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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MFW SHAREHOLDERS LITIGATION	Consolidated C.A. No. 6566-CS

REDACTED VERSION
FILED JUNE 21, 2012

THE M&F DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

On June 13, 2011, MacAndrews & Forbes Holdings Inc. ("M&F"), which owned approximately 43% of M & F Worldwide Corp. ("MFW"), proposed to acquire all outstanding shares of MFW that it did not already own for $24.00 per share in a cash merger (the "Proposal"). Although M&F could have behaved like the proverbial 800-pound gorilla, and simply launched a unilateral tender offer unimpeded by any procedural protections, it did precisely the opposite. Its Proposal was explicitly conditioned on approval by both an independent, fully empowered special committee (the "Special Committee") and a majority of MFW's minority stockholders (the "Minority Approval Condition"). Both conditions were non-waivable. As M&F explained in its Proposal letter to MFW's board of directors, it would not proceed with any transaction unless those conditions were satisfied. The decision to proceed in this manner was no accident.

M&F and its owner, Ronald Perelman, are not strangers to this Court. From the time they and their advisors began considering a potential going private transaction with MFW in early May 2011, they were acutely aware of the Delaware judiciary's developing scrutiny of going private transactions, as articulated in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994), and more recently in *In re Cox Communications Shareholders Litigation*, 879 A.2d 604 (Del. Ch. 2005), and *In re CNX Gas Corp. Shareholders Litigation*, 4 A.3d 397 (Del. Ch. 2010). From the outset, M&F and Mr. Perelman were committed to following the blueprint for best practices involving going private transactions with controlling stockholders laid out in those decisions. Committing to these procedural protections resulted in a value-maximizing

transaction, which was negotiated and approved by the independent Special Committee, and ultimately provided MFW's minority stockholders with more value than M&F's initial Proposal.

But M&F and Mr. Perelman's motives were certainly not wholly altruistic. They understood that under our evolving law on going private transactions, the more closely the structure and design of their Proposal replicated a true third-party transaction, the more likely it was that any deal ultimately struck would be measured, not against the strict standard of entire fairness, but under the Business Judgment Rule. Seeking to ensure consummation, M&F and Mr. Perelman consciously relinquished all ability to deploy their control position to achieve that result. Thus, recognizing that their effective voting control block virtually guaranteed the statutorily required stockholder vote for the Proposal, they irrevocably neutralized their voting power by proactively volunteering to make any transaction subject to the non-waivable Minority Approval Condition.

Understanding the possibility that both as controller and board member, Mr. Perelman and M&F might be seen to have influenced MFW's positions in the negotiation process, they simply removed themselves from the MFW side of the table, and proactively declared that they would not proceed with any transaction that was not approved by a fully empowered, independent special committee.

Those decisions carried risk, of course. A special committee that understood its power to "just say no" could do just that; minority stockholders who understood that their votes would be dispositive, and that the controller's voting power had been neutralized, would be motivated to vote in their own best interests – and unless

the deal was attractive enough, could collectively reject a transaction. But M&F and Mr. Perelman were willing to take those risks – to risk the possibility that a going private transaction they very much wanted to do might never clear the starting blocks – in order to ensure that if such a transaction did emerge, it would benefit from the presumptions of propriety embedded in the Business Judgment Rule.

In fact, the procedural protections worked exactly as they should have. Plaintiffs have not even bothered to suggest that the Minority Approval Condition was tainted or ineffective. The Minority Approval Condition was announced as non-waivable, so every minority stockholder knew that his or her vote mattered, and Plaintiffs have never pleaded a single disclosure claim, so there can be no argument that the minority stockholders' votes were less than fully informed.

And the Special Committee aggressively and effectively used the ultimate leverage it was given at the outset – the irrevocable right to veto any transaction that it did not consider to be in the best interests of the MFW minority stockholders. Far from being a "rubber-stamp" for M&F and Mr. Perelman, the Special Committee's four independent, disinterested directors were fully committed to obtaining the best deal possible for MFW's minority stockholders, as the undisputed record evidence shows. Anything shy of that, and the Special Committee would have "just said no." Indeed, the Special Committee's three-month-long process is a textbook example of how a special committee can "devise[] ways to increase the Special Committee's leverage" when "[a]rmed with an appropriate delegation of authority." *CNX*, 4 A.3d at 414.

The record here is devoid of the kind of process flaws that infected

previous controlling stockholder transactions reviewed by Delaware courts. There was no one-person "special committee" charged with fending off an impatient suitor; no "waivable" conditions placed on the initial proposal; and no retributive threats made to coerce an unwilling dance partner into a one-sided transaction.

Rather, the Special Committee retained independent, experienced legal and financial advisors, conducted extensive due diligence on each of MFW's businesses, obtained every shred of information it requested (including newly updated forecasts for MFW's key businesses that were not even shared with M&F and Mr. Perelman), and received exhaustive valuation presentations from its independent financial advisor, Evercore Partners. After three months of extensive discussions and negotiations, and despite significant deterioration in MFW's core business over that period, the Special Committee nevertheless extracted a higher, "best and final" offer from M&F of $25 per share. The following facts are undisputed:

- the Special Committee ***twice rejected*** M&F's $24 Proposal, after having deferred M&F for three months to permit the Special Committee to complete the comprehensive analysis of MFW's businesses and prospects that it deemed necessary for an effective evaluation of the Proposal;

- despite deterioration in certain of MFW's key businesses, and additional looming operational challenges and increased refinancing risks, the Special Committee still procured a meaningful increase in the offer price in the form of the $25 per share "best and final" offer from M&F;

- the final merger agreement (the "Merger Agreement") was approved by 65.4% of MFW's minority stockholders, substantially more than what was required to satisfy the Minority Approval Condition;

- the Special Committee's financial advisor, Evercore Partners – ***whose independence has gone unchallenged*** – concluded, after conducting extensive due diligence and valuation analyses on each of MFW's businesses,

that the Merger price was within its valuation range and fair, from a financial point of view, to MFW's minority stockholders;

- in the six months following the M&F $24 Proposal, no other bidder emerged with a bona fide offer for MFW or any of its operating subsidiaries; and
- MFW's future was uncertain due to the recent decline in the Harland Clarke check-printing business in 2011, the underperformance of its recent Global Scholar acquisition, and the significant event risks surrounding the refinancing of its $2 billion of debt.

Plaintiffs cannot offer any evidence (let alone sufficient evidence to create a genuine issue of material fact) that any of the M&F Defendants interfered with or impeded the Special Committee's process. To the contrary, Special Committee members testified that the M&F Defendants ensured that the Special Committee and its advisors were provided with all the information they requested to thoroughly evaluate and consider the Proposal. Finally, there is no claim that M&F or Mr. Perelman somehow coerced MFW's minority stockholders into accepting the $25 Merger consideration through some form of retributive threat, and not a shred of evidence to support such a claim if one were made.

Thus, this Motion presents this Court with a straightforward legal question, on which there is no factual dispute: whether a merger between a controlling stockholder and its subsidiary, which is conditioned from its inception on approval by ***both*** an independent, fully empowered special committee ***and*** a majority of the minority – and where those twin procedural protections are explicitly non-waivable – should be afforded the protections of the Business Judgment Rule before trial.

This Court should not hesitate to answer that question in the affirmative. If Delaware's evolving jurisprudence in this area is to provide any practical incentive for

parties structuring such transactions, it must reward those who voluntarily choose to follow its "best practices" blueprint for success. For these reasons, under the *Cox/CNX* Unified Standard for reviewing controlling stockholder going private transactions, this Court should apply the presumptions mandated by the Business Judgment Rule to the Merger, and grant Defendants' Motion for Summary Judgment on all counts.

STATEMENT OF FACTS[1]

I. THE PARTIES

Plaintiffs Alan Kahn, Samuel Pill, Irwin Pill, Rachel Pill and Charlotte Martin ("Plaintiffs") purport to have collectively owned approximately 5,700 shares of MFW common stock before the closing of the Merger.

MFW is a Delaware corporation with its principal executive offices located in New York, New York. (Am. Compl. ¶ 7) MFW is a holding company that conducts its operations through two entities: Mafco Worldwide Corporation ("Mafco Flavors") and a further holding company, Harland Clarke Holding Corporation ("HCHC"). (*Id.* ¶ 7) Mafco Flavors is an operating entity that produces licorice extract for use in the tobacco industry. (Am. Compl. ¶¶ 7, 32; Proxy at 97) HCHC is itself a holding company that has three operating subsidiaries: Harland Clarke Corp. ("Harland"), Harland Clarke Financial Solutions ("HCFS") and Scantron Corporation

[1] Exhibits 1-59 are included in the Transmittal Affidavit of Christopher M. Foulds and are cited as "Ex. __" The Verified Amended Consolidated Class Action Complaint (the "Complaint") is cited as "Am. Compl. ¶ __" and is included as Exhibit 1 to the Foulds Affidavit. MFW's Schedule 14A is cited as "Proxy at __" and is included as Exhibit 2 to the Foulds Affidavit. Deposition transcripts are cited as "Witness at __," and are included as Exhibits 3-7 to the Foulds Affidavit.

("Scantron"). (Am. Compl. ¶ 7) Although listed as a party in the Complaint, MFW is not the subject of any claims. (*Compare id.* ¶ 7 *with* ¶¶ 95-107)

The defendants include the individuals on the MFW board of directors: Ronald O. Perelman, Barry F. Schwartz, William C. Bevins (together with M&F, the "M&F Defendants"), Bruce Slovin, Charles T. Dawson, Stephen G. Taub, General John M. Keane (ret.), Theo W. Folz, Philip E. Beekman, Martha L. "Stormy" Byorum, Viet D. Dinh, Paul M. Meister and Carl B. Webb (the "Individual Defendants"). (*Id.* ¶¶ 8-20)

The defendants also include two Delaware entities that are wholly owned subsidiaries of M&F: MX Holdings One, LLC and MX Holdings Two, Inc. (together with M&F and the Individual Defendants, the "Defendants"). (*Id.* ¶¶ 23-25) Before consummation of the Merger, M&F indirectly owned 42.7% of MFW. (Proxy at 107) Mr. Perelman owned 100% of M&F and also individually owned MFW shares, ultimately giving Mr. Perelman a total beneficial ownership of 43.4% of MFW before the Merger. (Proxy at 107; Am. Compl. ¶ 1)[2] On January 20, 2009, M&F entered into an agreement with MFW that prohibited M&F from making open market purchases of MFW stock that would increase its stake above 45% without providing prior written notice to MFW and its board. (Ex. 59 (Ex. 31 to Schedule 13D/A, filed January 22, 2009)).

II. BACKGROUND OF THE MERGER

A. MFW's Business Declines Significantly In Early 2011.

On May 5, 2011, MFW reported disappointing first quarter earnings. (Ex.

[2] For ease of reference, the MacAndrews Defendants will refer to the 43.4% block owned collectively by MacAndrews and Mr. Perelman as being owned by MacAndrews.

8 (May 5, 2011 10Q)) Year-over-year operating income declined by 25.5%, and year-over-year EBITDA decreased for the third straight quarter. (*Compare* Ex. 9, MFW Form 8-K, Ex. 99.1 (May 5, 2011) *with* Ex. 10, MFW Form 8-K, Ex. 99.1 (Mar. 4, 2011) *and* Ex. 11, MFW Form 8-K, Ex. 99.1 (Nov. 4, 2010)) Year-over-year revenues also declined for the third straight quarter, driven by declines at MFW's largest operating unit, Harland. (*See id.*; Am. Compl. ¶ 43)

Harland is by far the largest operating unit at MFW, with double the revenues of all the other operating subsidiaries combined. (Am. Compl. ¶ 33) Harland's core business is printing paper checks for banks. Redacted

Redacted

B. M&F Retains Moelis & Co. To Explore Potential Strategic Alternatives Concerning Its Investment In MFW.

In early May 2011, M&F and Mr. Perelman began exploring a possible going private transaction with MFW. Redacted On or about May 23, 2011, M&F initiated discussions with Moelis & Company LLC ("Moelis") to act as M&F's financial advisor in connection with a potential bid for MFW, and engaged Moelis shortly thereafter. Redacted

On May 31, 2011, Moelis was provided with five-year projections that had been prepared in connection with lender presentations by HCHC and Mafco Flavors in the spring of 2011 (the "Financing Projections"). Redacted

Redacted These are the identical projections that were later provided to the Special Committee and its financial advisor, Evercore, in July

2011. Redacted

From the outset, M&F and its advisors determined that in the event it ultimately pursued a transaction with MFW, it would be structured as a merger that would be expressly conditional upon approval by both an independent, disinterested special committee and a non-waivable majority of minority stockholders. Redacted

Redacted

C. Moelis Prepares A Preliminary Valuation Of MFW Based On The Financing Projections.

On June 9, 2011, Moelis presented M&F with its preliminary valuation analyses of MFW. Redacted Moelis prepared valuations based on "Premiums Paid," "Illustrative LBO," "Discounted Cash Flow" and "Select Publicly Traded Companies" valuation methodologies. Redacted The Moelis analyses, which were based in part on the Financing Projections, resulted in values per MFW share ranging from $9.72 to $31.87. Redacted

D. On June 14, 2011, M&F Makes An Initial Proposal To Acquire MFW Through A Merger For $24 Per Share.

Shortly after Moelis's presentation, M&F decided to make an offer to acquire the remaining 56.3% of MFW that it did not already own. Beginning on Friday, June 10, 2011, Mr. Schwartz called each of the MFW directors to notify them that on the

following Monday M&F would be making a formal offer to purchase all MFW shares not owned by M&F. Redacted

Redacted

On June 14, 2011, as he had promised, Mr. Schwartz sent a letter on behalf of M&F to the MFW board of directors, setting forth a proposal to purchase the MFW shares not already owned by M&F for $24 per share in cash (the "Proposal Letter"). Redacted The $24 per share offer price represented a 41% premium to MFW's unaffected trading price. Redacted The Proposal Letter stated that M&F intended that any transaction with MFW would be structured as a merger, requiring Board and stockholder approval, rather than a unilateral tender offer made directly to MFW's minority stockholders. Redacted Moreover, M&F effectively sealed itself out of both the Board and stockholder approval processes, stating unequivocally that it would "***not move forward with the transaction unless it is approved by … a special committee [of independent, disinterested directors]***. In addition, ***the transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares not owned by [M&F] or its affiliates***." Redacted

M&F was adamant that it would not proceed with the Proposal unless MFW employed these minority protections. Redacted

Redacted

Redacted

Redacted

E. MFW Promptly Forms An Independent, Fully Empowered Special Committee To Consider The Initial Proposal.

On June 14, the MFW board met to discuss the Proposal. After reviewing its terms with Mr. Schwartz, the MFW board agreed that a fully empowered, independent special committee should be formed to consider and negotiate any transaction with M&F. Accordingly, the board adopted resolutions creating and empowering a special committee consisting of four independent directors: Paul Meister, Carl Webb, Viet Dinh and Martha "Stormy" Byorum. Redacted

The Special Committee underwent a thorough evaluation of potential conflicts for members of the Special Committee and its advisors. (Am. Compl. ¶ 52; Redacte

Redacted

Members of the Special Committee had not had any significant personal business dealings with Ronald Perelman for almost ten years, and none maintained any personal relationship with him. Redacted As Bruce Slovin's decision not to serve on the Special Committee showed, even the mere "appearance" of conflict was deemed unacceptable.

Redacted

The Special Committee had a broad mandate. It was authorized to hire its own independent legal and financial advisors, to consider and evaluate the Proposal as

[3] Although Bruce Slovin initially volunteered to serve on the Special Committee, after discussion with counsel, he decided to recuse himself the following day. Redacted

Redacted

well as other potential strategic alternative transactions, and, most importantly, to reject the Proposal if it ultimately concluded that it was not in the best interests of MFW's minority stockholders. Redacted As explained further below, the Special Committee fully exercised its broad powers under the resolutions, twice rejecting M&F's $24 Proposal, and ultimately negotiated a higher price for MFW's minority stockholders.

Redacted

Redacted

F. The Special Committee Hires Experienced, Independent Advisors And Proceeds With Due Diligence.

Shortly after its formation, the Special Committee selected independent legal and financial advisors (Willkie Farr & Gallagher LLP and Evercore Partners), and commenced due diligence on MFW's businesses. Redacted

Redacted

Redacted Over the next two months, the Special Committee, with the assistance of its lawyers and bankers, worked diligently on behalf of MFW's minority stockholders to consider all potential strategic alternatives in an effort to maximize stockholder value. Redacted

In that connection, the Special Committee investigated the possible benefits of approaching alternate buyers for MFW as a whole, or for its individual business segments. Redacted Although the Committee was skeptical that there would be interest on the part of other buyers in view of the size of M&F's holdings, it directed its advisors to identify potential buyers. Redacted But it is undisputed that no other serious buyer ever came forward during the entire pendency of the Special Committee's negotiations with M&F – when the fact that MFW was in play was widely and publicly known. Redacted

G. Evercore Requests And Receives Updated Financial Projections For Harland, Which Are Not Shared With M&F.

At the Special Committee's direction, Evercore conducted extensive due diligence on MFW and each of its operating subsidiaries. Throughout the summer of 2011, Evercore held numerous meetings with management from MFW and its operating subsidiaries, which assisted Evercore with creating consolidated financial models for MFW based on the Financing Projections.[4] Redacted

Redacted

Redacted

Redacted

Redacted No request was refused; indeed, Evercore and the Special Committee requested and received critical financial information that was prepared by MFW's operational managers specially for the Special Committee's purposes, information that was not even shared with M&F. Redacted

For example, after meeting directly with executives at MFW's operating subsidiaries, Evercore concluded that the Financing Projections were stale, and should be updated to account for MFW's most recent performance and known future business challenges, particularly at Harland. Redacted

Redacted

Redacted

Thus, in late July 2011, at the Special Committee's request, Harland's management prepared and provided directly to Evercore updated projections of its businesses (the "Updated Projections"). Redacted Typically, projections for MFW's businesses would be reviewed and vetted (and in some cases revised) by certain members of MFW's management team who also functioned as "dual role" officers at

M&F (including Mr. Schwartz, M&F's Executive Vice Chairman who served as MFW's CEO, and Mr. Savas, M&F's CFO who served in the same role at MFW). The Special Committee and Evercore insisted, however, that the Updated Projections not be shared with anyone affiliated with M&F, and that request was scrupulously honored. Redacted

Redacted

Redacted

Redacted Importantly, the Updated Projections were not provided to M&F until August 22, 2011, a full month after the Special Committee received them and only after the Special Committee had already rejected the $24 Proposal and made a counteroffer of $30 per share. Redacted

Redacted

The Updated Projections reflected the continuing decline in Harland's business, which accounted for approximately 80% of MFW's annual revenue. Redacted

Redacted Redacted As summarized below, MFW's management (again, without any involvement by M&F-connected "dual role" employees) believed it was appropriate to adjust MFW's projected EBITDA downward in years 2012 to 2015, based on Harland's recent performance and known near-term threats to the company's business and customer base:

Summary of EBITDA Projections Used by Evercore (millions)[5]					
	2011	**2012**	**2013**	**2014**	**2015**
Financing Case (Spring 2011)	441	484	518	524	535
Updated Case (July 2011)	441	459	489	482	491

At the time of the Proposal, and continuing throughout the Special Committee's process, MFW remained highly leveraged. In light of Harland's deteriorating performance, Redacted

Redacted

H. The $24 Offer Price Falls Within Each Of Evercore's Preliminary Valuation Ranges, But The Special Committee Determines To Negotiate Aggressively For A Higher Price.

On August 10, 2011, after nearly two months of due diligence, Evercore presented its preliminary valuation analyses to the Special Committee. Redacted

[5] (Proxy at 59-61)

Redacted Evercore relied on the Updated Projections, and employed comparable companies, comparable transactions and discounted cash flow analyses. Redacted The M&F $24 offer price fell within the value ranges of each of Evercore's valuation methodologies. Redacte Nevertheless, the Special Committee was determined to obtain a higher price for MFW's minority stockholders, while also exploring potential alternative transactions involving MFW's various subsidiaries. Redacted

I. After Additional Discussion And Analysis, The Special Committee Makes A Counteroffer Of $30 Per Share.

On August 18, 2011, the Special Committee (through Evercore) rejected M&F's $24 offer, and countered at $30 per share. Redacted

Redacted

Redacted Special Committee members expressed concern that the counteroffer was very aggressive, and the Special Committee was prepared to accept less. Redacted

Redacted

M&F rejected the Special Committee's $30 counteroffer, but indicated that it was willing to continue negotiating a potential transaction. Redacted

J. MFW's Business Continues To Deteriorate Through Late August 2011, Further Impacting MFW's Projections And Refinancing Options.

Shortly after the Special Committee made its $30 counteroffer, Evercore

met with Moelis to discuss their respective clients' views on valuation. (Proxy at 35) During the course of that meeting, it became evident that Evercore and Moelis were using different projections for Harland. Evercore informed Moelis that it was employing updated forecasts prepared by MFW's managers in late July, without any M&F involvement. Moelis requested a copy of those revised projections, and on August 22 they were provided to Moelis and M&F for the first time. Redacted

Redacted

It also emerged at the meeting between Moelis and Evercore that the two advisors were using different refinancing assumptions for Harland. Redacted

Redacted Evercore was given the updated refinancing assumptions on August 31, 2011. Redacted

Redact The effect on total MFW debt of the refinancing assumptions provided to Evercore is summarized in the table below:

Summary of Total Debt Projections Used by Evercore (millions)[6]

	2011	2012	2013	2014	2015
Updated Case (July 2011)	2,201	2,027	1,866	1,697	1,527
Final Case (August 2011)	2,201	2,044	1,902	1,746	1,586

[6] (Proxy at 60-61)

K. M&F Makes A "Best And Final" Offer Of $25 Per Share.

On August 25, 2011, shortly after Evercore obtained the Updated Projections, Mr. Schwartz called Mr. Meister, the Special Committee Chair, to arrange a meeting for early September to determine whether any agreement could be reached. (Proxy at 25) In the interim, Evercore and Moelis continued their valuation work, and the parties directed their respective counsel to begin drafting a merger agreement in the event they reached an agreement. (Proxy at 25-26)

On September 9, 2011, Mr. Meister and the Special Committee's advisors met with Mr. Schwartz, Mr. Savas and advisors for M&F. (Proxy at 27; Redacted Redacted Moelis began the meeting with a presentation on its view of MFW's business and the current market conditions generally. (Proxy at 27) Mr. Savas also informed the Special Committee and Evercore that Global Scholar, a recent major acquisition at HCHC, was not performing nearly as well as had been expected. (*Id.*; Redacted Mr. Schwartz noted that nearly three months had passed since M&F had delivered its $24 Proposal, and explained that in light of the subsequent deterioration of MFW's business and prospects, if M&F had been making its Proposal that day rather than in June, its offer would have been substantially lower. Redacted He also cautioned that although M&F remained willing to pay the $24 per share it had originally offered, any price flexibility that might have existed earlier was likely precluded by the decline since June. Redacted

Despite the M&F presentation, Redacted

Redacted Mr. Schwartz informed Mr. Meister that he would have to confer with Mr. Perelman about whether M&F would be willing to raise its offer. Redacted Mr. Schwartz left the meeting; upon his return, he informed Mr. Meister that M&F was willing to increase its offer to $25 per share (an increase of more than 4%, and some $10 million in the aggregate). Redacted Mr. Schwartz explained that $25 was M&F's "best and final" offer, and it would remain available only for a limited period. Redacted

L. Evercore Concludes That M&F's $25 "Best And Final" Offer Is Fair To MFW's Minority Stockholders.

On September 10, 2011, the Special Committee met with Evercore and Willkie to discuss the $25 "best and final" offer. Redacted The Special Committee was convinced, after speaking with Mr. Meister about his meeting with Mr. Schwartz, that $25 was in fact M&F's "best and final" offer, and there was serious concern that further negotiation might cause M&F to walk away from the bargaining table. Redacted Redacted

Redacted

Evercore presented the Special Committee with an analysis of the fairness of M&F's $25 offer. Redacted After a thorough analysis that accounted for the Updated Projections and refinancing assumptions, Evercore opined that the $25 offer price was fair, from a financial point of view, to MFW's minority stockholders. (Proxy at 35; Redacted After further discussions, the Special Committee unanimously determined that the proposed Merger was in the best

interests of the MFW stockholders other than M&F. Redacted

Redacted

The following day, the full MFW board met telephonically to discuss M&F's improved proposal, which had come after three months of extensive discussions and negotiations. Redacted After a report on MFW's recent underperformance, all attendees with M&F affiliations, including Messrs. Perelman, Schwartz, Bevins, Dawson and Taub, excused themselves from the meeting, and the M&F-affiliated members of the MFW board also recused themselves from the pending vote on the proposed Merger. Redacted Mr. Meister then explained to the remaining Board members that the Special Committee had concluded that the Merger Agreement and the Merger were advisable, fair and in the best interests of the MFW stockholders (other than M&F). Accordingly, the MFW board (with Messrs. Perelman, Schwartz, Bevins, Dawson and Taub not participating) unanimously approved and adopted the Merger Agreement and the Merger. Redacted

Redacted

M. A Majority Of The MFW Shares Not Held By M&F Votes In Favor Of The $25 Per Share Merger Proposal.

After approval by the Special Committee and the non-interested members of the MFW board, MFW and M&F jointly prepared a proxy statement for MFW's stockholders that set forth the entire procedural history of the Proposal and related events, as well as the financial analyses of the parties' respective advisors. Then, following a properly noticed meeting of MFW's stockholders, 65.4% of the outstanding MFW shares not owned by M&F or Mr. Perelman (7,141,344 shares out of 10,923,931) voted in favor

of the Merger Agreement and its $25 per share cash Merger price. (Ex. 12 (MFW Form 8-K, Ex. 99.1, Dec. 22, 2011)) The Merger closed on December 21, 2011.

III. PROCEDURAL HISTORY

The day after M&F made its Proposal, Plaintiff Charlotte Martin, a purported MFW stockholder, filed a placeholder complaint in this Court, alleging that the MFW board had breached its fiduciary duties in connection with M&F's initial Proposal, and that M&F and Mr. Perelman had breached their fiduciary duties to MFW as its controlling stockholder. Two additional complaints were filed shortly thereafter in Delaware. Two more virtually identical actions were filed in the Supreme Court of New York, but were later dismissed in favor of the Delaware actions.

The Delaware actions were eventually consolidated, and on September 14, 2011, this Court granted a Stipulated Order of Class Certification and Case Management. The Order certified the Consolidated Delaware Action as a class action pursuant to Delaware Court of Chancery Rules 23(a), 23(b)(1), and 23(b)(2), without opt-out rights, and contained a detailed discovery and briefing schedule to permit a preliminary injunction hearing before the scheduled close of the Merger. That same day, Plaintiffs filed the original complaint.

Over the next three months, the parties engaged in extensive discovery. Defendants produced approximately 39,000 pages of documents, and Plaintiffs deposed Messrs. Schwartz, Savas, Meister, Webb and Christensen. In late November, more than four months after the filing of their first complaint but just days before the scheduled preliminary injunction hearing, Plaintiffs voluntarily withdrew their application for a

preliminary injunction – a clear indication of Plaintiffs' own view of the weakness of their claims in the face of the procedural protections in place, and the exhaustive record of arm's-length negotiations between the parties. Plaintiffs never challenged the efficacy of the Minority Approval Condition, or made any disclosure claims.

On December 21, 2011, the stockholder vote on the Merger proceeded as scheduled. As noted above, more than 65% of the total unaffiliated shares voted in favor of the Merger, comfortably satisfying the Minority Approval Condition. M&F completed its acquisition of MFW that same day.

More than three months of complete inactivity followed. Finally, on April 4, 2012, Plaintiffs filed their Consolidated Amended Complaint. The Complaint repleads in virtually identical language the allegations of the original consolidated complaint, but also adds for the first time new claims that three of the four Special Committee members were somehow conflicted, and that Evercore's valuation analyses were flawed (even though Plaintiffs do not challenge Evercore's independence or expertise). Aside from the fact that these new allegations could and should have been made before the stockholder vote on the Merger, they – like the allegations of the original complaint – are unsupported by credible record evidence and thus are without merit.

ARGUMENT

I. THE M&F DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR.

A court will grant a motion for summary judgment where, as here, the motion demonstrates that there is "'no genuine issue as to any material fact'" before the court, *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (quoting *Celotex Corp. v. Catrett*,

477 U.S. 317, 322-23 (1986)), and that the moving party is entitled to judgment as a matter of law. Ch. Ct. R. 56(b), (c); *Nash v. Connell*, 99 A.2d 242, 243 (Del. Ch. 1953). A court must grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Burkhart*, 602 A.2d at 59 (citing *Celotex*, 477 U.S. at 322-23).

Furthermore, "summary judgment is appropriately granted even where 'colorable . . . or [in]significantly probative [contrary evidence]' is present in the record, if no reasonable trier of fact could find for the [non-movant] on that evidence." *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986) (embedded alterations in original)). Thus, "[t]he 'mere existence of a scintilla of evidence in support of the [non-movant's] position' is not sufficient." *Id.* (quoting *Anderson*, 477 U.S. at 252).[7]

As explained below, there are no genuine issues of material fact – that is, there is no significantly probative evidence to rebut the critical facts that (i) the Merger was conditioned on the approval of a fully empowered and independent Special Committee, which negotiated at arm's-length with M&F; (ii) the Merger was conditioned on the approval of a majority of MFW's minority stockholders, who were fully informed; (iii) both of the foregoing conditions were explicitly non-waivable, and both conditions

[7] The Delaware Supreme Court has "not[ed] [the] persuasiveness of *Anderson* in Delaware summary judgment analysis." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1284 (Del. 1994) (describing *Burkhart*, 602 A.2d at 59).

were satisfied; and (iv) M&F and Mr. Perelman satisfied their fiduciary duties as controlling stockholders to MFW and its minority stockholders. Thus, the M&F Defendants are entitled to judgment, as a matter of law, that the Merger is entitled to protection under the Business Judgment Rule.

II. THE MERGER SHOULD BE REVIEWED UNDER THE FRAMEWORK OF THE *COX/CNX* UNIFIED STANDARD.

Since the Delaware Supreme Court decided *Lynch*, negotiated mergers and negotiated tender offers between a controlling stockholder and its subsidiary ("Negotiated Controller Combinations") have been reviewed under the entire fairness standard. *See In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 406 n.1 (Del. Ch. 2010) (noting that "[c]onsistent with the actual transaction at issue in *Lynch*, the Court of Chancery has regarded an agreed-upon tender offer and squeeze-out merger as subject to entire fairness review under *Lynch*"); *Abrons v. Marée*, 911 A.2d 805 (Del. Ch. 2006). Under the entire fairness standard, the initial burden of establishing entire fairness rests upon the defendants, but if the defendants can show that the challenged transaction was recommended by an independent, fully empowered special committee, ***or*** is subject to a non-waivable majority of the minority condition, the burden of proof shifts to the plaintiff. *See S. Muoio & Co. v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at *9-10 (Del. Ch. Mar. 9, 2011), *aff'd mem.*, 35 A.3d 419 (Del. 2011); *Lynch*, 638 A.2d at 1117.

As this Court explained in *Cox*, the unilateral (non-negotiated) tender offer offered something of a solution for controlling stockholders seeking to avoid entire fairness review of going private transactions. *In re Cox Commc'ns S'holders Litig.*, 879 A.2d 604, 644 (Del. Ch. 2005). Unilateral tender offers were traditionally reviewed

under an evolving standard far less onerous than *Lynch*'s entire fairness standard, with the judicial inquiry focusing on whether the tender offer was coercive.[8]

That approach rested squarely on important first principles of Delaware corporate law. In a merger, stockholders have no choice whether they wish to sell their shares for the merger price; assuming board and stockholder approval, every stockholder is compelled to surrender his shares for the merger consideration. But stockholders derive protection from the mechanism of the required stockholder and board votes, and a third-party merger negotiated at arm's-length is typically entitled to the presumption of the Business Judgment Rule. On the other hand, because a controlling stockholder can influence if not absolutely determine the outcome of those votes, a merger proposal from a controller has been measured against the entire fairness standard.[9] That is, because the controller has the power to determine the outcome of the votes, the controller can unilaterally force minority stockholders to exchange their shares for the merger consideration – and having the power to effect the transaction unilaterally, he must prove its fairness to the unprotected minority.

A tender offer is different. Mechanically, each stockholder can elect whether to tender his shares into the offer – whether it is mounted by a controller or not. To be sure, our courts have identified ways in which a controller may act to coerce the

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[8] *See In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 438 (Del. Ch. 2002); *In re Aquila Inc. S'holders Litig.*, 805 A.2d 184, 190 (Del. Ch. 2002); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6-8 (Del. Ch. June 19, 2001).

[9] This has been the case even if the merger was negotiated and approved by a special committee, ***or*** was conditioned on approval by a majority of the minority.

minority into tendering, and – having identified the coercive element – impose the same stringent standard of review that is applied to controller mergers, and for the same conceptual reason. That is why tender offer jurisprudence has focused not so much on controller ***status*** – because unlike in mergers, controller status does not automatically confer the unilateral power to compel the minority to accept the transaction in the tender offer context – but rather factually on whether the particular controller tender offer is coercive (including the presumption that in negotiated controller tender offers, the controller has sufficient influence, explicit or implicit, to require a higher standard of review).

Returning to the question of coercion in non-negotiated tender offers, *In re Pure Resources, Inc. Shareholders Litigation*, 808 A.2d 421, 438 (Del. Ch. 2002), and its progeny established "safe harbors" – positing that a unilateral tender offer would not be found coercive (and thus would be entitled to the presumptions of the Business Judgment Rule) if (i) the transaction was subject to a non-waivable majority of the minority tender condition; (ii) the controlling stockholder promises to consummate a prompt short-form merger at the same price if it obtains more than 90% of the shares; (iii) the controlling stockholder has made no retributive threats; and (iv) the independent directors on the target board have free rein and adequate time to react to the tender offer. *Id.* at 445.

Despite the "jarring doctrinal inconsistency" in imposing a higher standard for Negotiated Controller Combinations (even ones that employ ***both*** an independent Special Committee and condition the transaction on approval by a majority of minority stockholders, thus mirroring a third-party transaction) than for unilateral tender offers

with the same procedural protections, the incongruence has persisted. *Abrons*, 911 A.2d at 812 (recognizing board negotiation "arguably afford[s] the minority stockholders additional protections"). Although a controlling stockholder could avoid entire fairness review altogether through the use of a non-coercive unilateral tender offer (which offers minority stockholders ***less protection*** than a negotiated merger), entire fairness review was traditionally inescapable in the merger context.

In *Cox*, this Court suggested that a "relatively modest alteration" of *Lynch*'s burden-shifting test would provide minority stockholders with sufficient protection, while permitting defendants equitably to avoid "entire fairness" scrutiny. *Cox*, 879 A.2d at 643. As this Court explained:

> That alteration would permit the invocation of the business judgment rule for a going private merger that involved procedural protections that mirrored what is contemplated in an arms-length merger under § 251 – independent, disinterested director and stockholder approval. Put simply, if a controller proposed a merger, ***subject from inception*** to negotiation and approval of the merger by an independent special committee ***and*** a Minority Approval Condition, the business judgment rule should presumptively apply.
>
> This alteration would promote the universal use of a transactional structure that is ***very favorable to minority stockholders*** – one that deploys an active, disinterested negotiating agent to bargain for the minority coupled with an opportunity for the minority to freely decide whether to accept or reject their agent's work product.

Id. at 643-44 (emphasis added).

Importantly, application of this "unified standard" to a negotiated merger would "leave in place another remedial option that is viable for stockholders who believe that the ultimate price paid in a negotiated merger is unfair – appraisal. Appraisal permits a stockholder to receive a fair value determination ***regardless of the procedural fairness***

leading to a merger." *Id.* at 645 (emphasis added). That additional protection for minority stockholders is not, of course, available in a tender offer – another reason to favor the merger transactional structure. Shortly after *Cox* was decided, this Court again advocated for Business Judgment Rule protection where both procedural protections were employed. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *14 (Del. Ch. Aug. 18, 2006) (citing *Pure Res.*, 808 A.2d 421; *Cox*, 879 A.2d 604) (noting "special rule of *Lynch*" should be curtailed by "giving the proponents of such transactions the certainty of business judgment rule protection" if both procedural protections are employed).[10]

Recently, in *CNX*, Vice Chancellor Laster agreed with this Court's view in *Cox* that a unified standard should apply to going private transactions involving controlling stockholders, regardless of structure, if both procedural protections outlined in *Cox* are employed. The Court held that if either a Negotiated Controller Combination or

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[10] Prominent commentators have also recommended a regime that applies the Business Judgment Rule to Negotiated Controller Combinations that mimic third-party transactional approvals, while allowing controllers the flexibility to employ fewer protections at the cost of some level of fairness review. *See* Hon. William T. Allen, Hon. Jack B. Jacobs & Hon. Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1306–09 (2001) ("In today's environment there is insufficient justification for giving less than full cleansing effect to a self-interested merger that is conditioned on approval of a majority of the minority stockholders. . . . Also strained is the rationale for not giving full ratification effect to approval by a genuinely effective special committee of independent directors."). *See also* Guhan Subramanian, *Fixing Freezeouts*, 115 Yale L.J. 2, 63-64 (Oct. 2005) ("If both the SC and minority shareholders approve, there are no gaps to fill and so the court should defer to the outcome of the process."); Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 Bus. Law. 25, 81-94 (Nov. 2005) (arguing that if "the transaction satisfied both steps and failed to violate certain other standards . . . the transaction would qualify for the protection of the business judgment rule"); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 838-40 (Dec. 2003) ("[T]he terms of a freeze-out merger that result from an appropriate committee process and an uncoerced shareholder vote should be reviewed on a business judgment standard, not entire fairness.").

a unilateral controller tender offer is both (i) negotiated and recommended by a special committee of independent directors, and (ii) conditioned on the affirmative vote or tender of a majority of minority stockholders, then the proposed transaction will not be enjoined ***and*** the Business Judgment Rule standard would presumptively apply in a future action for money damages (the "Unified Standard"). *CNX*, 4 A.3d at 412-13.[11]

This Court recently applied the Unified Standard to a negotiated controller merger in *Krieger v. Wesco Financial Corp.*, C.A. No. 6176-VCL (Del. Ch. May 10, 2011) (Tr. Ruling) (applying Unified Standard to merger conditioned from inception on approval by special committee and majority of the minority, and denying motion for preliminary injunction). And since *CNX*, this Court has suggested in numerous instances that the Business Judgment Rule might properly be applied to a negotiated controller merger that is conditioned from the outset on approval by an independent, fully empowered special committee and a majority of minority stockholders.[12]

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[11] Former Chancellor Chandler already had provided a means of properly avoiding entire fairness review in a more limited class of negotiated deals involving controlling stockholders. *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *11-12 (Del. Ch. Oct. 2, 2009). In *Hammons*, the controlling stockholder orchestrated a sale of the entire company to a third party. *Id.* In those cases (unlike a situation where the controller is the ultimate owner of the surviving entity), the Chancellor held that because the controlling stockholder did not stand on "both sides of the transaction," the deal could avoid entire fairness review if it employed both independent board and majority of the minority approval. *Id.* at *10.

[12] *See Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012) (Business Judgment Rule will apply to negotiated controller merger if it is "(1) recommended by a disinterested and independent special committee, and (2) approved by stockholders in a non-waivable vote of the majority of all the minority stockholders"); *S. Muoio*, 2011 WL 863007, at *9 (finding plaintiff bore burden of proof under entire fairness because recapitalization was approved by empowered, independent special committee, and noting that transaction could have "avoid[ed] entire fairness review completely" if recapitalization had been subject to majority of the minority vote); *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 460 (Del. Ch. 2011) ("If the controlling stockholder

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III. THE MERGER IS ENTITLED TO THE PROTECTION OF THE BUSINESS JUDGMENT RULE.

After months of extensive discovery, including robust document production and depositions of key players involved in negotiating the Merger, the record supports only one reasonable conclusion: because the Merger was subject to the two non-waivable conditions identified in the *Cox/CNX* cases, and those conditions were satisfied, the Merger is entitled to the protections of the Business Judgment Rule.

A. The Proposal And The Merger Were Both Subject To A Non-Waivable Minority Approval Condition, Which Was Satisfied.

There is no dispute that the Merger was subject to a non-waivable Minority Approval Condition, which carved out any and all MFW stockholders affiliated with M&F. The presence of this procedural safeguard alone provided significant protection for MFW's minority stockholders, fostered arm's-length bargaining, and is "powerful evidence" that the Merger was fair to MFW's minority stockholders. *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 550 (Del. Ch. 2003) (finding transaction entirely fair).[13] Plaintiffs offer no evidence (indeed, they do not even argue) that the

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permits the use of both protective devices, then the transaction could avoid entire fairness review."); *Hammons*, 2009 WL 3165613, at *11-12 (stating that transaction could have avoided entire fairness review if it had employed protections outlined in *CNX*).

[13] *See Aquila*, 805 A.2d at 188 (denying preliminary injunction, calling majority of minority provision an "important safeguard[]"); *Siliconix*, 2001 WL 716787, at *17 (denying preliminary injunction, stating majority of minority provisions protect the "collective wisdom" of minority stockholders); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 599-600 (Del. Ch. 1986) (denying preliminary injunction under entire fairness, describing majority of minority provision as an "indici[um] of fairness"). *Cf. In re John Q Hammons Hotels Inc. S'holders Litig.*, 2011 WL 227634, at *6 (Del. Ch. Jan. 14, 2011) (finding merger with controlling stockholder entirely fair because, in part, "[t]he unaffiliated Class A stockholders overwhelmingly supported the transaction – an undisputed fact that further supports the fairness of the Merger").

Minority Approval Condition was tainted, or was otherwise ineffective. And Plaintiffs have made no claim that material misstatements or omissions undermined the informed nature of the stockholder vote, and thus the effectiveness of the Minority Approval Condition. *See* Br. at 23, *supra*. Thus, at the very least, Defendants should be entitled to burden shifting under *Lynch* in any subsequent action for money damages if the Motion is denied. *In re CNX*, 4 A.3d at 403. But there is more.

B. The Merger Was Negotiated, And Ultimately Approved And Recommended, By A Fully Empowered, Well-Functioning Independent Special Committee.

The second requirement for application of the *CNX* Unified Standard, which focuses on a special committee's composition, authority and process, was also satisfied. *See, e.g.*, *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 453 (Del. Ch. 2010) (denying injunction because plaintiffs "have not advanced facts that support a reasonable inference that any of the Special Committee members are materially self-interested"); *In re Prodigy Comme'ns Corp. S'holders Litig.*, 2002 WL 1767543, at *3 (Del. Ch. July 26, 2002) (presence of fully empowered, independent special committee presents "substantial legal hurdles" for plaintiffs). The record overwhelmingly confirms the independence and effectiveness of the Special Committee.[14]

1. The Special Committee was disinterested and independent.

The Special Committee was fully independent. Plaintiffs' new, post-closing attack on the Special Committee's independence is based on an alleged web of

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"relationships" among certain members of the Special Committee, Mr. Perelman and M&F, but none of these purported "relationships" even approaches a disabling conflict of interest under settled Delaware law. "In order to show lack of independence, the complaint . . . must create a reasonable doubt that a director is not so 'beholden' to an interested director . . . that his or her 'discretion would be sterilized.'" *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). Moreover, "[e]vidence of personal and/or past business relationships does not raise an inference of self-interest." *Wisc. Inv. Bd. v. Bartlett*, 2000 WL 238026, at *6 (Del. Ch. Feb. 24, 2000).

First, with respect to Mr. Dinh and Ms. Byorum, their past business relationships with M&F are inadequate as a matter of law to cast any doubt as to their independence. Redacted

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Tellingly, Plaintiffs do not even allege (let alone cite to any record evidence) that these purportedly disabling conflicts were material to either Mr. Dinh or Ms. Byorum.

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Redacted Limited business relationships such as these fall well short of showing that the Special Committee members were so "beholden" to M&F or Mr. Perelman as to raise doubts about their independence. A "limited business relationship between [a director's] employer and [the potential acquirer] does not trigger any significant issue of conflict." *Siliconix*, 2001 WL 716787, at *14; *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 822 (Del. Ch. 2005) (rejecting claims that directors lacked independence due to relationships at other companies that conducted business with J.P. Morgan because such allegations "are simply not enough, without more, to raise a substantial question about [the directors'] independence"), *aff'd*, 906 A.2d 766 (Del. 2006).

Second, with respect to Mr. Webb, Plaintiffs make much of the fact that Mr. Perelman was an equity partner with Mr. Webb in several acquisitions that Mr. Webb worked on during the course of his 30-year banking career. (Am. Compl. ¶¶ 53-55) But simply being a co-investor in an unrelated enterprise with a controller – a relationship that in no way implicates dependence on the controller's goodwill – does not constitute a disabling self-interest. *See Beam*, 845 A.2d at 1051 (finding that allegations that directors "developed business relationships before joining the board . . . even when coupled with [controller's] 94% voting power, are insufficient, without more, to rebut the presumption of independence"). Redacted

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Redacted Importantly, everyone on the Special Committee knew that Mr. Webb had (many years ago) had a business relationship with Mr. Perelman, which it did not consider to be a conflict of interest. Redacted The Special Committee's commitment to independence was so strong that it considered even the mere "appearance" of conflict disabling. Redacted Mr. Webb's ten-year-old business relationship does not rise even to that level.

Third, Plaintiffs' insinuation that the Special Committee lacked independence because "Perelman's 43.4% position in the Company also meant that his vote determined who served on the Board with a near mathematical certainty" is legally irrelevant. (Am. Compl. ¶ 68) Under Delaware law, "it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election. That is the usual way a person becomes a corporate director." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984); *see also In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *15 (Del. Ch. May 22, 2000) (noting that "[t]he fact that . . . a large shareholder played some role in the nomination process should not, without additional evidence, automatically foreclose a director's potential independence").

Fourth, the strongest evidence of the Committee's independence can be found in the way it conducted and discharged its responsibilities. We turn next to that.

2. The Special Committee's robust negotiations ultimately led to additional value for MFW's minority stockholders.

As explained above, the Special Committee's enabling resolutions provided it with full authority, "comparable to what a board would possess in a third-

party transaction." *CNX*, 4 A.3d at 414, 416. Moreover, M&F's position, announced publicly from the outset, that it would not proceed without the approval of the Special Committee, made absolutely clear that the Committee had the critical power simply to "say no" to Mr. Perelman and M&F if it was ultimately unable to negotiate a transaction that it concluded was fair and in the best interests of MFW's minority stockholders. Redacted Redacted *See S. Muoio*, 2011 WL 863007, at *12 (finding special committee fully empowered to evaluate transaction with the "'critical power'" to say no); *W. Nat'l Corp.*, 2000 WL 710192, at *24 (emphasizing importance of special committee's "power to say no"); *Kohls v. Duthie*, 765 A.2d 1274, 1281 (Del. Ch. 2000) (denying injunction where special committee had "power to 'say no'").[15]

Moreover, there can be no question that the Special Committee fully understood its charter and the leverage that its authority to "say no" gave it. Redacted Redacted The Committee took charge of the process from the very beginning. It held an eager M&F at arm's-length for nearly three months while it collected all necessary information, and analyzed the Proposal with its legal and financial advisors.

Then, having conducted its investigation and analysis of the proposal at its own speed, the Special Committee fully exercised its power to "just say no," ***twice***

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[15] *See also Kahn v. Lynch Commc'n Sys., Inc.*, 1995 WL 301403, at *2 (Del. Ch. Apr. 17, 1995) (transaction was entirely fair where committee's independent financial and legal advisors "provided assistance in the negotiations"), *aff'd*, 669 A.2d 79 (Del. 1995); *Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 504 (Del. Ch. 1990) (finding fair dealing where merger was negotiated "by a committee of directors totally independent of [controller]").

rejecting M&F's $24 Proposal before extracting a higher price for MFW's minority stockholders. Moreover, the Special Committee was under no obligation to seek out other potential buyers, because it was clear that M&F was not willing to sell its position to a third party. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1287 (Del. 1989) (finding that if "the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market"). Nevertheless, it directed its advisors to identify potential buyers for MFW as a whole, or for its business segments, and it is undisputed that no other serious buyer ever came forward during the entire pendency of the Special Committee's negotiations with MFW – when the fact that MFW was in play was widely and publicly known. Redacted

The Special Committee's arm's-length negotiations demonstrate that it was an independent, effective advocate for MFW's minority stockholders. *See In re John Q. Hammons Hotels Inc. S'holders Litig.*, 2011 WL 227634, at *2 (Del. Ch. Jan. 14, 2011) (finding "fair dealing" prong was met because, among other reasons, "Special Committee understood their authority and duty to reject any offer that was not fair to the unaffiliated stockholders as evidenced by their rejection of the initial . . . offer").

The record also shows that the Special Committee acted reasonably in accepting M&F's $25 offer, rather than continuing to negotiate for a higher price. Reda

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Redacted As this Court has held, "[w]hile it is easy to say that the Special Committee could have or should have been more aggressive, the fact that others might have negotiated differently does not give rise to an inference of bad faith." *In re KDI Corp. S'holders Litig.*, 1988 WL 116448, at *6 (Del. Ch. Nov. 1, 1988) (applying Business Judgment Rule, refusing to enjoin management buyout).[16] Rather, "it is clear that the Special Committee's arm's-length negotiating strategy ultimately resulted in a benefit to the minority." *S. Muoio*, 2011 WL 863007, at *15.

C. The Special Committee Determined In Good Faith That The $25 Merger Price Offered MFW's Minority Stockholders Was A Full And Fair Price.

The record is equally clear that the independent Special Committee, acting in good faith and in the best interests of MFW's minority stockholders, reasonably concluded, after three months of extensive due diligence, that the $25 Merger offered MFW's minority stockholders a full and fair price for their stock. "If the price is not grossly inadequate, and the directors acted with an informed judgment, then the business judgment rule precludes any further inquiry as to the adequacy of the price." *Weinberger*

[16] *See also In re Cogent, Inc. S'holders Litig.*, 7 A.3d 487, 494 (Del. Ch. 2010) (denying preliminary injunction where target board accepted offer from third-party bidder even though bidder refused repeated requests from target board to increase its initial offer price); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 591-92, n.137 (Del. Ch. Sept. 8, 2010) (board of directors acted reasonably in choosing to accept a "[t]ake it or leave it" offer, rather than wait and risk losing the offer altogether); *Wayne Cnty. Emps. Ret. Sys. v. Corti*, 2009 WL 2219260, at *14 (Del. Ch. July 24, 2009) ("Bad faith cannot be shown by merely showing that the directors failed to do all they should have done under the circumstances."), *aff'd mem.*, 996 A.2d 795 (Del. 2010); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009) (Delaware directors act in bad faith "[o]nly if they knowingly and completely fail[] to undertake their responsibilities"); *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 62, 66 (Del. 1989) (no fiduciary breach where board acceded to "take it or leave it" offer with three-hour deadline).

v. United Fin. Corp. of Calif., 1983 WL 20290, at *9 (Del. Ch. Oct. 13, 1983) (citing *Gimbel v. Signal Cos.*, 316 A.2d 559, 609 (Del. Ch. 1974) ("[T]he business judgment rule weighs in favor of the directors' decision to sell assets unless the complaining shareholders can prove fraud or a clearly inadequate sale price."); *Muschel v. W. Union Corp.*, 310 A.2d 904, 908 (Del. Ch. 1973) (same)).

As explained above, the Special Committee and its advisors conducted extensive due diligence of each of MFW's business units, received updated financial projections from MFW that were not even reviewed by anyone affiliated with M&F, and fully evaluated the competing risks of remaining as a standalone entity. Moreover, Evercore, whose independence and experience remain unchallenged by Plaintiffs, twice determined that the Merger price was within or above its valuation range for MFW, and was fair, from a financial point of view, to MFW's unaffiliated stockholders. Redacted Redacted In doing so, Evercore considered MFW's Updated Projections and updated refinancing assumptions. Delaware law requires nothing more of directors before affording their decisions the protections of the Business Judgment Rule. *See Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *5 (Del. Ch. Nov. 30, 2007) ("If a plaintiff fails to rebut the business judgment rule, a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose.") (quotation marks and citations omitted); *Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *14 (Del. Ch. Apr. 5, 1990) (rejecting price challenge because plaintiffs failed to rebut Business Judgment Rule and thus court would not "further scrutinize the terms of the transaction,

including the fairness of the price").[17]

In short, unless Plaintiffs can show probative evidence that the Merger price was so inadequate as to constitute constructive fraud, they cannot prevail. They have not done so. In fact, the record powerfully supports the opposite conclusion: both the robust process, and the valuation analyses in the record, strongly support the reasonableness of the Special Committee's decision to accept the $25 Merger price.

D. Plaintiffs' Post-Merger "Price" Claims Do Not Rebut The Powerful Presumptions Of The Business Judgment Rule.

Having failed to offer even a scintilla of evidence that could credibly challenge the exhaustive, three-month-long process undertaken by the Special Committee in response to M&F's Proposal, Plaintiffs' Complaint alleges that the Merger was unfair to MFW's minority stockholders based on two newly alleged (but irrelevant) facts, both of which fail utterly to rebut the powerful presumptions mandated by the Business Judgment Rule.

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[17] Plaintiffs' unsubstantiated price claim would fail even under *Revlon*'s heightened standard for reviewing director conduct. Under *Revlon*, "|t|here is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end. Importantly, a board's actions are not reviewed upon the basis of price alone." *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *16 (Del. Ch. May 20, revised May 24, 2011). In the absence of a conflicted board, to prevail on a *Revlon* claim, Plaintiffs are required to show that the Special Committee "knowingly and completely failed to undertake their responsibilities" to obtain the best sale price. *Lyondell*, 970 A.2d at 243-44. The record does not even come close to supporting a claim under *Revlon*'s onerous standard, but supports precisely the opposite conclusion.

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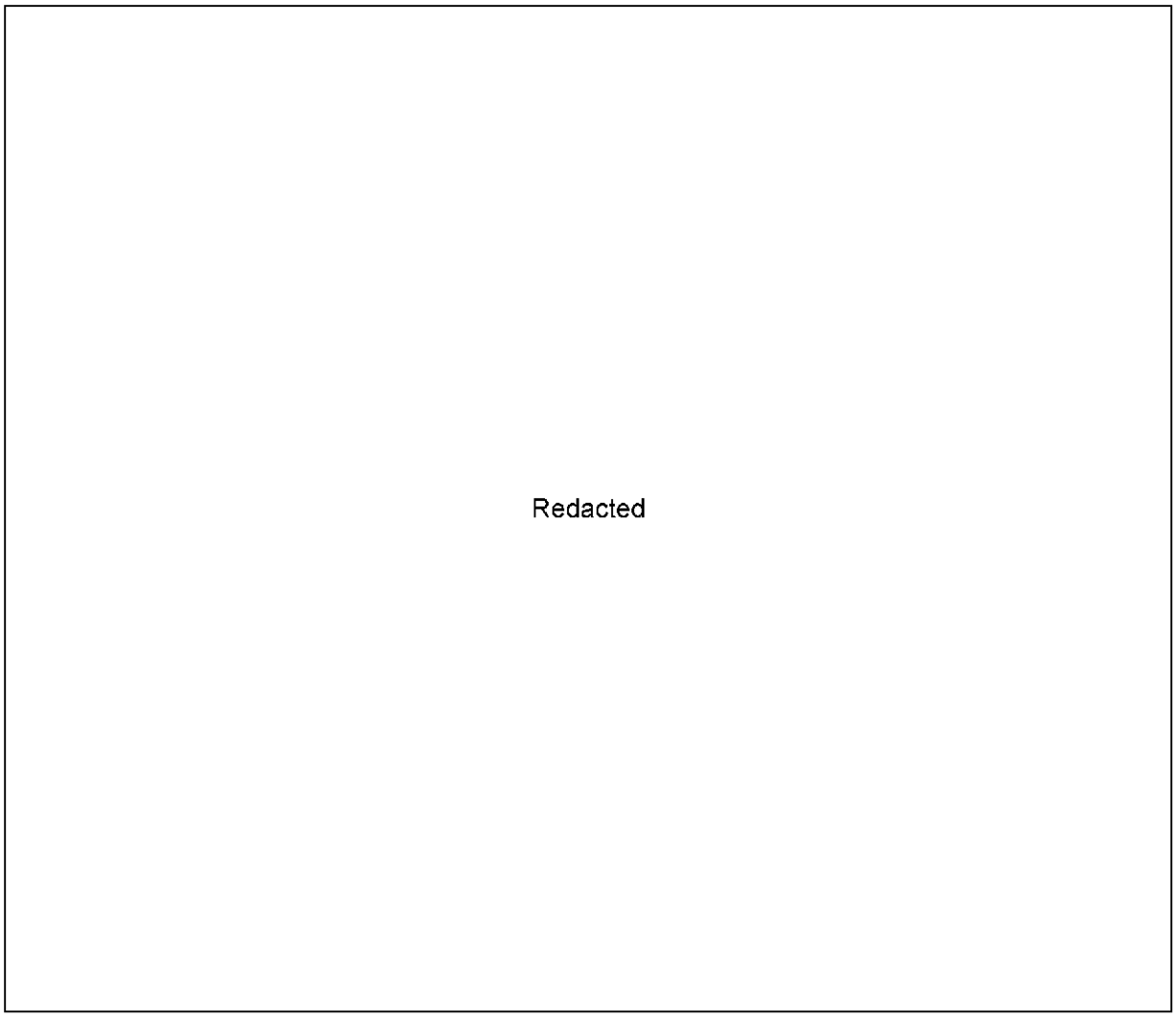
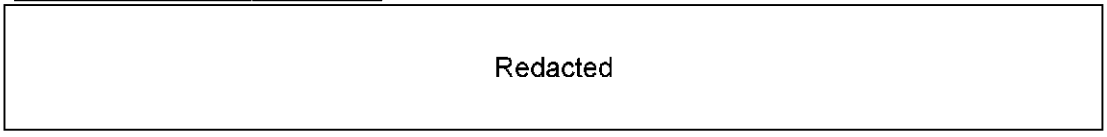


Second, Plaintiffs' Complaint claims, for the first time, that the Merger price was unfair to MFW's stockholders as of September 2011 because several months after the Merger closed, MFW revised Harland's 2012 Estimated EBITDA upward, from approximately $427 million in September 2011 to $498 million in March 2012. (Am.



Compl. ¶ 94) This new allegation ignores the fact that Harland's revised projections are due in part to its recent acquisition of Faneuil in March 2012, which is projected to contribute at least $11 million in additional EBITDA to Harland for 2012. (*Id.*) Nor do Plaintiffs allege that the Updated Projections, which were provided to the Special Committee and Evercore in September 2011 and on which their analyses were based, failed accurately to reflect Defendants' good faith estimates of MFW's projected future performance at that time. *See Ash v. McCall*, 2000 WL 1370341, at *8 (Del. Ch. Sept. 15, 2000) ("Plaintiffs are examining a corporate transaction with perfect 20/20 hindsight and declaring that it turned out horribly. . . . Due care in the decision making context is process due care – whether the board was reasonably informed of ***all material information reasonably available at the time it made its decision***."); *cf. In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) ("[I]n almost any business transaction, the parties go into the deal with the knowledge that, even if they have evaluated the situation correctly, the return could be different than they expected. It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the 'right' business decision.").

These allegations are further belied by the fact that in late May 2012, Harland was forced to withdraw a bond offering being made in connection with its effort to refinance its massive debt because of the ongoing volatility in the corporate debt markets. (*See* Ex. 56 (May 28, 2012 article noting that "Harland Clarke, which wanted to raise $295 million to refinance term loans" was "the eighth bond deal pulled this quarter and the seventh in the span of two weeks")) This is precisely the same market risk that

the Special Committee identified and considered in September 2011 when it was weighing the merits of the M&F Proposal against the competing risks of remaining a standalone entity. Redacted

IV. M&F AND MR. PERELMAN SATISFIED THEIR DUTIES AS CONTROLLING STOCKHOLDERS.

A. The Merger Was The Result Of Arm's-Length Negotiations With An Independent Special Committee.

Plaintiffs also allege that M&F and Mr. Perelman breached their fiduciary duties as controlling stockholders by dominating the negotiations with the Special Committee and dictating the terms of the Merger, but again discovery produced no evidence to support this claim.[20] Rather, the extensive record surrounding the Merger's timing, structure and negotiations reveals that the M&F Defendants discharged their fiduciary duties to MFW's minority stockholders in all respects.

First, as explained throughout the discussions above, the M&F Defendants did precisely what Delaware courts have described as best practices for a controlling stockholder and its affiliates. There is no evidence that M&F or Mr. Perelman impeded the Special Committee's process, or somehow coerced the Special Committee or the MFW board to vote in favor of the Merger. Rather, the record shows that the Special Committee had and exercised "real bargaining power," proceeded only

[20] Plaintiffs' Complaint makes much of a previously considered, unconsummated, potential acquisition by MFW of the Recorded Music Division of Warner Music Group. (Am. Compl. ¶¶ 70-71) Redacted

Redacted

after thorough due diligence, and ultimately extracted a higher price from M&F. *See, e.g.*, *In re First Boston, Inc. S'holders Litig.*, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) ("It is that power and the recognition of the responsibility it implies by committees of disinterested directors, that gives utility to the device of special board committees in change of control transactions.").

The record is equally clear that the Special Committee did not act out of fear or coercion, but instead "made reasonable choices in confronting the real world circumstances it faced." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 980 (Del. Ch. 2005). As Mr. Meister and Mr. Webb explained, MFW's business faced substantial hurdles in the near future. MFW's largest subsidiary, Harland, continued to struggle in 2011, and its most recent acquisition, Global Scholar, had significantly underperformed expectations. In light of its recent performance, MFW faced significant risks with respect to refinancing approximately $2 billion of debt. Redacted Redacted Accordingly, the Special Committee reasonably concluded that the Merger provided MFW's minority stockholders with significant, immediate value for their shares, while avoiding future risk and uncertainty.

Moreover, there is not a shred of evidence that M&F interfered with the independence of the Special Committee or coerced the Special Committee in any respect.[21] Nor do Plaintiffs contend that M&F "ever used the threat of a hostile takeover

[21] Plaintiffs' assertion that Mr. Savas's dual roles as CFO of both M&F and MFW constitute "improper influence" over the negotiations with the Special Committee lacks any support in the record. (Am. Compl. ¶ 71) Oddly, Plaintiffs suggest that the disclosure of updated actual and projected financial information to the Special Committee's financial advisor was improper.

(cont'd)

to influence the special committee." *See Lynch*, 638 A.2d at 1120 (quotations and citation omitted). That M&F was willing to walk away if the Special Committee rejected its "best and final" offer only supports its respect for the independence of the Special Committee, and its recognition that the Special Committee's power to say no was absolute. *Cf. Lynch*, 638 A.2d at 1120 (describing *Am. Gen. Corp. v. Texas Air Corp.*, 1987 WL 6337 (Del. Ch. Feb. 5, 1987)) (finding that special committee "'lost its ability to negotiate in an arms-length manner'" when "'at the end of their negotiations with [the majority stockholder] the Committee members were issued an ultimatum and told that they must accept the $16.50 per share price ***or [the majority stockholder] would proceed with the transaction without their input.***'" (emphasis added)).

Second, there is no record evidence that either M&F or Mr. Perelman coerced MFW's minority stockholders into approving the deal and accepting the Merger price. To the contrary, by publicly disclosing from the outset that any transaction would include a non-waivable majority of the minority condition, M&F and Mr. Perelman ensured that minority stockholders would understand that their votes would be dispositive. And there is no claim that in exercising their votes, the minority stockholders were not fully informed. Actionable coercion does not occur merely because an offer price is "'too good to pass up.'" *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995) (quotations and citation omitted), *aff'd*, 672 A.2d 35 (Del. 1996). And Plaintiffs have not pointed to anything M&F ever said or did that could be

(cont'd from previous page)
Standing alone this notion is odd enough, but it is even odder when one considers that this disclosure did not involve MacAndrews.

interpreted as a retributive threat against MFW's minority stockholders.

B. M&F Was Not Required To Pay More Than The Merger Price.

There is also no evidence to support Plaintiffs' claim that M&F and Mr. Perelman breached their fiduciary duties by offering $25 per share, which the record shows was a full and fair price for MFW's stock. Like any bidder proposing a consensual transaction, M&F and Mr. Perelman had no obligation to pay the absolute maximum amount they could afford to pay, but were only required to offer a fair price. "A fair price does not mean the highest price financeable or the highest price that a fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept." *Cinerama Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995). For the reasons explained in Section III.B-C, *supra*, M&F negotiated with the Special Committee in good faith, and offered MFW's minority stockholders a fair price for their stock.

Plaintiffs' attack on the timing of the M&F Proposal is also insufficient evidence of a breach of fiduciary duty. Plaintiffs make much of the fact that M&F made its offer when MFW was trading at $16.77, significantly below its 52-week high. Yet, *Kahn v. Lynch Communication Systems, Inc.*, 669 A.2d 79 (*"Lynch II"*), makes clear that "the mere fact that the transaction was initiated at [the controller's] discretion, does not dictate a finding of unfairness in the absence of a determination that the minority shareholders of Lynch were harmed by the timing." 669 A.2d at 85.

Indeed, in *Lynch II*, the Delaware Supreme Court held that the merger was entirely fair to minority stockholders despite allegations that the controlling stockholder, Alcatel, "timed its merger offer, with a thinly-veiled threat of using its controlling position to force the result, to take advantage of the opportunity to buy Lynch on the cheap." *Lynch II*, 669 A.2d at 85. The Supreme Court rejected this claim, finding that, as was the case with MFW, "Lynch was experiencing a difficult and rapidly changing competitive situation. Its current financial results reflected that fact. Although its stock was trading at low levels, this may simply have been a reflection of its competitive problems. Alcatel is not to be faulted for taking advantage of the objective reality of Lynch's financial situation." *Id.* Indeed, "[c]ontrolling shareholders, while not allowed to use their control over corporate property or processes to exploit the minority, are not required to act altruistically towards them." *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *7 (Del. Ch. Oct. 29, 1993). "[T]he law does not require more than fairness. Specifically, it does not, absent a showing of culpability, require that directors or controlling shareholders sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders." *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 598 (Del. Ch. 1986).

Plaintiffs have failed to show that the timing of the transaction harmed MFW's stockholders. Indeed, the record supports the opposite conclusion. The $25 Merger price offered MFW's minority stockholders more than a 40% premium for their stock at a time when MFW's business was declining, and faced significant refinancing risks. In short, there is no evidence that the M&F Defendants breached their fiduciary

duties by initiating the Merger when they did.

C. The M&F Defendants' Recusal Is Further Evidence That They Negotiated In Good Faith.

Generally, directors who did not participate in a board's deliberations on, or approval of, a transaction will not be held liable for that transaction. *See In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *3 (Del. Ch. Mar. 9, 1995), ("[T]hose directors' absence from the meeting, and their abstention from voting to approve the Combination, does . . . have dispositive significance, and shields these defendants from liability on any claims predicated upon the board's decision to approve that transaction."); *see also Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 499 n.12 (Del. Ch. 1990) (finding parent company-designated directors of subsidiary who played no role in negotiation or approval of going private merger not liable under entire fairness standard).

The M&F Defendants recused themselves from the board's vote on the Merger. Thus, the M&F Defendants may be "shield[ed] from liability on any claims predicated upon the board's decision to approve [the] transaction." *Tri-Star*, 1995 WL 106520, at *3; *see also* E. Welch, et al., FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 141.2.3.7 (5th ed. 2007) ("[A]n interested director who plays no role, overt or covert, in the board's decision-making process cannot be held liable on a claim that the board's decision to approve a challenged transaction was wrongful.").

Additionally, the M&F Defendants *qua* directors will find protection in the safe-harbor provided by 8 *Del. C.* § 144. Under the Delaware Supreme Court's *Benihana* decision, the vote of a majority of the disinterested and independent directors

insulates the M&F Defendants' alleged self-interest in the board's decision to recommend the Merger. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) ("Section 144 . . . provides a safe harbor for interested transactions, like this one, if '[t]he material facts as to the director's . . . relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors . . . and the board . . . in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors . . . .") (quoting 8 *Del. C.* § 144(a)(1)).

CONCLUSION

For the foregoing reasons, the M&F Defendants respectfully request that the Court find that Defendants' decision to enter into the Merger is protected by the Business Judgment Rule under the Unified Standard, and grant the M&F Defendants' Motion for Summary Judgment.

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