintiffs and other public stockholders of the Company by failing to engage in an honest and fair sale process, by failing to maximize shareholder value in connection with the merger, by failing to provide them with all material information regarding the merger, and by misrepresenting the sale process leading to the merger. The plaintiffs allege that Paralex and Mirra (the “Paralex Defendants”) breached their fiduciary duties by participating in an unfair sale process that benefitted the Rollover Shareholders at the expense of Allion’s unaffiliated public shareholders. The plaintiffs allege that H.I.G. and Brickell Bay Acquisition Corp., a corporation formed solely in anticipation of the merger, (the “H.I.G. Defendants”) aided and abetted such breaches of fiduciary duties.

The defendants moved to stay this action, inter alia, on the ground that the pending class action in Delaware, Allion’s state of incorporation, asserts the same claims against the same defendants as this action. By an order dated December 22, 2009, this court denied the motion, finding that the defendants had not met their burden of establishing that the ends of justice and the convenience of the parties would best be served if the litigation were to proceed in Delaware. The Director Defendants and Allion, the Paralex Defendants, and the H.I.G. Defendants now move separately to dismiss the amended consolidated complaint on the grounds that they have a defense founded upon documentary evidence (CPLR 3211[a] [1]) and that the complaint fails to state a cause of action (CPLR 3211[a] [7]).<sup>2</sup>

### **STANDARD FOR A MOTION TO DISMISS**

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any

---

<sup>2</sup>Although Allion is named as a defendant and moves with the Director Defendants to dismiss the complaint insofar as it is asserted against them, the plaintiff has not asserted any causes of action against Allion.

cognizable legal theory (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88; **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see*, **Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see*, **Leon v Martinez**, *supra* at 88; **Rovello v Orofino Realty Co.**, *supra* at 636).

Because Allion is a Delaware corporation, the pending breach-of-fiduciary duty and aiding-and-abetting claims are governed by Delaware law (*see* **Allied Irish Banks, P.L.C. v. Bank of America, N.A.**, 2006 WL 278138, \*12 [S.D.N.Y. 2006]).

## THE DIRECTOR DEFENDANTS

### 1. The Business Judgment Rule and the Duty of Loyalty

The Director Defendants contend that the claims against them must be dismissed because the plaintiffs cannot overcome the presumption of the business judgment rule. The business judgment rule is a presumption that a director's business decisions are made on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company (*see* **Citron v. Fairchild Camera & Instrument Corp.**, 569 A2d 53, 64 [Del 1989]). If a court finds that the business judgment rule applies, then the business decisions of disinterested directors will not be disturbed if they can be attributed to any rational business purpose (**Sinclair Oil Corp. v. Levien**, 280 A2d 717, 720 [Del 1971]; *see also* **Brazen v. Bell Atl. Corp.**, 695 A2d 43, 49 [Del 1997]).

The plaintiffs contend that they have pled enough facts to rebut the presumption of the business judgment rule. The presumption can be rebutted by alleging facts creating a reasonable inference that the Board was either dominated or controlled by a materially interested director or that at least half of the members of the Board did not possess the care, attention, and sense of responsibility necessary to afford them the status of independent directors (*see e.g.* **Orman v. Cullman**, 794 A2d 5, 22 [Del Ch 2002]; **Kahn v. Tremont Corp.** 694 A2d 422, 430 [Del 1997]). A failure to allege that the requisite number of directors was interested or lacked independence will result in dismissal (*see e.g.* **In re Tyson Foods, Inc. Consol. Shareholders Litigation**, 919 A2d 563, 587-88 [Del Ch 2007]; **Hokanson v. Petty**, 2008 Del Ch LEXIS 182 [Del Ch Dec. 10, 2008]).

Here, the record must create a reasonable inference that at least three of Allion's six directors did not possess the care, attention, and sense of responsibility necessary to afford them the status of independent directors (**Kahn v. Tremont Corp.** *supra* at 430 [Del 1997]). In

an attempt to meet that threshold, the plaintiffs contend that Stepanuk and Miller were conflicted designees of the Rollover Shareholders, that Besecker was conflicted by a highly profitable transaction with Mirra during the process leading to the merger, and that Moran was conflicted by an extraordinary phantom stock award and the prospect of employment by H.I.G. The plaintiffs also contend that Carpenter and Derr demonstrated a lack of independence by their passive, deferential approach to their Special Committee responsibilities.

The Director Defendants attempt to refute the plaintiffs' contentions. With respect to Moran, they contend that the phantom stock award to Moran does not support a claim of interest. Rather, they contend that it ensured Moran's interests were perfectly aligned with the interests of the non-Rollover Shareholders. They rely on **Globis Partners, L.P. v. Plumtree Software** (2007 Del Ch LEXIS 169, \*29 (Del Ch 2007) and **Krim v. ProNet Inc.** (744 A2d 523, 528 n 16 [Del Ch 1999]) to support their contention. Those cases hold that the accelerated vesting of stock options does not create a conflict of interest because the interests of the shareholders and directors are aligned in obtaining the highest price for their shares. The **Globis** court, however, noted that there is no bright line rule for determining whether additional, merger-related compensation constitutes a disabling interest (**Globis** at \*28) and that the acceleration of unvested options could be viewed as an inducement to effectuate the merger (**Id.** at \*31). In **Globis**, the acceleration of the unvested stock options was found not to create a conflict of interest under the facts of that case. It is clear, however, that the issue is fact-specific and must be fully analyzed in the context of the case under consideration.

Under applicable Delaware law, a director is considered interested when he receives a personal financial benefit from the transaction that was not equally shared by the stockholders (**Orman v Cullman**, 794 A2d 5, 29). The plaintiffs allege that Moran, who owned no shares of the Company's stock prior to the merger, received \$11.8 million in connection with phantom stock that would not have vested for another ten years had the merger not been approved. The court finds that the Director Defendants' conclusory assertion that the phantom stock ensured that Moran's interests were perfectly aligned with those of the stockholders is insufficient to establish as a matter of law that Moran did not suffer from a disabling interest when considering how to vote in connection with the merger. As previously noted, this issue is fact-specific, and the record is devoid of sufficient facts for the court to determine that Moran did not receive a financial benefit from the transaction that was not shared by the stockholders or that the award did not operate as an inducement for Moran to effectuate the merger.

The plaintiffs also contend that Moran was influenced by the prospect of his continued employment with H.I.G. after the merger. Unlike **Wayne County Employees' Retirement System v Corti** (2009 Del Ch LEXIS 126) upon which the Director Defendants rely, Moran's continued employment with H.I.G. was not certain. Moreover, the plaintiff alleges that Moran was aligned with a controlling shareholder group that included Mirra and Parallax (the "Control Group"), which retained an interest in the surviving company, H.I.G. That Moran may have been beholden to the Control Group for continued employment after the merger suggests

the possibility of a lack of independence (*see Orman v. Cullman, supra* at 29-30).

The plaintiffs contend that Carpenter and Derr, the members of the Special Committee, lacked independence because they deferred entirely to Moran, who may not have been independent. The plaintiffs contend that Moran and Mirra conducted all substantive negotiations with H.I.G., without the input or knowledge of the Special Committee, which was excluded from the sale process, and that Carpenter and Derr merely acceded to Moran's recommendations. Contrary to the Director Defendants' contentions, discovery is needed to determine exactly what the Special Committee's role was in the negotiations with H.I.G. and what, if anything, Moran and Mirra may have done to preclude or prevent the Special Committee from performing its functions. If it is ultimately determined that Moran was not independent, then Carpenter and Derr may not have been independent either.

The plaintiffs contend that Stepanuk and Miller were interested directors because, as designees of the rollover stockholders, the proxy statement excludes them as disinterested directors. While this factor standing alone may not be enough to overcome the presumption of a director's independence (*see Seminaris v. Landa*, 662 A2d 1350 [Del Ch 1995]), the plaintiffs also allege that the negotiating process was dominated by Mirra (on behalf of Paralex) and Moran, who conducted all substantive negotiations with H.I.G. to the exclusion of the Special Committee. In view of the fact that Paralex may have been a controlling shareholder (*see infra*), it cannot be determined on the record presently before the court that Miller and Stepanuk were disinterested as a matter of law.

Finally, it cannot be said that Besecker was disinterested as a matter of law. He had close ties to Mirra and Paralex, having purchased a 6% ownership interest in Paralex from Mirra, which he resold to Mirra at a substantial profit in May 2009, when the sale of Allion was being negotiated.

While each of the plaintiffs' claims of influence standing alone may not be sufficient to support a conclusion that the Director Defendants were interested, the totality of the circumstances and overlapping issues create a reasonable inference sufficient to survive a motion to dismiss that Allion's directors did not possess the care, attention, and sense of responsibility necessary to afford them the status of independent directors.

## **2. The Duty of Care**

Section 102(b)(7) of Delaware's General Corporation Law permits Delaware corporations to include in their certificates of incorporation a provision limiting or eliminating the personal financial liability of a director to the corporation or its stockholders for breaches of the duty of care. Although the Director Defendants contend that Article IX of Allion's Third Amended and Restated Certificate of Incorporation contains a provision exculpating them from liability arising from breaches of the duty of care, they have failed to provide the court with a

copy thereof. Thus, the Director Defendants have failed to provide the court with documentary evidence conclusively establishing this defense as a matter of law. Moreover, in view of the fact that discovery is needed regarding the issue of their independence, the court declines to dismiss the first cause of action against the Director Defendants for breach of the duties of care and loyalty.

### 3. The Duty of Disclosure

The plaintiffs allege that the Director Defendants breached their duty to disclose all material information concerning the merger to Allion's shareholders. The Director Defendants contend that they are entitled to dismissal of this claim because the shareholders have voted and there no longer is a remedy for any of the alleged disclosure violations. (*see Transkaryotic Therapies, Inc.* (954 A2d 346 [Del Ch 2008]). However, since this is not a case in which there is no evidence of a breach of the duty of loyalty by the directors who authorized the disclosures, dismissal is not warranted at this stage of the litigation (*see In re John Q. Hammons Hotels, Inc. Shareholder Litigation* (2009 Del. Ch. LEXIS 174, at \*50-\*51 n. 49 [Oct. 2, 2009]). Accordingly, the court declines to dismiss the second cause of action against the Director Defendants for breach of the duty of disclosure.

### THE PARALLEX DEFENDANTS

The plaintiffs contend that Paralex and Mirra, as controlling shareholders of Allion, owed fiduciary duties of loyalty and care to the other Allion shareholders. The plaintiffs contend that Paralex and Mirra breached their fiduciary duties by forming the Control Group, which caused the Board to sell Allion, resulting in the accretion of the Rollover Shareholders' equity in the surviving corporate entity and the sale of the unaffiliated public shareholders' equity at a discount.

A shareholder owes fiduciary duties in two instances: (1) when it is a majority shareholder with more than 50% of the shares and (2) when it exercises control over the business affairs of the corporation (**Superior Vision Servs. v. ReliaStar Life Ins. Co.**, 2006 Del Ch LEXIS 160, at \*13 [Del Ch 2006]). Paralex (not Mirra) owned 27.5% of the outstanding shares of Allion's common stock. Thus, fiduciary obligations will result only if Paralex is deemed a "controlling shareholder" (**Id.** at \*13-\*14). For Paralex to be deemed a controlling shareholder, the plaintiff must establish the actual exercise of control over the Company's conduct by Paralex (**Id.** at \*14, *citing Weinstein Enters. v. Orloff*, 870 A2d 499, 507 [Del 2005]). The focus is on whether the de facto power of Paralex, when coupled with other factors, gave it the ability to dominate the corporate decision-making process (**Id.** at \*16-\*17).

Although a controlling shareholder is often a single entity or actor, Delaware case law has recognized that a number of shareholders, each of whom individually cannot exert control over the corporation, can collectively form a control group when those shareholders are

connected in some legally significant way (*e.g.*, by contract, common ownership, agreement, or other arrangement) to work together toward a shared goal (*see* **Dubroff v Wren Holdings**, 2009 Del Ch LEXIS 89, \*12).

The plaintiffs allege that the Stockholders' Agreement establishes that Paralex and the other Rollover Shareholders agreed to work together. This contention, however, is a mischaracterization of the Stockholders' Agreement, which was executed in connection with the Biomed-Allion merger and which simply outlines the former Biomed shareholders' rights as Allion stockholders (*e.g.*, voting and transfer rights). Moreover, the Stockholders' Agreement contains restrictions on the Rollover Shareholders' ability to vote their shares, to acquire additional shares, and to take any action to seek control of the Company. Accordingly, the court finds that the plaintiffs have failed to establish that Paralex and the other Rollover Shareholders were connected by virtue of the Stockholders' Agreement to work together toward a shared goal (*see e.g.* **Dubroff**, 2009 Del Ch LEXIS 89, \*12, 16-17; **Feldman v. Cutala**, 956 A2d 644 [Del Ch 2007], *affd* 951 A2d 727 [Del Supr 2008]).

The plaintiffs also allege that the negotiating process was dominated by Mirra (on behalf of Paralex) and Moran, who conducted all substantive negotiations with H.I.G. to the exclusion of the Special Committee. Liberally construing these allegations, accepting the alleged facts as true, giving the plaintiff the benefit of every possible favorable inference (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88; **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634), the court finds that, when taken together with all of the other alleged facts, they are sufficient to create a reasonable inference that Paralex exercised control over Allion's conduct and dominated the corporate decision-making process. Accordingly, the court declines to dismiss the complaint insofar as it is asserted against Paralex.

As previously noted, Mirra was not an Allion shareholder. Thus, in order to hold Mirra liable for any purported breaches of fiduciary duty by Paralex, it is necessary to pierce Paralex's corporate veil. The plaintiffs seek to pierce the corporate veil on the ground that Mirra was Paralex's sole shareholder.

Although sole ownership is relevant, the involvement of a sole or majority shareholder in a corporation is insufficient, without more, to establish a basis to disregard the corporate entity and pierce the corporate veil (*see* **Harco Nat'l Ins. Co. v. Green Farms, Inc.**, 1989 Del Ch LEXIS 114, at \*10 [Del 1989], *citing* 1 William M. Fletcher, *Cyclopedia of the Law of Corporations* § 41 [perm. ed., rev. vol. 2006]). Delaware law requires an element of fraud in order to pierce the corporate veil. (*see generally* **Wallave ex re. Cencom Cable Income Partners II, Inc., L.P. v. Wood**, 752 A2d 1175, 1184 [Del Ch. 1999]). The plaintiffs do not allege, nor does the record reflect, that Mirra engaged in any fraudulent conduct. Accordingly, the third cause of action is dismissed insofar as it is asserted against Mirra.

### THE H.I.G. DEFENDANTS

The plaintiffs contend that the H.I.G. Defendants aided and abetted the other defendants' purported breaches of fiduciary duty.

To state a claim for aiding and abetting a breach of a fiduciary duty, the plaintiff must first state a legally cognizable breach-of-fiduciary-duty claim (*see e.g. Malpiede v. Townson* 780 A2d 1075, 1096 [Del Supr 2001], *citing Penn Mart Realty Co. v. Becker*, 298 A2d 349, 351 [Del Ch 1972]; **In re Santa Fe Pac. Corp. Shareholders' Litigation**, 669 A2d 59, 72 [Del 1995]). The plaintiffs have stated a legally cognizable claim for breach of fiduciary duty against the Director Defendants and Paralex. To state a claim for aiding and abetting those breaches, the plaintiffs must show that the complaint supports a reasonable inference that the H.I.G. Defendants acted with the knowledge that the conduct advocated or assisted constituted a breach of the Director Defendants' fiduciary obligations (*see Malpiede v Townson, supra, citing Penn Mart Realty Co. v Becker, supra; In re Santa Fe Pac. Corp., supra*). Conclusory allegations of conspiracy, without more, will generally be insufficient to charge a third party who has negotiated a merger agreement with another corporation with knowing participation in a breach of trust, even if it is assumed that such a breach is itself well pleaded (*see Greenfield v Tele-Communications, Inc.*, 1989 Del Ch LEXIS 49 [Del 1989]).

The court finds that the plaintiffs conclusory allegations are insufficient to establish that the H.I.G. Defendants knowingly participated in the alleged breaches of fiduciary duty. The plaintiffs fail to allege that the negotiations were not conducted at arms length or that the H.I.G. Defendants exerted an influence over Paralex or the Director Defendants (*see Penn Mart Realty Co. v Becker, supra* at 351), that the H.I.G. Defendants offered Paralex or the Director Defendants a side deal in order to induce them to breach their fiduciary duties (*see, In re Transkaryotic Therapies, Inc.*, 954 A2d at 372-373), that the transaction was inherently wrongful and that Paralex and the Director Defendants wanted to keep their plan a secret (*see Gatz v. Ponsoldt* (925 A2d 1265 [Del 2007]), or that the H.I.G. defendants were aware of the alleged self-dealing and that it may have had an effect on the price of the non-Rollover defendants' shares (*see In re John Q Hammons Hotels, Inc. Shareholders Litigation* (2009 Del Ch LEXIS 174, \*61-\*62 [Oct. 2, 2009])). The plaintiffs merely allege that the H.I.G. defendants knew that they were aiding and abetting the alleged breaches of fiduciary duty and that such breaches would not have occurred but for the conduct of the H.I.G. Defendants, who rendered substantial assistance to the Paralex and Director Defendants. Such allegations are patently insufficient. Accordingly, the fourth cause of action against the H.I.G. Defendants is dismissed.

**CONCLUSION**

The complaint is dismissed insofar as it is asserted against Mirra and the H.I.G. Defendants. The court declines to dismiss the complaint insofar as it is asserted against the remaining defendants.

**Dated:** August 13, 2010

\_\_\_\_\_  
**J.S.C.**