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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.	No. 334,2013 Court Below: Court of Chancery of The State of Delaware C.A. No. 6566-CS (Consolidated)

APPELLANTS' REPLY BRIEF

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INTRODUCTION[1]

Defendants mix and match the two independent issues on this appeal. The first issue, which is purely legal, is whether the standard of review articulated in *Kahn v. Lynch* should be modified when a controller conditions his or her initial offer to buy out the minority on the appointment of a special committee and approval of the majority of the minority or unaffiliated stockholders. The facts of this case are only relevant to this first issue inasmuch as both defendants and plaintiffs agree that McAndrews & Forbes controlled MFW and conditioned its offer to buy out the remaining shares of MFW that it did not already own on the approval of a special committee and a majority-of-the-minority provision. Otherwise, at least as to this first issue, no other facts are relevant. On the other hand, if this Court agrees with the defendants and adopts their position as to the first question, then and only then is the second question reached and the issues of the independence of the members of the MFW special committee and the effectiveness of the MFW majority of the minority provision become at issue.

[1] Unless noted otherwise, all capitalized terms have the same meaning as those in Appellants' Opening Brief.

ARGUMENT

I. ENTIRE FAIRNESS SHOULD REMAIN THE STANDARD OF REVIEW FOR ALL CONTROLLER FREEZE-OUT MERGERS

A. This Court Clearly Articulated a Bright-Line Standard of Review for all Controller Buyout Transactions, Which it Has Consistently Reaffirmed

Defendants argue that neither *Kahn* nor any of the other cases of this Court that consistently reaffirmed *Kahn*'s continuing viability actually considered the existence of both a special committee and a majority-of-the-minority approval provision and, therefore, *Kahn* is inapplicable. In so doing, defendants focus on the "disjunctive" – "or" – language from *Kahn* and argue that this language "should not be interpreted away as accidental." M&F Br. at 17. However, defendants ignore the more specific and unequivocal language from *Kahn* that "the ***exclusive*** standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness." *Kahn v. Lynch*, 638 A.2d 1110, 1117 (Del. 1994) (emphasis added). This language could not be clearer, and it would be difficult to conclude that this language is somehow accidental.[2]

[2] Delaware Courts have subsequently agreed that *Kahn* requires application of entire fairness in all controller freeze-out cases. *See, e.g., Abrons v. Maree*, 911 A.2d 805, 812 n.8 (Del. Ch. 2006) (noting that *Kahn* held that "a long form merger with a controlling stockholder is always subject to entire fairness even if the transaction was negotiated and approved by a special committee of independent directors subject to approval by a majority of the disinterested shares, but the result of either of those two protections is to shift the burden of persuasion on the issue of entire fairness from the defendants to the plaintiffs").

Two cases that were cited and quoted from extensively in *Kahn* make it clear that the Court in *Kahn* considered the ramifications of having both mechanisms when it held entire fairness to be the "exclusive" standard of review. In *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929 (Del. 1985), both mechanisms were employed. Skelly Oil's president "formed a team to negotiate the merger" (*id.* at 938 n.7), the merger was approved by the "independent directors" (*id.* at 936), and a majority of the minority stockholders voted to approve the transaction (*id.*). Nevertheless, this Court applied the entire fairness standard. *See id. at* 937 (stating that "'the requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts'") (quoting *Weinberger v. UOP*, 457 A.2d 701, 710 (Del. 1983)).

Similarly, the merger challenged in *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490 (Del. Ch. 1990), was required to pass entire fairness review, despite the presence of both an independent well-functioning board committee[3] and

[3] The target's board created and empowered a Merger Committee of outside directors, "none of whom were Remington employees and all of whom were independent of, and had never been affiliated with or employed by, DuPont." 584 A.2d at 494 (footnote omitted).

required approval by a majority of the minority vote.[4] With respect to the standard of review and burden of proof, *Citron* stated the issue as follows:

> The question posed here is whether the business judgment form of review will also govern a parent-subsidiary merger that is either negotiated on behalf of the subsidiary by a committee of disinterested, independent directors, or is ratified by the informed vote of disinterested minority shareholders, or both.

Id. at 501. Relying on this Court's opinion in *Rosenblatt*, *Citron* rejected defendants' contention that business judgment should be the standard of review, holding that entire fairness would apply, with the burden of persuasion shifted to plaintiff based on the independence of the committee and fully informed majority of the minority approval.

Kahn cited both *Rosenblatt* and *Citron* often, and quoted extensively from *Citron* with respect to the rationale for *Kahn's* application of the entire fairness standard. There is nothing in *Kahn* indicating that this Court intended to reject the holdings in *Rosenblatt* and *Citron* that use of both an independent committee and majority-of-the-minority approval has no impact on the application of the entire fairness standard of review.

[4] "[T]he merger proposal would be made subject to 'majority of the minority' approval, *i.e.,* approval by a majority of the shares voted by Remington's stockholders other than DuPont. In effect, DuPont gave the Remington minority the power to decide whether or not the merger should go forward." 584 A.2d at 493.

This Court's role is not simply limited to narrowly deciding cases on their specific facts. Many thousands of practitioners in this and many other countries throughout the world rely on the rulings of this Court to provide them guidance in situations that are in many, if not all, cases factually distinguishable from the specific cases decided. When such practitioners see that this Court has used the word "exclusive," it is difficult to imagine that they think there is some other meaning to that word that they should consider.[5]

B. The Circumstances Leading to *Cox's* Proposed Changes Are No Longer Present

Defendants argue that plaintiffs point to no data or authority other than the anecdotal experience of plaintiffs' counsel for the proposition that the number of *Cox*-type settlements started to dwindle after *Cox* and came to a halt with Vice Chancellor Laster's decision in *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 947 (Del. Ch. 2010), in March 2010. However, despite defendants' reference to "perverse litigation incentives," M&F Br. at 30, defendants cite no decision since that 2010 *Revlon* decision that approved a *Cox*-type settlement that would conflict with plaintiffs' statement. The three co-lead plaintiffs' counsel in this case and

[5] Consistent with the role of the Court to provide guidance, the Court reiterated in *Southern Peru* the exclusive role of the entire fairness standard in all controller buyouts: "[T]he 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 eradicated and still require careful judicial scrutiny.'" *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1241 (Del. 2012) (footnote omitted).

their Delaware counsel are regular practitioners in public-company merger and acquisition litigation in the Delaware Court of Chancery and, likely, would be aware of any such settlements – as would defendants' counsel.

In the last few years, since the *Revlon* decision was issued and the end to *Cox*-type settlements, the incentives for both plaintiffs' lawyers and controllers have changed in ways that should, ultimately, encourage controllers to make fair offers and discourage plaintiffs' counsel from bringing non-meritorious lawsuits. Because it is no longer acceptable to settle a controller freeze-out merger based solely on work done by a special committee – and for no additional money for the minority stockholders – these cases are now being litigated post-closing. Since such transactions have already closed, there is no possibility of settling the actions for anything other than additional compensation for the minority stockholders – disclosures or changes to defensive measures, for example, would provide no benefit upon which to base a settlement. Thus, since the 2010 *Revlon* decision, controller freeze-out cases are still being litigated or have resulted in additional money for the minority stockholders (either as a result of a settlement or a plaintiffs' judgment after trial), dismissal of the complaint at summary judgment, or judgment for defendants after trial. The "perverse litigation incentives" referred to by defendants simply do not exist anymore.

From plaintiffs' counsel's point of view, if the lawsuit is not settled or won at trial, they will face a long and expensive process, including often hundreds of thousands of dollars in expert fees, document management costs, and travel and deposition costs, all with the possibility of losing at trial and receiving no fees or reimbursement of those expenses whatsoever. It will not take many defendants' judgments to cause plaintiffs' counsel to be very careful when deciding whether to agree to file controller freeze-out cases, knowing that filing such a case might be a bet-the-firm proposition. Thus, fewer lawsuits will be filed challenging freeze-out deals where the price is fair. Similarly, significant results for plaintiffs (including, for example, the recent settlement on the eve of trial of the *CNX* case for over $42 million) should ultimately make controllers think twice before they offer to buy out the minority stockholders at a price that is unfair based on the same methodologies employed by the courts. The result of these incentives is that prices offered and paid by controllers in freeze-outs should become fairer (which should be the primary goal of these proceedings), in keeping with a controller's duty of loyalty to the minority stockholders, and fairer prices should result in less litigation.

C. Defendants' Argument that Using Both Mechanisms Replicates Arm's-Length Transactions Is Incorrect

Defendants argue that a controller conditioning an offer on both a special committee and a majority-of-the-minority provision "is the optimal structure for

the protection of the minority in controller buyouts,"[6] M&F Br. at 18, and that using both of these mechanisms "replicate[s] the protections of a third party merger." *Id.* However, special committees are generally comprised of current or former colleagues or friends of the controller or, at least, have often sat with the controller on the board, and often for extended periods. Noted scholars have pointed out this structural bias and "groupthink" and believe board independence is too easily accepted by the Delaware courts.[7] *See* Opening Br. at 20 n.11. Certainly, this dynamic does not "replicate" an arm's-length transaction where a board is generally asked to negotiate with *strangers or competitors* of the company.

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[6] Defendants incorrectly state that plaintiffs have conceded that "'this transaction structure is the optimal one for minority stockholders.'" M&F Br. at 19 (quoting Op. at 527-28 (citing A1980 and A3387)). In support of this assertion, defendants cite the Court of Chancery's decision below, which, in turn, cites the record at A1980 and A3387. Those citations are to a page in plaintiffs' brief below and a page from the transcript of oral argument below. Nothing on the transcript page cited can be construed as supporting such a position. The page in plaintiffs' brief below states: "[I]t certainly is hard to dispute that a special committee and majority-of-the-minority condition together are better than either alone or neither, in many instances. However, these protections are not sufficient to abandon entire fairness review of controller freezeout mergers." A1980. Hardly a ringing endorsement.

[7] Defendants cite to three cases where independent directors stood up to controllers. *See* M&F Br. page 20. Plaintiffs certainly do not assert that *all* special committees are flawed. However, there are many examples where such committees are flawed. *See, e.g., Ams. Mining Corp.*, 51 A.3d at 1241 ("The Court of Chancery concluded that 'although the Special Committee members were competent businessmen and may have had the best of intentions, they allowed themselves to be hemmed in by the controlling stockholder's demands.'"); *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1149 (Del. Ch. 2006) ("It is unfortunate … that the process designed by Schreier, Filer, and the rest of the CP board to effectuate the merger between CP and IIC in the case *sub judice* fails at the very threshold to establish fair dealing. Indeed, redolent as they are with cynicism and corruption, the facts in this case serve as a singular example of the pitfalls inherent in organizing any sort of self-dealing transaction.").

Contrary to defendants' argument, plaintiffs do not argue that arbitrageurs should be "stripped" of their "full right to vote." *See* M&F Br. at 21. Of course, every stockholder has individual reasons to vote for or against any proposal. But, when a significant proportion of a company's shares is transferred to arbitrageurs after the announcement of a merger, it cannot reasonably be asserted that such vote somehow represents a referendum on whether or not the transaction is fair. Neither is the fact that other stockholders sold their shares to arbitrageurs any indication that those stockholders thought the price was fair. Opening Br. at 21-22. Considering that controller freeze-outs are voted down very rarely, it is more likely that such stockholders believed the consummation of the transaction to be inevitable and they would rather have the cash immediately to re-invest than wait for the closing, regardless of the fairness or lack of fairness of the price. Moreover, even if these stockholders were not faced with the likely approval of the transaction, unlike the controller, these stockholders do not have the benefit of internal confidential information about the company that would have allowed them, assuming they had the requisite sophistication, to make some kind of a determination using traditional valuation analyses as to the fairness of the price being offered.

D. Defendants' Proposed New Standard Eliminating Careful Court Scrutiny of the Price and Adopting a Solely Process-Based Mechanism Should Be Rejected

Whether or not the protections at issue do or do not replicate an arm's-length transaction, which they do not, in evaluating a transaction where a controller – who has a fiduciary duty of loyalty to the minority stockholders – freezes out that minority, careful scrutiny by the Court of the price should not be eliminated in favor of a mechanism that is solely process-based and attempts only to "replicate an arm's-length transaction." Significantly, defendants neither acknowledge a controller's fiduciary duty of loyalty to the minority stockholders, nor do they assert that using the protections at issue will, in fact, assure a fair price, which would be in keeping with the controller's fiduciary duty and is the goal of entire fairness review.[8]

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[8] The recent article by Restrepo and Subramanian that defendants rely upon (*see* M&F Br. at 26-27) similarly does not acknowledge a controller's fiduciary relationship with the minority stockholders, and is otherwise flawed. *See* Fernan Restrepo & Guhan Subramanian, *The Effect of Del. Doctrine on Freezeout Structure & Outcomes* (2013) ("Restrepo and Subramanian"). In Restrepo and Subramanian, the authors reviewed 12 years of statistics concerning controller freeze-outs but divided them only by whether they were pre-*Cox* or post-*Cox*. While the authors noted differences between these two groups of cases, they didn't describe whether the changes that were observed were gradual or abrupt. Moreover, the reasons the authors provided for these changes were based solely on "practitioner intuition," which, in turn, was based on "conversations with practitioners." The authors do not state how many practitioners were consulted or who they were. Based on this vague anecdotal approach, the authors conclude that the unified approach proposed in *Cox* was somehow responsible for the changes that were noted and that "more deals are attempting to fit into the unified approach blueprint." The authors do not explain how a proposed approach could be responsible for the changes. A more likely explanation is the criticism by the Court of *Cox*-type settlements and buyers' subsequent understanding that post-closing litigation would be likely. The authors also do not provide any documentation for the conjecture that more deals are attempting to fit into the unified approach.

footnote continued on next page

In an arm's-length transaction, which defendants' new structure supposedly replicates, Delaware's *Revlon* jurisprudence would require a board, as auctioneers of the company, to obtain the best price reasonably available, but not necessarily a "fair" price.[9] *See In re Answers Corp. S'holder Litig.*, 2012 WL 3045678, at *3 (Del. Ch. July 19, 2012) ("In the *Revlon* context, directors 'advance the corporate welfare' by trying to get the best price reasonably available for the corporation's shareholders."). Fulfilling that *Revlon* requirement is solely process-based and does not necessarily result in fair value. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (noting that in order to satisfy their fiduciary duties, "directors must 'engage actively in the sale process,' and they must confirm that they have obtained the best available price either by conducting an auction, by conducting a market check, or by demonstrating 'an impeccable knowledge of the market'") (internal citations omitted).

However, unlike in *Revlon* situations (where the buyer does not have a fiduciary relationship to the company's stockholders), in controller freeze-outs, the controller has unfair advantages over public stockholders, among other things, in

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In fact, the transaction at issue in this action appears to be one of the few attempts at such an approach since *Cox*.

[9] Unlike the process-based solution utilized solely in the *Revlon* context and that defendants advocate, courts in entire fairness proceedings look to various traditional valuation methodologies to determine fair value. *See, e.g., Gesoff*, 902 A.2d at 1163-64 (Del. Ch. 2006) (relying exclusively on DCF analysis); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *25 (Del Ch. Aug. 18, 2006) (same).

terms of information and timing.[10] Because of these unfair advantages, such a process-based mechanism should never take the place of entire fairness review, which combines a careful factual review of both the process and the fair value of the minority's shares. *See Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997) ("Entire fairness remains applicable even when an independent committee is utilized because the underlying factors which raise the specter of impropriety can ***never*** be completely eradicated and still require careful judicial scrutiny." (emphasis added)). Defendants' proposed new structure would eliminate this "careful judicial scrutiny" of the price and, possibly, any meaning to a controller's duty of loyalty to the minority stockholders.

Moreover, the controller's refusal to sell his or her shares, as in the case on appeal, makes it impossible for any other potential bidder to offer a topping bid. Thus, under defendants' proposed structure, unlike in *Revlon* situations (with actual arm's-length transactions), MFW's special committee could never have acted as a neutral auctioneer because there is no possibility of another buyer emerging.

[10] For example, since a controller can time a company's transactions for his or her own benefit, delaying a beneficial transaction can keep the stock price from increasing (which it arguably would have after the beneficial transaction was announced), affecting not only the price of any subsequent freeze-out transaction but also the vote on that transaction, including any majority-of-the-minority condition.

II. MATERIAL ISSUES OF FACT REMAIN REGARDING THE INDEPENDENCE AND FUNCTIONING OF THE MFW SPECIAL COMMITTEE

A. Material Issues of Fact Remain Whether the MFW Special Committee Was Independent

The majority of MFW's Board (including the Special Committee) consisted of directors who had business and personal ties to Perelman, McAndrews & Forbes or other insiders. *See* A103-07; A122-24; A726-30; A2588-89; A2960-61; A3014; A3017-18; A3023; A3143-45; A3155-56. Thus, this case is distinguishable from defendants' citations in support of summary judgment on director independence.[11]

In re Gaylord Container Corp. S'holders Litig., 753 A.2d 462 (Del. Ch. 2000), is distinguishable and involved examination of defensive measures taken by a board against a possible hostile takeover following declassification of shares. *Id.* at 464. The Court concluded that a director was not conflicted by virtue of having

[11] Summary judgment was also inappropriate in this case because not only the Board's independence, but its ability to function independently of Perelman was in dispute. This Court has previously held that summary judgment should be denied "when, from the evidence produced, there is a reasonable indication that a material fact is in dispute….[or] if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances." *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*, 1998 WL 731660, at *2 (Del. Ch. Oct. 9, 1998) (Jacobs, V.C.) ("Summary judgment must be denied 'if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or inference to be drawn there-from.'") (citation omitted). Indeed, "summary judgment, with ever-lurking issues of fact, is a treacherous shortcut" and may be inappropriate "even in cases where the Court has found that there are no material factual disputes." *Mentor Graphics*, 1998 WL 731660, at *3 (citation omitted). In addition, "[i]n evaluating the record on a motion for summary judgment, a trial judge is not permitted to weigh the evidence or resolve conflicts presented by the pretrial discovery." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

offered his company's advisory services to the board because the board rejected that offer. *Id.* at 465 (noting that had the company "been hired, a different finding might be in order"). Another director was not conflicted when a law firm where he served as of counsel completed advisory work for the bondholders (not the controller) five years before the defensive measures were taken. *Id.* This is different than Dinh's personal oversight of his law firm's completion of various legal work for McAndrew's & Forbes and another Perelman-controlled entity shortly prior to the Buyout, as well as his status as a partner and founding member of that law firm. A3014; A3017-18. Likewise, the facts in *Gaylord* are very different from Byorum's successful solicitation – as a senior member of Stephens Cori – of work from a Perelman-controlled entity.[12] Similarly, defendants' suggestion that Webb's longstanding lucrative business partnership is immaterial is not supported by cases decided after this Court's decision in *Beam ex rel. Martha Stewart Living Omnimedia v. Stewart*, 845 A.2d 1040 (Del. 2004). *See e.g., London v. Tyrrell*, 2010 WL 877528, at *15 (Del. Ch. Mar. 11, 2010) (material fact remained whether SLC member was independent of defendant Tyrrell when the SLC member had previously hired the director to sell his company and expressed

[12] While Defendants contend that the 2011 work by Stephens Cori was immaterial because it did not result in fees, the fact that Byorum personally solicited this work on behalf of Stephens Cori and the work could have resulted in a substantial fee suggest that her relationship with Perelman was a material one to her. A3155-56.

gratitude and respect for the director, because "the independence of an SLC member may be impaired if that member feels he owes something to an interested director. That sense of obligation does not have to be financial in nature").

Similarly, although *Se. Pa. Transp. Auth. v. Volgenau* cited to the Court of Chancery's opinion below *in dictum*, that case involved highly distinguishable facts. 2013 WL 4009193 (Del. Ch. Aug. 5, 2013). Unlike here, that merger was with a third party, the controller did not stand on both sides of the transaction, and his proceeds through the merger were either equal to or less than those received by minority stockholders. *Id.* at *10, *25. In addition, the *Volgenau* buyout was accomplished through an extensive bidding process that included a post-signing go-shop. *Id.* at *4-9. Similarly, *In re Transkaryotic Therapies, Inc*., 954 A.2d 346, 351 (Del. Ch. 2008), involved an appraisal and breach of fiduciary action over a merger with an unaffiliated third party. [13]

[13] Defendants' other cited authorities are likewise distinguishable both in facts and procedural posture. Unlike *In re BJ's WholeSale Club, Inc. S'holders Litig.*, plaintiffs here do more than point to long-term board positions and undefined "relationships," but show how members of the Special Committee had business and/or personal relationship with Perelman and McAndrews & Forbes. 2013 WL 396202, at *6 (Del. Ch. Jan 31, 2013) (decided on a motion to dismiss). Likewise, *Wisc. Inv. Bd. v. Barlett*, involved the allegation that the company's chairman was conflicted by virtue of receiving a success fee for negotiating a merger with a third party. 2000 WL 238026, at *1, *6 (Del. Ch. Feb. 24, 2000) (motion for preliminary injunction). In *In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2001 WL 50203 (Del. Ch. Jan. 11, 2001) – another motion to dismiss case – the Court dismissed plaintiffs' complaint for poor drafting and a later Court denied defendants' motion for summary judgment. *See In re Freeport-McMoran Sulphur, Inc. S'holder Litig*., 2005 WL 1653923, at *1, *12 (Del. Ch. Jun. 30, 2005) (denying summary judgment in order to determine whether the entire board acted independently and whether certain members of the board were independent from controller).

Although defendants attempt to paint this Buyout as the result of arm's-length negotiation, the record belies this assertion. The Special Committee failed to recognize Perelman's $24 opening as an opportunistic bid, given that MFW stock traded at a two-year low and ultimately achieved only a $1 increase above the opening bid. A2614-16.

B. Material Issues of Fact Remain Whether the Special Committee Was Fully Empowered and Whether it Satisfied its Duty of Care

As this Court has previously found, "[d]irectors must not only be independent, but must act independently." *Texlon*, 802 A.2d at 264 (citing *Kahn v. Tremont*, 694 A.2d at 429). The Special Committee here failed on both counts. The Special Committee was comprised of a majority of interested directors who failed to maximize stockholder value by failing to adequately investigate alternatives to the Buyout by failing to solicit third party interest in either the whole Company (A3165) or portions of the Company (A3063-64)[14] or even

[14] Dinh, for example, assumed that the Company's business segments were not desirable assets and that a sum-of-the-parts analysis would return a lower value for the Company, though Evercore did not provide the Special Committee with such a valuation. A3058-59. Moreover, the Special Committee did not ask about, nor did Evercore identify, potential acquirors of the Company's assets or business segments. A3063-64. A sum-of-the-parts analysis, however, results in a higher value as demonstrated by the analysis by MFW's own advisor, American Appraisal Associates, Inc. ("American Appraisal"), which conducted a valuation of MFW's business for the purpose of complying with SEC reporting rules. By preparing a DCF for each segment, American Appraisal derived a higher valuation for the Company in February 2011 than did Evercore, even though American Appraisal used more conservative projections. *Compare* A1792; A1811-12; A1823; A1851-58 *with* A2672-82. Moreover, when American Appraisal was hired by the Company again following the consummation of the Buyout, it had to deal with

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creating a process by which unsolicited third party interest could be evaluated (A606-07; A3165; 3085-89). These facts alone demonstrate that the Special Committee was not in a position to engage in arm's-length bargaining.

In addition, the Special Committee was not fully informed and had divergent views regarding long-term projections. For example, in April 2011, just one month prior to Perelman's mobilization to acquire the Company, HCHC updated its five-year projections in order to amend its $1.7 billion credit facility. A667-68. Although management's projections were created within two months of Buyout negotiations for the purpose of receiving lending, the Special Committee instructed HCHC (a division of MFW) to update its projections with the understanding that HCHC would provide lower projections than those created in April 2011. A588-89; A3159.[15]

Moreover, Meister testified that there was some concern whether the updated projections were influenced by McAndrews & Forbes. A616-17.[16] Yet,

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"significant impairments in lieu of a bargain purchase scenario for the privatization transaction." AR42-77.

[15] Members of the Special Committee apparently did not agree on the reliability of the April 2011 projections. Byorum, a banking executive, maintained that it would be "ill-advised" to provide a bank with projections that were incorrect, while Meister maintained that there was a possibility that the projections had been prepared with a "positive bias" to raise money. A585-87; A3158; A3163-64.

[16] Discovery also revealed that in June 2011, shortly prior to the Special Committee's retention of Evercore, Perelman sought to schedule an introductory meeting with Christopher Knee ("Knee"), a lead member of the Evercore engagement team. A2937-38. Importantly, Schwartz

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the Special Committee did not take any steps to ensure that the financial information used by Evercore was independent or reliable. On September 6, 2011, Evercore informed the Special Committee that it received updated refinance assumptions from McAndrews & Forbes that further negatively impacted the projections. A1184-85. Evercore noted that these assumptions were provided by dual employees (i.e., employed by both McAndrews & Forbes and MFW), though the Special Committee did not even inquire as to who those individuals were, let alone whether their dual status raised any doubt as to the refinance projections. *Id.*; A3091-92. The Special Committee was also not aware of all material information, including that McAndrews & Forbes could take advantage of $80 million in tax payments from MFW once it took the Company private – a potential bargaining tool in negotiations. A568-69; A2840-41.

Testimony from Byorum raises additional troubling issues concerning Evercore's work and the information presented to (or not presented to) the Special Committee. At an August 17, 2011 meeting, the Special Committee determined that Evercore would communicate a $30 per share counteroffer for which Evercore prepared a script. A2828-31. Byorum had no recollection of any discussion surrounding the information contained in the script, nor did the Special Committee

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testified that he interviewed Moelis as advisor to McAndrews & Forbes and was not aware of any plans to hire another advisor. A701-02. Schwartz was not aware that Perelman reached out to Knee or why. A707.

focus on the fact that Evercore's script valued the Company based on free cash flow. A3168. Likewise, in connection with Evercore's fairness opinion, Byorum had no recollection of any details discussed and could not recall any discussion surrounding the *Precedent Transaction Analysis*, which indicated that three out of the four sets of multiples indicated per-share values above the $25 consideration. AR4-39; A3170-71.

Defendants further misconstrue the facts surrounding Dinh's, Meister's, and Byorum's roles in the Faneuil transaction. The record shows that the Faneuil special committee was formed after Dawson – a member of the Board and the President and CEO of HCHC – "mentioned to [Schwartz] that he would be very interested in [HCHC] acquiring Faneuil." AR1-3; A2505-06. The Faneuil special committee engaged in due diligence until Dawson abruptly called off the acquisition in May 2011 – just as Perelman began considering acquiring MFW. A2983-86; A3147-48. Rather than demonstrating the Faneuil special committee's ability to say no to McAndrews & Forbes insiders, this sequence of events highlights these individuals' passivity with respect to Company insiders and Perelman's ability to take unfair advantage of his position as controller.

CONCLUSION

For all of the foregoing reasons, as well as those in Appellants' Opening Brief, the Court of Chancery erred in dismissing this action. This Court should reverse and remand.

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