IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MFW SHAREHOLDERS LITIGATION : Consolidated
: Civil Action No. 6566-CS

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Superior Courtroom No. 8B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, March 12, 2013
10:32 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

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ORAL ARGUMENT ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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THE COURT: So many people. Welcome, everyone.

MR. LAFFERTY: Your Honor, I guess I'll step up first, take care of some introductions.

My cocounsel at counsel table, Tariq Mundiya and Todd Cosenza; Mac Measley from my office. Mr. Mundiya is going to make the presentation on behalf of the special committee defendants today.

THE COURT: Welcome.

ALL COUNSEL: Good morning, Your Honor.

MR. ANDREWS: Good morning, Your Honor. Peter Andrews, Faruqi & Faruqi, on behalf of plaintiffs. We have Carl Stine, Wolf Popper, making argument today; and also Mr. Monteverde from Faruqi & Faruqi. We also have Matt Insley-Pruitt from Wolf Popper; Ms. Keener from -- you know, her well. And Ms. Kira German from Gardy & Notis.

THE COURT: Welcome, everyone.

Good morning, Mr. Allingham.

MR. ALLINGHAM: Good morning, Your Honor.

Before I begin, let me make a couple of introductions, too. I don't know if Your Honor

knows Stephen Fasman, who is the chief legal officer at MacAndrews & Forbes Holdings. I think you do know my colleagues Joe Larkin and Chris Foulds; and Jennifer Raatz I think is perhaps new to the Court.

THE COURT: Welcome.

MR. ALLINGHAM: May I proceed, Your Honor?

THE COURT: You may.

MR. ALLINGHAM: First of all, Your Honor, I want to personally thank you for postponing this argument when I was a little under the weather a couple weeks back.

THE COURT: No. Everyone is glad you're okay. We were a little worried about you. I mean, there's always been reason to worry about you.

(Laughter)

MR. ALLINGHAM: Having nothing to do --

THE COURT: But this is more vivid.

MR. ALLINGHAM: Having nothing to do with my physical health, I'm sure.

I don't think -- I probably could have dragged myself in here; but even if I could have, I think that the issues presented on this motion deserve

the most careful of attention, both because they have far-reaching implications for our corporate law and also because they have far-reaching implications for the disposition and litigation of shareholder challenges to control transactions in this Court.

Here's what I'd like to do today, with the Court's permission. I want to spend a little time discussing the standard of review that should apply to going-private merger transactions and, in particular, the one being challenged here in which MacAndrews & Forbes Holdings, which is 100 percent owned by Ronald Perelman, purchased the roughly 56 percent of the equity of M&F Worldwide, which we all call MFW, that it did not already own. So this is -- has always been treated as and is the classic controller transaction about which there's been considerable discussion in recent years.

THE COURT: Even though it's a controller transaction, under the Exchange rules, did the company have a majority of independent directors?

MR. ALLINGHAM: Yes.

THE COURT: Because it wasn't a majority --

MR. ALLINGHAM: Yes. In fact, the

company has -- has had, I think, contractual commitments with its subsidiaries to do so, certainly with respect to MFW, and I think as to all the affiliate companies.

I don't want to -- I don't want there to be any suspense, Your Honor. I'll argue that the business judgment rule should apply to that transaction because every trace of potential influence that MacAndrews and Mr. Perelman could have wielded over the transaction was voluntarily and conclusively relinquished by them, so that this transaction was consciously designed, intentionally designed, conditioned from the outset on approval by both an independent, fully functioning special committee and, and a majority of MFW's minority stockholders, with both conditions made explicitly nonwaivable from the initial announcement.

So this merger fully replicated and was intended and designed to fully replicate a third-party arm's length deal. And just as the business judgment rule under our law clearly applies to a third-party arm's length merger deal, so should it apply to this transaction, because minority stockholders in both situations benefit from exactly

the same protections: negotiation of the deal by independent, disinterested, effective, and active bargaining agents, one; and the opportunity on a fully informed basis to accept or reject the product of their agents' bargaining process in a shareholder vote. That, of course, is the issue that has far-reaching implications for our corporate law.

THE COURT: You -- you concede, right, that there's one -- there's still one remaining, I suppose, distinction between this, sort of, transaction and a situation where there isn't anything like control, which is that when it's a third-party deal where the voting power of management or any block holder is -- let's just pick a safe number -- under 15 to 20 percent, for example, that one of the -- the tools that the board has available to it to make sure that it's getting an optimal deal is the ability to benchmark it against other sales transactions; that that factor is not present in a circumstance like this, because to the extent that MacAndrews & Forbes and Mr. Perelman made clear that they were not sellers, you don't have the same sort of market check. They might have the ability to say no to this transaction and to stop it in the tracks, but they

don't have the ability to shop it against other deals.

MR. ALLINGHAM: Yes. It's a -- it's a valid point, Your Honor. The -- and it's -- Your Honor has the facts correct.

The announcement from the beginning was that MacAndrews was not a seller.

THE COURT: Right.

MR. ALLINGHAM: That has some practical implications, i.e., that it is unlikely -- the special committee, for example, is not required to do a vein act. So to -- to -- to go out and actively shop is, sort of, not a very meaningful exercise.

On the other hand, that does not mean that the advisors to the special committee didn't examine, as -- as an analytical exercise, the availability -- the -- the values that might have been created in such a transaction.

THE COURT: No; I understand that. It's just that parties don't do futile acts. For example, strategic -- you know, there are implications, as you know, from representing buyers in transactions, to expressing your interest in a situation, because if you express your interest in -- for example, in a synergistic deal, it may not be the

only synergistic deal that the market has in mind --

MR. ALLINGHAM: Certainly true.

THE COURT: -- and one in which you then are the baitfish rather than the predator fish could occur to people. And so people -- the willingness of people to engage in search costs or even -- private equity, rather, to engage in search costs, if there is not a likelihood of acceptance, is diminished.

MR. ALLINGHAM: Yes.

THE COURT: And so somebody could make petro dollars -- Sovereign Wealth could make Mr. Perelman an offer they -- that he couldn't refuse because some sheik, rather than buying an English premier league team or a modeling agency, decides he wants to process checks for Bank of America; right?

MR. ALLINGHAM: A plausible scenario.

THE COURT: Right. "Whatever the intrinsic value of this is in the minds of the people who wrote Van Gorkum, double it and we'll take this off your hands." That could have happened; right?

MR. ALLINGHAM: Well, it --

THE COURT: What I'm getting at here is when we're looking at the dynamic, the legal

change, right, you're talking about, so the policy issue is on the table, invoking the business judgment rule in essentially a binary process where there's two choices essentially: do a merger with the controller or remain independent; and that if the committee is given the ability to, effectively, say no -- and, frankly, not only the committee to say no, but even if the committee says yes, then the stockholders, independent stockholders, have also the ability to say no for themselves --

MR. ALLINGHAM: Right.

THE COURT: -- then our law should recognize that and give that business judgment rule protection. Right?

MR. ALLINGHAM: That's exactly my point, yes.

THE COURT: And we're not looking at a Revlon market -- turning everything into a Revlon thing, because then you're talking about controllers basically saying they have to be willing to sell.

MR. ALLINGHAM: That's correct. And I -- and I view Revlon as changing the calculus of directors' calculation of value. That is to say, in a decision to sell the company, we are -- we are -- we

are now looking at the highest price, not any number of other considerations.

THE COURT: I mean, the directors in this situation should be looking for the highest price they can get; right?

MR. ALLINGHAM: That's correct.

THE COURT: Well, why is this option open to me? Your friends are going to tell me -- they're going to cite four or five cases. They're going to say when there's a controlling stockholder transaction, the entire fairness standard applies. And they're going to be right about that literal quotation; right? We're not going to be able to argue -- you're not going to be able to argue with them about that. They're actually going to be able to cite something that says that, and it will actually have the four-letter word that starts with H and ends with D; right? Hold; right?

MR. ALLINGHAM: Yes. My friends do argue that Kahn v Lynch imposes a bright-line test. If it's a controller transaction, then entire fairness, period, end of story.

THE COURT: And there are cases that parrot that statement; right?

MR. ALLINGHAM: Most recently in Southern Peru in the Supreme Court.

I -- I would say, however, Your Honor, that I disagree -- and with respect, I disagree with some statements to this effect in the Cox opinion. I don't think either that, in -- in addressing that argument in Kahn v Lynch, the argument that was being addressed was one that presents these facts. And that's important -- let me just pause.

That it did not present these facts is very important, because if you have only one procedural protection or the other procedural protection and not both acting in tandem, you have not sealed off the potential exercise of influence by the controller on the terms of the transaction or the vote to approve the transaction.

THE COURT: Because I -- I take it one of your points there is -- about Lynch is that when they're talking about the committee's ability to say no, it was the threat to -- to use the tender offer route --

MR. ALLINGHAM: Well, sure.

THE COURT: -- and bypass the committee. So as a factual matter, without having

both of them up-front, that -- that neither is as -- neither works as well without the other because --

MR. ALLINGHAM: That --

THE COURT: -- because if you have the nonwaivable majority-of-the-minority condition, then the controller can't say to the special committee "If you say no to me, I'm just going to run to the stockholders because" -- or you have the commitment that you won't do a deal without the special committee's approval, you can't run to the stockholders with a tender offer.

MR. ALLINGHAM: That's exactly right. And, in fact, our friends concede that in their brief. They say it's -- it's -- it's definitional, almost, that the two acting in tandem are better than one. I think that's important doctrinally when looking at the Kahn v Lynch case because otherwise you have not, in effect, sealed off all windows and doors --

THE COURT: Well --

MR. ALLINGHAM: -- of control.

THE COURT: -- I take it what you're also saying is, pragmatically speaking, it's part of why no one has been able to present the case -- and I think this is where Cox and others -- people read

it that way. People look at it, and they say there's a statement that says this applies. Then it says you can do one of these -- if one or the other of these things will give you this burden shift. If you're not sure that you're going to get any benefit for doing both, why would you do both? And, therefore, no one does -- no one did both until your client did both. Is that --

MR. ALLINGHAM: I -- I can't say that no one ever did both. It certainly --

THE COURT: It was the way they did --

MR. ALLINGHAM: There's no opinion that presents those facts.

THE COURT: But the way they did both wasn't a commonly the-train-is-leaving-the-station. There's the call from the special committee that's gotten happy to the --

MR. ALLINGHAM: Yes.

THE COURT: -- plaintiffs' lawyer and they say, "We've gotten to a price with the thing, plus we've added the majority of the minority." And so the majority of the minority gets added, tacked onto the situation as part of the agreed upon --

MR. ALLINGHAM: Yes --

THE COURT: -- terms --

MR. ALLINGHAM: -- not announced from inception, which is what -- which is what makes it effective.

THE COURT: Right. And in a weird way, they got the business judgment -- they got something better than the business judgment rule, because they got -- actually at the same time that the special committee got happy, the plaintiffs' lawyers got happy, and there was a negotiated settlement. And so --

MR. ALLINGHAM: Yes. The only thing better than the business judgment rule is a release, Your Honor.

(Laughter)

MR. ALLINGHAM: Let me come back to Your Honor's question, though. My friends do say "It's a bright-line rule and you're bound." And I -- I take this Court's insistence on deference to controlling authority.

What I would say is that in our reading, Kahn v Lynch is not controlling authority on these facts. We know for a fact that this argument was not presented to Kahn v Lynch. We, therefore,

should take it as true that Kahn v Lynch, in whatever language it wrote -- it wrote, the Court wrote --

THE COURT: Right.

MR. ALLINGHAM: -- was not intending to reject this argument, which was not presented to it. And then I would say, Your Honor -- Your Honor, there is other language in Lynch that suggests that the Court understood what it was doing and what it was not doing.

So -- this is also well-known language, Your Honor. The Court said, shortly after the -- the bright-line rule, the -- the exclusive standard -- we reaffirm the exclusive standard -- this language: "Nevertheless, even when an interested cash-out merger transaction receives the informed approval of a majority of [the] minority stockholders or" -- not "and"; "or" -- "an independent committee of disinterested directors, an entire fairness analysis is the only proper standard of review."

Now, as I said, the language doesn't say when an interested cash-out transaction receives the approval of a majority of the minority and a committee, which is what it would say, presumably, if the Court was speaking to these facts.

So our view -- and we urge the Court to find -- that Lynch includes no holding as to the standard of review for -- for a controller transaction that includes both protections. And doctrinally, again, Your Honor, there's a reason for that. One or the other does not seal off the controller. Both does.

THE COURT: And how -- how about Tremont and Emerald Partners and Southern Peru or American Mining or whatever it's called?

MR. ALLINGHAM: None presents these facts. Tremont --

THE COURT: Is it just, again, the same situation where the Court cites that but isn't presented with the question?

MR. ALLINGHAM: Yes. In my view, in fact, you can reach back even farther than Kahn to -- to then-Vice Chancellor Jacobs' opinion cited in Kahn. I think in each case the Court was citing to language that did not address my particular fact situation. And the, you know, sort of, exclusivity of the standard of review just persists without reference to the particular facts of the case.

THE COURT: Because the Supreme Court

has never had a chance to actually be asked it. And to the extent that the market perceived it as uncertain, controllers had no incentive to actually provide both protections to stockholders up-front.

MR. ALLINGHAM: That's exactly true. And, in fact, just -- just to -- to finish the point, the -- the alternative language -- the -- the other language that I quoted to you, which is stated in the alternative, is not a mistake, in my view. It's repeated in Southern Peru word for word. So, again, Southern Peru, which presented only one of those protections, states the rule in the alternative.

THE COURT: Right. So, like, if you said to your child, "You can go to the movies if you do your math or your English homework," very few adolescent children are going to do both --

MR. ALLINGHAM: Both.

THE COURT: -- right? Or they're going to be the ones that every other kid hates; right? "I do both."

(Laughter)

MR. ALLINGHAM: "I'm swell."

So that's the first point I want to talk about. And I'll try to -- try to modify what I

was going say to take into account what we've already discussed.

The second issue I want to turn to, which I think has important implications for challenges in this Court to controller transactions and more generally to challenges in this Court to any -- any M&A transactions, deals with the difference -- and it's a fundamental difference, Your Honor -- between pleadings-based motions to dismiss, on the one hand, and evidentiary-based motions for summary judgment on the other. And that, in turn, implicates what I think is a critical point in this Court: the point at which plaintiffs actually have to begin litigating and proving their claims.

This is a motion for summary judgment under Rule 56. That rule imposes obligations on me as the moving party, and it imposes obligations on the nonmoving party as well. What this Court is presented with today is an utter failure of the plaintiffs, the nonmovants, to do what Rule 56 requires; that is, to present evidence of specific facts showing that there's a genuine issue of fact for trial on matters on which I bear the burden, one; and, two -- and what is really important today -- to present evidence of

specific -- specific facts showing that they can carry their burden on issues on which they carry the burden.

This is not an obligation that's satisfied by a reference to the nonmovants' own pleadings. This is not a Rule 12 motion to dismiss. Evidence of specific facts are required, not merely a promise to present some evidence down the road, not merely a promise that additional discovery is required in order to carry those burdens. Evidence of specific facts now is required --

THE COURT: Well, is the big gap --

MR. ALLINGHAM: -- under Rule 56.

THE COURT: -- in your view, the absence of a -- of an expert report from them on the underlying fairness of the price that was paid?

MR. ALLINGHAM: That's certainly true with respect to the price, but there are many other issues and arguments presented, none of which is -- is -- is supported by evidence, placed in the context of the legal framework that this Court has to apply to these issues.

And on the issue of an expert report --

THE COURT: I mean, do you have an

expert report or you just have the opinion of Evercore?

MR. ALLINGHAM: I have the opinion of Evercore. But the opinion of Evercore in Tanzer and other cases even applies --

THE COURT: Oh, no, no, no. I'm not --

MR. ALLINGHAM: -- entire fairness, a prima facie showing of fairness.

THE COURT: That was the special committee's advisors.

MR. ALLINGHAM: It's not telling tales out of school, Your Honor, for me to say that, however, I have an expert. It is not telling tales out of school to suggest that the plaintiffs probably have an expert. And it's certainly true that these lawyers have the ability, because they do it frequently at the PI stage, to present financial expert affidavits on fairness. They're capable of it. They just in this case chose not to do it. And that's okay at a PI hearing, if that's what they want to do. That's okay on a motion to dismiss at the pleading stage, if that's what they want to do. It is not okay under Rule 56 to do it at the evidentiary summary

judgment stage.

And the consequences of failing to make that showing are stark in the rule. "If the adverse party does not ... respond [to a prima facie showing], summary judgment ... shall be entered against the adverse party."

So although we view the question of the appropriate standard of review as -- as an important issue for our corporate law and we view that as an issue under which this Court can and should grant summary judgment, it is not necessary for this Court to determine to apply the business judgment rule in order for summary judgment to be granted here. It can be granted under either of the standard of reviews --

THE COURT: But --

MR. ALLINGHAM: -- possible.

THE COURT: -- your friends would say that -- they would say that -- they would point to the following evidence: that MacAndrews & Forbes timed the offer opportunistically to deal with the market lull so that when they made their offer, it was at a substantial premium to market, but it was timed at a time when the stock price was well below the yearly

high; that the projections that the committee used were overly conservative, which was proved by the fact that the company within a calendar year after the deal closed had substantially outperformed the projections on which the deal was priced.

And I know you have a response to, in terms of the factual relevance of this, but this impairment analysis, which they say, suggests casts doubt on it; and they obviously criticize some of the multiples used by Evercore and suggest that there's some minor tweaking of the multiple, that the value range used by the financial committee could have -- would have materially changed; and that, taken together, that raises a triable issue of fact around the fundamental issue of financial fairness.

MR. ALLINGHAM: So I have a -- sort of an overarching response to that, and then I have responses to each of those points.

The overarching response is their burden is not to show a triable issue on that fact. The burden is on the plaintiffs now to show the unfairness of this transaction. And they have to do that by evidence.

Now, with respect to the points that

Your Honor has made, as to what Your Honor calls the market lull, it's true. The stock was down. It's also true --

THE COURT: Was the entire market down? Or was it just --

MR. ALLINGHAM: I -- I --

THE COURT: -- this business?

MR. ALLINGHAM: I'm sure we can answer that question for Your Honor, but I can't, off the top of my head, remember.

I think -- I think we would then get into issues was the market down in particular sectors. I'm not sure that it's -- that it's an important -- I don't think the market was moving dramatically in that period, but we can find the answer.

The real point is it is -- it is uncontested that the price of the stock was down. It's also uncontested that the performance of the company was down. And this is not temporary -- a temporary problem. The critical business of this company, the core business, is check printing. Check printing is a business that is threatened -- and nobody disputes this, not even the plaintiffs -- is threatened by all manner of electronic forms of

payment which obviate the need for checks altogether and by -- by the electronic data processing of checks, which obviates the need for printing checks. This is a -- what we used to call in law school, a wasting asset. This is not a business --

THE COURT: No, no. I understand. And there's all this testimony about why Mr. Perelman, in particular, likes to buy nearly dead things.

(Laughter)

THE COURT: It's not -- not quite as grim as those insurance policy things where they -- you know, like -- like, they kill -- like, they gave you, like, a million dollars that did really well for three years, but you're going to die on the first day --

MR. ALLINGHAM: Your Honor, there -- there are opinions in this Court that talk about Mr. Perelman's ability to see some value in mature businesses. That's entirely true. This is a business in which the performance of the core business was clearly deteriorating. We had information during the pendency of this offer that the largest customer by far was, for the first time, going to put its business out to bid, which meant that even if we could retain

that volume, it was going to be under price pressure. And that's what happened.

THE COURT: No. No. I -- one of the oddments you always have to deal with in this context, right, is you always have a situation where the defendant is coming in to buy something. And the defendant, therefore, in this context always has an incentive to call it stinky in the non-French cheese sense, just stinky, which raises the question of, you know, is it an act of charity or is it perhaps not as stinky as they're making out.

MR. ALLINGHAM: And so in terms of the incentives to buy or sell, I understand what Your Honor is saying. And clearly there are always differences of opinion between buyers and sellers; else, there would not be a transaction.

THE COURT: Well -- and that's why you get to where -- I thought the key -- and this is where I think the doctrinal difference may make a difference, which is if you're actually down into the -- the dough of it, right, of fairness, it's really pretty hard to miss -- it's really pretty hard to avoid trial, because when you're debating about it, there are debate -- there's a debate about the future

of the industry, about this or that.

And isn't part of what the doctrinal debate about is if, frankly, you get the benefit of an independent bargaining committee who has the ability to say no? Well, they can say, no and they've negotiated for you. And even more, if you're a mature adult, stockholder, if you don't like what the committee did and you really think the check business is going to go wild, you simply vote no. It's not like a tender decision. It's a vote on a merger. And if you vote no and everybody else votes yes and you don't want to seek appraisal, then you can still take the deal. So it's a totally free vote. You don't have to vote yes.

I think that's where the rub is for me, because I think -- as I read the spirit of the fairness cases, it's not that easy for the Court to, simply on a facial level, say that something is clearly fair; right? By fair, we don't mean if the range of something was 19 to 32. If you got $19.10, I don't think, if you read Weinberger, you could simply say that's fair; right?

MR. ALLINGHAM: Sorry.

THE COURT: Well, could you? if you

just simply knew there were some raw fairness range and it was $19 to 31 and the committee got 19.10.

MR. ALLINGHAM: I think --

THE COURT: Is that what Weinberger says is fair?

MR. ALLINGHAM: I think there are circumstances in which I would argue that Weinberger would permit a finding of fairness in that circumstance. I think it's fact specific to the particular deal.

THE COURT: Right. But that's what I'm saying, which is I think it's one of these situations where you could easily come out in a case where you say "If I had to do an appraisal, I would say this is 31.50. They got 29.75. It's an entire fairness case. 29.75 is entirely fair."

But it's this process and price test. If you look into effect -- and, frankly, the 29.75 was validated by the market because it was informed by a majority-of-the-minority vote. There had been negotiations. There were dynamics this way, and you're just one court trying to guess, you'd say that's fair.

But I think there can be a

circumstance where somebody said "Look, it's within the range of fairness." You didn't see any evidence of negotiation. There was no negotiation of the majority-of-the-minority vote. Might have been in some bare range of fairness. But is that really what an arm's length deal, right -- because part of what you're trying to do is, how would an arm's length negotiation come out; right?

MR. ALLINGHAM: Yes.

THE COURT: That doesn't mean it necessarily comes out at the bottom of a fairness range.

MR. ALLINGHAM: It's true it does not necessarily mean that.

THE COURT: Right. I mean, a market test would not necessarily suggest that it comes out that the winner of the negotiation always -- you know, that the winner is always the buyer who paid at the low end of the valuation range. And what I'm saying is complex. When I get -- you're -- you're really saying if they had a financial advisor who came in and said that this deal was mispriced, they would meet their burden under Rule 56.

MR. ALLINGHAM: Uh-huh.

THE COURT: But by pointing to -- and I admit they point to some of their complaint; but they also point to things in the record, you know, the stuff about the projections or the performance. That stuff's in the record; right?

MR. ALLINGHAM: The -- the projections are in the record, correct.

THE COURT: How about the stuff about the performance of the company afterwards? Isn't that in the record?

MR. ALLINGHAM: It's in the record. It's in the first quarter 10-Q. It is, however -- let me take that as an example, Your Honor, of the difficulty with the discovery evidence that was developed by the plaintiffs.

So there was -- there was extensive discovery before the preliminary injunction hearing. We moved heaven and earth to do what we had to do to make the production, barrelling toward a PI hearing, which days before the hearing plaintiffs abandoned. Six months went by. The plaintiffs filed a document request. We filed a motion for summary judgment. The plaintiffs demanded extensive discovery. One of the things that they asked for -- and -- and we

essentially agreed to give them all that discovery with a single exception. I said, "Look, Mr. Perelman has no knowledge about the issues presented on the summary judgment." And they said -- they made no objection to that. We gave them everything else. We gave them the Perelman deposition.

THE COURT: Did that ultimately ever happen?

MR. ALLINGHAM: Did what happen?

THE COURT: Did everybody enjoy their turkey in France or -- you know, just as a human, I bled for the --

MR. ALLINGHAM: Different case, Your Honor.

THE COURT: Oh, that's a different case, okay.

MR. ALLINGHAM: So one of the issues --

THE COURT: They all bleed together.

MR. ALLINGHAM: One of the issues that the plaintiffs specifically asked about was the new set of projections. And -- and I think it's conceivable they asked about it because they knew that the new -- new company had new businesses in it, among

other things. And so you can't just take those projections at face value. You have to look at what -- what goes into it. And they said, "We want to depose someone who can tell us about these projections." That sounds like a good idea to me. We said, "We can't object to that." So we produced a fellow named Pete Fera, and we all trooped down to San Antonio right after Labor Day. And the plaintiffs took the deposition of Mr. Fera. And the plaintiffs asked not a single question about the new projections, not one.

Now, this is all of a piece, Your Honor -- and I said this in our brief --

THE COURT: By "the new projections" you mean the one -- the ones that were developed for use by the committee or --

MR. ALLINGHAM: No, no. This is a new set of projections in --

THE COURT: The subsequent year.

MR. ALLINGHAM: Yes, the subsequent-year projections, okay, which were responsive to the -- to the first-quarter results that were better than had previously been projected, partly as a result of acquisitions.

So that curious decision not to ask a single question about a fact that they were going to then present to Your Honor just as a bald fact is -- is all of a piece with what appears to be the discovery strategy in this case.

THE COURT: Because they thought it would be attractive to you.

MR. ALLINGHAM: So -- so all the piece was a strategy in this case, what seems to be, anyway. So they deposed all of the special committee members, and they develop facts that relate to -- that show that the special committee members were not complete strangers to Mr. Perelman. Not surprising. Clearly, not, as a matter of law, a problem. But it's -- it's some connection of some kind.

So, for example, Mr. Webb used to be an equity partner with Mr. Perelman in a bunch of enterprises that made a lot of money for both of them. It's a fact. It means they're not strangers.

What they didn't do was to ask a single question about the legal construct that matters here, which is materiality. So I can -- I can say to Your Honor in my brief, "I think Mr. Webb is a very rich man. I think Mr. Webb is a person who was

standing alongside Gerald Ford and Ronald Perelman in the construction of these banking enterprises" --

THE COURT: This is a different Gerald Ford; right?

MR. ALLINGHAM: It's a different Gerald Ford. "And I think" -- "Tom Allingham thinks that this is really not" --

THE COURT: Because if you were standing next to Gerald Ford now --

(Laughter)

THE COURT: I mean, he was --

MR. ALLINGHAM: A return --

THE COURT: -- a really decent guy.

MR. ALLINGHAM: A return of the vertigo.

THE COURT: We lost him, unfortunately. So we'd really be in a very different realm.

MR. ALLINGHAM: But I, Tom Allingham, might say "That's not a relationship that causes Mr. Webb to be so beholden to Mr. Perelman, and he'll abandon his fiduciary duties and just do whatever Mr. Perelman wants."

THE COURT: No. And I was focused

more -- because I think the financial fairness issue is a very difficult one and part of why, again, the policy decision about which standard of review is a very important one.

MR. ALLINGHAM: I -- I --

THE COURT: Because I think a litigable -- again, as I read the spirit of entire fairness review, you have to look at both the process and price. You're not allowed to just look at one. Obviously the price is usually the most ponent thing, but you look at the process as well. That things that go to the process or go to questions about it go to value.

I mean, I -- for example, I think an effective plaintiffs' lawyer, if you -- if you actually at trial were able to pick apart the financial analysis undergirding the deal, you wouldn't necessarily need your own expert; right?

MR. ALLINGHAM: That's true, Your Honor, but you would need some evidence to support your picking apart. That is, it's not enough to say --

THE COURT: Oh, I agree with that.

MR. ALLINGHAM: It's not enough for me

to say "Oh, I think that the terminal value multiple is wrong. And although I'm not going to show you my math, I think that if you change the terminal value multiple to something I think is right," I, Tom Allingham, then you get numbers that are, you know, 50 percent larger.

THE COURT: No. For example, what they do with Evercore is say "If you look at the component parts of the business if you're doing a DCF and you're looking at the exit multiple, you got to look at the" -- "the contributing factors as of the time you're doing your," you know, "valuation." I think they're talking about the terminal date.

MR. ALLINGHAM: Uh-huh.

THE COURT: And they're saying "Look, the components of this are changing. They didn't give appropriate weight to that changing. And if you use just a moderately higher exit multiple, the fairness range moves in a very significant way, which casts doubt on the fairness of the deal."

MR. ALLINGHAM: Yes. So in -- if Your Honor is offering that as an example --

THE COURT: Well, I think that is one of the points that they make.

MR. ALLINGHAM: So that -- that's a point. That point is supported by citation to the complaint and to nothing -- to nothing else. The calculations are not replicated anywhere. They are just stated as an attorney's ipse dixit. You can present --

THE COURT: What exactly is an attorney's ipse dixit?

MR. ALLINGHAM: It is to say the thing. So it's just to say the thing. I just say it; right?

So -- so at -- that's fine on a motion to dismiss. On a Rule 56 summary judgment motion, we --

THE COURT: They don't even cite to the Evercore report for the underlying data.

MR. ALLINGHAM: Just for the facts, but they don't challenge Evercore's independence or expertise.

THE COURT: No, no. I think what they're -- what I'm saying is, is it true that you can calculate from the evidence that they cite to? I thought their point was when you look at the terminal value year, that a much higher percentage of the

overall earning of the company was one of the businesses. When you looked at the multiples for that business, they were significantly higher than the multiples used by Evercore. Evercore did not adjust for the changes in contribution; and that if they had simply moved the exit multiple by .5 percent, then the fairness range would move. And they do that, I thought, by citation to actual parts of the Evercore report.

MR. ALLINGHAM: So let me -- let me -- let me respond to that.

It is true that an argument is made that the terminal value multiple derived from comparable companies based on their performance in 2012 is challenged by the plaintiffs. It is true that the challenge that they make is to say "Okay. I observe" -- I did, by the way, ask Gus Christensen of Evercore about this, another example of a willful -- apparently willful decision not to ask any questions that might have developed some evidence on the points that they are going to advance as attorneys' ipse dixit. Sorry for using it again. I didn't ask Mr. Christensen about this.

But the argument is "Evercore did what

Evercore always does in a circumstance where there are multiple businesses in a company. They say, 'I'm going to identify comparable companies. I'm going to extract trading multiples based on 2012 trading prices for those comparable companies. I am going to apply those business unit terminal'" -- sorry; "'those business unit trading multiples to each business unit of MFW, and I'm going to derive a single terminal value multiple for MFW for application in 2015 cash flows by weighting those individual business unit comparable company derived trading multiples as a one'" -- "'a global terminal value multiple,'" okay?

THE COURT: Uh-huh.

MR. ALLINGHAM: Now, there are a lot of ways you could do that. One way is the way that Evercore did it, which is the way they always do it, which is to weight it based on a thing that we know, the 2012 EBITDA contributions of each individual business unit. It is quite true that another way you could do it is to weight it in 2013 or '14 or 2015. And the plaintiffs say, "You should have done it based on the not knowable about projected business unit contributions in 2015 because you're trying to derive a multiple for 2015 cash flows."

THE COURT: Well -- and I think what they're saying there is that -- and this gets to whether it's evidence. And this gets -- this gets at whether the Rule 56 standard, which is not what I'm ultimately persuaded of now, right. But if what they're saying is in 2015 you're doing a DCF on your terminal value based on cash flows of that terminal year. You've weighted them, which is by virtue of the accepting the projections, you have, in fact, made a decision about what percentage contribution would be made by each of the businesses.

MR. ALLINGHAM: I don't know --

THE COURT: So why aren't you aligning your judgment as to the projections, or is this some sort of hedge?

And I guess where I'm down into the weeds about this stuff is, I get your point if they were just citing to their complaint. What I'm a little confused about -- and believe me, I'm no, you know -- I can -- the judges of this Court are more willing victims of appraisals than, you know, enthusiastic participants in them. I mean, it's some sort of exercise of, like, the judicial -- because the lull -- nobody wants -- no one is better able to

appraise a company than a law-trained judge faced with two experts who are entirely divorced from any academic or, you know, kind of principle who come in and apply the same accepted methodologies and come out an 80 percent value difference.

So I -- I don't really hunger to get into this stuff. But what I'm trying to get at is your friends have that point, which you say is a debatable point; right? I get that. That's the question, is in entire fairness --

MR. ALLINGHAM: Before we leave that point, Your Honor, let me just say the real question, I think, on that point is not whether you should pick this alternative approach or that alternative approach. It's, in the context of an overall valuation, which is the only valuation in the record, is that a reasonable -- reasonable approach to take? And -- and --

THE COURT: But, see, that's where it also bleeds into the role of the financial advisor as not simply giving a fairness opinion but also as a negotiator and whether they should have been using these things to push back. And don't they also make the point -- was it -- this was a comparable companies

analysis?

MR. ALLINGHAM: There is a comparable companies analysis, yes.

THE COURT: Was there a comparable transactions analysis?

MR. ALLINGHAM: Yes.

THE COURT: Okay.

MR. ALLINGHAM: And in both of those cases they're just flat wrong. This is not even a debatable point. In the comparable companies analysis they just arbitrarily say, announce that in a comparable companies analysis you have to add control premiums to the comparable companies, okay?

Now, there are circumstances in which you do add control premiums to a comparable company analysis. Those circumstances do not -- this is just Tom Allingham talking, which is just as good as Carl Stine talking -- but do not include controller transactions where control has already passed. So that the remaining minority stockholders hold exactly the same kind of economic interest as a single -- a single stockholder trading on the Exchange.

THE COURT: Well, that's an interesting question, because that's not actually a

purely financial question. It's one in which legal policy itself actually plays as much a role as any anything else. I mean, you know, you get into all these debates about -- I don't think that there's, really, any evidence that solvent companies -- and I use the term "solvent." I mean, healthy, profitable companies, that it can actually test the market, sell at a premium as an entire company typically to minority trades in their stock, which I don't really understand and I don't know why some law professors get confused by it. It presents no corporate finance problem at all, because buying an entire company is very different than buying a thousand shares. You're getting something very different. It has additional risks, but it has additional benefits. But you're not buying the same thing.

What you're saying, the problem with saying in a situation where there's a controller, that obviously you know there's control. And so when you're assessing what a fair price should be, you should accept your fate that you bought a stock in the controlled enterprise. The problem with that is the intersection of appraisal value and our law; right?

MR. ALLINGHAM: I agree with that.

THE COURT: Right. What you would be implying there is actually the standard of fair value is different than the standard that would apply in appraisal.

MR. ALLINGHAM: What I'm really saying, Your Honor, is that --

THE COURT: Well, right, because in an appraisal, you would have to make sure that there's not a minority discount.

MR. ALLINGHAM: That's correct. That's our law. I understand that.

But -- but what we have here is an announcement by an attorney citing to his complaint that, in a controller transaction, even in a controller transaction, we have to add a control premium to the comparable companies analysis prepared by Evercore. Now, Evercore clearly didn't think so.

THE COURT: Oh, no, no. I get that. And that's why I asked -- there's a different comparable transactions analysis; right?

MR. ALLINGHAM: Yes. And I can speak to that in a minute, but just --

THE COURT: Well -- and that would be an analysis that would presumably take into account

the value at which entire companies were purchased in the marketplace and, therefore --

MR. ALLINGHAM: It --

THE COURT: -- for someone looking for an appraisal-type value, if you're talking about adjusting out minority discounts, that analysis would address that.

MR. ALLINGHAM: It might or it might not, Your Honor. I can imagine -- and, remember, you've got to place this particular transaction on a spectrum of control transactions. So the plaintiffs point out that this transaction is placed at the low end of the spectrum of those control -- of those comparable transactions. They didn't ask Mr. Christensen why he placed this transaction there.

I would suggest to Your Honor -- and, again, it's just as good as Mr. Stine or Mr. Monteverde's opinion. I would suggest to Your Honor that in that universe of whatever it was, 50 or 80 transactions, there was not a single controller transaction in there. So it might be that you would say -- but we don't know because they didn't ask Mr. Christensen. And it's their burden to develop this record.

THE COURT: Isn't this notion of a controller transaction inconsistent with the test of fairness itself?

MR. ALLINGHAM: I'm not sure I understand, Your Honor.

THE COURT: If the idea under entire fairness is that an asset will pass at essentially the same price as it was the product of arm's length bargaining --

MR. ALLINGHAM: Uh-huh.

THE COURT: -- isn't that inconsistent with a controller overlay?

MR. ALLINGHAM: I don't think so, but I think we're now talking about intersections of law and corporate finance.

THE COURT: Oh, no, no. I get that. But that's important, because the problem is when you talk about -- like, when we do an appraisal, we don't appraise the value of a company in some Brealey and Myers way. We appraise the company in a jurisprudentially defined way that our Supreme Court has defined. That's why, when I do appraisals, it makes my head hurt because I'm supposed to, A, adjust for the -- make sure there's no minority discount but

then value the company as a going concern, which means you've got to adjust away for any minority discount, but then have to try to identify if there's something -- synergistic value in the marketplace when people buy and sell companies, and you have to take that out.

MR. ALLINGHAM: I --

THE COURT: People in the real world don't have to, you know, do that. But in the world of 262, we do.

MR. ALLINGHAM: But let me circle back to the -- I think the -- the fundamental question Your Honor is asking.

So we could go to trial and we could examine the question of fair price and fair process at trial. We could do that. I take Your Honor's point -- and I agree with it -- that we have this process here. These two procedural protections would be powerful evidence of fairness. I take that point, too.

What I'm saying is -- is a little bit different. What I'm saying is that there can be no question that the burden has shifted to the plaintiffs to prove unfairness in this case. I say that because we have an uncontested majority-of-the-minority vote

here, and Southern Peru --

THE COURT: But the burden is to prove it, but it's not -- it's to introduce now, to point to admissible evidence that, you know, taken in its entirety and construed -- has to be construed, obviously, in a -- I guess there are all kinds of philosophical debates about rational or reasonable that I don't want to -- with my head cold, I can't even begin to approach; but either -- at least let's say it has to be a rational reading of that evidence that the plaintiffs have pointed to, if accepted, would persuade the tribunal that the deal was unfair; right?

MR. ALLINGHAM: Yes.

THE COURT: And I think what your friends say is too low terminal multiple, when -- just looking a consistent analysis of what Evercore accepted, which is the relative case with cash flows of the businesses as of the terminal value, if you just adjust for that and they all point to the specific evidence, it would suggest that the deal was unfair. Even excluding the new businesses that were purchased by -- is it the check business?

MR. ALLINGHAM: Yes.

THE COURT: Yeah. That even --

MR. ALLINGHAM: I'm sorry, no. It's a call center business.

THE COURT: The call center business. Even if you exclude those, within six months there's substantially overperformance, casting doubt on the conservatism of the original projections. Then they would put into the account, again -- they would say "Look at this stress test on impairment, which suggests a much more robust valuation of the same assets. And, Judge, you might not believe us after trial; but we at least get to go to trial and get our shot at convincing you that this is unfair."

MR. ALLINGHAM: And my response -- and I won't beat a dead horse, Your Honor -- is Rule 56 contemplates that, particularly in a situation where the plaintiffs bear the burden. They can go and take additional discovery. They can make their showing by affidavit. They have to make their showing by evidence. We have a situation here where there was comprehensive discovery. Everything they asked for they got.

What they have now presented to Your Honor -- let me just talk about -- because remember

the scintilla of evidence issue on summary judgment. It doesn't take just a scintilla. You can't just say "Well, I got one," right? Or "I got two." It has to be substantial evidence that would support the thing on which they bear the burden.

So what we have is a comprehensive valuation analysis from Evercore Partners, whom they have not even bothered to challenge the independence or expertise of. Okay, so there's no question here that -- that Evercore was, you know, hiding the ball.

THE COURT: They deposed Evercore?

MR. ALLINGHAM: They deposed Evercore. And it's important that in deposing Evercore, they didn't ask Gus Christensen about any of the points that they now make. And -- and with respect to the overperformance question, they didn't ask Mr. Fera down in San Antonio any questions about this point. It's as if -- and -- and with respect to the independence of the directors. They didn't ask any questions about the materiality of it. It's as if they thought to themselves, thinking about the pleading-stage type motion, "If I don't ask these questions, I won't get a bad answer. If I don't ask these questions, I won't get a bad answer."

So they didn't ask the questions. And so what you now have is, with respect to the terminal value multiple, they have an argument that someone, an unspecified someone, might make a different judgment on this relatively small point than Evercore did. They didn't ask Gus Christensen why he made that judgment. So that's Point No. 1.

Point No. 2, what is the result of the change -- the proposed change in that terminal value multiple? Or said differently -- let's make it two stages, Your Honor. They say that causes half-a-turn increase in terminal value multiple. How do I know that? It's just in their -- they just cite to their complaint.

THE COURT: You can't figure it out from the --

MR. ALLINGHAM: I can't figure it out. In fact, I will tell, Your Honor, when I make the calculation that I think they're trying to make, I come out with a lower turn, not lower than Evercore's, but lower than they've suggested. I can't replicate it. And that illustrates the point.

How do we know? There's no -- there's no evidence that's what happens if you do that.

There's no evidence that it is better to make the judgment that they propose than Mr. Christensen's judgment. They didn't ask Mr. Christensen why he made that judgment.

And fundamentally, Your Honor, let's just accept the half-a-turn increase. There's no evidence in the record to suggest the massive increases in value that they say flows from that. And it's not my job --

THE COURT: It doesn't flow from math?

MR. ALLINGHAM: A, it's not my job to -- to do terminal value calculations. And I don't have a spreadsheet --

THE COURT: I know, but you --

MR. ALLINGHAM: -- and my computer doesn't do it.

THE COURT: But we all know that you love it.

(Laughter)

MR. ALLINGHAM: But, two, we have a construct here. Rule 56 requires evidence. No one can tell.

THE COURT: Okay. If I can do the math, if Strine can do the math, is that in the

record? I mean, it's -- it's the movement from 5 to 5.5. I mean, it's a range; right? You never did the -- what you're saying, they needed to do the actual math?

MR. ALLINGHAM: It is their burden, and they need to put in the evidence of math. It could be "I have expertise in this area. I've done the calculations, and the result is this." It cannot be "Here's my brief."

THE COURT: Do they cite the analysis of Evercore, though?

MR. ALLINGHAM: Not for this -- not for the impact on the price. They cite -- it's on page 29 of their brief. They cite complaint Nos. -- paragraph 79 and complaint paragraph 80 on the way Evercore calculated its terminal value. They do cite Evercore. But for the conclusions they draw on which they rely for the notion that there is a disputed issue of fact on fairness, they cite to their complaint, and that's it.

And, Your Honor, plaintiffs put in expert affidavits all the time. They're capable of doing that. You know, there's the old principle in Van Gorkum that we get evidence -- where strong

evidence is available, ought to be -- you ought to derive inferences from that. They know how to do this. This is their burden.

With -- with respect -- and so what we have is this unsupported calculation on a terminal value multiple turn of half a turn and an unsupported calculation about its value impact. You have projection -- and -- and, again, they didn't develop the evidence that they could have developed when they had the opportunity to. On the overperformance, they didn't ask a question of Mr. Fera about that. These are -- these are issues on which they bear the burden and where they affirmatively made a decision not to ask.

THE COURT: Do you have anything further at this time, Mr. Allingham?

MR. ALLINGHAM: May I have a minute, Your Honor?

THE COURT: Sure.

MR. ALLINGHAM: We've -- we've strayed from my prepared script.

THE COURT: That's surprising to you, I know.

MR. ALLINGHAM: If I might take a

minute, Your Honor, to talk about the -- the one arguable point that the plaintiffs -- you know what? I'll wait.

I think, Your Honor, that I'll reserve --

THE COURT: Okay.

MR. ALLINGHAM: -- for rebuttal.

THE COURT: Thank you, Mr. Allingham.

We should probably hear from the special committee, and then you can ...

MR. MUNDIYA: Thank you. Good morning, Your Honor.

THE COURT: Good morning.

MR. MUNDIYA: I'll be -- I'll reasonably brief.

There is no genuine issue here that the special committee acted -- it was independent, acted thoroughly, understood its mandate, and did the job that was expected of it throughout the summer of 2000 --

THE COURT: How many meetings did the special committee have?

MR. MUNDIYA: Eight meetings from June through September, Your Honor.

No question that there are independent legal --

THE COURT: They're all in the Hamptons?

MR. MUNDIYA: No, Your Honor. They were -- they were various places, but they met in person and over the phone.

THE COURT: Went from Ina Garten's place to Billy Joel's place to a trashy weekend outing with some fallen former Disney teen idol.

MR. MUNDIYA: They --

THE COURT: A full summer in the Hamptons.

MR. MUNDIYA: There was extensive discussion, Your Honor, over this -- this deal. They understood -- they understood their mandate, independent legal advisors, independent financial advisors.

THE COURT: What about these connections with law firms? I mean, the Bancroft firm, what exactly -- what work had they done for the Perelman-controlled entity?

MR. MUNDIYA: There was some discrete work that the Bancroft law firm did. There was no

specific engagement letter, and the amount of fees was $50,000. So de minimis in 2010, 2011. There was $150,000 that was charged by Bancroft for Scientific Games, which is a Perelman affiliate. Again, discrete work, de minimis. The record is clear it was de minimis. So -- and it was also discussed at the special committee. So --

THE COURT: What year was that?

MR. MUNDIYA: That was 2010, 2011. 2010 --

THE COURT: So a couple hundred thousand fees for the 2010 --

MR. MUNDIYA: Yes. Maybe even going back to 2009 as well, Your Honor. So it was de minimis.

With respect to Ms. Byorum, similarly, 2007, 2008. They did some investment banking work for --

THE COURT: Is it really wise for independent directors to be service providers?

MR. MUNDIYA: Your Honor, it -- it is -- it's not wise as a -- as a policy matter; but Mr. Dinh is a -- is a partner in a law firm. It was -- he has special expertise in some of these

matters. It was discrete advice. It wasn't ongoing -- certainly wasn't ongoing at the time of the deal.

THE COURT: Was he personally working on these matters?

MR. MUNDIYA: I think he was supervising the matters. I think the work was done -- was work done by associates.

THE COURT: He was the billing partner?

MR. MUNDIYA: Yes, Your Honor. Yes, Your Honor. He was -- he was involved.

Let -- let --

THE COURT: Was he ever asked about his total billings for the firm?

MR. MUNDIYA: I think he was -- he was -- he was asked about the billings generally. And I think he said -- he gave -- he gave the number, 50,000 to a hundred thousand.

THE COURT: No. His billings.

MR. MUNDIYA: I don't think he was asked that question, Your Honor.

THE COURT: He wasn't asked?

MR. MUNDIYA: He was asked about the -- the amount of work that Bancroft had done.

THE COURT: Oh, no. I understand. But he wasn't asked personally about, like, you know --

MR. MUNDIYA: "How many hours did you spend on this project?"

THE COURT: No.

MR. MUNDIYA: Sorry.

THE COURT: What his denominator was.

MR. MUNDIYA: No, he was not asked that question, but he did testify it was de minimis. The denominator was not --

THE COURT: Yeah, but you know your denominator; right?

MR. MUNDIYA: Yes, yes, we do.

THE COURT: Or a pretty close range of it; right?

MR. MUNDIYA: No. That's right, Your Honor. But that -- that was -- again --

THE COURT: That's what I'm saying. They chose not --

MR. MUNDIYA: They chose -- that's the point. You know, they chose not to ask that question.

But the -- but the testimony is -- the testimony is that the amount of fees that were charged

were, quote, de minimis, both with respect to Ms. Byorum and with respect to Bancroft.

And if you go back to the summer of --

THE COURT: Yeah. I just observe I think as a matter of, like, when people say things are de minimis, I'm not saying they're not de minimis. If things are immaterial and de minimis -- you know, here's good advice for the world -- stop doing them.

MR. MUNDIYA: Okay.

THE COURT: Because then the cost of legal briefs to argue about them exceed them, but they create question -- I mean, I really -- the question is -- I know the Exchanges have much tighter definitions; but why people would be service providers, you're kind of in one bucket or they're -- you know, we're in a new rung. You're either a service provider or you're the other. And that's where you know you're going to get people -- I'm not saying that's the law, but people come in all the time and say "I did something that was de minimis and immaterial."

MR. MUNDIYA: Right.

THE COURT: Which makes them sound frivolous, which is you think that they're, you know,

again, happy-go-lucky because that day they just happened to do de minimis, immaterial things.

MR. MUNDIYA: Your Honor, understood. And -- and these -- these did go back in time, and it was -- it was discussed --

THE COURT: Yeah, it wasn't that much time, 2009 -- this transaction was consummated in ...

MR. MUNDIYA: 2011, Your Honor.

THE COURT: Okay.

MR. MUNDIYA: When -- when we go back to what the special committee did, the -- the one thing that I think stands out is the amount of work that did go into understanding the transaction, the fact that alternatives were looked at over the summer of 2011.

I don't know whether Your Honor's had a chance to look at the -- the August 10th and August 17th presentations by Evercore, but that tells you how thorough Mr. Meister, Mr. Dinh and Ms. Byorum and Mr. Webb looked at this transaction. They asked Evercore to look at a potential sale of Harland Clarke to a competitor, even though that may not have been feasible; but they said, "Let's check to see that the deal on the table is the best that we can get for the

shareholders."

So they went out and they looked at a deal, a potential transaction, that may not have been viable as a practical matter, but, as an economic matter, to see if that was the best deal available for shareholders. And Evercore concluded that it was not.

THE COURT: The practical obstacles were Mr. Perelman's objection -- would have been his objection to selling --

MR. MUNDIYA: No, Your Honor.

THE COURT: -- or the antitrust concern about --

MR. MUNDIYA: That's right.

THE COURT: -- having only one big check-writing, check-printing gorilla --

MR. MUNDIYA: That's right, Your Honor. The antitrust concerns --

THE COURT: -- in a dead market.

MR. MUNDIYA: Right.

So when we go back -- when we go to the specifics of -- of the special committee members, you see Mr. Meister. He is -- there's no challenge to his independence. He's been a director of this company since 1995. He understood the business

extremely well; public company experience, private company experience, you know, understood his mandate, was very involved in the -- in the discussions with Evercore and led the charge. So he was a quintessential special committee member.

We have Ms. Byorum, who had great investment banking experience. Any work that she'd done ended four years prior to this transaction for Scientific Games.

The only other issue they have on the -- on the independence are the, quote, clubby Wall Street entanglements. Doesn't -- doesn't amount to anything, Your Honor.

THE COURT: They're just expected.

MR. MUNDIYA: Well, it's historical. And the fact that she was at Citibank from 1996 to 2007 --

THE COURT: No. I understand.

MR. MUNDIYA: -- is really --

THE COURT: I mean, that's -- what you're talking about, that's the old structural bias argument; right?

MR. MUNDIYA: Right. There was no business with Ron Perelman entities between 1996 and

2007. So I think -- I think that should -- that disposes of that.

And with respect to Mr. Webb, you know, no -- no relationship with Mr. Perelman for 10 years. They're not -- the evidence is there's no social relationship. They're not friends. They meet at board meetings.

THE COURT: I take it Mr. Webb is pretty wealthy.

MR. MUNDIYA: He is pretty wealth, Your Honor.

So with that, we don't think there's really any genuine challenge to the independence of the committee.

THE COURT: Thanks.

MR. MUNDIYA: For those reasons, the Court should grant summary judgment.

THE COURT: Thank you.

MR. STINE: Good morning, Your Honor.

I think we have to take a step back here and take a look at what motion the defendants made. Defendants did not make a motion saying that the burden should shift to entire fairness. They didn't make that motion. They also did not make a

motion saying that the evidence shows that we meet our burden of entire fairness here. The motion that they actually made, which is not really what they argue today, the motion that they made was the standard of review should be under Cox/CNX and not under Kahn versus Lynch and that business judgment should apply and, under business judgment, they win.

So we got this motion. We got discovery on that motion. We got discovery on that motion. And then defendants filed a reply. And the reply all of a sudden says, out of nowhere, we don't meet our burden -- "Plaintiffs don't meet [our] burden of entire fairness." Well, that wasn't the motion they made. Certainly, had they made that motion, we would have come to Your Honor and said, "Your Honor, we would like to complete discovery. We would like to complete expert discovery. We would like to put in expert reports." At that point we think it's reasonable, then, to talk about a summary judgment motion on entire fairness or shifting the burden. Or -- and in the reply they don't withdraw their -- they don't withdraw their motion and file a new motion. They don't seek to amend their motion. They just file a reply.

First of all, it's outside -- way outside of the scope of the original motion and, therefore, the reply is improper. And the whole discussion of whether or not plaintiffs meet their burden of showing entire fairness is really not proper, given the scope of the initial motion, the -- not the initial motion; the motion that is here before Your Honor.

Second of all, in Southern Copper --

THE COURT: So you're saying they do not argue in the alternative --

MR. STINE: They do not.

THE COURT: -- in the opening brief.

MR. STINE: They do not. They don't argue in the alternative. They don't even mention entire fairness. They don't say, "Your Honor, if you should choose to apply Kahn versus Lynch, it's plaintiffs' burden to show fairness." They don't say that. They don't say, "In the alternative, Your Honor, if" -- "if Your Honor wants to follow Kahn versus Lynch, we want to make a motion to shift the burden." They don't --

THE COURT: You're saying they do that in their reply brief.

MR. STINE: It's all in their reply brief. It's not in their opening brief.

The discovery that we did based on the motion that they made, they didn't seek to amend their motion. They didn't withdraw their motion and file a new one. So we're here today -- and there has been literally an hour discussion -- about entire fairness and plaintiffs' supposed burden of coming with evidence --

THE COURT: So you view the motion as presenting a purely legal question.

MR. STINE: Well, in a sense.

THE COURT: Or in a doctrinal, which is you either -- once you're in business judgment rule land, then you're in the if-a-rational-person-could-approve-it-as-fair.

MR. STINE: Exactly right. So -- so, Your Honor, the -- the question isn't, you know, whether or not we have an expert affidavit to show that -- our view on the fairness of the price. We'll get to that. You know, we haven't gotten to that point yet. We get to that after -- when we get to expert discovery. We haven't gotten to expert discovery. It wasn't an issue in their opening brief,

in their motion -- I keep saying "opening," but it's not an issue in their motion. They didn't make that motion.

THE COURT: Well, the motion was just a form motion; right?

MR. STINE: Oh, no, no, no, no. It wasn't, Your Honor. It was a brief. They filed a brief in support of. It was not a --

THE COURT: Oh, no, no, no. What I mean is the motion itself, right, is -- they filed their opening brief the same day as their motion. Therefore, what explains the basis for seeking summary judgment is the brief.

MR. STINE: Yes.

THE COURT: Right.

MR. STINE: That's true, Your Honor, yes.

THE COURT: All right.

MR. STINE: The brief explains it.

And so -- and the second point is they -- they -- defendants, you know, Mr. Allingham, said that it's obviously our burden because they had a special committee and a majority of the minority. So in Southern Copper, Your Honor -- I'm sure Your Honor

knows this better than I do because it was --

THE COURT: Not necessarily.

MR. STINE: Not necessarily.

(Laughter)

THE COURT: In order to process current developments, I think it's most -- it's critical to me, I think -- and to many other people -- to eliminate previous --

MR. STINE: Right.

THE COURT: -- information.

MR. STINE: The brain wipe, yes. I understand, Your Honor.

So in Southern Copper --

THE COURT: I mean, I'm happy when I go back and read something that I wrote and say, "Wow, I still agree with myself."

(Laughter)

THE COURT: But I -- I don't necessarily have any recollection of having written it.

MR. STINE: Right. With me, it's even what I ate for dinner the night before.

THE COURT: Exactly.

MR. STINE: So -- but in Southern

Copper, the defendants moved for summary judgment, saying that the burden should be shifted. So they did that. And according to the Supreme Court decision, Your Honor could decide whether to shift the burden based on the -- on the pretrial record. And the Supreme Court said, "In the absence of a renewed request by the Defendants during trial that the burden be shifted to the Plaintiff, the burden of proving entire fairness remained with the Defendants throughout the trial."

Here, they didn't make a motion. There's been no judicial ruling. I think -- I think it's pretty clear under Southern Copper that the Supreme Court was saying that the burden stays with defendant until a judge says otherwise, they make a motion or there's some other --

THE COURT: So what you're saying is you view this as teeing up the purely -- well, I mean, not that it's purely legal, because there are elements of their motion in terms of things like whether the committee members were independent, whether the committee's mandate was sufficient. You agree they teed those up, issues, but solely for purposes of saying -- they didn't get to the point of well, if

it's entire fairness lite -- for the students, that's spelled l-i-t-e, just like lite beer. If it's entire fairness lite, the plaintiffs haven't -- don't have, you know, evidence of financial fairness.

MR. STINE: They didn't -- they didn't argue that in their -- in their motion. That's not in their motion. It's in their reply and --

THE COURT: So what you took yourself as your charge to do was to just, one, say "No. The law is" -- "under Lynch, Tremont, Emerald Partners, and Southern Peru, the law is it's entire fairness no matter whether you use both" --

MR. STINE: Right.

THE COURT: -- "and even if you were going to be eligible, the committee" -- "the committee was not sufficiently independent or empowered."

MR. STINE: That's exactly right, Your Honor.

THE COURT: Okay.

MR. STINE: And that's what's in our opposition. And it's -- so we didn't -- we didn't respond to a motion that they didn't make. So that's the first thing.

So, first of all, the burden hasn't

shifted because there hasn't been a judicial determination that the burden hasn't shifted. That's the first point.

But --

THE COURT: Okay. Can we then talk about what you thought the motion was about? Because, you know, I think Mr. Allingham admitted -- and, you know, the special committee's lawyers would have to admit -- that there are sentences that say when you have a merger with a controlling stockholder, the entire fairness standard applies.

MR. STINE: Right.

THE COURT: No question. You got -- I mean, you can take that thing, and you say -- I actually think it uses -- some of them use the H word.

How is it, though, that cases that never addressed a question address the question?

MR. STINE: I'm sorry?

THE COURT: How is it that cases that never addressed a specific question in fact address that specific question?

MR. STINE: Well, Your Honor, I think --

THE COURT: That sounds philosophical,

but it is. I mean, it's actually important.

MR. STINE: Right. No. And I understand the question, Your Honor.

And I think I would answer it that -- that there's always a way to distinguish any case. That's first of all.

And the second point is the Delaware Supreme Court decides cases on the facts, but it also provides guidance to all practitioners and to the courts --

THE COURT: Well -- but no one is bound -- I mean, we do have a system of hierarchy, and I take it very seriously. That's why I'm asking these points.

MR. STINE: Right.

THE COURT: You know, I've -- I think I've discussed the -- some of these questions in three or four cases over a 14-year judicial career --

MR. STINE: Right.

THE COURT: -- even though I have many entire fairness cases. And I never have addressed the specific question here directly because I never was actually presented with the question. No one has ever presented the question before.

And that's why -- I understand people give guidance, but one of the problems with guidance -- one of the problems with dictum is an overbroad statement of what a holding is when it's, in fact, not a holding, leaves people uncertain.

And as I said about the homework, I think the homework analogy is apt. If you tell people -- you tell your kid, "If you do your math or your English homework Saturday, you get to go to the movies on Saturday night." That means Sunday, when you want to just have a martini or a cold milk and a cookie and homework all to be done, you know your kid is going to have taken the one homework assignment and waited until Sunday night; right?

MR. STINE: Right.

THE COURT: Whereas if you say "You only get to go to the movie if you do both on Saturday" so that Sunday is relaxing, the kid has an incentive to actually do both.

MR. STINE: Right. And that is why, Your Honor, we just didn't stop in our analysis in our brief with "Judge, you have to follow Kahn versus Lynch because that's the law." We didn't stop at that. What we did is we then moved on to the next

point and said "Judge, the law should remain as it is" --

THE COURT: I get that, but what I'm saying -- Mr. Stine, you would say both that the cognitive tension that I would face as a trial judge is that "I have flat-out statements from the Supreme Court that say this is the standard of review."

MR. STINE: Right.

THE COURT: That's the strong point in your favor. The strong point in Mr. Allingham's favor is the precise question asked -- being asked of this Court now has never been asked of my Supreme Court.

MR. STINE: Right.

THE COURT: And they've never had the opportunity to answer; right?

MR. STINE: Right. Well, they haven't had --

THE COURT: So doesn't it come down to what the technical -- what it actually means to do a holding?

MR. STINE: Right.

THE COURT: And can we say if the definition of an actual holding in something that's necessary to a decision, isn't the only holding that

was necessary in the prior decisions to say that using one of these procedural devices will not invoke the protections of the business judgment rule? As a precise matter, the only thing that was necessary to decide the case was to hold that using one of them is not good enough?

MR. STINE: Right. And --

THE COURT: Is that correct?

MR. STINE: In response to that, what I would say, Your Honor, is courts always decide whether they want to interpret holdings of a higher court narrowly or broadly.

THE COURT: Well -- and I don't want to decide that. What I'm asking is if there's a precise definition of what is dictum or not, if the definition is is it necessary to decide the question before the Court, that in all of those previous cases it was -- it was totally sufficient to simply say that the use of one of the devices would not alleviate the ultimate burden to have an inquiry as to substantive fairness; right?

MR. STINE: Right. Well, I think --

THE COURT: Is that correct?

MR. STINE: No. I think what Your

Honor is saying is it wasn't an issue at the time. So you didn't -- so they didn't need to decide the issue.

THE COURT: As a result, as a formal matter of whether something is binding precedent under the classical definition, it would not be.

MR. STINE: Right. And -- and I agree with that, Your Honor.

THE COURT: Okay.

MR. STINE: And I don't disagree with that. I think we all --

THE COURT: No. And I want --

MR. STINE: In fact, I think the law students would agree with that, too, that that's the definition of "holding."

THE COURT: And I think one of the issues is, then, because you have a statement, it can affect corporate -- it can affect people's behavior because they do have to read -- as you said, there's a -- some of my colleagues or the previous colleagues on the Court, you know, used to talk about the difference between the -- you know, listening to the entire musical piece rather than one note.

MR. STINE: Right.

THE COURT: Because even in Lynch,

wouldn't you agree, one of the issues in Lynch, for example, about why it wasn't enough was that what you were going to do is run and do a tender offer if the committee said no? And a tender offer is a form of acceptance; that my friend, Professor Bebchuk, for example, would say a tender offer is intrinsically more coercive than a merger vote because if you don't tender, you could be left in even a worse situation where you're, like, now a stub part of, like, having a 7 percent public float or something like that; right?

MR. STINE: Right, right.

THE COURT: Whereas in a merger vote, you can vote freely and still get the deal closed.

MR. STINE: Right.

THE COURT: I appreciate that candor.

Why don't we talk about the why not, because what -- I think it is -- it's an -- interesting and rational minds can differ about it.

The problem with the current dynamic, obviously from your clients' own perspective, is if I rule for your current clients, who I assume hold stock in many other companies, why will they as stockholders in any other companies ever have the benefit of these procedural protections in combination?

MR. STINE: Well, I think that the Delaware Supreme Court and in -- in Southern Copper actually dealt with that, that it's a matter of good corporate practice. But to back off of that --

THE COURT: So people should just do good things selflessly --

MR. STINE: Well, no, it's not a question --

THE COURT: -- and they'll see a wave of -- I mean, policy -- part of why you have a go toward things, like Unocal, which had to go towards independent directors, right, Revlon -- is you set -- there are risks, right, with any kind of standard, because for a standard to create the right incentive effect, somebody has to get something for it. When they get something for it, it's a cost because in a particular case there could be a cost. But if what you gain from the overall standard is systematically valuable to the people you're trying to protect, then you might do it.

MR. STINE: Right.

THE COURT: And isn't it fairly stark that if you don't actually give credit to doing both, rational controllers will not do both except as some

deal-closing metric with a settlement; right?

MR. STINE: Right. And my response to that is I'm -- I'm not sure why they would do both, but they might do -- first of all, there's two responses.

First of all, if there's an actual independent special committee negotiating and they think that there's a benefit to the shareholders to get a majority-of-the-minority provision, then they will use that in negotiations, and maybe they will decide a higher price in response to that.

But my real response to that is what we wrote in our brief about majority-of-the-minority provisions. And that's that in -- in the real world, our -- our arbitrageurs come in and they buy shares, and their interest is not in voting in -- in favor of a deal or against a deal because it's fair or unfair. They're looking for their 10 cents.

THE COURT: But isn't that -- but the problem with that is -- I mean, you know -- and I admit to my own -- I think that the smartest people in the market often get the most disserved by our corporate governance system. The smartest people in the market are the people who index. That's the real

smart money. Smart money doesn't get represented in our corporate governance system. Dumb money sets the tone.

What do I mean by "dumb money"? is every corporate finance class in the country teaches that an active trading strategy is likely to result in a poor outcome because you're trying to outguess the entire market. You're unlikely to do that, and you're likely to run up really high costs and particularly if you're not taking any nondiversifiable risk. I mean, private equity or someone like Mr. Perelman, arguably, get compensated for taking nondiversifiable risk because they actually buy particular companies and have control to go with it. So I get all that.

But isn't there an issue -- and I think Chancellor Chandler pointed this out in Airgas. It was certainly pointed out across the pond when the people who make dairy milk were sold. Who did the arbitrageurs sell to? Who did they get their shares from?

MR. STINE: They got them from regular shareholders, yes, that's --

THE COURT: Regular shareholders who presumably decided that the price in the marketplace

after MacAndrews & Forbes made its premium-to-market offer was sufficiently attractive that they would voluntarily sell their shares; right? So arbitrageurs -- if the whole argument is arbitrageurs, all they want is 10 cents more, it may be because people are longer holders. Now, it may be a mutual fund and it may have held it for 17 months. But, remember, in this country you get a long-term capital gains rate when you hold an asset for how long?

MR. STINE: A year.

THE COURT: A year; right? That's our idea of the long term is, is a year. All the arbitrageurs got their shares presumably from longer-term holders who concluded that the price increase that had already resulted from the offer was sufficiently attractive for them to sell.

So I'm not sure it even -- to say, then, the arbitrageurs only want X percent more, if they could get X plus 25 percent more, wouldn't they be happier?

MR. STINE: No, no. Absolutely. And the response to that is I just -- I would say because people are selling to arbs at that point doesn't necessarily mean that they -- that's not necessarily a

referendum on the fairness of the transaction.

THE COURT: No. Of course there's not. I mean, everybody has different horizons. For example, if you've got an actively traded mutual fund that has had some problems in its performance and other sectors of the portfolio having a premium come in, the ability to take a premium and another thing might be a useful thing -- I mean; right? I mean, everybody has different things. Somebody needs -- your kids' tuition is due.

MR. STINE: No, no. Absolutely. And -- but I don't --

THE COURT: But that's not always -- that's not a company-specific factor. And if you want to, sort of -- you'd have to prove that this is somehow -- that the blend of sellers for this company were different; right? Because that affects every stockholder base.

MR. STINE: No. No.

THE COURT: Everybody has different horizons.

MR. STINE: I don't think it's a question of horizons. I think it's a question of here's Ron Perelman; right? And the analysis -- they

announce a proposal by Ron Perelman for $24. Time goes by, and a lot of people sell and buy at $24 at that point. Time goes by, and they announce that a deal is done, there's a merger agreement at 25. And a significant, you know -- maybe they think -- maybe it's based on horizon, but I doubt it. I think it's based on the fact that "This is a done deal. I'm going to take my $25 now."

THE COURT: But isn't that, Mr. Stine, what we're really, then, saying, that the stockholders really shouldn't be even given rights?

MR. STINE: No.

THE COURT: No, no. What I mean by that is they are essentially folks who have -- are infants, not even adolescents or --

MR. STINE: Are what? I'm sorry. Are what?

THE COURT: Life is full of risk.

MR. STINE: Right.

THE COURT: Every day you take a risk. You cross the street. You do whatever.

MR. STINE: Right.

THE COURT: What we're saying as stockholders, "Okay, it was a $24 offer that was a

41 percent premium to market. We held through that. We were hoping the special committee" -- "they get 25. That's only a dollar more. Now it's what? --a 44, 45 percent premium. We think the long-term value is higher, but let's just take the 25 now."

Their choice is obviously to vote no.

Here's another reason why they could vote no. You're not talking about them having to wait long to actually get the 25; right?

MR. STINE: You never know.

THE COURT: No, no. Wait a minute. If they vote no and a majority of them vote no, then they get to remain as investors in the company; and if the company's prospects are better, which is what they're supposedly -- that's why they think it's more than 25 -- they're still in the same situation. There's still a substantial public float. If they vote no and a majority of the stockholders vote yes, the only economic consequence to them of not having sold before the vote is some three- or four-week time period, because when the deal closes -- and most people who buy companies like to close fairly rapidly; right?

When did they close here?

MR. STINE: It was --
THE COURT: This particular --
MR. STINE: It closed --
THE COURT: -- like, really fast. I mean, this one may never have won another lag in history between, you know, closing, if you might remember --
MR. STINE: Yes.
THE COURT: -- the Technicolor gap.
So really what you're talking about is somebody holding out. They cast their no vote. If their no vote doesn't succeed, they can take the deal price when the deal closes with everybody else; right? So they're really -- what they're risking there is the difference between getting $25 per share five weeks before they would otherwise get it. And what we're saying is that kind of value gap makes stockholders unable to freely vote.
MR. STINE: I'm not saying that they're not freely able to vote.
THE COURT: Wait a minute. That's -- you are kind of saying that; right? Is that the courage to have the actual courage to stick out, right, to get paid five weeks later, that stockholders

can't actually wait that long. If that is the case, that it -- really fundamentally undermines giving them the right to vote on anything.

MR. STINE: Well -- and in response to that what I would say is: First of all, it's not a question of whether or not they're waiting. It's -- it's a question of there are no deals that get announced that are voted -- where a majority of the minority actually works. It just doesn't happen in the real world except for situations, unusual circumstances where there are large minority shareholders. But in general, cases -- there aren't cases where majority-of-the-minority provisions work in this kind of transaction. That's the first --

THE COURT: There aren't repriced transactions?

MR. STINE: After a merger agreement and --

THE COURT: Isn't one of the issues here is because there haven't been real up-front majority-of-the-minority provisions? which is if you're lumping in all your stats, the majority-of-the-minority provisions tacked onto negotiated settlements, is that really an apt

comparison?

MR. STINE: Well, first of all, you know, I -- you would be -- Your Honor would be in a much better position to know about those kind of tacked-on situations.

THE COURT: Well, I just know there used -- I mean --

MR. STINE: There used to be -- there used to be --

THE COURT: It used to be fairly common.

MR. STINE: Right, up until Your Honor's decision in Cox, and then more recently --

THE COURT: Well, I would like to say up until Mr. Weiss' objection --

MR. STINE: Right, up until --

THE COURT: -- eminent member of the plaintiffs' bar.

MR. STINE: And I would say that they slowed down after that. But when Vice Chancellor Laster wrote his Revlon decision, I would say they ground to a halt. Maybe there are other situations that they weren't. So --

THE COURT: But what I'm getting at is

the fact that stockholders don't say no doesn't mean they cannot. And -- and --

MR. STINE: It's possible.

THE COURT: And it also doesn't mean that it doesn't influence the committee's leverage, because one of the advantages when you have the majority of the minority is that the controller knows going in that the special committee's work is going to have to be subject to stockholder review; right?

MR. STINE: Well, that's either -- that's either a threat to them or it's not, depending on the situation. So when the situation where the company has all small minority shareholders, I don't think that that's a concern.

THE COURT: What company has all small minority shareholders?

MR. STINE: Well, it depends on the situation.

THE COURT: I mean, I always love when they talk about -- my friends at the SEC still talk about retail investors. If they want to talk about the real retail investor, they're talking about the ordinary person who is -- has to give their money into a 401(k) plan. That's your retail investor. And so

what they should be focusing on is the mutual funds, because I don't know about you, but I don't get to pick particular stocks in my retirement savings plan. I don't know anyone who gets to.

MR. STINE: Right.

THE COURT: And -- and either of my college savings plan do I get to do that.

But was there something here that -- did they not have institutional investor holdings and --

MR. STINE: I don't think that they had any significant ones.

THE COURT: What do you mean by "significant"?

MR. STINE: I don't know the numbers; but when we looked at it, there was not any -- any that were threatened -- that would threaten the transaction.

THE COURT: That's not what I'm saying, which is were there large institutions who held the securities of this case?

MR. STINE: Yeah. And -- and I looked at that, and I -- and I don't know the -- the -- the size.

THE COURT: Well -- and if you're an individual investor, you might actually have a longer horizon; right?

MR. STINE: Well -- but, Your Honor, I still don't think it's a question of horizons. You -- you know, I don't think it's a question of horizons because when you announce a --

THE COURT: Why do I have to take 25 if I get a free chance to vote no if I think the company is worth 31?

MR. STINE: I think in the real world, it just doesn't work that way.

THE COURT: And that's what I mean. So in the real world, stockholders -- there should always be a risk-free option because there's no -- if you believe the company's worth 31, you can hold the stock. Now, the risk is that you're wrong. The whole bet of a sales transaction is you're saying "I think it could be 31, but I realize it could be 20. I realize it could go down to 17. I now have a chance to get 25."

As long as you're freely making the decision, how is it not meaningful?

MR. STINE: Well --

THE COURT: I mean, the fact that you would like -- we would all like, right -- I would like to be able to eat the same amount of food I used to be able to eat when I was 19. When I was 19, I would -- when I was 17, I was "Why can't I gain weight?"

MR. STINE: Right.

THE COURT: That is not a question, you know -- you get your wishes in life in weird ways; right? So, I mean, whatever wish, you know, I should have taken back the time delayed. Like, the Lord processed my -- my wish, you know, a generation later.

So -- but when you're an investor, right, the whole point -- I get the point about tender offers. That's Professor Bebchuk's point; right? which is a takeover is one of these situations where you're afraid that you're left in; right?

MR. STINE: Right. And --

THE COURT: So you may actually -- having a stub equity position, we could all agree that's a dangerous, you know -- if you're down to six or seven, you don't have a float.

Here's the situation -- this company is going to have a big float if the merger went down because it's going to have the same float it had

before; right?

MR. STINE: Right. And --

THE COURT: All you're saying is that it's really hard to turn down a 45 percent premium to market when you know for sure you can put that in your bank account. And -- so that's really powerful. And stockholders tend to like that kind of thing, and they tend not to turn it down in exchange for the possibility that the stock might go to 28 or 29; right?

MR. STINE: Right. And --

THE COURT: Is that involuntary or is that just coming to grips with not everybody was born to be Jay-Z?

MR. STINE: Right. And -- and I would respond to that, Your Honor. We all know that in the context of fairness, determining fairness, or in an appraisal that the stock price is really not looked at by this Court in terms of the analysis. You look at the discounted cash flow analysis, comparable company, precedent transaction.

And in terms of the timing of this transaction, here's a situation where they were offered that premium. And you're right, you're

exactly right. National stockholders looked at that premium and said, "This is a done deal. It's a premium" --

THE COURT: No, no. This is a done deal.

MR. STINE: Right.

THE COURT: There's nothing -- there's a negotiated contract, which -- to which the board approved the transaction subject to the stockholders.

MR. STINE: Right.

THE COURT: The party that ultimately determined that it was a done deal are the party, you're saying, had no ability to say it was not done.

MR. STINE: I'm not saying they don't have the ability. I'm saying in the real world, it doesn't happen. It just doesn't happen. So somebody, a holder of shares --

THE COURT: Was there an appraisal cap in this deal?

MR. STINE: No. In fact, I think Your Honor had a -- an appraisal cap? No, I don't think so. But there was an appraisal -- you had an appraisal action in this case, I believe. I think --

THE COURT: I don't know.

MR. STINE: I think you did. I think it was settled. But, anyway.

THE COURT: See how I bring a really fresh perspective? because, I mean, I may have had an appraisal action, and it doesn't vividly ...

MR. STINE: Right.

THE COURT: What I'm saying is sometimes people condition not only majority of the minority, but sometimes the buyer will actually say that you can't have an appraisal petition in excess of a certain amount --

MR. STINE: No, there wasn't anything like that. But, Your Honor -- and I don't want to beat a dead horse with this. But the fact is --

THE COURT: There are markets for that.

MR. STINE: I know, really. In -- at furniture stores, I think; right?

But --

THE COURT: We actually have some horse meat submarine sandwiches for the students who are --

MR. STINE: Right. Do you have names for the horses?

THE COURT: Well, you know, we have a selection, actually, of delicious Mid-Atlantic sandwiches for the students. Horse meat had not been a specialty; but in honor of --

MR. STINE: Right.

THE COURT: -- of our desire for closer ties with the EU, we've --

MR. STINE: Right, right. And I think IKEA gives a discount on furniture.

THE COURT: Exactly. Many of the students probably have an IKEA card.

MR. STINE: Right, right.

So -- but I think the situation is, is the majority-of-the-minority provision, is it some kind of a referendum of fairness? Does it provide some -- does it provide some protection for the shareholders to get a fair price? And I think that's what's clear --

THE COURT: Let's just pause on that.

MR. STINE: Right.

THE COURT: Is what you're saying in the vote in this context is actually distinct from the third-party situation? Because in the third-party situation you would say the same dynamic is true --

MR. STINE: Right.

THE COURT: -- which is when the board of directors signed up a third-party deal at a substantial premium to market, stockholders are overwhelmingly likely to accept it.

MR. STINE: Right. That's --

THE COURT: Right?

MR. STINE: And the difference is -- there's a difference between those two situations. In the situation of an arm's length deal, the vote isn't considered some type of protection to the minority against a majority shareholder --

THE COURT: Oh, sure it is.

MR. STINE: No.

THE COURT: That's the whole --

MR. STINE: No, but there's no -- but there's no conflict of interest in that situation.

THE COURT: No, no. But it -- but it still is a protection. Our law carefully, by statute -- people ignore -- but it's also easy for us to make central our ornamental contributions and lose sight of what's really fundamental.

The whole reason why stockholders vote on mergers or asset sales is because of the concern

that this is a really substantial thing and you want them, the fiduciaries, to actually be on their toes and to have that subject to ultimate approval by the equity owners.

MR. STINE: Absolutely.

THE COURT: And that's why there's also burden -- there's standard-of-review effect that's given in third-party situations to approval by stockholders; right?

MR. STINE: Right. No; absolutely.

THE COURT: All I'm saying is on this point, Mr. Stine, your point that the stockholders don't tend to turn down premium deals, right --

MR. STINE: Uh-huh.

THE COURT: -- when they don't have a sure other offer that's higher, that in the dynamic where the third-party deal is a 45 percent premium to market and the stockholders believe, you know, "We really think it should be a 53 percent premium," where they have the ability to vote down the 45 percent premium and continue to own the stock and see whether their view of value comes true, they almost always take the 45 percent premium.

MR. STINE: I think they almost always

take the 45 percent premium. I think they almost always take the 25 percent premium or the 15 percent premium.

THE COURT: Again, I mean, one of the problems is you do know that you're arguing -- what you're saying about the behavior of stockholders, right --

MR. STINE: Yes.

THE COURT: -- suggests that they're really not adults.

MR. STINE: Well --

THE COURT: What I mean by "adults" is people who have to actually -- you're allowed to make choices, but you understand that with every choice comes a downside.

MR. STINE: Right. I -- I totally agree with you, Your Honor. But to go back to the difference between an arm's length deal and this kind of deal where there's a controller, is in an arm's length deal we all know that shareholders have their -- whatever reason they have for voting, whether it's they need the money for their, you know, kids' college or whether they don't like -- you know, it's a bad day for them, whatever reason they have, they're

allowed to vote in favor or against a deal in an arm's length transaction. And that's the way -- the way it is; right?

But in a situation here, where you've got Ron Perelman, who's the 800-pound gorilla in the room, the law has been set up to protect minority shareholders from that situation, where -- where there's coercion, where there's a --

THE COURT: But what is the coercion here --

MR. STINE: -- conflict of interest.

THE COURT: -- other than, again -- I would put it the inherent coercion. This is the theory that was first in the du Pont case, that essentially if you have a controller, everybody's just afraid. Why -- what, based on market behavior about stockholders in this day and age, suggests that they're afraid?

MR. STINE: See, that wasn't the -- I understand.

THE COURT: No. But that is the premise of inherent coercion --

MR. STINE: No.

THE COURT: -- which is that you can

never -- that no matter what anybody says, you're hovering in fear from Mr. Perelman.

MR. STINE: See -- see, I don't necessarily agree with that. I think that more -- first of all -- my -- my point really wasn't about the coercion. It was more about the right, against somebody who is in a conflict situation and sitting there. I think there's probably more coercion over this supposedly independent board --

THE COURT: Than over the stockholders.

MR. STINE: -- than over the stockholders, right. So -- because the independent board, these are all people who -- supposedly independent board. These are all people who have known him for years. Whether they worked with him or not, they're together. Here's a guy who I am sure is difficult to say no to; right?

And -- and so it's kind of off topic, the point; but to go back to -- and I'd like to stick on this idea of the majority of the minority because I don't think it's been explored.

I think that a difference between the arm's length transaction where people are allowed to

vote whatever they want and that's just the result of it and they have different reasons and in a situation with a controller, it isn't just a vote. It isn't just a vote on something. It's a protection. And -- and the -- it's supposed to be a protection. And my point, and our point, is it really isn't a protection that people say it is. It's not really the protection, because the arbs come in. They buy it. People decide whether or not they want to sell the shares based on, you know, whatever the reason; but -- but the fact is in the real world, it almost always goes through, if not always, you know.

And I was trying to think of situations. Vice Chancellor Laster, I think in the CNX decision, gave some examples in -- of where he said that there were majority-of-the-minority provisions that -- that were successful. And I -- I know about the Revlon situation that he pointed to. But there was an exchange -- it was an exchange transaction for, you know, preferred shares for -- for common shares. It wasn't the same kind of situation where arbs would come in and buy --

THE COURT: But isn't part of the point the vote -- the dynamic you're worried about is

that the special committee is overwhelmed in some sort of way by Mr. Perelman? But that the fact that there's the majority-of-the-minority provision creates good incentives for the committee as well, because independent directors also have reputational issues and things that they have to deal with. Many independent directors serve on multiple boards. There's a thing that changed its name to something that sounded like a kind of low-end California vineyard. And I think it's back to its three initials now, but they're pretty powerful. And they monitor these things, and they take into account director behavior. And there are institutional investors who do.

Because when you just said, again, the arbs come in, again, that's a voluntary decision of the stockholder who was a long-term holder to say that the price was enough and that "I want to take that price now."

That -- that happens all the time. And I don't know how it contradicts the theory. And isn't it true that majority of the minority is a contextually specific device that's not in the DGCL itself except in 144; right?

MR. STINE: Right.

THE COURT: So it's something on top of -- this would have required a stockholder vote and votes beyond Mr. Perelman to be accomplished, in any event; right?

MR. STINE: Right.

THE COURT: He didn't have enough votes to accomplish it.

MR. STINE: He was short. I think he said 40 -- 43 percent, something.

THE COURT: Right. So in order to -- he would have had to have gotten votes. But what this does is say "Mr. Perelman, your votes don't count." It takes him, practically speaking, to zero influence over the vote in terms of being able to push the vote through; correct?

MR. STINE: That's right. Yeah; no. I understand that, Your Honor. It really --

THE COURT: And then the theory would have to be that -- you're not saying stockholders voted -- they're influenced by their economic dynamics of the risk of holding when they can get a premium. It's not that they really think that if Mr. Perelman -- if the vote went down, that

Mr. Perelman is going to be able to --

MR. STINE: I don't --

THE COURT: -- pillage --

MR. STINE: -- personally, I don't believe that. I mean, I think it's the economic situation. You know, they announce a merger transaction. The stock goes up to 20 cents below the merged transaction. They look and they say, "I'll take it now. You know, there might be a risk that the thing is going to fall apart."

THE COURT: I mean, what is better for stockholders -- I mean, why is it better for stockholders -- let's assume the following: Let's assume that I read Lynch your way and I conclude "If you do both, you don't get any extra credit."

MR. STINE: The shift of the burden.

THE COURT: Yeah. You know, "I do both. I don't get any extra credit. I don't need both to get credit. I'm not going to do both."

MR. STINE: Right.

THE COURT: No stockholders are going to get this package or protection. Why is the value of litigation under entire fairness lite sufficiently valuable to stockholders to deny them an incentive

system where you get a combination of protections that replicates a genuine third-party deal? So you get a special committee with the real ability to say no; and even if the special committee says yes, you, as a stockholder, get the free and uncoerced ability to vote no. So you're going -- it's two starkly different worlds, which is there's going to be a risk in the world where you give effect to those two devices, that in a particular case somebody is going to say "Those two devices didn't work as well as we would like." So there's a cost. There's no --

Again, I'm not like -- I view people as being adults. There's a cost to every rule. But in that rule the gain has to be that litigation itself, the litigation-intensive standard produces some sufficient benefit to outweigh the cost that you will never get the two devices used in tandem up-front.

MR. STINE: Well -- and the answer to that is -- I mean, we cite in our brief -- I think it's in a footnote -- that in Siliconix -- after Siliconix there was a study done by Professor Sub --

THE COURT: Subramanian.

MR. STINE: -- Subramanian.

THE COURT: Hockessin, Delaware, boy.

MR. STINE: What's that?

THE COURT: He's a Hockessin, Delaware, boy.

MR. STINE: Yeah. Good.

(Continuing) -- where, post Siliconix, he looked at the premiums and --

THE COURT: People don't know that in Hockessin. A story written about one of the most distinguished corporate law scholars in the country, dual-tenured Harvard Business School, Harvard Law School, Hockessin, Delaware, boy. Mr. Allingham famously tangled with him in Toys "R" Us.

MR. ALLINGHAM: (Inaudible)

THE COURT: Sorry for that shot.

MR. STINE: It's a little side ...

He did a study. And it's not one of the conclusions of the study; but if you look at the chart in his -- his paper, post-Siliconix controlled buyouts had greater premiums than post-Siliconix controller tender offers.

Now, you can look at that and say okay, here's a situation where, with a buyout that's subject to -- to entire fairness and the threat of --

of litigation like this, that the share -- that the -- that the special committee and the -- the controller himself is going to be more apt to provide --

THE COURT: But aren't you drawing a lesson from that data that Professor Subramanian himself does not draw? Isn't what he -- the lesson he draws from it, that if you do a stockholder referendum in isolation without an effective negotiating agent for the stockholders, that you get lower outcomes than when you're in a legal rubric where there's incentive for a special committee?

And I thought Professor Subramanian actually comes out to the policy conclusion of him looking at the landscape; that if the -- if stockholders -- that the best of all worlds for stockholders, in terms of reducing litigation where it doesn't provide value to stockholders and getting them a fair pricing, is to give credit when both procedures, both a negotiating agent and an uncoerced stockholder approval mechanism, are used; and that the flaw in Siliconix is that you can go right to the stockholders with a so-called tender offer. A tender offer, for the reasons Professor Bebchuk and others have written about, is not the same as a merger vote.

It's binary because you've had no negotiating agent. And so you tend to get a lower price.

MR. STINE: Right. I -- first of all, Your Honor, I -- I acknowledge Your Honor's a scholar in this area.

THE COURT: I don't know that I'm a scholar. I just have read a lot of junk.

MR. STINE: Well, you've read a lot and you've written on the subject.

THE COURT: Not junk. By "junk" I mean the good stuff.

MR. STINE: The good stuff, of course. I think it's hard to imagine -- all right. I'll back up.

THE COURT: I mean, isn't Professor Subramanian's bottom line that when he looks at the data, he says an independent special committee with the right mandate, plus noncoerced informed majority-of-the-minority vote should get business judgment rule protection?

MR. STINE: I think it does. But -- but to -- I don't necessarily -- I obviously don't agree with him.

THE COURT: I understand. I'm saying

the data you're providing is his data. The conclusion, you would admit, he draws from the data is different on a policy basis than yours.

MR. STINE: I absolutely agree with that, but I think that the data shows what the data shows. And I think from experience -- I mean, this -- this was a paper written a few years back. But I think that experience from the cases post Cox and post CNX is that -- that entire fairness cases get litigated, and they are being litigated, as an example here, postclosing more and more. And plaintiffs -- the plaintiffs' bar is being -- is faced with situations where they look and they say, "Oh, what did I sign up for here, you know?" Is there a case where there actually is an unfair price? Because the defendants certainly are coming, saying "Let's settle this thing right away."

So here's this dynamic where defendants are fighting them, and defendants are saying, "This was a fair transaction. We're going to litigate." And plaintiffs are saying, "This is" -- "is this an unfair or fair transaction?"

If it's unfair, we have -- we're in a postclosing land that we weren't in before, where

we've got experts, not the kind who, you know, you have to pay a few thousand dollars to to give some kind of an opinion for a PI, but you have to pay hefty amounts of money and make big commitments on. So the dynamics switched to real litigation, you know, real litigation about real transactions.

So it's a situation where here's a controller, and he's in a situation where he's negotiating a deal, and he's saying with his advisors, "If I don't offer a fair price here, I'm going to get sued by Mr. Monteverde or Mr. Stine" or whoever, "and they're going to hire experts. And I'm going to have experts, too. And what's my expert going to say? Is my expert going to say this is a fair price or is this an unfair price?"

Let's -- let's think ahead here, right, because that's what's going to be important. And I don't want to come up with a situation like, you know, Southern Peru where we're going to be -- have to shell out billions of dollars in litigation. Let's just do it the right way to start off with.

So it comes back to real litigation, which -- which, you know, Your Honor, I hope -- I think what you were looking for when you wrote Cox was

that there be real litigation --

THE COURT: I wasn't really looking -- again, I think there's a lot of mystery around Cox. I -- I was not looking for anything.

MR. STINE: Well -- but --

THE COURT: Mr. Weiss made -- had made three previous objections in the earlier iterations brought here by another plaintiff -- another of your colleagues in the plaintiffs' bar.

MR. STINE: Right.

THE COURT: He then sought fees on fees for his objections. I recall where he objected to a fee; and when I cut the fee, he wanted a fee for his contribution in cutting the fee.

MR. STINE: Right.

THE COURT: But I -- I wanted nothing of Cox but for it to go away.

(Laughter)

MR. STINE: Understood.

THE COURT: It did not.

(Laughter)

MR. STINE: Understood. But --

THE COURT: And part of why I understand the literature here is it was a big debate

about literature, if you read Mr. Weiss' -- not surprising, given that he was a professor at the time.

MR. STINE: Right. Right. So -- so --

THE COURT: But he apparently met some people who do your line of work. And he's a good guy and he -- you guys took him into the bosom of your side of the V.

MR. STINE: Right. So --

THE COURT: I don't know if he's still there or not. Do we know?

MR. STINE: I don't know, Your Honor.

So to -- to move on -- and we've talked a lot about the reasons why -- and, Your Honor -- you know, I haven't dealt with the arguments at all about the special committee is not independent.

THE COURT: Well, let me just -- on the one thing, what is -- how do I conclude that the fees paid to the Bancroft firm are material?

MR. STINE: Well --

THE COURT: What's the standard? And -- because if you didn't ask anything about the denominator --

MR. STINE: Your Honor, I -- I don't

think that we get there today based on the motion that they made. They --

THE COURT: Well, I think we have to get there today, because I would say that, at the very minimum, they would have to establish that it was -- that -- that there's not a -- a triable issue of fact about the independence of the special committee. Right? I mean, the whole premise of the burden -- of the business judgment rule would be that it was an independent committee, the members were independent of Mr. Perelman for purposes of our law. And that's why I'm asking about the materiality of the fees involving the Bancroft firm to Mr. Dinh.

MR. STINE: Right. Well --

THE COURT: Would you admit that there's nothing in there -- I mean, your friends say that you-all did not ask anything about Mr. Dinh's denominator.

MR. STINE: We asked about the amounts, and I don't see --

THE COURT: The amounts, but there's nothing in comparison.

MR. STINE: I understand.

THE COURT: And that's important;

right?

MR. STINE: Well, I think it's -- I don't think that --

THE COURT: And Mr. Webb, for example, would you concede he's, like, a seriously rich dude?

MR. STINE: Listen, I wouldn't be surprised if he's a seriously rich dude; but I think that the point that we're trying to make about Mr. Webb is not so much that he was beholden in terms of dollar amounts to Mr. Perelman. I think that what you see here is a pattern with the whole board about these relationships that they had.

THE COURT: And I get that. And that's -- I mean, that's an important debate within American corporate law that goes -- that predates Aronson versus Lewis. But, you know, at the Yogi Bera moment the fork was taken. When you got to the fork, they took it. And the direction that they took it in was that so-called structural bias, simply because people had relationships, that that was not sufficient; that in order for them to not be independent, there had to be a quality of beholdenness, where there was a materiality to the relationship such that the relationship was

sufficiently tangible to where the party would not put that relationship at risk by saying no in a transactional setting.

I mean, I had a situation -- obviously you can strain this. I had a situation where the brother-in-law of a controller was independent of him on the presumption that brothers-in-laws don't necessarily like their -- each other. A person might recall I pointed out, "Well, if they didn't really like each other, why was he on the board of all the guy's companies?" I don't know if that's scratching memories of anyone here.

But is -- is -- so I get that. And I think people say "mere friendship." There's a difference between mere friendship, right, someone has lunch, or dinner a couple times, a year; right? If you rent a vacation house with your family every summer for five years, that's not mere friendship. You're drawing next generations, other people into it. And so these things are contextual.

But I thought Aronson versus Lewis pretty clearly slammed the door on the mere fact that people are -- travel in the same world means they can't act independently of each other on a negotiating

committee.

MR. STINE: Right. And I think that we do more than that overall. But I just --

THE COURT: Well, Mr. Webb, for example, he doesn't know his wealth to Mr. Perelman, does he?

MR. STINE: I -- you know, he -- he was in a situation where he was partners with --

THE COURT: They made a lot of money together; right?

MR. STINE: Let -- let's say they were current partners. I mean --

THE COURT: But they were co-fat cats, and they made opportunistic killings -- not actual killings --

MR. STINE: Right.

THE COURT: -- like metaphorical --

MR. STINE: Right. But -- but, Your Honor --

THE COURT: They made literally metaphorical killings --

(Laughter)

THE COURT: -- to use the current way of talking.

MR. STINE: Right.

THE COURT: Literally metaphorical killings.

MR. STINE: (Inaudible)

THE COURT: Exactly. And so together, a couple decades back or a decade or so back; right?

MR. STINE: Right. Yeah, but I think that the question is not whether he only made the money because of Mr. Perelman, but you have to look, well -- if they were current partners -- like, if they were current brothers-in-law, it doesn't necessarily mean that the brother-in-law in the example that Your Honor gave, always gives money to his brother-in-law.

THE COURT: No, no. But what you presume in the brother-in-law situation is, one, you don't put your brother-in-law on the board if you have a strained relationship. The problem with the brother-in-law situation is if you're the brother-in-law, you're married to the sister. The sister has a relationship with their brother.

MR. STINE: Right.

THE COURT: There might even be that the sister and the brother might just share a mother and a father.

(Laughter)

THE COURT: The cousins may just be friends. And it all gets really icky.

MR. STINE: Right.

THE COURT: And there's all kinds of things in people's mind.

Now -- and I also think it's contextually different. Like, I happen to view accusing someone of a crime as a different level of being able to say no than saying no on a transaction.

MR. STINE: Right.

THE COURT: Right? I mean, like, if you actually -- I had a case that involved insider trading accusations. Well, you're going to accuse somebody of insider trading. That's kind of, like, you know, "Hey, cousin, got the bad news. The good news is we're all still going to be friends; right? We all decided we were independent of each other. The bad news, I've concluded that there are good grounds to believe you committed insider trading, and we are authorizing the company to bring suit, and likely it will draw the U.S. Justice Department into the thing."

MR. STINE: Right.

THE COURT: "But we're all good";

right?

MR. STINE: Right. So --

THE COURT: I think that's a little different conversation than "I think you're going-private price is too low."

MR. STINE: Right, right. A little bit different.

Your reference to ickiness with this --

THE COURT: Right.

MR. STINE: -- I think that that really, kind of, is the word. It's the degrees of ickiness here.

THE COURT: And then what you're saying is -- I would tend to agree with you, as part of my colloquy with your friend for the special committee, was every -- every member has a little bit to explain; right?

MR. STINE: Right. Exactly right.

THE COURT: But do you get to a point where if everybody has a little to explain, it adds up to material or do you have to actually, under our law, under Mr. Allingham's favorite line of cases, do you have to actually go director by director? I thought

Technicolor and other cases said you have to actually look at the specific director and make a judgment on -- as to that director about materiality. And I think Martha Stewart, the case -- may be actually the person, too, but the Martha Stewart case says the same thing.

MR. STINE: Right. Well --

THE COURT: I don't know what she's saying on the show about --

MR. STINE: I think in the context of when there's a special committee and whether or not one or more of these infect the process, I think it's a little bit different.

And I just -- Your Honor, in the -- in the Southern Copper case, the reason why Your Honor didn't shift the burden was you found that that analysis was fraught with factual complexity. And I think -- and that had to do with the special committee independence. And you said, "... [and] will rarely be determinable on the basis of the pre-trial record alone."

And the Supreme Court acknowledged the position that Your Honor took with that and said, "... the general inability to decide burden shifting prior

to trial is directly related to the reason why entire fairness remains the applicable standard of review, even when an independent committee is utilized, i.e., 'because the underlying factors which raise the specter of impropriety can never be completely'" -- "'never be completely eradicated and still require careful judicial scrutiny.'"

I think that --

THE COURT: But that's why I think what your friends' motion is premised on, is when you use both devices up-front in tandem, they have an effect together that they don't have in isolation. And Lynch itself, for example -- as I mentioned before, Lynch itself, the threat the committee was rendered -- the concern about its independence -- or to mandate its ability to say no, the controller basically said, "Well, if you say no, it doesn't matter because the other people can say yes. And we'll present to them a tender offer," which, for all the reasons you would say were -- all the reasons you gave for why a vote is not enough, apply more fully to a tender offer.

MR. STINE: Right.

THE COURT: I think what your friends

are saying here is the standard they want is good old-fashioned corporate Delaware law.

MR. STINE: Well --

THE COURT: A strong brew, which is if you don't do it the right way, you get entire fairness. But if you do it the right way, there's a nonlitigation-intensive way to get the business judgment rule standard, which is an independent committee meeting the recognized tests for independence under our law, with the appropriate mandate and the ability to say no and recognizing up-front that even if they say yes, the deal will only go through if there's an informed, uncoerced vote.

MR. STINE: Right.

THE COURT: And they're saying if you establish those things up-front, you should get business judgment rule, and business judgment rule means we don't go back and say "Well, you know, if you added Warren Buffett to that committee, they would have gotten another dollar and a quarter."

But that's the difference between entire fairness and what they're asking for.

MR. STINE: Right. And I understand that. I get that.

THE COURT: And what they're saying about the difference between Southern Peru is that under the existing line of the "or," you have to get down into the dough of fairness, anyway. And the reason why no one wastes a lot of time on burden shifting is, as I understand the burden, what you got is only if -- I mention this because I'm a kid and I remember one of the most painful things is -- did you ever fall off the front of your bike seat and you land on that bar and you're just stuck there? You can't talk because you're in excruciating, agonizing pain, and you think that your ability to have a future generation has been entirely lost.

If you're stuck there on that bike, as I understand what the burden shift does, is the other -- the party who has it gets to just push you and you fall off the other side of the bike; right?

MR. STINE: Right.

THE COURT: Under a preponderance standard. And so no one ever cared about it.

I think this standard -- I think what Mr. Allingham and his friends are arguing for is, it's not that approach to it. You -- you do the things that classically cleanse an interested transaction,

but you do them together. You actually do not just one of the things that 144 says; you do them together. The litigation intensiveness of the fairness review is actually out of the process.

MR. STINE: Right. And, Your Honor --

THE COURT: And I say there's risks to that; right?

MR. STINE: And, Your Honor, I understand. It's what Your Honor talked --

THE COURT: What I don't understand is, I don't believe there's any value to saying you get business judgment rule if you pass entire fairness, which is there's no -- I mean, what I mean is if up-front what you have to do is to say "Would I have made every move or not" -- "or decided not to make every move that Mr. Meister and the committee made, would I have pressed back, using certain valuation metrics to get, sort of, higher" --

MR. STINE: Right.

THE COURT: If you're down into that, you're not -- you're not even talking about them qualifying for the business judgment rule. You're talking about some factually intensive heightened review process.

MR. STINE: You're talking about a situation where, at the pleading stage, you can dismiss what would be generally --

THE COURT: Well, I mean, I'm talking about summary judgment, which is I think there's a big difference of whether you're looking at whether the committee is structurally empowered in the right way in a controller situation so that they can effectively say no and have bargaining power, whether they engaged in an obviously rational process in terms of actually having meetings and being able to pick their own advisors, having the right mandate. I think those are very distinct up-front things that people can assess.

If you're getting down into substantive fairness review, combining process and price, and seeing whether it came out like an arm's length transaction, that's fairness review; right?

MR. STINE: Well, that's --

THE COURT: That's what you do in a fairness review; right?

MR. STINE: Right, that's what you do in a fairness review.

THE COURT: So if you do not, you don't do that -- that's exactly what the business

judgment rule was about. It's that when you're in business judgment rule land, you don't do that.

MR. STINE: See --

THE COURT: What I'm saying is I don't know -- there's not a real in-between here; right?

MR. STINE: Well, that's a good question. I mean, I don't know whether there's a real in-between --

THE COURT: Well, what is the in-between? Because if the in-between is -- and this is where I thought you started with a strong point and I want to hear from your friends, which is your friends say they starkly want business judgment. Part of why you said "I didn't get into" -- "I put in some things to kind of cast doubt on it, but I didn't feel like it was my burden at this point to actually engage whether entire fairness lite was the standard and, thus, I have the burden of persuasion under the preponderance thing. So I didn't get my financial expert at this point. That wasn't the motion I was confronted with."

MR. STINE: Right.

THE COURT: Which suggests that in your own mind it's a distinct concept; right?

MR. STINE: Right.

THE COURT: To be in business judgment rule. You were saying why it shouldn't be business judgment rule.

MR. STINE: Right. And -- and we do say in our -- I'll just say we do say why we -- even if it's business judgment rule, why summary judgment still is inappropriate. We say that. And I understand. But -- but you're right. It's a different situation.

But ... All right. If it -- if it's a Cox/CNX situation and it's not a -- and they had both starting off with and then it --

THE COURT: Shouldn't this case actually be CMX?

MR. STINE: CMX?

THE COURT: Yeah. I mean, if we're going to go sequentially like this, it really should be CMX. I don't know if anybody but me has ever noticed that, but I always thought it was odd. It's like some DNA sequencing.

MR. STINE: Right. I don't -- I think under Kahn versus Lynch, I think it's pretty clear -- and especially under -- you know, Your Honor talked

about dictum at the Supreme Court versus holding. And I think that there's always the -- you know, the -- the statement that you hear over and over is there's dictum and there's good dictum. You know, the fact is that --

THE COURT: Good dictum is dictum that you like?

MR. STINE: Well, dictum is dictum from the Delaware Supreme Court that says what they think that the law -- the law is in a certain area. And I think it's pretty clear that they think that Kahn versus Lynch applies and that in any controller situation --

THE COURT: Well, let me ask what my legal duty is, though. I owe a duty of fairness to your clients and a duty of fairness to all parties to apply the law.

MR. STINE: Right.

THE COURT: If a question has not been spoken to, do you apply dictum and act like it has been spoken to? Or do you have to actually address the question and then give the Supreme Court your honest view as a trial judge on the open question and say -- admit that they have language that's at

tension -- they have dictum that's at tension with the holding but, nonetheless, it is dictum; that ultimately it's up to the Supreme Court to decide this question for itself, but the trial court needs to address with an open mind the question that's not, in fact, been presented, squarely presented, by prior cases?

MR. STINE: And I'm sure Your Honor has dealt with the situation in the past, as have all, you know, trial judges throughout the country all the time. It's a situation where there's a -- you know, something is not on all fours --

THE COURT: Well, no. I think Airgas, for example, was a situation where you could take various Supreme Court decisions and, you know, could reach a different conclusion. For example, I don't believe -- there is only one purpose to a poison pill, and that's to preclude an offer.

MR. STINE: Right.

THE COURT: But the Unocal test says that if you preclude, and then it says that you can go -- well, then there was other law that says you can go do an election contest. Well, Moran said there were two ways around the pill. Not just an election.

MR. STINE: Right.

THE COURT: It said that the Court would enjoin the operation of the rights plan if it wasn't a reasonable thing. Then you had Unitrin and other things that said things are unreasonable if they're preclusive.

And -- and then, I think, Chancellor Chandler parsed it correctly, which said the only way you take law -- yes, you can preclude -- you can actually preclude if you have a reasonable basis to believe that stockholders would be making a mistake to take the bid, even as to a noncoerced offer. But it took awhile for the law to, kind of, get to that place.

And, I mean, I appreciate candor. I don't think there's ultimately an answer to this --

MR. STINE: Right.

THE COURT: -- because we talked about before -- even the judges who wrote the previous decisions are not the same people anymore.

MR. STINE: Right.

THE COURT: I mean, just -- that's just not how the world works and --

MR. STINE: Well, Southern Copper was

recent. But --

THE COURT: And it was. But, again, that was precisely not posed by that case; right?

MR. STINE: That's -- that's true. But in -- I think they went out of their way to say things that were necessary for the decision. They went on pages about entire fairness in Kahn versus Lynch. I don't think -- all they needed was one sentence.

THE COURT: Well, I think part of why they did, because something was at issue in that case. If you recall, there was a complaint on appeal by new counsel, I believe, for the defendants that the burden shift had not been determined before trial.

MR. STINE: Right.

Unless Your Honor has other questions ...

THE COURT: No. Thank you, Mr. Stine.

MR. STINE: Okay. Thank you.

THE COURT: Mr. Allingham and Mr. Mundiya. If -- I think we've -- if you could be pointed. You're between --

MR. ALLINGHAM: I see the time, Your Honor.

THE COURT: You're between hunger -- a reporter who wishes to kill me -- and she should -- and students and delicious subs from, I believe Capriotti's.

MR. ALLINGHAM: The pressure is overwhelming.

(Laughter)

THE COURT: They've never had a Bobby.

MR. ALLINGHAM: The surprise at having to argue about summary judgment on this motion -- on entire fairness on this motion, we teed up the issue in our opening brief at pages 31 and 32. Burden shifting is explicitly argued there. Did the plaintiffs think, nevertheless, that this was just a binary bright-line motion or did they understand that it was more? To get the answer to that, Your Honor, look at the discovery they asked for.

THE COURT: Let me just look at -- wait a minute.

Yeah. There's a problem here, though. What you say is what you should get is summary judgment on burden shift.

MR. ALLINGHAM: Sure. And -- and did the plaintiffs continue to think that this was a

bright-line argument? The answer is no. If you look at the discovery that they asked for, it was broad and it addressed issues that relate to entire fairness.

THE COURT: But as a matter of precision, your motion was, at best, that if you were denied your argument on the -- your ... if you were denied your argument about business judgment rule, that you would get a burden shifting, to go into trial with a burden shift. Isn't that precisely what your brief says?

MR. ALLINGHAM: That's the argument on pages 31 and 32.

THE COURT: Well --

MR. ALLINGHAM: What then happened in the plaintiffs' brief was that they made 15 pages of arguments on entire fairness, pages --

THE COURT: Well, they make arguments on entire fairness or ...

MR. ALLINGHAM: They have 12 to 15 pages, Your Honor, attacks on the price which would have been entirely unnecessary.

THE COURT: No, no. I mean, what they say is this: They have headings "Even if the Court follows" -- this term "unifying standard," I'm not

always -- somehow makes me think of the Soviet Bloc or something.

But the -- that even if that applies, that the special committee was not independent, was not fully empowered; and they questioned things about, right -- earlier they, obviously, have stuff about the buyout.

MR. ALLINGHAM: Yeah, the buyout price was unfair to MFW shareholders with subsections.

THE COURT: But part of that is you pour in -- you have your own patriotic-trumpets-blaring part of your brief, which I don't -- I think would be unsurprising for you not to have. But as a very precise matter, your request for summary judgment in your brief is to apply the presumptions mandated by the business judgment rule and grant the motion for summary judgment. Then at the end of the brief the same thing is repeated, "... find that Defendants' decision to enter into the Merger is protected by the Business Judgment Rule ...."

And what you're saying on page 31 and 32 is, "At the very least, though, Judge, if we lose on that" -- now, you do say "at the very least," but I

take that like a plaintiff's -- like a complaint, where it says "damages of at least," because you never want to sell yourself short. At the very least, you get a burden shift in the ultimate trial.

MR. ALLINGHAM: I -- I think that I made my point, Your Honor. I don't --

THE COURT: I'm saying -- I'm not saying that your -- I understand they joined issue with you. It would be impossible for even the most moderate of lawyers, let's say, you know, Mr. Bouchard, Mr. Lafferty, like the most unruffled of, you know, practitioners, right, Mr. Monteverde, people of equilibrium and calm temperament, they would be unable to face your opening brief without commenting something on the price; right?

MR. ALLINGHAM: I take your point. My only point is this motion progressed from the opening brief through the answering brief to the reply brief --

THE COURT: I understand that. But what they -- their job in their answering brief is to meet your motion. And your motion was predominantly, almost exclusively about business judgment rule, which is why your client took on this -- I mean, your

client -- not why. But your client -- what your client was saying is, "I did these two powerful things together, and I get credit for it." That's the major part of the motion.

And then on 31 and 32, what you've been able to point to is, "Well, at the very least, though, if we don't win on our major argument, then we get -- going into the trial, we get the burden shift under the Lynch standard as the plaintiffs articulate it."

MR. ALLINGHAM: That is -- that's correct, Your Honor.

THE COURT: As a formal matter. I'm saying there might be a spirit -- you know, like, we have the spirit of the remand. That might be the spirit of the briefing where it's evolved; but if you're looking formally within the four corners of your opening papers, this is the motion.

MR. ALLINGHAM: And -- and Your Honor's latter point is the point I was trying to make.

THE COURT: Okay.

MR. ALLINGHAM: The second point I want to make is this: In Southern Peru, the Supreme

Court found it was not inappropriate to decline to address the burden-shifting question before trial. That was with respect to a burden-shifting device where there was a factual dispute. In our case, there is no factual dispute. There was a majority-of-the-minority vote. There were no disclosure claims. And there was a 2 to 1 margin on that majority-of-minority vote. So perfectly appropriate to decide the burden-shifting question now.

THE COURT: Like even right now.

MR. ALLINGHAM: Yes.

THE COURT: Like, literally right now.

(Laughter)

MR. ALLINGHAM: With -- with respect to the issue of burden, it is clear under any procedural scenario that the burden to show a lack of independence on the part of special committee member is on the plaintiffs. As Your Honor pointed out, they asked no questions.

THE COURT: How about this accumulation of unnecessary de minimis questions that your clients present?

MR. ALLINGHAM: I think --

THE COURT: What I think Mr. Stine's point is, that there's -- each member of the committee has something that at least the Court has to consider.

MR. ALLINGHAM: I, frankly, don't agree with that, Your Honor. I don't think Mr. Meister has even been argued to lack independence. The allegations about Mr. Webb are legally insufficient.

THE COURT: Well, Mr. Meister, I suppose, just raises the new emerging question that's going to exist in corporate governance, which is how long can one be independent; right?

MR. ALLINGHAM: That is, is it a good thing or a bad thing to have an experienced director?

THE COURT: No. I think that's a -- that's, as I would expect from you, a scintillatingly fine dodge of the fundamental question --

(Laughter)

THE COURT: -- which is when human beings do important and meaningful things together over time, their relationships change. And I think one of the emerging issues -- I agree the law hasn't gone there yet; but it would be surprising to me for an independent director to have the same relationship

with a manager and controlling stockholder after a decade of such service that he or she did at the beginning. It would actually creep me out to think that people were so robotic that they would not change. What you're saying is the law hasn't gone there, and there's no, even, argument about Mr. Meister; right?

MR. ALLINGHAM: There is no argument about Mr. Meister.

THE COURT: And the only thing is he has served as independent director in Perelman-affiliated companies for over a decade now?

MR. ALLINGHAM: Yes. But as Your Honor says, that's not an issue. I'm not going to make the argument to the contrary, but it's not an issue our law has ever gone to --

THE COURT: No. And neither -- even with the -- and the Exchanges haven't even gone there. Although they've gone in all kinds of interesting places, this is not one place they have gone.

I mean, I suppose from our colonial experience, you could say that, you know, we were actually capable of being independent after over a century of dependency. So ...

MR. ALLINGHAM: Your Honor had a lively discussion with Mr. Stine about the appropriateness of determining entire fairness questions on summary judgment. We cite in our brief the leading case on that, which is the Tanzer decision. That's a case in which the burden had not been shifted. The plaintiff -- sorry. The defendants made a prima facie showing of fairness, and the defendants failed to bring forward any evidence. The Court entered summary judgment on the question of entire fairness. And in various forms, that opinion and that ruling have been cited in subsequent cases, including Arnold versus Society for Savings.

The Celotex decision from the U.S. Supreme Court supports the notion that a failure to make a showing in the -- where there is -- where there's an allegation of an absence of evidence on -- on which the plaintiffs bear a burden is adequate for summary judgment.

THE COURT: No. I get that stuff. And I think we're -- is there anything else you're -- you're metaphorically dying to say? Actually, if you're literally dying to say, we -- we want to urge you to choose life, but --

(Laughter)

MR. ALLINGHAM: Yes. Let me make one final point, and that has to do with the inherent coercion discussion. I think that the question of the standard of review should address the particular transaction facing the Court.

So what's the concern about inherent coercion? It's not, obviously, that Mr. Perelman or MacAndrews would dictate the terms of this transaction. We know they're insulated from that. It's not, obviously, the vote. We know they're insulated from that. The question is -- the last remaining question is this notion of inherent coercion. And in this case -- and -- and -- and --

THE COURT: And the conundrum there has to be intellectually -- what people are going to say is "I know I can freely choose no without any consequence" except the three -- when did the deal close in relationship to the vote?

MR. ALLINGHAM: Very quickly.

THE COURT: Yeah. I mean, I'm assuming, from experience, there's, like, a team that makes sure things close so the business plan doesn't change or something.

Is ... that even if you assume there's a two-week delay or something like that, there's appraisal right here; right?

MR. ALLINGHAM: Yes.

THE COURT: Yeah. But because it was a merger vote, if I vote no, I get the transactional consideration at the same time as everybody else in the deal. So the only cost to me of hanging around the vote is to delay between when I could have sold --

MR. ALLINGHAM: Which is a delay -- which is a -- which is a choice you have in any transaction.

THE COURT: That's what I'm saying. So the whole thing about inherent coercion has to be it's not that I'm afraid that the controller -- that I actually have to be around for the controller to punish me, because I can freely vote no and still be gone, thinking he'll punish me if I -- if the transaction goes down, right. Or is it that if we all vote -- if I know all of us vote no, the transaction actually will go down and he'll be able to punish me?

MR. ALLINGHAM: And I think that is the conjecture that -- that --

THE COURT: That if we all vote no,

then -- then Mr. Perelman is going to rise up and engage in retributive acts, and we'll all be sorry, and we'll get 14 bucks or some pathetic number down the line.

MR. ALLINGHAM: Exactly. And that -- that is articulated as a possible perception on the part of minority shareholders. It's a perception that, frankly, makes no sense at all in this case.

The two specific examples, which Your Honor has now talked about, you know, stop the dividend payments, MFW never paid dividends. Okay, let's do a retributive transaction at a lower price. In this case the MacAndrews & Forbes Worldwide board had already extracted an agreement from Mr. Perelman that he would not buy above a certain level of stock, below a majority, without giving notice to the board, which gives the board the absolute power to do what it needs to do if he's going to do some unfair act. There is no reason for shareholders to perceive --

THE COURT: Well -- and I take it, then -- what we're saying something about the inadequacy of our law, too, if a controller, in the wake of a no vote, attempts to do retributive acts, what we would be saying is somehow our law has no

ability to constrain such duties -- breaches of the duties of loyalty when they actually happen.

MR. ALLINGHAM: That's true, Your Honor, although in Citron, the Court said it would take you awhile to get your remedy for that unlawful act. But my point is the board has absolute power to stop that awful act that Mr. Perelman obviously isn't contemplating, anyway. Why would a minority shareholder, looking at a controller, who, for the first time, has said "I'm walking away from influence here. I'm walking away from influence on the vote. I'm walking away from influence on the terms of the transaction. I will let the chips fall where they may. And if a deal I want to do doesn't get out of the starting gate, okay"?

THE COURT: Well -- and what you're saying is those conditions actually create an environment where if the controller then attempts to do something retributive, it can shine the light on himself because you promised to let the committee say no. You promised that you would abide by the committee's decision, but now you've essentially, you know, got a club in your hand and you're beating the -- the -- the daylights out of people.

MR. ALLINGHAM: And my point is both of these provisions, no dividend and the agreement, were publicly disclosed. So were the conditions. No rational minority shareholder would say under all of those circumstances "I can't think of what it might be, but I'm still afraid Mr. Perelman is going to do something to me if I vote no." It's just not rational.

Thank you, Your Honor.

THE COURT: Anything from the special committee?

MR. MUNDIYA: No, Your Honor.

THE COURT: Well, thank you, and thank you particularly to our reporter. Our students are here and they're going to go somewhere else. I would free the lawyers, and maybe I will talk to the students for a couple minutes, and then they can go down and enjoy their lunch without the presence of my bald head. And -- but you guys do not -- you've risen. You may leave. And so may Neith.

(Court adjourned at 1:10 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 146 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 15th day of March 2013.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

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