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Case Number 334,2013

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, PHILIP E. BEEKMAN, WILLIAM C. BEVINS, MARTHA L. BYORUM, CHARLES T. DAWSON, VIET D. DINH, THEO W. FOLZ, JOHN M. KEANE, PAUL M. MEISTER, BARRY F. SCHWARTZ, BRUCE SLOVIN, STEPHEN G. TAUB, CARL B. WEBB and MACANDREWS & FORBES HOLDINGS, INC., Defendants-Below, Appellees.	No. 334, 2013 On appeal from the Court of Chancery of the State of Delaware, C.A. No. 6566-CS (Consolidated)

ANSWERING BRIEF OF APPELLEES MACANDREWS & FORBES HOLDINGS INC., RONALD O. PERELMAN, BARRY F. SCHWARTZ, M&F WORLDWIDE CORP., WILLIAM C. BEVINS, BRUCE SLOVIN, CHARLES T. DAWSON, STEPHEN G. TAUB, JOHN M. KEANE, THEO W. FOLZ, AND PHILIP E. BEEKMAN

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NATURE OF THE PROCEEDINGS

This appeal challenges the Court of Chancery's opinion granting summary judgment to defendants below-appellees ("Defendants") on claims by the plaintiffs below-appellants ("Plaintiffs") of breach of fiduciary duty arising from the merger (the "Merger") between affiliates of MacAndrews & Forbes Holdings Inc. ("MacAndrews") and M&F Worldwide Corp. ("MFW"). *See In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013) (cited as "Op. at [ ]").

On June 24, 2011, MacAndrews made a proposal to MFW's board to acquire the 57% of MFW shares that it did not already own for $24 per share (the "Proposal"). Op. at 499. From the outset, MacAndrews committed publicly that it would not proceed with ***any*** buyout of MFW that was not (i) negotiated and approved by a special committee of independent MFW directors, and (ii) approved by a majority of MFW shares not affiliated with MacAndrews.

Multiple lawsuits were filed within days of the announcement. Plaintiffs took substantial document and deposition discovery. In June 2012, Defendants moved for summary judgment (the "Motion"). Plaintiffs sought and received substantial additional discovery, but elected not to submit any Rule 56 affidavits, factual or expert, in response to the Motion. B14; B59-61; B63-68.

The Court of Chancery granted summary judgment. The court found that the Motion presented a "novel question of law" never presented to this Court –

specifically, "what standard of review should apply to a going private merger conditioned upfront by the controlling stockholder on approval by both a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote." Op. at 499-500, 502. The Chancellor held that business judgment review should be applied to a very limited category of controller mergers – those in which the controller voluntarily relinquishes his control, such that the negotiation and approval process replicates that of a third-party merger. Specifically, the court held that the business judgment rule should apply if, ***but only if***: (i) the controller conditions the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee acts with care; (v) the minority vote is informed; and (vi) there is no coercion of the minority. *Id.* at 535.

Based on the undisputed evidence, the Chancellor found that Plaintiffs had failed to raise any genuine issue of material fact as to whether these prerequisites were satisfied, reviewed the Merger under the business judgment standard, and granted summary judgment. *Id.* at 536. This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. Neither *Kahn v. Lynch* nor any other opinion of this Court has addressed the question of the standard of review applicable to a controller merger conditioned from the outset on two unwaivable protections: (i) negotiation and approval by a special committee of independent directors fully empowered to say no, and (ii) approval by an uncoerced, fully informed vote of a majority of the minority stockholders. Where both protections are present, the controller's power to influence the negotiation and approval process is eliminated; the conceptual rationale for application of the heightened entire fairness standard is absent; and the default business judgment rule can and should be applied.

2. Denied. The Court of Chancery properly found that Plaintiffs offered no evidence below to create a triable issue of fact regarding (i) the approval of the Merger by the special committee (the "Special Committee") and a majority of the minority, (ii) the Special Committee's independence, (iii) the Special Committee's power to retain independent advisors, and to say no definitively, (iv) the Special Committee's due care in approving the Merger, (v) whether the majority-of-the-minority vote was fully informed, and (vi) whether the minority vote was uncoerced. Summary judgment was therefore properly granted.

COUNTERSTATEMENT OF FACTS

Plaintiffs' failure to raise any genuine issue of material fact on any of the strict requirements established by the court below for application of the business judgment rule to the Merger is particularly striking in view of the fact that Plaintiffs had full opportunity to develop evidence on these issues, before and after Defendants filed their Motion. Plaintiffs received more than 100,000 pages of documents, and deposed all four Special Committee members, their financial advisors, and senior executives of MacAndrews and MFW.

Yet after 18 months of discovery, Plaintiffs presented no record evidence to create a triable issue of fact on any material issue – no evidence on the materiality of the purported Special Committee conflicts, or its exercise of due care; no evidence that the decisive majority-of-the-minority vote approving the Merger was coerced in any way; and no evidence that the vote reflected anything but the fully informed collective views of MFW's minority on the Merger's fairness. In the Chancellor's words, "the plaintiffs have done nothing." Op. at 510.

In this Counterstatement of Facts, we present the facts of record, found to have been undisputed by the court below. The legal effect of those undisputed facts is then addressed in the Argument sections that follow.

A. MFW Faced Serious Long-Term Business Challenges In Early 2011.

MFW had four business segments: Harland Clarke Corporation ("Harland"), which printed paper bank checks; Harland Financial Solutions, which provided technology products and services to financial services companies; Scantron Corporation, which provided scanning and educational products and services; and Mafco Worldwide Corporation, a manufacturer of licorice flavorings. Op. at 519; A171. By 2011, all had serious long-term business challenges; the largest business, Harland, faced pricing pressures and "a seemingly irrevocable long-term decline" due to global trends toward electronic and online payment systems. Op. at 519; A51; A117; A750-51. On May 5, 2011, MFW reported deteriorating first quarter earnings, and projected continuing declines through 2011. A50-51; A806-10. Despite revising its projections downward, MFW still missed its revenue and EBITDA forecasts for 2011. A3224; B41; B117.

B. MacAndrews Makes A Proposal To Acquire MFW Through A Cash Merger For $24 Per Share.

In May 2011, MacAndrews began to explore taking MFW private, and engaged Moelis & Company to advise it. Op. at 506-07; A202. Moelis prepared valuations of MFW ranging from $10 to $32 per share. A997; A1136. On June 13, MacAndrews made its Proposal to buy all MFW shares it did not already own for $24 in cash, a premium of more than 40% over MFW's unaffected trading

price. Op. at 506. The Proposal stated publicly and unequivocally:

> We will not move forward with the transaction unless it is approved by [an independent] special committee. In addition, the transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares of [MFW] not owned by MacAndrews or its affiliates.

Id.; A1151-52. MacAndrews also made clear it would not take any retributive action against MFW or its minority stockholders if an agreement could not be reached: "[S]uch determination would not adversely affect our future relationship with [MFW] and we would intend to remain as a long-term stockholder." *Id.*

C. The MFW Board Forms An Independent, Fully Empowered Special Committee To Negotiate A Transaction.

MFW's independent directors formed a Special Committee consisting of Defendants Meister, Dinh, Webb, and Byorum. Op. at 506-07; A1156-61; A1163. The court below found "no dispute of fact that the MFW special committee was comprised solely of directors who were independent under our Supreme Court's jurisprudence," because Plaintiffs offered no evidence on the point:

> Despite receiving the chance for extensive discovery, ***the plaintiffs have done nothing***, as shall be seen, 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 510 (emphasis added).

The Chancellor also correctly found no genuine issue of material fact concerning the appropriate breadth of the Special Committee's mandate, or its satisfaction of its duty of care. The Special Committee was not merely authorized to "evaluate" the Proposal, but was empowered to hire its own independent legal and financial advisors, negotiate with MacAndrews over any element of the Proposal, consider strategic alternatives, and "say no definitively to MacAndrews." Op. at 507-08. The Special Committee "did not have to fear that if it bargained too hard, MacAndrews . . . could bypass the committee and make a tender offer directly to the minority stockholders. Rather, the special committee was fully empowered to say no and make that decision stick." Op. at 508.[1]

Examining the Special Committee's execution of its broad mandate, the Chancellor found there was no "evidence indicating that the independent members of the special committee did not meet their duty of care . . . ." Op. at 516. To the contrary, the Special Committee "met frequently and was presented with a rich body of financial information relevant to whether and at what price a going private

[1] In connection with an earlier instance in which MFW formed a special committee to evaluate a potential transaction with MacAndrews – a potential acquisition of a MacAndrews subsidiary called Faneuil, Inc., which had a business complementary to Harland – Plaintiffs accuse MacAndrews of "manipulation" by "delaying the development of lucrative business ventures," including the Faneuil merger. *See* Appellants' Opening Brief ("OB") at 18 n.6. In fact, the undisputed evidence that Plaintiffs rely on shows just the opposite: ***MacAndrews*** was the one that offered the deal to MFW (which MacAndrews certainly had no obligation to do), and ***MFW's Faneuil special committee*** turned it down, based on the lack of enthusiasm for the deal on the part of senior Harland executives and after receiving advice from Lazard. *See* OB at 5-6; *see also* A2976-86; A3147-48. Thus MFW's Faneuil special committee is another example of a special committee that functioned effectively regarding a MacAndrews-related transaction.

transaction was advisable." Op. at 516. As with the issue of independence, the Court of Chancery ruled that "the plaintiffs d[id] not make any attempt to show that the MFW special committee failed to meet its duty of care . . . ." Op. at 514.

D. The Special Committee Conducts Due Diligence And Considers Strategic Alternatives Without Any Influence From MacAndrews.

The Special Committee hired legal counsel (Willkie, Farr & Gallagher LLP) and financial advisors (Evercore Partners), whose independence and expertise is unchallenged. Op. at 507, 514; A1163-69; A1270-79. The Special Committee insisted from the outset that MacAndrews (including any "dual" employees who worked for both MFW and MacAndrews) be screened off from the Special Committee's process, to ensure that the process replicated arm's-length negotiations with a third party. A617; A685-86; A1346; A3223. That instruction was scrupulously honored.

Evercore and the Special Committee asked MFW to prepare new financial projections reflecting "management's most up-to-date, and presumably most accurate, thinking" on MFW's business units. Op. at 514-15; A617-18; A685-86; A751; A3223. The updated projections (which formed the basis for Evercore's valuation analyses) reflected MFW's deteriorating results, especially in Harland's paper check-printing business. Op. at 515, 519; A1437; A3198. Consistent with the Special Committee's determination to conduct its analysis free of any MacAndrews influence, MacAndrews (including "dual" MFW/MacAndrews

executives who normally vetted MFW projections) was excluded from the process of preparing the updated financial projections. Op. at 514-15; A685-86; A3223.

E. The Special Committee Continues Its Exhaustive Due Diligence, And Considers Numerous Strategic Alternatives And Valuation Analyses, Satisfying Its Duty Of Care.

On August 10, 2011, Evercore presented a range of MFW valuations, based on the updated projections and generally accepted methodologies, including DCF and premiums paid analyses. Op. at 515; A1411-49. Although the $24 Proposal fell within the range of values produced by each of Evercore's methodologies, Op. at 515 (citing A1424), Evercore was directed to conduct additional analyses and explore strategic alternatives that might generate more value to MFW's stockholders than a sale to MacAndrews. *Id.* at 508 n.33, 515; A1177-78.

Plaintiffs claim the Special Committee had "no right to solicit alternative bids, conduct any sort of market check, or even consider alternative transactions." OB at 7-8. They are wrong. Although the Chancellor found that MacAndrews's stated (and, under our law, perfectly legal) unwillingness to sell its MFW stake meant that the Special Committee did not have the practical ability to ***market*** MFW to other buyers, that did not mean the Special Committee could not seek Evercore's advice about strategic alternatives, including values that might be available if MacAndrews was willing to sell. *See, e.g.*, Op. at 508; A576-77; A746-47. For example, Evercore was asked if a possible sale of Harland to a rival

check-printing company might produce a higher value; the response was "no." Op. at 515; A1178-79. Thus, the record (summarized at length by the court, *see* Op. at 508, nn.32-33) is undisputed that:

> [t]he special committee did consider, with the help of its financial advisor, whether there were other buyers who might be interested in purchasing MFW, and whether there were other strategic options, such as asset divestitures, that might generate more value for minority stockholders than a sale of their stock to MacAndrews & Forbes.

Op. at 508.[2]

F. The Special Committee Rejects The $24 Proposal, Then Negotiates And Unanimously Approves An Improved Deal.

On August 18, 2011, the Special Committee rejected the $24 Proposal, and countered at $30 per share. Op. at 515; A216. The $30 counteroffer was a negotiating position; Special Committee members expressed concern that it was very aggressive, and the Special Committee was prepared to accept less. A608; A772. On September 9, MacAndrews rejected the $30 counteroffer. Op. at 515; A1188. MacAndrews representative Barry Schwartz told Special Committee Chair Paul Meister that the $24 Proposal was now far less favorable to MacAndrews (but

[2] In a footnote, OB at 9 n.4, Plaintiffs ask this Court to consider two "feeler" e-mails sent by third parties to MacAndrews concerning the Proposal. Plaintiffs presented these e-mails to the court below, which found them insufficient to create a triable issue on any material fact based on the record. A1955-56. As Special Committee member Carl Webb testified: "In my judgment, no one during the entire pendency of this matter, four months, ever came forward in a serious nature and sought financial information or requested due diligence or engaged an advisor to approach the company. So I don't think there are any serious entrees for any of the parts, or the whole during this [process]." A764-65; *see also* Op. at 508 n.32. Special Committee members Meister and Byorum shared Webb's view. A600-01; A3165-66; *see also* A679.

more attractive to the minority) than when it was first made, because of continued declines in MFW's businesses, but said MacAndrews would stand behind its $24 offer. Op. at 515; A620-21; A1188-89. Meister insisted he would not recommend $24. Op. at 515; A621. After discussions with Perelman, Schwartz conveyed MacAndrews's "best and final" offer of $25 a share. Op. at 515; A712.

At a meeting the next day, Evercore opined that the $25 price was fair based on generally accepted valuation methodologies, including DCF and comparable companies analyses. Op. at 515; A1188-89; A1265-68; A1463-94. The Special Committee unanimously approved and agreed to recommend the Merger. A1190.

G. The Merger Is Approved By A Majority Of Fully Informed And Uncoerced Minority Stockholders.

Armed with the proxy statement's disclosures of the background of the Merger, as well as Evercore's valuation ranges and the analyses supporting its fairness opinion, MFW's stockholders, representing more than 65% of the minority shares, approved the Merger. Op. at 516; A202-24; A236-60; B71. Plaintiffs did not challenge the proxy disclosures, and the court below found that "the plaintiffs themselves do not dispute that the majority-of-the-minority vote was fully informed and uncoerced, because ***they fail to allege any failure of disclosure or any act of coercion.***" Op. at 517 (emphasis added).

ARGUMENT

I. INTRODUCTION

MacAndrews and its Chairman, Ronald Perelman, deployed the dual cleansing devices of a fully empowered special committee and a majority-of-the-minority vote for a reason. They understood that under our evolving law on going-private transactions, the more closely their Proposal replicated a true third-party transaction, the more likely it was that any deal ultimately struck would be measured, not against the strict standard of entire fairness, but under the business judgment rule. So, seeking to ensure consummation, they consciously relinquished all ability to deploy their control position to achieve that result.

Knowing that their control block could effectively guarantee the statutorily required stockholder vote on the Merger, they irrevocably neutralized their own voting power by publicly conditioning any transaction on a non-waivable minority approval condition. Understanding that as controller and Board member, they might be seen to have influenced MFW's negotiating position, they removed themselves from MFW's side of the table, publicly declaring that they would not proceed without approval of a fully empowered, independent special committee.

These decisions carried risk, of course. A special committee that understood its power to "just say no" could do just that; minority stockholders who understood that their votes would be dispositive would be motivated to vote in their own best

interests – and, unless the deal was attractive enough, could collectively reject it. But MacAndrews and Perelman were willing to take those risks – to risk the possibility that a going-private transaction that they very much wanted to do might not clear the starting blocks – in order to ensure that if a transaction did emerge, it could benefit from the business judgment rule's presumption of propriety.

In fact, the procedural protections worked just as they should have. The Special Committee used its ultimate leverage – the unquestioned power to veto any transaction – to extract an increased, premium Merger price that garnered a fully informed, uncoerced vote of approval from more than 65% of the minority.

The Court of Chancery identified two basic questions that flow from these facts. First, has this Court ever established the standard of review applicable to a controller merger presenting these facts? And second, if there is no controlling precedent on that question, what standard of review ***should*** apply – in the Chancellor's words, what standard best serves "the strong public policy interest our common law of corporations has in the fair treatment of minority stockholders and the need to ensure that controlling stockholders do not extract unfair rents using their influence"? Op. at 524. We turn now to those critical questions.

II. THE COURT OF CHANCERY PROPERLY REVIEWED THE MERGER UNDER THE BUSINESS JUDGMENT RULE.

A. Question Presented: Did the Court of Chancery correctly apply the business judgment rule to a controlling stockholder merger that was, from the outset, conditioned on (i) negotiation and approval by a special committee of independent directors fully empowered to say no, and (ii) approval by an uncoerced, fully informed majority-of-the-minority vote? A66-A75.

B. Scope Of Review: "On appeal from a decision granting summary judgment, 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. 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." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 48 (Del. 2006) (citations omitted). Questions of law are reviewed *de novo*. *Id.*

C. Merits Of Argument:

1. This Court Has Never Addressed The Appropriate Standard Of Review For Controller Mergers With The Dual Procedural Protections Present Here.

As Plaintiffs concede, this Court has never been asked to consider whether the business judgment rule should apply to a controller buyout conditioned on the dual protections of (i) approval by a fully empowered special committee acting

with due care, and (ii) the informed, uncoerced approval of a majority of minority stockholders. Op. at 520; A3413-15. But Plaintiffs insist that broad statements in opinions from this Court – in particular, *Kahn v. Lynch* – ***in cases that concededly did not present those facts*** nevertheless establish a "bright-line rule" that covers those facts, and thus controls the standard of review here. OB at 14.

Of course, the ultimate authority regarding the scope and effect of language in this Court's opinions is this Court. But Plaintiffs' proposed all-encompassing "bright-line test" would, we respectfully submit, run afoul of this Court's careful adherence to traditional definitions of dictum.

This Court has consistently held that judicial statements on issues that would have no effect on the outcome of the case before it constitute dictum, *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 276 & n.17 (Del. 2010), and have no precedential effect. *Id.*; *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010). Similarly, this Court treats as dictum language on an issue with respect to which the record before the Court was "not sufficient to permit the question to be passed on." *State ex rel. State Highway Dep't v. 9.88 Acres of Land*, 253 A.2d 509, 511 (Del. 1969). And if an issue is not presented to a court with the benefit of full argument and factual record, any statement on that issue is without binding force. *See, e.g.*, *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1218 (Del. 2012) (statements on uncontested issues are dictum).

Because Plaintiffs correctly conceded that no case in this Court, including *Kahn v. Lynch*, has ever turned on the standard of review effect of conditioning a merger on the dual protections present here, and that this issue has never been briefed or argued to this Court,[3] *see* Op. at 521, any statement from this Court nominally addressing the standard of review under such facts is by definition non-binding dictum, leaving the central question in this case still open.[4]

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[3] Plaintiffs' concessions are well-founded. In none of the three cases they cite – *Kahn v. Lynch, Southern Peru,* and *Kahn v. Tremont* – did the controller give up its voting control via a non-waivable majority-of-the-minority condition. The three cases can be distinguished on other grounds as well. *See generally* Op. at 522-23. For example, the conduct of both the controller and special committee in *Lynch* "was of a very different and more troubling nature"; unlike here, the controller in *Lynch* "*threatened* to proceed with a hostile tender offer at a lower price if the special committee did not recommend," and the special committee lacked either the authority or the stomach to say no in the face of that threat – even though one member testified the Merger price was unfair. Op. at 522 (emphasis in original); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1120-21 (Del. 1994) ("*Lynch I*"). In *Kahn v. Tremont*, two committee members effectively abdicated their duties, and the third had been a well-paid consultant to one of the controller's companies. Op. at 523; *Kahn v. Tremont Corp.*, 694 A.2d 422, 429-30 (Del. 1997). And in *Southern Peru*, the parties did not contest the standard of review, but simply agreed that entire fairness would apply. Op. at 523-24; *In re S. Peru Copper Corp. Deriv. S'holder Litig.*, 52 A.3d 761, 766 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012).

[4] Plaintiffs seek to draw an inference that this Court in *Southern Peru* must have intended to address the standard of review issue presented in this case, even though that issue was concededly not presented there, because this Court reaffirmed the general proposition that interested controller transactions are reviewed for entire fairness, without acknowledging the line of Court of Chancery decisions beginning with *In re Cox Communications*, 879 A.2d 604 (Del. Ch. 2005), that have suggested the possibility that the business judgment standard might be applied to the more robust dual protection merger structure. OB at 16. But there is no reason to draw such an inference, because there was no reason for this Court to address those opinions; their discussion of a possible business judgment standard turned on facts not at issue in *Southern Peru* (which is doubtless why the *Southern Peru* parties agreed that entire fairness applied there). The Court of Chancery explicitly acknowledged as much, holding that because the parties agreed entire fairness was the standard, "there is no need to consider whether room is open under our law for use of the business judgment rule in a circumstance like this, if the transaction were conditioned upon the use of a combination of sufficiently protective procedural devices." *S.*

In any case, even if it were not dictum, the binding holding in *Lynch* on its face does not speak to the situation of dual protective devices present here:

> [E]ven when an interested cash-out merger transaction receives the informed approval of a majority of minority stockholders ***or*** an independent committee of disinterested directors, an entire fairness analysis is the only proper standard of judicial review.

Lynch I, 638 A.2d at 1117 (emphasis added). As the Court of Chancery correctly noted, the disjunctive "or" should not be interpreted away as accidental. Op. at 522. Thus, this Court has not addressed the novel issue presented here, and the Chancellor properly decided it on its merits.

2. Application Of The Business Judgment Rule To Controller Mergers Employing The Dual Protective Devices Present Here Is The Rule Of Equitable Common Law That Best Protects Minority Stockholders.

The Court of Chancery correctly held that controller buyouts like the Merger, conditioned on both special committee approval and a majority-of-the-minority vote, should be reviewed under the business judgment rule if those conditions are satisfied. Theoretical and practical reasons support this holding.

First, as a theoretical matter, the default standard of review is business judgment, *see In re Trados Inc. Shareholder Litigation*, 2013 WL 4516775, at *19 (Del. Ch.); entire fairness is an exceptional standard, employed in the merger

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Peru, 52 A.3d at 761. On appeal, this Court similarly recognized that "the Plaintiff and the Defendants agree that entire fairness is the appropriate standard of judicial review for the [single protection] Merger," and reaffirmed entire fairness as the proper standard of review for such transactions. *Ams. Mining*, 51 A.3d at 1239.

context as a substitute for the dual statutory protections of board approval and stockholder approval, when those protections are potentially undermined by the influence of a controller position. But where, as conceded in this case, that potential influence is eliminated by the deployment of dual protections – that is, where the controller publicly relinquishes the ability to use his control to undermine the statutory protections available to stockholders in a third-party merger – there is no longer any conceptual reason to impose the more stringent standard of review.

Second, as a practical matter the dual protection merger structure is the optimal structure for the protection of the minority in controller buyouts. As the Court of Chancery explained:

> [W]hen these two protections are established up-front, a potent tool to extract good value for the minority is established. From inception, the controlling stockholder knows that it cannot bypass the special committee's ability to say no. And, the controlling stockholder knows it cannot dangle a majority-of-the-minority vote before the special committee late in the process as a deal-closer rather than having to make a price move.

Op. at 528.

A merger using both protections "is critically different than a structure that uses only *one* of the procedural protections." *Id.* (emphasis in original). Using only one "does not replicate the protections of a third-party merger under the DGCL approval process, because it only requires that one, and not both, of the

statutory requirements of director and stockholder approval be accomplished by impartial decisionmakers." *Id.* By contrast, using both protections "replicates the arm's-length merger steps of the DGCL by requir[ing] two independent approvals, which it is fair to say serve independent integrity-enforcing functions." *Id.* (citation omitted).

Plaintiffs conceded below that "this transactional structure is the optimal one for minority stockholders." Op. at 527-28 (citing A1980; A3387). But they now argue that neither procedural protection is sufficiently effective to protect minority stockholders because "possible ineptitude and timidity of directors" may undermine the special committee protection, and because majority-of-the-minority votes may be unduly influenced by arbitrageurs who have an artificial bias to approve virtually any transaction. OB at 20-21. Because of these infirmities, Plaintiffs argue these protections are not sufficient to "abandon" entire fairness. *Id.* at 19.

Plaintiffs' assertions regarding the MFW directors' inability to discharge their duties are supported neither by the record in this case, nor by well-established principles of Delaware law. As the Court of Chancery correctly observed:

> Although it is possible that there are independent directors who have little regard for their duties or for being perceived by their company's stockholders (and the larger network of institutional investors) as being effective at protecting public stockholders, the court thinks they are likely to be exceptional, and certainly our Supreme Court's jurisprudence does not embrace such a skeptical view.

Op. at 528-29 (citing *Aronson v. Lewis*, 473 A.2d 805, 814-15 (Del. 1984), *overruled on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

Plaintiffs' cynical view of independent directors is also inconsistent with bedrock principles 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." Op. at 502. The mere presence of a controlling stockholder does not alter Delaware law in this regard. *See Aronson*, 473 A.2d at 816. In fact, examples of independent directors standing up to controller misconduct are easily found. *See Black v. Hollinger Int'l Inc.*, 872 A.2d 559, 563 (Del. 2005) (subsidiary board instituted rights plan and sued controller); *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 846 (Del. Ch. 2003) (subsidiary directors sued to enjoin controller tender offer); *see also In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 413 (Del. Ch. 2010) ("Last fall the directors of iBasis adopted a rights plan in response to a tender offer by its controlling stockholder, Royal KPN. The iBasis directors filed two lawsuits against Royal KPN, took one . . . through trial, and ultimately extracted a price increase from $2.25 to $3 per share.").

In any case, Plaintiffs presented no evidence that the ***MFW*** Special Committee was "timid" or "inept"; as the court below found, "the plaintiffs do not point to any evidence indicating that the independent members of the special

committee did not meet their duty of care in evaluating, negotiating, and ultimately agreeing to a merger at $25 per share." Op. at 516.

Plaintiffs' claim that majority-of-the-minority vote provisions are ineffective to protect the minority because such votes are dominated by arbitrageurs with an artificial bias to approve transactions is similarly flawed. Factually, Plaintiffs offer no evidence to support their assertion that arbitrageurs dominated MFW's minority stockholder profile.[5] In any case, Plaintiffs concede that stockholders (presumably including arbitrageurs) ***do*** vote against mergers they do not find favorable, or force an increase in the price, *see* OB at 21, so any artificial bias of arbitrageurs is apparently offer-specific. Plaintiffs find no fault with the Chancellor's non-exhaustive list of such "no" votes. Op. at 530-31, nn.167-68.

Plaintiffs' attack on the majority-of-the-minority vote because of hypothetical arbitrageur bias also fails legally. Delaware law does not strip certain shares (such as those that changed hands after announcement of a proposal) of the full right to vote; the statutory stockholder approval requirement of Section 251

[5] The two cases Plaintiffs cite to support their argument in fact illustrate the need for such evidence. In both *Airgas* and *Inter-Tel*, unlike here, there was record evidence concerning the presence of and likely behavior of arbitrageurs in the minority stockholder body. *See Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 95 n.312 (Del. Ch. 2011) (citing trial testimony); *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 814 (Del. Ch. 2007) (citing statement of proxy solicitor). Moreover, *Airgas* strongly supports the independence of directors, even when those directors are nominated by acquirers. *Airgas*, 16 A.3d at 123. And *Inter-Tel* illustrates that stockholder approval of a merger is hardly a foregone conclusion, arbitrageurs or no – a key point of the case was that "the stockholders were likely to vote down the Merger." *Inter-Tel*, 929 A.2d at 814.

does not distinguish between long- and short-term holders. And even if arbitrageurs were somehow second-class citizens, the first-class citizens who sold them their shares presumably considered the Merger price fair. *See* Op. at 520.

Plaintiffs also argue (for the first time on this appeal) that majority-of-the-minority conditions generate no value for the minority – that "there is no relation between offer premiums and the presence or absence of a majority of the minority condition." OB at 21 (citation omitted). But Plaintiffs' only citation is an article that is irrelevant on its face, because it examines management buyouts, not controller going-private transactions – a crucial difference because, as the article itself states, "in many instances the interested management stake is well below majority control," so a minority vote (that is, a vote of the non-sponsor shares) already is required. Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? The Value of Corporate Process and Management Buy-Outs*, 36 DEL. J. CORP. L. 849, 877 (2011); *id.* at 899 ("A majority of minority condition is therefore simply a regular majority voting requirement."). The distinction is critical, as the article's conclusion makes clear: "[I]n an MBO ***as opposed to a freeze-out***, a per se requirement of a majority of minority condition appears inappropriate . . . ." *Id.* (emphasis added).

In the end, Plaintiffs are forced to fall back on broad judicial statements from cases that are not controlling here. They cite *In re Atlas Energy Resources,*

LLC, Unitholder Litigation, 2010 WL 4273122 (Del. Ch.), for the proposition that protective devices "cannot alter the standard of review," because of the "inherent coercion" of controller buyouts, and claim that Vice Chancellor Noble "recognized the unfair advantages a controller has over public stockholders in terms of information and timing." OB at 17-18.

But the Vice Chancellor's broad statement in *Atlas* is non-controlling dictum. Just as in *Kahn v. Lynch*, there was no majority-of-the-minority vote in *Atlas*, and no record on which statements about the standard-altering effect of such a condition could be based. In contrast, the Court of Chancery reviewed an extensive record in this case regarding the Merger's dual protection structure, and found no evidence whatsoever of any actual coercive act by MacAndrews, or even a claim of coercion by Plaintiffs. Op. at 517, 533. Hypothetical "inherent coercion" is no reason to apply entire fairness to a dual protection merger, where – as here – the Court finds on the basis of a full discovery record that there is neither a claim nor evidence of coercion of any kind, and Plaintiffs did not even dispute that the majority-of-the-minority vote was uncoerced. Op. at 517.

Thus, the hypothetical concerns underpinning the concept of "inherent" coercion in controller mergers – "the potential to influence, however subtly, the vote of minority stockholders," or the minority's fear that by voting "no" they could risk retaliation of some kind – were concededly not present here.

Moreover, as the Court of Chancery noted, "plaintiffs themselves do not argue that minority stockholders will vote against a going private transaction because of fear of retribution." Op. at 517; *see* A3388-90. Thus, Plaintiffs do not even share the hypothetical concern that "inherent" coercion might render a stockholder vote on a dual protection controller merger any less voluntary than in a third-party merger. Rather:

> [Plaintiffs] just believe that most investors like a premium and will tend to vote for a deal that delivers one and that many long-term investors will sell out when they can obtain most of the premium without waiting for the ultimate vote. But that argument is not one that suggests that the voting decision is not voluntary, it is simply an editorial about the motives of investors and does not contradict the premise that a majority-of-the-minority condition gives minority investors a free and voluntary opportunity to decide what is fair for themselves.

Op. at 533-34. The point is a critical one. Here – and unlike the transactions in *Lynch*, *Tremont*, *Southern Peru*, and *Atlas*, none of which included a minority approval condition – the vote was not any less voluntary than in a third-party merger, precisely because the transaction fully replicated a third-party merger.

The danger of reliance on dictum such as the statements Plaintiffs cite from *Atlas* is graphically illustrated by Vice Chancellor Noble's more recent opinion in *SEPTA v. Volgenau*, 2013 WL 400193 (Del. Ch.). There, Vice Chancellor Noble granted summary judgment on a challenge to a controller transaction where both protections ***were*** deployed, and held: "As does *MFW*, this case serves as an

example of how the proper utilization of certain procedural devices can avoid judicial review under the entire fairness standard and, perhaps in most instances, the burdens of trial." *Id.* at 28. Plainly, Vice Chancellor Noble does not consider it impossible for appropriate procedural protections to alter the standard of review in controller transactions. *Volgenau* illustrates that the standard of review question can only be answered based on the specific characteristics of the controller transaction at issue, precisely the same conclusion that the Court of Chancery reached here. *See* Op. at 503; *see also id.* at 528.

3. Application Of The Business Judgment Rule To Dual Protection Controller Mergers Will Appropriately Incentivize Controllers To Structure Transactions That Best Protect Minority Stockholders.

Absent a meaningful incentive to do so, controllers cannot be expected to agree to both protections (thereby maximizing protection for the minority) because granting veto rights to independent directors ***and*** minority stockholders increases the risk of non-consummation for the controller, with little or no compensatory benefit. This cost-benefit calculus is reflected in empirical studies of the actual use of one or both of the protections in real world controller transactions under current incentives.[6] Those studies starkly illustrate the powerful incentive provided by the

[6] In the merger context, two possible incentives may exist. First is the possibility of business judgment review posited by *Cox*; that incentive will, however, be altered one way or another by this Court's decision here. Second, there is a potential evidentiary utility in the adoption of protective devices in proving entire fairness, as this Court recognized in *Southern Peru*, 51 A.3d at 1244. But empirical evidence suggests that this benefit has not been sufficient incentive for

promise of a business judgment standard of review; they also show that current incentives in the merger context have been inadequate to persuade controllers to adopt the optimal, dual protection merger structure in most cases.

Data for controller transactions between 2001 (when a line of cases beginning with *In re Siliconix Shareholder Litigation*, 2001 WL 716787 (Del. Ch.), established that a freezeout executed as a tender offer was subject to business judgment review) and 2005 (when *Cox Communications* suggested the ***possibility*** of business judgment review for any controller transaction, including merger freezeouts, that employed both protections), and going forward from *Cox Communications* to May of 2013,[7] is presented in Fernan Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach* (2013) ("Subramanian"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297707, the most recent study on the topic by Professor Subramanian, a distinguished scholar in this area.

Three important conclusions emerge from that study. ***First***, the rule established in *Siliconix* and *In re Pure Resources Shareholders Litigation*, 808 A.2d 421 (Del. Ch. 2002), exempting tender offer freezeouts employing both

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widespread use of the optimal dual protection structure. *See infra* at 27-28; Subramanian at 23-24.

[7] The number of such transactions is significant. Between *Siliconix* and *Cox*, there were 79 controller freezeout transactions observed; in the post-*Cox* period, there were 66. Subramanian at 2.

protections from entire fairness review was a powerful incentive to controllers to employ that structure; well over 80% of all tender offer freezeouts employed a minority approval condition and a special committee in the post-*Siliconix* period. *See* Subramanian at 23. By contrast, in the same period, ***fewer than one-third*** of merger freezeouts – which did not benefit from business judgment review – employed the dual protection optimal structure. *Id.* ***Second***, even the ***possibility*** that business judgment review might attach to dual protection controller mergers, posited by *Cox*, modestly increased controllers' willingness to use the dual protection structure,[8] *id.* at 24, but without a definitive adoption of the business judgment standard, minority stockholders will remain underprotected: "[T]he incidence of MOM conditions has increased since *Cox*, from 33% to 50%, but this still leaves approximately half of all merger freezeouts without a meaningful shareholder approval requirement." *Id.* at 20. ***Third***, the data suggest that this Court's resolution of the standard of review question here will have a very significant impact on controller transaction structures going forward. If business judgment is established as the clear standard for dual protection mergers, then employment of that optimal structure should at least approach the greater-than-

[8] Recent decisions suggest that transactional planners are adhering to that structure precisely for this reason. *See, e.g.*, *Volgenau*, 2013 WL 4009193, at *28 (granting summary judgment where both procedural protections effectively deployed; special committee independence established on summary judgment); *Krieger v. Wesco Fin. Corp.*, C.A. No. 6176-VCL, at 13-14 (Del. Ch. May 10, 2011) (TRANSCRIPT) (applying business judgment rule to controller merger conditioned from inception on special committee and minority approval and denying preliminary injunction).

80% levels observed for dual protection tender offers after *Siliconix*. Conversely, if the possibility of business judgment review articulated in *Cox* is rejected, a return at least to pre-*Cox* levels, in which the minority has no meaningful approval right in more than two-thirds of freeze-out mergers, can be expected.[9]

That is because, in the absence of a meaningful incentive to accept the transactional risk of the optimal dual protection structure, controllers can and will avoid it altogether by employing the "more coercive" two-step unilateral tender offer structure that traditionally has not been reviewed under the entire fairness standard. Op. at 536. *See Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009).[10] The logical anomaly of applying the more deferential business judgment standard to the more coercive tender offer structure (where the minority lacks any independent bargaining agent acting on its behalf), but subjecting the optimal dual

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[9] Such a result would be a tangible loss for minority stockholders. And there is no reason to believe (and Plaintiffs have offered no evidence to support the notion) that controllers will pay less in deals that deploy both protections and are subject to the business judgment standard of review than in deals conditioned on one (or none) of those conditions. In fact, the opposite is likely to occur. As the Court of Chancery explained, "the requirement that a majority of the minority approve the special committee's recommendation enhances both motivations, because most directors will want to procure a deal that their minority stockholders think is a favorable one, and virtually all will not want to suffer the reputational embarrassment of repudiation at the ballot box." Op. at 529. For this reason, Professor Subramanian has advocated for application of the business judgment standard to dual protection controller mergers. Subramanian at 21.

[10] *See also In re Pure Res. S'holders Litig.*, 808 A.2d 421, 438 (Del. Ch. 2002); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6-8 (Del. Ch.); *In re Aquila Inc. S'holders Litig.*, 805 A.2d 184, 190 (Del. Ch. 2002); *In re Life Techs., Inc. S'holders Litig.*, 1998 WL 1812280, at *1 (Del. Ch.) (TRANSCRIPT); *In re Ocean Drilling & Explor. Co. S'holders Litig.*, 1991 WL 70028, at *5 (Del. Ch.); *Lewis v. Charan Indus., Inc.*, 1984 WL 8257, at *4 (Del. Ch.).

protection merger structure (with a less coercive opportunity for the minority to say no, ***and*** a powerful bargaining agent in the form of a special committee) to the exacting standard of entire fairness, has been remarked on in *Cox* and its progeny, and by the court below. Op. at 525. But equally important is the corollary point that unless dual protection controller mergers are reviewed under the same business judgment standard as unilateral controller tender offers, controlling stockholders will continue to be incentivized to use the sub-optimal, more coercive tender offer structure.

Plaintiffs concede that the dual protection structure is optimal for the minority, but argue it is not necessary to incentivize controllers to adopt it by applying business judgment review. Instead, they propose to incentivize adoption of that optimal structure by modifying *Kahn v. Lynch* to require ***both*** protections in order to obtain even the modest benefit of a burden shift. OB at 19 n.10.

Plaintiffs' proposal would have the perverse effect of ***reducing*** the incidence of procedural protections offered to the minority, since controllers would no longer have ***any*** incentive to offer only one procedural protection. And the modest benefit of a burden shift would be highly unlikely to persuade controllers to take on the transactional uncertainty that conferring a veto on both a special committee and the minority would entail. *See In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 550 (Del. Ch. 2003) ("[U]nlike the burden shift under *Lynch*, the question of

whether the standard of review is entire fairness or the business judgment rule is consequential and worth fighting over from a litigant's perspective.").

Moreover, Plaintiffs' proposal would do nothing to correct the problem of perverse litigation incentives articulated by the Chancellor:

> [T]he absence of a legally recognized transaction structure that can invoke the business judgment rule standard of review has resulted not in litigation that generates tangible positive results for minority stockholders in the form of additional money in their pockets, but in litigation that is settled for fees because there is no practical way of getting the case dismissed . . . .

Op. at 525.

Plaintiffs acknowledge the problem, but offer no cogent response, except to claim (with no citation) that (i) "the number of such settlements began to dwindle" post-*Cox*, and (ii) the "Court of Chancery's power to regulate attorneys' fees and plaintiff leadership structures, together with plaintiffs' lawyers' concern for their reputation in the legal community, are sufficient to remedy this purported consequence of the application of the entire fairness standard." OB at 23-24. Plaintiffs offer no ***evidence*** that the problem is getting smaller,[11] but in any case, their argument misses the point.

The problem is not only that settlements are presented that largely benefit the lawyers. The problem is also that the entire fairness standard makes it difficult

[11] In fact, in the section of their briefing below on this issue, Plaintiffs conceded that "the conclusions offered in this section are anecdotal and based solely on the experience of plaintiffs' counsel." A1980 n.18.

to resolve cases short of a trial, which confers enormous settlement leverage on the plaintiffs regardless of how the controlling stockholder structures its buyout, how weak the plaintiffs' claims are, or what plaintiffs' counsel does. *In re Cysive*, 836 A.2d at 550. Burden shifting has not altered that dynamic; only business judgment review can offer the possibility of dismissing non-meritorious claims on motion, and provide a meaningful incentive for controllers to adopt the optimal dual protection merger structure that would be the only route to that business judgment review.

III. THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE MERGER WAS APPROVED BY AN INDEPENDENT, FULLY EMPOWERED SPECIAL COMMITTEE AND A FULLY INFORMED, UNCOERCED MAJORITY OF MINORITY STOCKHOLDERS.

A. Question Presented: Were the Court of Chancery's findings that the minority approval condition was satisfied and that the Special Committee was independent, fully empowered and acted with care supported by the record below? A74-A93.

B. Scope Of Review: See Section II.B. above.

C. Merits Of Argument:

1. There Is No Dispute That The Minority Approval Condition Was Satisfied.

There is no dispute that a majority of the MFW minority stockholders voted in favor of the Merger. Op. at 516; B71. The uncontroverted evidence entitled Defendants to summary judgment on this issue. *See Brandywine Dev. Grp., LLC v. Alpha Trust*, 2003 WL 241727, at *5 (Del. Ch.) (granting summary judgment on defendant's uncontroverted prima facie evidence, where plaintiff adduced no contrary evidence).

But Plaintiffs argue that there were material issues of fact regarding the "efficacy" of that majority-of-the-minority vote, because (i) it is "likely" that "a significant number of MFW's public shares were held by arbitrageurs," and (ii) it is "doubtful that the majority-of-the-minority condition provided any protection to

public stockholders seeking a fair price for their shares." OB at 33.

Plaintiffs effectively concede that they presented no evidence on these points, by noting that they are "highly factual and, ***if necessary***, will be the subject of expert testimony at trial." *Id*. (emphasis added). And in any case, they cite no record evidence to support either premise.

As discussed at page 21, the fundamental premise of Plaintiffs' argument – that the vote of one type of stockholder is somehow worth less than the vote of other types – is legally flawed. Moreover, as noted at pages 21-22, mergers are not infrequently voted down, a fact that undermines Plaintiffs' suggestion that arbitrageurs have a universal bias to approve ***any*** transaction.

But the critical point here is Plaintiffs' acknowledged failure to present any evidence to support these arguments. Plaintiffs seek to excuse that failure by claiming they need not meet any burden on summary judgment because the "issue is highly factual," OB at 33, but before responding to the Motion, Plaintiffs requested and were provided with discovery on this exact issue, B59-61, and the ***only evidence*** in the record is that a majority of unaffiliated MFW stockholders voted in favor of the Merger. A959; B71.

Plaintiffs' implicit argument that they bear no burden to present evidence on a summary judgment motion is incorrect. Court of Chancery Rule 56 states that "the adverse party's response, by affidavits or as otherwise provided in this rule,

must set forth specific facts showing that there is a genuine issue for trial." *See also Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

In fact, Delaware courts have frequently addressed on summary judgment matters on which Plaintiffs contend they were not required to present evidence. *See, e.g.*, *Volgenau*, 2013 WL 4009193, at *28 (special committee independence established on summary judgment); *In re Gaylord Container Corp. S'holder Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000) ("To the extent [Plaintiffs] believe that they can wait until trial to generate evidence comprising [the Special Committee's] independence, they misconceive how Rule 56 operates.").

Here, Plaintiffs failed to present ***any*** evidence that the majority-of-the-minority vote was anything but fully informed and uncoerced – indeed, they failed even "to allege any failure of disclosure or any act of coercion," Op. at 517 – and summary judgment was properly entered against them.

2. There Is No Genuine Dispute That The Court of Chancery Correctly Found That The Special Committee Was Independent, Empowered, And Acted With Care.

Finally, we respectfully refer the Court to the Answering Brief of the Special Committee Defendants, and incorporate the arguments there establishing the Special Committee's independence and duly careful, fully informed exercise of its broad mandate. The Chancellor's conclusions that Plaintiffs did nothing to

establish the materiality of the purported conflicts they raised, or to show that the MFW Special Committee failed to meet its duty of care, Op. at 510, 514, are fully supported by the record.

CONCLUSION

For all of the foregoing reasons, the judgment below should be affirmed.

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