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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN KAHN, SAMUEL PILL, IRWIN PILL, RACHEL PILL and CHARLOTTE MARTIN, Plaintiffs-Below, Appellants, v. M&F WORLDWIDE CORP., RONALD O. PERELMAN, BARRY F. SCHWARTZ, WILLIAM C. BEVINS, BRUCE SLOVIN, CHARLES T. DAWSON, STEPHEN G. TAUB, JOHN M. KEANE, THEO W. FOLZ, PHILIP E. BEEKMAN, MARTHA L. BYORUM, VIET D. DINH, PAUL M. MEISTER, CARL B. WEBB and MacANDREWS & FORBES HOLDINGS INC., Defendants-Below, Appellees.	Case No. 334, 2013 Court Below: Court of Chancery of the State of Delaware, Consol. C.A. No. 6566-CS

(AMENDED) ANSWERING BRIEF OF SPECIAL COMMITTEE DEFENDANTS BELOW, APPELLEES PAUL M. MEISTER, MARTHA L. BYORUM, VIET D. DINH, AND CARL B. WEBB

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
William M. Lafferty (#2755)
D. McKinley Measley (#5108)
1201 N. Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Paul M. Meister, Martha L. Byorum, Viet D. Dinh and Carl B. Webb

OF COUNSEL:

Tariq Mundiya
Todd G. Cosenza
Christopher J. Miritello
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019

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NATURE OF PROCEEDINGS

This appeal arises from a 2011 transaction in which MacAndrews & Forbes Holdings, Inc. ("M&F"), a 43% stockholder in M&F Worldwide Corp. ("MFW"), acquired the remaining common stock of MFW (the "Buyout"). At the outset, M&F's proposal to take MFW private was made contingent upon two key procedural safeguards intended to protect MFW's minority stockholders. First, the Buyout had to be negotiated and approved by a special committee of independent MFW directors (the "Special Committee"). Second, the Buyout required the approval of a majority of stockholders unaffiliated with M&F.

The Buyout closed in December 2011, after it was approved by a vote of 65.4% of MFW's minority stockholders. Appellants initially sought to enjoin the transaction. However, after taking expedited discovery, including several depositions, they withdrew their request for injunctive relief. Appellants then sought post-closing relief against M&F, Ronald O. Perelman and MFW's directors (including the members of the Special Committee) for breach of fiduciary duty. Again, Appellants were provided with extensive discovery. Defendants moved for summary judgment below. The Court of Chancery granted Defendants' Motion for Summary Judgment because the pair of protective conditions undisputedly functioned as they were intended, and thus the Buyout was entitled to review under the business judgment standard. Appellants challenge that determination.

On appeal, Appellants seek to achieve what the Court of Chancery, after a thorough and careful review of the record developed through extensive discovery, soundly concluded Appellants had failed to do below — raise a triable issue of fact surrounding the independence and performance of the highly qualified Special Committee. Their arguments on appeal fare no better.

Appellants' renewed challenge to the independence of three of the four Special Committee members relies upon the same thinly tethered assertions regarding those directors' previous personal or business contacts with Mr. Perelman that the Court of Chancery rejected as a matter of well-established Delaware law. Grounded in speculation as opposed to actual evidence, such allegations are insufficient to raise triable issues of fact surrounding the Special Committee's independence. Moreover, as the Court of Chancery observed, to the extent Appellants have alleged that the Special Committee members were beholden to Mr. Perelman based on prior economic relationships with him, Appellants **never** developed or proffered evidence as to the materiality of those relationships. *See* Memorandum Opinion ("Op.") at 20-21. Accordingly, Appellants' claim that the materiality of such relationships cannot be determined until trial rings hollow.

Appellants' second claim, that the Special Committee was not fully empowered, is also belied by the undisputed factual record. The MFW Board resolution creating the Special Committee made clear that the Special Committee had the power to "just say no" to M&F's offer. And as the Special Committee members uniformly testified, not only did they understand their mandate to include the power to consider alternative transactions that would potentially unlock value for MFW's stockholders, but they also in fact exercised that power with assistance from their experienced and independent financial advisors. Ultimately, after carefully evaluating M&F's offer during the course of eight separate meetings, the Special Committee voted to approve the Buyout, but only after it negotiated an increased price for MFW's shares. Based on the undisputed record, and as the Court of Chancery held, "there is no triable issue of fact regarding whether the [S]pecial [C]ommitee fulfilled its duty of care." Op. at 34.

Finally, in light of the combination of procedural protections upon which the Buyout was conditioned, the Court of Chancery properly applied the business judgment rule. Although Appellants contend that this Court's decision in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994), requires the application of entire fairness review, as the Court of Chancery held (and Appellants conceded at oral argument below), "[i]n no prior case was [the

Delaware] Supreme Court given the chance to determine whether a controlling stockholder merger conditioned on both independent committee approval and a majority-of-the-minority vote should receive the protection of the business judgment rule." Op. at 6. Application of the business judgment rule here is "consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion." *Id.* at 7.

For these reasons, as well as those set forth in the brief of the M&F Defendants-Appellees, the Court of Chancery's ruling granting summary judgment to the Special Committee Defendants-Appellees should be affirmed in all respects.

This is the Special Committee Defendants-Appellees' answering brief.[1]

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[1] The Special Committee Defendants-Appellees respectfully join in the arguments raised by the M&F Defendants-Appellees' answering brief.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that the business judgment standard applies to going-private mergers involving a controlling stockholder that are conditioned upon the approval of an independent and fully empowered special committee that fulfills its duty of care, and the uncoerced, informed vote of the majority of the minority stockholders. This case is not controlled by *Kahn v. Lynch Communications Systems, Inc.*, 638 A.2d 1110, 1115 (Del. 1994) because the merger in *Lynch* lacked such procedural protections which, "are established up-front, a potent tool to extract good value for the minority," (*see* Op. at 53), and warrant application of the business judgment rule. *See* Argument Section II.

2. Denied. The Court of Chancery correctly concluded that no material issues of disputed fact existed and that the fully empowered Special Committee was comprised of entirely independent directors and satisfied its duty of care to MFW's stockholders. Moreover, Appellants failed to proffer evidence raising triable issues of fact regarding the effectiveness of the majority-of-the-minority condition as a means of stockholder protection. *See* Argument Section I.

COUNTERSTATEMENT OF FACTS

On June 13, 2011, Ronald O. Perelman, then Chairman of MFW, and Chairman and CEO of M&F (a 43% stockholder in MFW), submitted a proposal to MFW's Board whereby M&F would acquire the remaining shares of MFW that it did not already own at a price of $24 per share. *See* A1150-54.[2] The offer price represented a premium of nearly 50% over the price of MFW shares at market close the preceding business day.[3] *See* A1151. The Buyout proposal stated in part:

> The proposed transaction would be subject to the approval of the Board of Directors of the Company [i.e., MFW] and the negotiation and execution of mutually acceptable definitive transaction documents. It is our expectation that the Board of Directors will appoint a special committee of independent directors to consider our proposal and make a recommendation to the Board of Directors. *We will not move forward with the transaction unless it is approved by such a special committee. In addition, the transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares of the Company not owned by M&F or its affiliates. . . .*

Id. (emphasis added). The next day, the MFW Board met to consider the proposal. *See* A1155-61. After certain directors affiliated with M&F excused themselves from the meeting, the remaining independent directors passed a resolution creating a Special Committee to evaluate the potential Buyout. *See* A1158-60. The resolution, in relevant part, stated:

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2 References to the Appendix take the form "Ax" where x is the page number.

3 The previous business day, MFW's stock had closed at $16.96 per share. *See* A1635.

> [T]he Special Committee is empowered to: (i) make such investigation of the Proposal as the Special Committee deems appropriate, (ii) evaluate the terms of the Proposal; (iii) negotiate with [M&F] and its representatives any element of the Proposal . . .; (iv) negotiate the terms of any definitive agreement with respect to the Proposal (it being understood that the execution thereof shall be subject to the approval of the Board); (v) report to the Board its recommendations and conclusions with respect to the Proposal, including a determination and recommendation as to whether the Proposal is fair and in the best interests of stockholders of the Company other than [M&F] and its affiliates and should be approved by the Board; and (vi) determine to elect not to pursue the Proposal. . . .
>
> . . . [T]he Board shall not approve the Proposal without a prior favorable recommendation of the Special Committee . . . .
>
> . . . [T]he Special Committee [is] empowered to retain and employ legal counsel, a financial advisor, and such other agents as the Special Committee shall deem necessary or desirable in connection with these matters. . . .

A1159.

The appointed independent Special Committee consisted of the following highly qualified MFW directors: Paul Meister (Chairman), Martha Byorum, Viet Dinh, and Carl Webb.[4] Each had extensive business and corporate governance experience:

- Mr. Meister has been a director of MFW since 1995. He is a Founder and Chief Executive Officer of Liberty Lane Partners,

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[4] A fifth director, Bruce Slovin, was initially appointed. He recused himself the following day on grounds that he had "some current relationships that could raise questions about his independence for purposes of serving on the special committee." A1241.

LLC, a private management and investment company. He has also served as Chairman of inVentiv Health, Inc. since 2010 and as its Chief Executive Officer since 2011. Mr. Meister was Chairman of the Board of Thermo Fisher Scientific Inc., a scientific instruments, equipment and supplies firm, from November 2006 until his retirement in April 2007. From March 2001 to November 2006, Mr. Meister was Vice Chairman of Fisher Scientific International, Inc., a predecessor to Thermo. *See* A352.

- Ms. Byorum has over 30 years of experience in banking, (*see* A3151 (Byorum Depo. Tr. at 40:17)), and has been a director of MFW since 2007. She has served as Senior Managing Director of Stephens Cori Capital Advisors and Executive Vice President of Stephens, Inc., a private investment banking firm, since January 2005. She has also served as a director of several public and private companies, including Northwest Natural Gas and Aeterna Zentaris, as well as charitable organizations. *See* A3144-45 (Byorum Depo. Tr. at 11:22–13:13); A350.

- Mr. Dinh has been a director of MFW since 2007. He is a Professor of Law at the Georgetown University Law Center and is a principal of Bancroft PLLC, a law and public policy consulting firm specializing in national security, regulatory compliance, and law enforcement, which he co-founded in 2003. Mr. Dinh, a former law clerk to Justice Sandra Day O'Connor, served as U.S. Assistant Attorney General for Legal Policy from 2001 to 2003. He has also served on the board of directors of News Corporation, a global, vertically integrated media company, since 2004. In addition, Mr. Dinh served on the Board of Orchard Enterprises, Inc., an independent music and video distributor specializing in comprehensive digital strategies for content owners, from 2007 to 2009. Since 2012, Mr. Dinh has served on the board of directors of Revlon, Inc. *See* A350-52.

- Mr. Webb has served as a director of MFW since January 2007. Since 2010, he has been the Chief Executive Officer and Board Member of Pacific Capital Bancorp, a bank holding company

> and is Chairman and Chief Executive Officer of Pacific Capital Bank, N.A., a provider of commercial and consumer banking services. Mr. Webb is also the Co-Managing General Partner of Ford Financial Fund, L.P., a Dallas-based private equity firm. In addition, Mr. Webb has served as a consultant to Hunter's Glen/Ford, Ltd., a private investment partnership, since November 2002. He served as the Co-Chairman of Triad Financial Holdings LLC, a financial services company, from July 2007 to October 2009, and the interim President and Chief Executive Officer from August 2005 to June 2007. Mr. Webb has also acted as a director of Hilltop Holdings, Inc. since 2005. *See* A354-55.

After interviewing four potential financial advisors, the Special Committee engaged Evercore Partners ("Evercore"). *See* A1163-65. The Special Committee also retained Willkie Farr & Gallagher LLP as its legal advisors. *See* A208. The qualifications and independence of Evercore and Willkie Farr & Gallagher LLP are undisputed. *See* Op. at 18.

In order to carefully evaluate M&F's offer, the Special Committee held a total of eight meetings during the summer of 2011. *See* A1155-1239. As the Court of Chancery held, it is "undisputed that the [S]pecial [C]ommittee was empowered not simply to 'evaluate' the offer, like some special committees with weak mandates, but to negotiate with [M&F] over the terms of its offer to buy out the noncontrolling stockholders. Critically, this negotiating power was accompanied by the clear authority to say no definitively to [M&F]." Op. at 17.

Consistent with this broad authority, and in conjunction with Evercore, the Special Committee considered not just M&F's Buyout proposal, but also investigated whether there might be other buyers (*e.g.*, private equity buyers) who might be interested in purchasing MFW. *See* A599-600 (Meister Depo. Tr. at 116:3-117:9). The Special Committee also considered whether there were other strategic options, such as asset divestitures, that could unlock value for MFW's stockholders. *See* A596-99 (Meister Depo. Tr. at 114:23-116:2); A3110 (Dinh Depo. Tr. at 168:6-14). As Mr. Meister, the Special Committee's Chairman, explained, the Special Committee "had a process and had made it clear to our respective advisors that we were interested in any and all meaningful expression[s] of interest from a meaningful potential buyer." A606 (Meister Depo. Tr. at 129:14-18). Accordingly, Evercore made the Special Committee aware of inquiries that had been made by parties supposedly expressing interest in MFW's business. *See* A600-01 (Meister Depo. Tr. at 119:8-12).

During the summer of 2011, however, no entity came forward proposing any transaction, let alone one that had the prospect of delivering more than the $24 per share proposed by M&F. *See* A3111 (Dinh Depo. Tr. at 169:17-23). As Mr. Meister testified, Evercore concluded that there were no third party inquiries

from interested or capable parties. *See* A600-01 (Meister Depo. Tr. at 118:23-119:4, 119:8-12).

The Special Committee's assessment of the Buyout proposal was also shaped by both developments in MFW's business and the broader U.S. economy during the summer of 2011. For example, during the negotiation process, the Special Committee learned of the underperformance of MFW's Global Scholar business unit. *See* A753, A777 (Webb Depo. Tr. at 110:15-19, 62:14-18). The Special Committee also considered macroeconomic events, including the downgrade of the U.S. credit rating, (*see* A3094-95 (Dinh Depo. Tr. at 152:23-153:9)), and ongoing turmoil in the financial markets which created financing uncertainties. *See* A608 (Meister Depo. Tr. at 134:15-25); A3093-94 (Dinh Depo. Tr. at 151:3-152:18). These events had the effect of making M&F's $24 per share offer seem even more advantageous to MFW's stockholders in September 2011 than it did in June 2011. As Mr. Webb testified:

> [T]he world had changed, to some degree, from the time that offer was made initially to present and were we [sic] in jeopardy of the deal being taken off the table. . . . The world had changed simply because I felt – again in my judgment – that the refinance outlook for this company had certainly not gotten any better between the May time frame and the September time frame. And nothing made it easier, in my view, for this company to meet the challenges, and not [just] on the refinance challenges but the market challenges.

A775 (Webb Depo. Tr. at 105:17–106:3).

Despite these uncertainties, the Special Committee nevertheless negotiated with M&F, ultimately securing an increased offer of $25 per share. *See* A1188. The independent Special Committee, and later the full MFW Board, voted in favor of M&F's revised proposal. *See* A1190. Consistent with the second condition imposed by Mr. Perelman and M&F at the outset, the Buyout was then put before MFW's stockholders for a vote. Over 65% percent of MFW's non-controlled stockholders approved the transaction, a clear majority of the non-controlled stockholders. *See* A959.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT THE MFW SPECIAL COMMITTEE WAS INDEPENDENT, FULLY EMPOWERED, AND SATISFIED ITS DUTY OF CARE TO MFW'S STOCKHOLDERS.

A. Question Presented

Did the Court of Chancery properly conclude that there were no triable issues of fact as to the MFW Special Committee's independence and that the Special Committee was fully empowered and fulfilled its duty of care to MFW's stockholders in evaluating, negotiating, and approving the Buyout?

B. Scope of Review

Appellants' statement of the standard of review on appeal from a decision granting summary judgment is incorrect. This Court **does** review interpretations of its existing precedent and other questions of law *de novo*. But with respect to factual findings supporting a grant of summary judgment, on appeal this Court "reviews the entire record to determine whether the Chancellor's findings are clearly supported by the record, and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006). "This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are **clearly wrong** and justice so requires." *Id.* (emphasis

added); *see also Brown v. Stornawaye Capital LLC*, 2012 WL 5288151, at *3 (Del. Oct. 24, 2012).

C. Merits of Argument

After a careful and thorough examination of the factual record, the Court of Chancery ruled that the MFW Special Committee, as a matter of law, was comprised of entirely independent directors. The Court of Chancery also ruled that there was no material factual dispute that the Special Committee satisfied its duty of care to MFW's minority stockholders. Appellants' renewed challenges to the Special Committee's independence, process and performance, which lack support in both the record and applicable Delaware law,[5] should be rejected.

1. The Special Committee Was Comprised Entirely of Independent Directors.

Appellants do not challenge the independence of the Special Committee's Chairman, Mr. Meister. The undisputed factual record establishes that Mr. Meister directed negotiations with M&F throughout the Special Committee's review of the

[5] Appellants falsely contend that the Court of Chancery "relied heavily" on New York Stock Exchange ("NYSE") rules in assessing the independence of the Special Committee, asserting that application of such rules "goes against longstanding Delaware precedent." *See* Appellants' Opening Brief ("AOB") at 26-27. The decision below, however, explicitly acknowledged that directors' compliance with NYSE independence standards "does not mean that they are necessarily independent under [Delaware] law in particular circumstances." Op. at 21. As other Delaware courts have done, *see, e.g.*, *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 823-24 (Del. Ch. 2005), the Court of Chancery discussed NYSE standards on director independence for illustrative purposes. The court's factual and legal determinations regarding the Special Committee's independence, however, were premised on settled Delaware law. *See id.*

Buyout and secured an increased offer for MFW stockholders of $25 per share. *See* A1188; A610 (Meister Depo. Tr. at 137:2-5); A777 (Webb Depo. Tr. at 109:8-110:6). Mr. Meister's independence and the central role he played on behalf of the Special Committee (both of which are undisputed) underscore the well-functioning nature of the Special Committee and the spirit of independence with which it evaluated the Buyout.

Having conceded Mr. Meister's independence, Appellants nonetheless assert that the three other Special Committee members — Mr. Webb, Mr. Dinh, and Ms. Byorum — were somehow beholden to Mr. Perelman as a result of isolated prior business and/or social dealings with Mr. Perelman or Perelman-related entities. Applying well-established Delaware law, the Court of Chancery concluded that none of the Appellants' contentions — which remain grounded in speculation and innuendo rather than the evidentiary record — raised a triable issue of fact concerning the independence of the Special Committee. *See In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000) (to survive summary judgment, non-moving party "must affirmatively state facts—not guesses, innuendo, or unreasonable inferences . . . .").

Appellants' blanket assertion that the materiality of any economic relationships the Special Committee members may have had with Mr. Perelman

"should not be decided on summary judgment," (AOB at 31), is not supported by Delaware law. Delaware courts have regularly decided director independence as a matter of law at the summary judgment stage. *See, e.g.*, *Se. Pa. Transp. Auth. v. Volgenau*, 2013 WL 4009193 (Del. Ch. Aug. 5, 2013) (no dispute of material fact that Special Committee functioned independently); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) (no issue of material fact concerning directors' alleged conflict of loyalty); *In re Gaylord Container Corp. S'holder Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000) (concluding that directors were independent on a motion for summary judgment). As the Court of Chancery noted, despite receiving extensive discovery, Appellants did "nothing . . . to compare the actual circumstances of the [challenged directors] to the ties [they] contend affect their impartiality" and "fail[ed] to proffer any real evidence of their economic circumstances." Op. at 20-21. "To the extent [Appellants] believe that they can wait until trial to generate evidence compromising [the Special Committee's] independence, they misconceive how Rule 56 operates." *Gaylord Container*, 753 A.2d at 465 n.3.

To suggest that director relationships cannot be decided on summary judgment, Appellants cite a trio of distinguishable cases involving facts entirely absent from the record below. For example, in *Kahn v. Dairy Mart Convenience*

Stores, Inc., 1996 WL 159628 (Del. Ch. Mar. 29, 1996), one member of the two member special committee convened to review a leveraged buyout (LBO) had an *ongoing* consultancy relationship with the target, the continuation of which would depend upon that director's continued good will with the controlling stockholder and the management group leading the buyout effort. *See id.* at *6. Here, Appellants have presented no evidence of ongoing engagements between any of the Special Committee members and Mr. Perelman at the time the Buyout was proposed. Moreover, the record in *Dairy Mart* established that the special committee received a higher offer than the proposed LBO price, but failed to consider that offer or even negotiate for a higher price. *See id.* at *7. Here, it is undisputed that the four-member Special Committee did negotiate and obtain a higher price for MFW's shares, and never received an offer higher than M&F's. *See* A3111 (Dinh Depo. Tr. at 169:17-23).

Kahn v. Tremont Corp., 694 A.2d 422 (Del. 1997) (*see* AOB at 31) is also inapposite. In *Tremont*, this Court found troubling facts demonstrating that two special committee members "abdicated their responsibility as committee members by permitting . . . the member whose independence was most suspect, to perform the Special Committee's essential functions." *See id.* at 429. Specifically, the special committee chairman in *Tremont* had personally received $10,000 monthly

compensation and $325,000 in bonuses from consultancies with the entity whose shares were to be purchased. That chairman "conducted all negotiations over price and ancillary terms . . . without the participation of the remaining two directors" and handpicked a financial advisor whose independence was also suspect. *See id.* at 430. Furthermore, all three special committee members failed to attend informational meetings with the advisors. *See id.* In sharp contrast to the *Tremont* special committee, the MFW Special Committee chose as its Chairman Mr. Meister, whose independence is not contested. There is also no record evidence impugning the independence of the Special Committee's advisors at Evercore, or suggesting that all four Special Committee members were not active participants in the Committee's work.

Finally, in *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745, at *34 (Del. Ch. June 4, 2004), plaintiffs established that one special committee member received consultancy fees from the controlling stockholder representing as much as 22.5% of his income (in addition to substantial income from serving on the Board and various special committees). Another special committee member received director fees representing 10% of his income. *See id.* at *34. Moreover, plaintiffs in *Emerging Communications* proffered record evidence that "all three . . . directors . . . expected to continue as

directors of [the controller's entities] and benefit from the substantial compensation which accompanied that status." *See id.* at *35. In this case, however, as the Court of Chancery observed, Appellants made no attempt to establish the materiality of the challenged Special Committee members' prior economic dealings with Mr. Perelman. *See* Op. at 20-21. Moreover, there is no record evidence that at the time the Buyout was considered and approved, any Special Committee member expected to receive any benefit from Mr. Perelman based upon his or her approval of the Buyout.[6]

Appellants' specific challenges to the independence of Mssrs. Webb and Dinh and Ms. Byorum, addressed sequentially below, should be rejected.

Carl Webb

Appellants first challenge the independence of Mr. Webb, asserting that Mssrs. Webb and Perelman shared a "longstanding and lucrative business partnership" between 1983 and 2002 which included acquisitions of thrifts and financial institutions, and which led to a 2002 asset sale to Citibank in which Mr. Webb made "a significant amount of money." AOB at 27.

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6 In *Emerging Communications*, plaintiffs also demonstrated that there were serious disclosure violations that "rendered [the] vote uninformed." *See id.* at *36-37. In this case, as the Court of Chancery held, Appellants "fail[ed] to allege any failure of disclosure or any act of coercion." Op. at 34.

As the Court of Chancery correctly concluded, however, the fact that Mr. Webb engaged in business dealings with Mr. Perelman *nine years* earlier — which rendered such dealings stale by the time of Mr. Perelman's 2011 offer — does not raise an issue of fact concerning Mr. Webb's ability to evaluate the transaction.[7] *See* Op. at 27-28; *see also Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) ("Allegations that [the controller] and the other directors . . . developed business relationships before joining the board . . . are insufficient, without more, to rebut the presumption of independence.")[8]; *Wis. Inv. Bd. v. Bartlett*, 2000 WL 238026, at *6 (Del. Ch. Feb. 24, 2000) ("Evidence of personal and/or past business relationships does not raise an inference of self-interest.")

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7 Although Appellants state that the Special Committee was unaware of or ignored Mr. Webb's prior dealings with Mr. Perelman (*see* AOB at 27 n.16), that assertion is belied by the record. The members of the Special Committee testified that they knew about such dealings and indeed, "talked about [them] fairly openly." *See* A3107-08 (Dinh Depo. Tr. at 165:7-166:15); *see also* A743 (Webb Depo. Tr. at 42:16-20); A3158 (Byorum Depo. Tr. at 65:19-66:1).

8 Contrary to Appellants' arguments (*see* AOB at 28 n.18), this Court's decision in *Martha Stewart*, which assessed director independence for purposes of assessing demand futility, is relevant to the independence inquiry in this case. Courts have applied *Martha Stewart* in deciding director independence in a variety of factual and procedural contexts, including on motions for summary judgment. *See In re Transkaryotic Therapies, Inc.*, 954 A.2d at 369 n.102 (Del. Ch. 2008); *see also In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *6 n.63 (Del. Ch. Jan. 31, 2013).

Moreover, Mr. Webb's independence is buttressed by the complete lack of evidence that Mr. Webb and Mr. Perelman "had any economic relationship in the nine years before [the Buyout] that was material to [Mr.] Webb, given his existing wealth." Op. at 28. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995) ("[A] shareholder plaintiff [must] show the 'materiality of a director's self-interest to the . . . director's independence . . . .") (internal quotations and citation omitted); *see also Brehm v. Eisner*, 746 A.2d 244,, 259 n.49 (Del. 2000) ("The term 'material' is used in this context to mean relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking.").[9] For these reasons, the Court of Chancery did not err in holding that no triable issues of fact existed as to Mr. Webb's independence.

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[9] Citing *In re Oracle Corp. Derivative Litigation*, 824 A.2d 917, 938 (Del. Ch. 2003), Appellants argue that the Court of Chancery improperly disregarded Mr. Webb's "longstanding relationship with Perelman outside of the purely economic context," that "director independence should not be considered in purely economic terms" and that courts must account for "an array of other motivations" including "love, friendship, and collegiality." AOB at 28 n.17. This argument misses the mark. The record is clear that to the extent Mr. Webb shared *any* relationship with Mr. Perelman, it was a business relationship and concluded in 2002. As Mr. Webb undisputedly testified, outside of any business contacts, his relationship with Mr. Perelman over the last 23 years was "very limited." A732-33 (Webb Depo. Tr. at 20:22-21:5). The Court of Chancery did not "ignore" any non-economic relationship between Mr. Webb and Mr. Perelman; there simply is no record evidence that such a relationship ever existed.

Viet Dinh

Appellants also contend that there are triable issues of fact surrounding Mr. Dinh's independence, asserting that Mr. Dinh's law firm, Bancroft PLLC, advised M&F and Scientific Games (a company in which M&F owned a 37.6% stake), between 2009 and 2011 and earned a total of $200,000 in fees. *See* AOB at 28. Appellants falsely contend that the Court of Chancery concluded that those fees were immaterial because they did not violate NYSE rules. But as the Court of Chancery made clear, Appellants failed to proffer any evidence as to why those fees earned over a three-year period were material to Mr. Dinh personally given his economic circumstances. Op. at 25-26. In fact, Appellants simply ignored the requirement to show that compensation received by Mr. Dinh's law firm was material to Mr. Dinh such that it would have influenced his decision-making with respect to the Buyout. *See Gaylord Container*, 753 A.2d at 465 n.3 (no issue of fact concerning director's independence where director's law firm "has, over the years, done some work" for the company because plaintiffs did not provide evidence showing that the director "had a material financial interest" in the representation). Indeed, the fees from the Scientific Games engagement were not even material to Bancroft as they "would not fund Bancroft's total costs for employing a junior associate for a year." Op. at 26. The **only evidence** in the

record is that these fees were "de minimis," (*see* A3016-18 (Dinh Depo. Tr. at 74:12-76:25)), and Appellants have never offered any evidence to the contrary to create a genuine issue of material fact. *See* Ct. Ch. R. 56(e) ("An adverse party may not rest upon the mere allegations or denials in the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.") As the Court of Chancery found:

> Despite receiving the chance for extensive discovery, the plaintiffs have done **nothing** . . . to compare the actual economic circumstances of the directors they challenge to the ties the plaintiffs contend affect their impartiality. In other words, the plaintiffs have ignored a key teaching of our Supreme Court, requiring a showing that a specific director's independence is compromised by factors material to her. As to each of the specific directors the plaintiffs challenge, the plaintiffs fail to proffer any real evidence of their economic circumstances.

Op. at 20-21 (emphasis added).

Moreover, Appellants completely ignore undisputed record evidence that Bancroft's discrete prior engagements, which were inactive by the time the Buyout proposal was announced, were fully disclosed to the Special Committee soon after it was formed. *See* A1163; A3015-18 (Dinh Depo. Tr. at 73:11-76:13); A3154 (Byorum Depo. Tr. at 50:5-51:16). Whether Bancroft may hypothetically receive future work from Mr. Perelman (*see* AOB at 29) is the type of speculative and

hypothetical argument that could be applied to *any* director relationship, and does not defeat summary judgment.[10]

Nor does the relationship between Mr. Dinh, a Georgetown University Law Center professor, and M&F's Barry Schwartz (who sits on the Georgetown Board of Visitors) create a triable issue of fact as to Dinh's independence. Mr. Dinh earned tenure long before he knew Mr. Schwartz (*see* A3022-23 (Dinh Depo. Tr. at 80:25-81:5)), and there is no record evidence suggesting that Mr. Schwartz could exert influence on Mr. Dinh's position at Georgetown based on his recommendation regarding the Buyout.[11] As Mr. Dinh testified, the Board of

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10 Appellants' citation to the Delaware Rules of Professional Conduct for lawyers (*see* AOB at 29 n.19) is a red herring. Although legal ethics rules may not consider fee amounts in applying conflict of interest principles, to raise a triable issue of fact regarding Mr. Dinh's independence, Appellants must still present evidence that Bancroft's prior engagements for M&F and Scientific Games were economically material to Mr. Dinh. As the Court of Chancery noted, despite ample opportunity for discovery, Appellants presented no such evidence. *See* Op. at 21. In any event, to the extent Appellants raise any arguments about the applicability of Delaware Rule of Professional Conduct 1.7 to the analysis of Mr. Dinh's independence, those arguments were not raised below and thus have been waived. *See, e.g.*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).

11 Although Appellants assert that similar claims were rejected in *Oracle* (*see* AOB at 30), Chancellor Strine's contextual analysis of the *Oracle* Special Litigation Committee's independence was colored by the "special sensitivity" and "extremely serious accusations" of insider trading the Stanford professors on the SLC were charged with investigating against a major Stanford benefactor and fellow Stanford professor. *See* 824 A.2d at 940-43. In that case, Chancellor Strine held that it was "implausible" to think the Stanford professors on the SLC would not be concerned with offending a colleague and a major contributor to the university by deciding that insider trading claims should be pursued against them. *See id.* at 945. Here, there is no evidence that Mr. Schwartz was a "major benefactor" of Georgetown University. Moreover, as the Court of Chancery

Visitors has no influence over the Law Center's governance. *See* A2961 (Dinh Depo. Tr. at 19:8-23). Although Appellants contend that Mr. Schwartz's inviting Mr. Dinh to join the Board of Revlon, Inc. (which, as the Court of Chancery observed, occurred months *after* the Buyout was approved), "illustrates the ongoing personal relationship between Mr. Schwartz and Dinh," this does not raise an issue of fact concerning Mr. Dinh's independence from Mr. Perelman. *See, e.g.*, *Wis. Inv. Bd.*, 2000 WL 238026, at *6. Nor is there any record evidence suggesting that Mr. Dinh expected to be asked to join Revlon's Board at time he served on the Special Committee. *See* Op. at 513 n.65.

Martha Byorum

Appellants finally attempt to concoct issues of material fact regarding Ms. Byorum's independence based on vague allegations that Ms. Byorum "had a business relationship with Perelman from 1991 to 1996 through her executive position at Citibank." AOB at 30. As the Court of Chancery properly concluded, however, Appellants presented no evidence of the nature of Ms. Byorum's interactions with Mr. Perelman while she was at Citibank, let alone evidence establishing that after 1996, Ms. Byorum had an ongoing economic relationship

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observed, Mr. Dinh is neither the Law Center's Dean nor the head of a distinct organization within the Law Center, and therefore is less likely to be involved in the type of fundraising that was of concern in *Oracle*. *See* Op. at 26 n.64. And, even if he were, "that relationship would have to be contextually material." *Id.*

that was material to her in any way. *See* Op. at 23. As Ms. Byorum testified, her interactions with Mr. Perelman while she was at Citibank resulted from her role as a senior executive given that Mr. Perelman was a client of the bank at the time. *See* A3145 (Byorum Depo. Tr. at 16:13-15). Ms. Byorum also testified that she had no business relationship with Mr. Perelman between 1996 and 2007, when she joined the MFW Board. *See* A3146 (Byorum Depo. Tr. at 19:7-10).

As to Appellants' arguments that Ms. Byorum "has been to Perelman's house and attended dinners that Perelman hosted," (AOB at 30), such allegations are routinely rejected as insufficient to draw a director's independence into question. *See Martha Stewart*, 845 A.2d at 1050 ("[a]llegations of mere personal friendship . . . standing alone, are insufficient to raise a reasonable doubt about a director's independence"); *see also In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *9 (Del. Ch. Oct. 13, 2011).

Additionally, Appellants contend that Ms. Byorum performed advisory work for Scientific Games in 2007 and 2008 as a senior managing director of Stephens Cori Capital Advisors ("Stephens Cori"). *See* AOB at 31. But as the Court of Chancery noted, however, Appellants proffered no evidence establishing how the $100,000 fee that Stephens Cori received for that work was material to either

Stephens Cori, or Ms. Byorum on a personal level.[12] *See* Op. at 24; *see also In re Freeport McMoran Sulphur, Inc. S'holders Litig.*, 2001 WL 50203, at *4-5 (Del. Ch. Jan. 11, 2001) (finding that consulting fee of $230,000, (increased to $330,000 after the merger), did not cast doubt on director's independence, where the plaintiffs had not alleged that the fee was material to the director). Moreover, it is undisputed that Stephens Cori's engagement for Scientific Games (which occurred years before the Buyout was announced and the Special Committee convened),[13] was fully disclosed to the Special Committee, and that the Special Committee properly concluded that "it was not material, and it would not represent a conflict." A3156 (Byorum Depo. Tr. at 57:23-58:2).

2. The Special Committee Was Fully Empowered.

Appellants' argument that the Special Committee's "narrow mandate" prevented it from considering alternative transactions or seeking other buyers lacks support, and is indeed flatly contradicted by the undisputed factual record. The resolution creating the Special Committee explicitly empowered the Special

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12 The Court of Chancery observed that Stephens Cori's fee from the Scientific Games engagement was "only one tenth of the $1 million that Stephens Cori would have had to have received for [Ms.] Byorum not to be considered independent under NYSE rules." Op. at 24.

13 Although Appellants note that Stephens Cori did some follow-up work for Scientific Games in 2011, it is undisputed that such work was also fully disclosed to the Special Committee, and that in any event, Stephens Cori did not receive any additional compensation as a result. *See* A1167; A3155 (Byorum Depo. Tr. at 56:13-18).

Committee "to elect not to pursue the [Buyout] proposal." A1159. Among other powers given to the Special Committee in the resolution was the authority to "report to the Board its recommendations and conclusions with respect to the [Buyout], including a determination and recommendation as to whether the Proposal is fair and in the best interests of the stockholders . . . ." *Id.* Mr. Meister, the Special Committee's Chairman, testified expressly that the resolution "subsumed" the power to seek alternative transactions. A568 (Meister Depo. Tr. at 54:3-16 ("Q: So it was your belief that the Special Committee had the power to seek or consider alternative transactions? A: I did.")). As the Court of Chancery concluded, it is "undisputed that the [S]pecial [C]ommittee was empowered not simply to evaluate the offer, like some special committees with weak mandates, but to negotiate with [M&F] over the terms of its offer to buy out the noncontrolling stockholders. Critically, this negotiating power was accompanied by the clear authority to say no definitively to [M&F]." Op. at 17.

It is also undisputed that the Special Committee considered means of maximizing stockholder value through divestiture of M&F's business units. A576-77 (Meister Depo. Tr. at 70:24-71:5). As Mr. Meister testified, "The Committee made it very clear to Evercore that we were interested in any and all possible avenues of increasing value to the shareholders, including meaningful expressions

of interest for meaningful pieces of the business." *See* A607 (Meister Depo. Tr. at 131:7-11); *see also* A304 (Dinh Depo. Tr. at 122:8-21). For example, Mr. Meister specifically tasked Evercore with analyzing whether a sale of Harland Clark Holdings Corp. ("Harland Clark"), MFW's check printing business, to competitor Deluxe Corporation could enhance the value of MFW's stock. *See* A1178; *see also* A596-97 (Meister Depo. Tr. at 109:6-111:5 ("From a value — theoretical value creation alternative, that would be hypothetically a very interesting move. That was my theory. That's why I asked the question. I wanted to see whether somebody — when, actually someone did the analysis, whether that theory was right.")). That analysis proved that a sale of Harland Clark "would not result in higher valuations for [MFW]." A1180.

The Special Committee's consideration of alternative transactions and other means of increasing the value of MFW distinguish this case from those cited by Appellants. For example, in *Dairy Mart*, despite having received a higher offer from another potential acquirer, "[t]he only proposal that the special committee could and did consider was that of the management group . . . ." *See* 1996 WL 159628, at *3. Here, it is undisputed that no offer in excess of the eventual purchase price of $25 per share was received during the three months M&F's offer was in the public domain. *See* A3111 (Dinh Depo. Tr. at 169:17-23). In *Emerging*

Communications, the special committee's "only options were to make a deal with [the controller] on whatever terms he was willing to accept, or no deal at all . . . ." *See* 2004 WL 1305745, at *6 n.13. Moreover, in *Emerging Communications*, the special committee chairman's negotiations were "fatally compromised" because, among other things, the controller "withheld" the most current projections; the controller lied about his financing; and the committee chairman routed all of his communications through the controller's secretary. *See id.* at *35-36 n.27. The record in this case is devoid of any such facts. As detailed above, the MFW Special Committee had and indeed considered other options besides the proposed Buyout. Analysis of those options, however, proved they were unlikely to achieve added value for MFW's stockholders. *See, e.g.*, A1180.

Finally, Appellants quibble that while M&F indicated it would not proceed with the Buyout unless it was approved by both the Special Committee and a majority of MFW's minority stockholders, the Special Committee "made no attempt to formalize those conditions through a standstill or other agreement that the Special Committee could enforce." AOB at 32. This strained argument is both factually and legally unsupportable, and only underscores the weakness of Appellants' position. There is no record evidence that M&F's conditions were ever breached or that Mr. Perelman ever expressed a willingness to circumvent his

self-imposed conditions. *See In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 446 (Del. Ch. 2002) ("I am reluctant, however, to burden the common law of corporations with a new rule that would tend to compel the use of a device that our statutory law only obliquely sanctions and that in other contexts is subject to misuse, especially when used to block a high value bid that is not structurally coercive.").

The undisputed factual record compels but one conclusion — that the fully empowered Special Committee fulfilled its duty of care to MFW's stockholders. As the Court of Chancery soundly concluded:

> [T]here is undisputed evidence that the [S]pecial [C]ommittee could and did hire qualified legal and financial advisors; that the [S]pecial [C]ommittee could definitively say no; that the [S]pecial [C]ommittee could and did study a full range of financial information to inform itself, including by evaluating other options that might be open to MFW; and that the [S]pecial [C]ommittee could and . . . did negotiate with [M&F] over the terms of its offer.

Op. at 18. That the result achieved through the Special Committee's efforts — an increased offer of $25 per share — was approved by over 65% of MFW's minority stockholders, is a testament to the care and diligence with which the Special Committee carried out its mandate. As the Court of Chancery observed, Appellants "do not dispute that the majority-of-the-minority vote was fully informed and uncoerced." Op. at 34.

II. GIVEN THE DUAL PROCEDURAL PROTECTIONS UPON WHICH THE BUYOUT WAS CONDITIONED, THE COURT OF CHANCERY CORRECTLY APPLIED THE BUSINESS JUDGMENT RULE.

A. Question Presented

Did the Court of Chancery properly conclude that the Buyout is subject to the business judgment rule (not entire fairness) because it was conditioned upon the approval of (1) a fully empowered, independent Special Committee, and (2) an informed, uncoerced majority-of-the-minority vote?

B. Scope of Review

Whether a trial court correctly formulated a legal standard when granting summary judgment presents a legal question that this Court reviews *de novo*. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006). *See also* Argument Section I.B. above.

C. Merits of Argument

Given its well-reasoned conclusions that the two deal protections upon which the Buyout was conditioned — approval by both an independent and empowered Special Committee, and a majority of MFW's minority stockholders — undisputedly functioned as they were intended, the Court of Chancery properly ruled that the Buyout was entitled to deference under the business judgment rule.

Appellants' argument that this Court's decision in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1115 (Del. 1994) requires entire fairness review for all controller-initiated going private transactions is belied by both the facts underlying *Lynch*, and the limitations of the decision itself. The merger in *Lynch* was conditioned only upon the approval of a special committee, and not on the approval of minority stockholders. *See* Op. at 42.

Accordingly, *Lynch* establishes no governing standard for transactions, like the Buyout, that are conditioned upon both protections working in tandem. As the Court of Chancery observed:

> Both parties agree that no case has turned on the question of the effect of conditioning a merger upfront on the approval of a special committee and a majority of the noncontrolling stockholders. And, the parties agree that this issue has never been briefed or argued to a Delaware court. Therefore, under the Supreme Court's definition of dictum, the question in this case is still open.

Op. at 40-41. Furthermore, when pressed at oral argument below, Appellants' counsel would not answer whether *Lynch*'s holding extended to transactions involving both deal protections. In fact, as the Court of Chancery observed, *Lynch* was more limited, merely holding that use of only one protective device does not invoke the protections of the business judgment rule. *See* A3360-62 (Tr. of 3/12/13 Oral Argument at 75:9-77:14).

Confronting an open question of law, the Court of Chancery well articulated the reasons why application of the business judgment rule to transactions conditioned upon both independent special committee and majority-of-the-minority approval is most consistent with fundamental principles and aims of Delaware corporate law. *See* Op. at 50-60. As the Court of Chancery observed, application of the business judgment rule in this case,

> . . . is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion. Not only that, the adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection, a structure where stockholders get the benefits of independent, empowered negotiating agents to bargain for the best price and say no if the agents believe the deal is not advisable for any proper reason, plus the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them. A transactional structure with both these protections is fundamentally different from one with only one protection.

Op. at 7-8. This Court should exercise its opportunity to definitively endorse these principles as matters of Delaware law.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the judgments of the court below should be affirmed in all respects.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ William M. Lafferty
William M. Lafferty (#2755)
D. McKinley Measley (#5108)
1201 N. Market Street
Wilmington, Delaware 19801
(302) 658-9200
Attorneys for Paul M. Meister, Martha L. Byorum, Viet D. Dinh and Carl B. Webb

OF COUNSEL:

Tariq Mundiya
Todd G. Cosenza
Christopher J. Miritello
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019

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