EFiled: Jan 04 2017 10:00PM EST
Filing ID 60023246
Case Number 515,2016

IN THE

Supreme Court of the State of Delaware

JEAN-MARC ROUSSET AND SUSAN VANCE, Plaintiffs-Below, Appellants, v. CLYDE B. ANDERSON, TERRENCE C. ANDERSON, RONALD G. BRUNO, RONALD J. DOMANICO, EDWARD W. WILHELM, TERRANCE G. FINLEY, R. TODD NODEN, JAMES F. TURNER, FAMILY ACQUISITION HOLDINGS, INC., and FAMILY MERGER SUB, INC., Defendants-Below, Appellees.	**No. 515, 2016** CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOLIDATED C.A. No. 11343-VCL

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On July 13, 2015, a proposed transaction was announced under which entities owned by the controlling stockholders of Books-A-Million, Inc. ("BAM" or the "Company") would purchase the remaining minority shares for $3.25 per share (the "Transaction"). Two stockholder lawsuits were filed regarding the Transaction: *Vance v. Books-A-Million, Inc., et al.*, C.A. No 11343-VCL (Del. Ch.), and *Rousset v. Anderson, et al.*, C.A. No. 11559-VCL (Del. Ch.). Plaintiffs did not challenge the adequacy of the disclosures in the proxy statement, move to expedite, or seek preliminary injunctive relief.

After the Transaction closed, the cases were consolidated. Defendants filed motions to dismiss and, in lieu of an opposition, Plaintiffs filed the Verified Consolidated Amended Complaint (the "Amended Complaint"). Defendants again moved to dismiss. After briefing and argument, the Court of Chancery issued a 42-page opinion dismissing the Amended Complaint in its entirety. The Court held that the Transaction followed the framework established in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); that Plaintiffs failed to plead facts supporting a reasonable inference that any of the elements of *M&F Worldwide* were not met; and that the Transaction thus would be reviewed under the deferential business judgment standard. The Court therefore dismissed the Amended Complaint. Plaintiffs appealed.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held, based on the allegations in the Amended Complaint and the undisputed facts set forth in the proxy statement, that "plaintiffs' complaint has not pleaded grounds to take the transaction outside of the *M&F Worldwide* framework." Mem. Op. at 1. Plaintiffs failed to adequately allege that the Special Committee committed gross negligence such that it breached its duty of care, whether based on an allegedly unfair price or an allegedly inadequate process. Opening Br. at 4. First, Plaintiffs cannot circumvent *M&F Worldwide* simply by claiming the ultimate merger price was "unfair." More fundamentally, the pleaded facts failed to "support[] a reasonably conceivable inference that the directors were grossly negligent" in recommending a 90-percent premium transaction for minority stockholders after five months of negotiations, 33 meetings, consideration of alternatives, market testing, and counteroffers that resulted in approximately 20 percent higher deal consideration. Mem. Op. at 38-39. As to process, Plaintiffs' disagreements about tactics and judgments by the indisputably independent Special Committee members do not show that the Special Committee was "ineffective," raise an inference of gross negligence or bad faith, or state a claim for breach of the duty of care or the duty of loyalty. *See* Opening Br. at 30-38.

2. Alternatively, the dismissal of the Special Committee members should be upheld under *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173 (Del. 2015). Plaintiffs have never disputed that Messrs. Wilhelm and Domanico are exculpated from money damages for duty of care claims, and the Court of Chancery correctly ruled that Plaintiffs have not alleged a valid duty of loyalty claim against these directors.

STATEMENT OF FACTS

BAM is a Delaware corporation engaged in the retail book business, operating over 250 bookstores throughout the United States. A142 ¶ 11; A148 ¶ 31. BAM was founded in 1917 by Clyde W. Anderson and since then has continued to be controlled by his descendants (the "Anderson Family"). A143 ¶ 12; A257. During the relevant period, the Anderson Family owned approximately 57 percent of BAM's outstanding shares. A143 ¶ 12.

A. Prior discussions about potential transactions with the Anderson Family and other parties were unsuccessful.

Over the past four years, BAM has negotiated with the Anderson Family and other parties regarding potential transactions. *See* A153-55 ¶¶ 48-60. In April 2012, the Anderson Family offered to acquire the outstanding BAM shares for $3.05 per share—a 20-percent premium over BAM's closing price the previous day. A153 ¶ 48; A257. A special committee formed by the Board evaluated and declined the offer, and asked the Anderson Family to increase its proposed price. A257. In July 2012, the Anderson Family "withdrew [its] proposal . . . and ceased further communications with that special committee." A257; A153 ¶ 49.

During the summer of 2013, "Party Y" approached BAM to discuss a potential transaction. A153 ¶ 50. In September 2013, Party Y submitted a non-binding indication of interest ("IOI") to acquire the BAM shares held by the Anderson Family for $3.30 per share. A154 ¶ 51. Discussions with Party Y were

discontinued when BAM questioned Party Y's sincerity in light of its failure to proceed with diligence and negotiations. A153 ¶ 50; A154 ¶ 53; A258.

Discussions with Party Y restarted in early 2014. A154 ¶ 54; A258. This time, Party Y proposed to acquire all outstanding shares of BAM for $4.15 per share, but "only for the retail trade and electronic commerce trade segments" because Party Y "did not have sufficient capital to acquire the whole business." A154 ¶ 54; A258. The proposal was subject to the Anderson Family agreeing to a number of conditions, including: (1) providing a backstop commitment to acquire BAM's real estate holdings for at least $19 million; and (2) acquiring certain other assets for approximately $2.8 million. A154 ¶ 55; A258.

In April 2014, members of the Anderson Family advised the Board that, in their capacity as stockholders, they would not support Party Y's proposal. A154 ¶ 56; A258. Nonetheless, Party Y submitted a non-binding IOI to acquire all outstanding shares of BAM for $4.21 per share, again contingent on the same financial backstop commitments from the Anderson Family. A155 ¶ 57; A258. The Board unanimously decided to terminate discussions with Party Y for a number of reasons, including: Party Y's lack of substantial assets and its apparent inability to finance the transaction; the Anderson Family's unwillingness to sell its BAM shares; and Party Y's reliance on the Anderson Family committing to acquire the Company's real estate holdings for at least $19 million and the

Anderson Family's unwillingness to do so. A155 ¶ 57; A258. There were no further merger discussions in 2014. *See* A258.

B. This Court establishes the *M&F Worldwide* framework.

On March 14, 2014, this Court decided *M&F Worldwide*, holding that "business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned *ab initio* upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders." 88 A.3d at 644.

C. The Anderson Family makes its proposal, following the *M&F Worldwide* framework.

On January 29, 2015, BAM announced that the Anderson Family had proposed a take-private transaction to acquire the outstanding minority shares of BAM common stock for $2.75 per share. A155 ¶ 58. That initial offer constituted a 64-percent premium over BAM's closing price that day. A258. The Company filed the Anderson Family's proposal with the Securities and Exchange Commission ("SEC") the next day. A155 ¶ 59; A258.

Consistent with *M&F Worldwide*, the Anderson Family's proposal conditioned any transaction upon both (1) approval by a special committee of independent directors, and (2) approval by a non-waivable majority-of-the-minority vote of BAM's stockholders. A258. The proposal further stated that the

Anderson Family was only interested in acquiring the outstanding shares that it did not already own, and that it was not interested in selling its shares. A155 ¶ 59; A258.

D. The Special Committee is formed, hires independent counsel, and accepts Mr. Bruno's resignation.

At the time of the Anderson Family's proposal, and for the remainder of the relevant time period, the Board consisted of: Clyde B. Anderson and Terrence C. Anderson (the "Andersons"), Ronald G. Bruno, Ronald J. Domanico, and Edward W. Wilhelm. A143-44 ¶¶ 12-16. The Andersons recused themselves from the sale process, which meant that only three of BAM's five directors could negotiate with the Anderson Family and constitute a quorum to vote on the Transaction. A156 ¶ 62; A258-59; A271. Messrs. Bruno, Domanico, and Wilhelm were all NASDAQ-independent directors. A324-25.

The day after receiving the Anderson Family's proposal, all three independent directors were appointed to the Special Committee to negotiate and evaluate the proposal on behalf of the minority stockholders. A156 ¶ 62; A258-59. The Board resolved that it would not go forward with a transaction absent the Special Committee's recommendation and further authorized the Special Committee to retain its own independent legal and financial advisors, consider alternative transactions, and accept or reject the Anderson Family's offer. A156

¶¶ 63-64; A258-60. The Special Committee hired independent legal counsel and appointed Mr. Wilhelm as chairman. A259-60.

One week later—and before any negotiations had occurred—the Special Committee met with its independent counsel. A259. At that time, Mr. Bruno informed the Special Committee's counsel of certain "social and civic relationships" with the Anderson Family. A259. After consulting with its counsel (without Mr. Bruno), the Special Committee determined that even though Mr. Bruno was independent under the NASDAQ rules, it would be preferable if he did not serve on the Special Committee. A156 ¶ 63; A259. Mr. Bruno "concurred with the determination of the other members of the Special Committee" and promptly resigned. A259.

The Special Committee next hired additional legal counsel and, after vetting three potential financial advisors and discussing any potential conflicts of interest, including some limited prior work for an Anderson Family affiliate, hired Houlihan Lokey ("Houlihan") as its financial advisor. A156 ¶¶ 63-64; A259-60.

E. The Special Committee tests the market and negotiates a better price from the Anderson Family.

The Special Committee reviewed the Anderson Family's offer and several possible alternatives, including: issuance of a special dividend; a leveraged buyout; and third-party transactions. A261. Despite the Anderson Family's statements that it would not sell any of its shares or support a transaction that would require it to

do so, and that it was only looking to buy the outstanding minority shares, A155 ¶ 59, the Special Committee and Houlihan nonetheless solicited offers for BAM from various third-parties. A156-57 ¶ 65; A261. Houlihan advised the Special Committee that, as a general matter, the most likely suitors for the Company were financial buyers, as the "potential interest level from strategic buyers may be limited given ongoing [bookstore] industry challenges." A512.

In late March and early April 2015, at the Special Committee's direction, Houlihan contacted three entities that previously had expressed interest in acquiring BAM—Parties X, Y, and Z—to see if any would submit formal proposals. A156-57 ¶ 65; A261. The only party that ultimately expressed interest was Party Y, which submitted a non-binding IOI to acquire all shares of BAM for $4.21 per share, contingent on, among other things, completion of due diligence; financing the proposed approximately $65 million transaction through the Company's existing credit facility; and the Company's agreement to a "no shop" provision. A157 ¶ 66; A261; A471.

Notwithstanding the Anderson Family's prior representations, the Special Committee directed Houlihan to provide Party Y's non-binding IOI to the Anderson Family to see if it would sell its shares at that price. A261-62. The Anderson Family reiterated that it was not interested in selling. A261. The Special Committee then asked Party Y whether it would be willing to purchase the

Company's minority shares, but Party Y reiterated that it was only interested in acquiring a controlling stake. A262.

The Special Committee could not force the Anderson Family to sell its shares or force Party Y to bid on only the minority shares, *see* A262, and so, on April 29, 2015, it met to consider the only viable offer—the Anderson Family's offer to purchase BAM's minority shares for $2.75 per share. A258; A262. The Special Committee considered not responding to the Anderson Family's proposal. A262. But after considering numerous factors, including the limited trading volume of BAM's common stock, the Company's competitive challenges, and the Company's financial performance and prospects, the Special Committee concluded that making a counterproposal would be in the best interests of the minority stockholders to provide certainty of value and liquidity. A262. Accordingly, the Special Committee made a counterproposal of $3.36 per share based on (among other things) its analysis of the Company's historical stock prices and future prospects and "the likelihood, subject to expected negotiations, of acceptance by the Anderson Family." A158 ¶ 69; A262.

The negotiations continued over the ensuing weeks. A263-64. The Anderson Family countered with $3.10 per share in cash plus the right to forego the Transaction if holders of five percent or more of the outstanding shares exercised appraisal rights. A158 ¶ 70; A263. The Special Committee rejected that

proposal and countered with an offer of $3.25 per share with no appraisal rights condition. A263. The Anderson Family agreed to $3.25 per share but again demanded a five percent appraisal rights condition. A263-64. The Special Committee ultimately negotiated an increase of the appraisal rights condition so that it would be triggered only if ten percent or more of the Company's outstanding shares sought appraisal. A264.

The revised offer provided that the Anderson Family would purchase the minority interests in BAM for $21 million in cash, $18 million of which would be financed using the Company's existing credit facility. A160 ¶ 75. Because the offer involved use of the Company's credit facility, a third-party solvency opinion was required. A265.

On May 29, 2015, as the Special Committee reviewed the Anderson Family's revised offer, Party Y sent a letter to Houlihan reaffirming its interest in acquiring 100 percent of BAM's shares. A158-59 ¶ 73; A265. Again, Party Y's proposal was subject to the conditions in its non-binding IOI, including the Anderson Family selling its controlling interest and use of the Company's credit facility to finance the approximately $65 million transaction. A158-59 ¶ 73; A261; A265; A471.

F. The Special Committee receives a fairness opinion, deliberates, and then recommends the Transaction.

On July 13, 2015, the Special Committee met to discuss its options with respect to the Anderson Family's offer and Party Y's proposal. A159 ¶ 74; A266. The Special Committee first met with its legal and financial advisors to discuss its members' fiduciary duties in connection with the proposed transactions. A266.

After that discussion, the Special Committee "invited Mr. Bruno, as a member of [the BAM] Board determined to be independent under the rules of NASDAQ and a member of the audit committee, to join the meeting to listen to presentations by, and discussions with, King & Spalding and Houlihan Lokey." A266. Because the Andersons had recused themselves from the sale process, Mr. Bruno, along with Mr. Wilhelm and Mr. Domanico, constituted the quorum necessary for any transactional approval. *See* A267. Accordingly, Mr. Bruno needed to hear the fairness presentation in his capacity as a Board member who would ultimately vote on the Transaction.

After discussing the various proposals, the Special Committee concluded that Party Y's proposal was not viable because, among other things, the Anderson Family had no interest in selling its shares; Party Y had not made an offer for anything less than 100 percent control of BAM; and Party Y remained unable to secure its own financing for its proposal (which required financing an amount

more than three times what the Anderson Family's proposal required). A158-59 ¶¶ 73-74, A266.

Houlihan then delivered a presentation as to the fairness of the Anderson Family's offer, which detailed the history of the parties' negotiations, including Party Y's non-binding IOIs. A160 ¶ 77; A266; A526-59. Houlihan noted that (1) the Anderson Family had reiterated that it was not interested in selling its shares to a third-party, and (2) "[a] request was made to Party [Y] to consider purchasing all of the publicly held shares of Company common stock at $4.21 per share through a tender offer but Party [Y] declined to pursue this alternative." A529. Houlihan discussed the Company's recent trading history, as well as the performance of its stock relative to peers. A533-35. Houlihan then analyzed the Anderson Family's offer. The presentation included a discounted cash flow ("DCF") analysis and a selected companies analysis, and found the Anderson Family's offer to be within the fairness range of both analyses. Indeed, it was at the very top end of the DCF range. A161 ¶ 80, A162 ¶ 83; A537.

Houlihan gave the Special Committee its oral opinion, confirmed in a written opinion issued that same day, that the Anderson Family's current offer was fair to the Company's minority stockholders from a financial standpoint. A160 ¶

77; A266. The Company's CFO then joined the meeting to discuss the required solvency opinion.[1] A266-67.

Immediately thereafter, the Special Committee excused Mr. Bruno, the Company's CFO, and representatives from Houlihan from the meeting. A267. The Special Committee then deliberated and voted to recommend approval of the Anderson Family's increased offer.[2] A267. The Board then met and, based on the Special Committee's recommendation, approved the Transaction. A267.

Thus, after 33 meetings (including at least 18 meetings and calls with Houlihan), five months of negotiations, outreach to and consideration of alternative buyers and transaction structures, multiple counteroffers on price and rounds of negotiations over non-economic terms, and a fairness presentation, the Special Committee recommended a deal price of $3.25 per share to BAM's minority stockholders. A258-67. This price was over 90 percent higher than BAM's closing price the day before the Anderson Family made its proposal and approximately 20 percent higher than the Anderson Family's initial bid. *See* A268.

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[1] A solvency opinion was rendered by Cappello Group, Inc. to confirm the Company's debt capacity to support these borrowings. A266-67; A315.

[2] While Plaintiffs assert on appeal that Mr. Bruno was absent only for the Special Committee's *vote*, the Proxy makes clear that after he left, the Special Committee conducted "a review of the negotiations and discussions regarding the potential transaction," and then decided to recommend approval. A267. There are no contrary allegations in the Amended Complaint. *See* Opening Br. at 33; A159-60 ¶¶ 74, 77; A170 ¶ 104.

G. Plaintiffs sue but do not allege disclosure claims, request expedited discovery, or seek to enjoin the Transaction.

On July 28, 2015, 15 days after the Transaction was announced, the *Vance* Complaint was filed. A16. On August 21, 2015, BAM filed a Preliminary Proxy Statement with the SEC, A46 ¶ 12, as well as a Schedule 13E-3, which attached copies of Houlihan's presentations to the Special Committee, including the July 13, 2015 fairness presentation, A470-559. On October 1, 2015, the *Rousset* Complaint was filed. A41.

The Company filed the Definitive Proxy Statement on October 22, 2015, followed by a revised version on October 23, 2015 (the "Proxy"). A236-37. The 104-page Proxy included an 11-page summary of the merger negotiations and an 11-page explanation of Houlihan's fairness analysis. A257-67; A272-82. The Proxy detailed the negotiations of the Transaction, the Special Committee's process, Houlihan's fairness opinion, and the terms of the merger agreement. A257-82. The Proxy further indicated factors the Special Committee considered in deciding to present the Anderson Family's offer to the minority stockholders, including that the Anderson Family's all-cash consideration provided certainty of value and liquidity and compared favorably to recent and historical market prices for BAM's stock; BAM's minority stockholders were free to reject the deal following an informed vote; and even if the deal was approved, any dissenting stockholders would be entitled to pursue appraisal under Delaware law. A268-69.

Plaintiffs did not seek to amend either Complaint in response to the Proxy. They did not move to expedite, seek preliminary injunctive relief, or challenge the adequacy of any disclosures in the Proxy.

H. The fully-informed, uncoerced minority stockholders approve the Transaction, and Plaintiffs pursue a post-closing damages case.

In the approximately five months between the announcement of the deal and the stockholder vote, no bidder emerged to offer the minority stockholders a better price for their shares. On December 8, 2015, stockholders holding approximately 66.3 percent of the shares of the Company's outstanding common stock not owned by the controllers or any officer of the Company approved the Transaction. *See* B22; B48. The appraisal-out was not triggered, and the Transaction closed two days later. *Id.*

After the Transaction closed, the two cases on appeal were consolidated, and the *Rousset* Complaint was designated as the operative complaint. Del. Ch. Dkt. No. 6. The *Rousset* Complaint asserted claims against (1) BAM's directors and members of its management for breaches of fiduciary duties, (2) the Andersons for breaches of fiduciary duties as controlling stockholders, and (3) the acquisition entities for aiding and abetting breaches of fiduciary duties. A68-73. The *Rousset* Complaint focused heavily on the Anderson Family's refusal to sell its shares. A43 ¶ 4; A57 ¶ 56, 58; A58 ¶ 59; A59 ¶ 65; A61 ¶ 74; A67 ¶ 91. Defendants

moved to dismiss. A75; A131. Plaintiffs responded by amending their pleadings. *See* A138.

In their Amended Complaint, Plaintiffs shifted their focus to the disparity between the Anderson Family's offer for the minority interest and Party Y's conditional IOI for the entire Company. *See, e.g.*, A166-67 ¶ 92. Among other things, Plaintiffs for the first time alleged that the Special Committee breached its duties by not demanding that the Anderson Family make "a higher offer matching or exceeding Party Y's superior proposal." A171 ¶ 109. Like the original *Rousset* and *Vance* Complaints, the Amended Complaint did not assert any disclosure claims, nor did it contain the words "gross negligence" or even "negligence."

Defendants again moved to dismiss. A177; A560. In their opposition, Plaintiffs conceded that "the Special Committee could not force the Controllers to sell [its] shares." A607. Instead, Plaintiffs focused on Party Y's non-binding IOI and argued that the Special Committee should have refused to sell the minority shares to the Anderson Family (and should not have allowed the stockholders the choice of whether to do so) unless the Anderson Family matched Party Y's $4.21 per share conditional IOI for the entire Company. A598; A603; A606-07.

I. The Court of Chancery dismisses the Amended Complaint.

On October 10, 2016, following briefing and oral argument, the Court of Chancery issued a Memorandum Opinion dismissing the Amended Complaint with

prejudice. The Vice Chancellor applied the six conditions set forth in *M&F Worldwide*, noted that three of the six requirements were not disputed, and held that Plaintiffs failed to plead facts supporting a reasonable inference that the other three were not met. *See* Mem. Op. at 18-42.

On the first requirement, the Court of Chancery held that the Transaction was conditioned "from the outset, on approval by both a special committee of independent directors and a non-waivable vote of disinterested stockholders." *Id.* at 18. The Court noted that the Amended Complaint "does not allege that the Anderson Family delayed establishing the conditions, wavered from them, or sought to circumvent them." *Id.*

On the second condition, the Court of Chancery ruled that the Amended Complaint did not support an inference "that the members of the Committee were not disinterested or independent." *Id.* at 37. The Court noted that "plaintiffs do not directly challenge the independence or disinterestedness of Wilhelm or Domanico, who were the two individuals who served on the Committee, negotiated with the Anderson Family, and decided to recommend the Anderson Family's offer to the Board." *Id.* at 20. Instead, Plaintiffs alleged that "[Mr.] Bruno . . . tainted the independence of the Committee by sitting in on Houlihan Lokey's fairness opinion presentation," and that the Special Committee "approved the Merger in bad faith." *Id.* at 21.

As to the first argument, the Court concluded that Mr. Bruno indisputably "did not participate in the negotiation of the Merger" and that the Special Committee's independence was not compromised by inviting Mr. Bruno to sit in on the fairness presentation, given that he "ultimately would vote on the Merger" and therefore "needed to hear the fairness presentation," and was excused before the Special Committee deliberated and voted to accept the proposal. *Id.* at 21-22. As to the second argument, the Court explained that although "it seems that the difficult route of pleading subjective bad faith is [a] theoretically viable means of attacking the *M&F Worldwide* framework," *id*. at 23, Plaintiffs failed to clear that high hurdle based on the existence of Party Y's $0.96 higher non-binding IOI to purchase something that was not for sale: the entire Company. *Id.* at 25-31. The Court found the existence of a 30-percent higher proposal to acquire the entire Company, as opposed to just the minority shares, unsurprising and "within a rational range of discounts and premiums." *Id.* at 35. Accordingly, the Court concluded, such allegations on their own "do not support a reasonable inference that the Committee acted in bad faith." *Id.* at 37.

On the third condition, the Court of Chancery noted that Plaintiffs did not contest the Special Committee's authority to retain advisors and say no definitively. *Id.* Indeed, the Proxy showed that the Special Committee exercised both such powers. *See* A259-60; A262.

On the fourth condition, the Court of Chancery concluded that Plaintiffs failed to "support a reasonable inference that the Committee was grossly negligent" where the Special Committee "met thirty-three times, negotiated with the Anderson Family for over five months, sought alternative buyers for the whole company, considered alternative transaction structures, rejected the Anderson Family's initial offer, submitted two counteroffers, negotiated over non-economic terms, and obtained a sale price 20% higher than the Anderson Family's initial offer [and] . . . 90% above BAM's closing price on the day before the Anderson Family announced its bid." Mem. Op. at 39.

Finally, as to the fifth and sixth conditions, the Court of Chancery observed that Plaintiffs did not dispute that the vote of the minority stockholders was informed and uncoerced. *Id.* at 41. Indeed, Plaintiffs "have never asserted any disclosure claims" and "do not argue that there was [coercion of the minority.]" *Id.*

The Court accordingly held that business judgment review applied, and that Plaintiffs' claims failed to support an inference that the Transaction's terms were so extreme as to constitute waste. The Court therefore dismissed the Amended Complaint with prejudice. *Id.* at 41-42.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFFS' ALLEGATIONS DO NOT SUPPORT A REASONABLE INFERENCE THAT ANY OF THE *M&F WORLDWIDE* CONDITIONS WERE NOT MET.

A. Question Presented

Whether Plaintiffs adequately pleaded that the Special Committee was grossly negligent in recommending a 90-percent premium transaction for the purchase of solely the minority shares following five months of negotiations, 33 meetings, market testing, multiple counteroffers that led to a nearly 20-percent price increase and more favorable non-economic terms, and a fairness opinion, based on the existence of a conditional, non-binding IOI by another party to purchase the entire Company, even though the controlling stockholders were unwilling to sell the controlling stake and the other bidder was unwilling to purchase just the minority shares? *See* A209-17.

B. Scope of Review

Dismissal of a claim under Court of Chancery Rule 12(b)(6) is reviewed *de novo*. *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010).

C. Merits of Argument

The Court of Chancery correctly ruled that Plaintiffs failed to plead facts supporting a reasonable inference that any of the *M&F Worldwide* factors were not

met. Mem. Op. at 1. Plaintiffs' "Question Presented" challenges the Court of Chancery's application of only one of those elements: whether Plaintiffs pleaded sufficient facts "to demonstrate that the Special Committee breached its duty of care in negotiating a fair price." Opening Br. at 13. The Amended Complaint is devoid of allegations from which one could reasonably infer that the Special Committee engaged in gross negligence when it negotiated and recommended a 90-percent premium transaction for the minority stockholders. Indeed, Plaintiffs could not even bring themselves to use the words "gross negligence"—or even "negligence"—anywhere in their Amended Complaint.

Plaintiffs rest their argument primarily on the existence of Party Y's non-binding IOI to acquire the entire Company for approximately 30-percent more per share than the Anderson Family offered to pay for the minority shares. A140 ¶ 4; A155 ¶ 58; A157-58 ¶ 68; A161 ¶ 78; A171 ¶¶ 107, 109; Opening Br. at 16-25, 31-32, 35-38. As the Court of Chancery correctly noted, this was not an apples-to-apples comparison: the Anderson Family's proposal was for the minority shares and Party Y's non-binding IOI was for control of the Company. Mem. Op. at 34-35. Plaintiffs admit that the Special Committee had no ability to accept Party Y's conditional IOI for the entire Company, given that the Anderson Family was unwilling to sell its shares and was not required to do so. A155 ¶ 57. And, of course, the Special Committee could not force Party Y to purchase only a minority

stake. A607. The Special Committee did exactly what this Court would expect under the circumstances—it canvassed the market to obtain additional information and confirm that the Anderson Family's offer was reasonable; it presented the Anderson Family with Party Y's IOI and asked if it was willing to sell on those terms (the Anderson Family was not); and it asked Party Y if it was willing to bid on just the minority shares (Party Y was not). A262.

Confronted with these facts, the Special Committee deliberated with its advisors and considered its options, including whether to cease discussions with the Anderson Family altogether. A262. However, considering the circumstances, the Special Committee concluded that it was in the best interests of the minority stockholders to give them an opportunity to realize (or reject) a substantial premium for their shares, and therefore embarked on additional negotiations. A262. The Special Committee's diligent negotiations paid off. It used Party Y's non-binding IOI as leverage and extracted a significantly better price and better deal terms for the minority stockholders—who voted to accept the deal despite full disclosure of Party Y's non-binding IOI. A158 ¶¶ 70-71; A262-64.

On these allegations, neither the Transaction price nor process supports a reasonable inference that the Special Committee acted with gross negligence. The Court of Chancery's decision should be affirmed.

1. The *M&F Worldwide* test.

Absent adherence to safeguards designed to protect minority stockholders, where a controlling stockholder seeks to take a company private, the transaction is subject to entire fairness review. *See Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). However, this Court held in *M&F Worldwide* that if minority protections are in place from the outset and throughout the process, such that the process mirrors that of an arm's-length, third-party transaction, business judgment review applies. 88 A.3d at 644-45. Specifically, this Court set forth the following six requirements:

> (i) the controller conditions the procession of 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 meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

Id. at 645.

Where a controlling stockholder take-private merger is structured to comply with *M&F Worldwide*'s requirements, rigorous "entire fairness" review is replaced with deferential business judgment review. *Id.* at 645-46. And this Court has affirmed that "the pleading stage is an appropriate point to determine if a transaction complied with *MFW*'s procedural requirements." *Emps. Ret. Sys. of St. Louis v. TC Pipelines GP, Inc.*, 2016 WL 7338592, at *3 n.9 (Del. Dec. 19, 2016)

(citing *Swomley v. Schlecht* ("*SynQor*"), 128 A.3d 992 (Del. 2015) (affirming dismissal under *M&F Worldwide* at pleading stage)).

2. Plaintiffs failed to plead facts supporting a reasonable inference that the Special Committee breached its duty of care in negotiating the Transaction price.

Plaintiffs' argument that the Special Committee did not meet its duty of care rests primarily on the notion that, in Plaintiffs' judgment, the ultimate price was "demonstrably unfair." Opening Br. at 14.

Plaintiffs' argument puts the "entire fairness" cart before the *M&F Worldwide* horse. If a plaintiff could avoid *M&F Worldwide* by claiming an unfair price, it would defeat the purpose of creating a procedural structure that obviates the need for such judicial second-guessing. *See SynQor*, 2014 WL 4470947, at *19 (Del. Ch. Aug. 27, 2014) (TRANSCRIPT), *aff'd*, 128 A.3d 992 (Del. 2015) ("[T]he whole point of encouraging this structure was to create a situation where defendants could effectively structure a transaction so that they could obtain a pleading-stage dismissal against breach of fiduciary duty claims."). Rather than focus on the structure and the process, Plaintiffs' argument would essentially require the Court to conduct an "entire fairness" review of the deal price *in order to determine whether an entire fairness review was even necessary.* That is not the law. *See TC Pipelines GP*, 2016 WL 7338592, at *3 n.9; *In re MFW S'holders Litig.*, 67 A.3d 496, 518 (Del. Ch. 2013) ("When a committee is structurally

independent, has a sufficient mandate and cannot be bypassed, and fulfills its duty of care, it should be given standard-shifting effect.").

In any event, the facts pleaded in the Amended Complaint do not support an inference that the Special Committee breached its duty of care. The "[d]uty of care is measured by a gross negligence standard," which is "a very tough standard to satisfy." *SynQor*, 2014 WL 4470947, at *21; *see also M&F Worldwide*, 88 A.3d at 652-53; *Malpiede v. Townson*, 780 A.2d 1075, 1096, 1097 n.77 (Del. 2001). "[G]ross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason." *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008). Nor do those allegations support a reasonable inference that "the Special Committee members breached their duties of loyalty" by "fail[ing] to act in good faith," Opening Br. at 14, which is an even higher bar than gross negligence. *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 64-65 (Del. 2006) ("[W]e address the issue of whether gross negligence . . . without more, can also constitute bad faith. The answer is clearly no."). Pleading bad faith requires conduct evincing "an actual intent to do harm" or an "intentional[] fail[ure] to act in the face of a known duty to act, demonstrating a conscious disregard for [one's] duties." *Id.* at 64, 67 (Del. 2006); *see Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009).

The pleaded facts do not come close to satisfying those standards. Plaintiffs' primary argument is that "Party Y's materially higher offer" of $4.21 per share is itself sufficient to create an inference that the $3.25 Transaction price is facially unfair. Opening Br. at 17. That is wrong for several reasons.

First, Party Y and the Anderson Family were bidding on different things—the Anderson Family sought to acquire the minority shares, whereas Party Y sought to acquire the entire Company—that is, control. A155 ¶ 59; A157 ¶ 66; A258; A262; A266.

Second, the Special Committee could not accept Party Y's non-binding IOI.[3] The Anderson Family made clear multiple times that it was unwilling to sell its controlling interest and, as Plaintiffs concede, the Special Committee could not force it to do so. A155 ¶ 59; A157 ¶ 67; A262. As such, only the minority interest was for sale. Party Y, however, made clear that it was *not* willing to offer $4.21 per share (or any other amount) for the minority interest. A262.

[3] While Plaintiffs repeatedly refer to an "offer" from Party Y (*see*, *e.g.*, Opening Br. at 8), it was merely a non-binding IOI that was subject to a host of conditions, including completion of due diligence and financing the potential approximately $65 million transaction through the Company's existing credit facility. A157 ¶ 66. There was never a firm offer in hand for $4.21 per share, nor any guarantee that Party Y would even be able to close such a transaction. Indeed, the Board's prior history with Party Y, wherein Party Y repeatedly indicated its inability to pay, did not engage a financial advisor, and did not conduct due diligence, left plenty of reason to doubt the seriousness of that non-binding IOI. A155 ¶ 57; A157 ¶ 66; A258.

The suggestion that the Special Committee was grossly negligent in accepting $3.25 per share is particularly misplaced given the undisputed efforts the Special Committee expended to reach this price. Even though the Anderson Family repeatedly told the Special Committee that it was unwilling to sell its shares, the Special Committee nonetheless solicited other bidders because, if the bid was strong, the members of the Anderson Family might change their minds and, even if they did not, this would provide a helpful market check.[4] A261. When the Special Committee received Party Y's $4.21 non-binding IOI, it asked the Anderson Family if it would be willing to sell and, separately, asked Party Y if it would be willing to buy just the minority shares. A261-62. Both parties declined. A261-62.

Next, the Special Committee debated whether to continue discussions with the Anderson Family at all. A262. The Special Committee and its advisors discussed various financial analyses, "how the proposal compared to the current and historical trading price of the Company," and the Anderson Family's repeated assertions that it was not interested in selling its shares. A262. Ultimately, the

[4] Plaintiffs essentially ask the Court to punish the Special Committee for taking the commendable step of canvassing the market and testing the Anderson Family's resolve. Under Plaintiffs' theory, any time a Special Committee receives an indication of a higher offer for the entire company, but agrees to the sale of the *minority* interest at any lower price, the transaction would *automatically* be subject to entire fairness review. Such a rule would discourage special committees from testing the market in response to controlling stockholders' offers.

Special Committee concluded that, because the Anderson Family's offer provided certainty of value and liquidity to minority stockholders, the merger consideration compared favorably to recent and historical market prices for BAM's stock, and appraisal rights were available under Delaware law, A268-69, it was beneficial to the stockholders to at least give them a chance to obtain a premium for their shares—knowing that if the stockholders did not like the premium, they were free to reject it. A262-63.

The Special Committee then negotiated hard to obtain better terms for the minority stockholders. A262-64. Indeed, Party Y's non-binding IOI provided leverage in that regard; the Anderson Family knew that Party Y's IOI would be disclosed in the Proxy and, therefore, had every incentive to provide a strong offer that would dissuade stockholders from bringing appraisal claims. *See* A263. Through these negotiations, the Special Committee was able to extract another $0.50 per share for minority stockholders. A264; A268.

Ultimately, the price achieved was more than 90 percent higher than the closing price the day before negotiations were announced and approximately 20 percent higher than the Anderson Family's initial offer of $2.75 per share. A258; A268.

On these facts, it would break with precedent to conclude that Plaintiffs pleaded a duty of care violation. For example, in *SynQor*, the special committee

held 20 meetings, countered the purchaser group three times, and ultimately negotiated an increase in the merger price from $1.10 to $1.35 per share. 2014 WL 4470947, at *2, *6. The plaintiffs alleged that the committee did not extract sufficient value for litigation claims and that it should have favored a dividend over a sale. *Id*. at *13. While there were "potential bases to disagree with the committee's strategy or tactics[,]" the Court of Chancery dismissed the case because such decisions are "debatable and [are]n't a duty of care violation." *Id.* at *22. This Court affirmed. *See SynQor*, 128 A.3d 992 (Del. 2015).

In *M&F Worldwide*, the special committee held eight meetings and negotiated with the controller to achieve an increase in price from $24 to $25 per share, but did not seek any third-party offers. *MFW*, 67 A.3d at 516. These facts did not constitute gross negligence because "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 transaction was advisable." *Id.*

In this case, the absence of gross negligence is even more stark. BAM's Special Committee met 33 times (including at least 18 times with its financial advisor), negotiated for over five months, sought an alternate buyer, rejected offers and submitted two counteroffers on the deal price (and engaged in other negotiations on non-economic terms), and obtained a 90-percent premium for the minority stockholders. A267-71.

Plaintiffs' insistence that the Court of Chancery held that Party Y's IOI "could not, as a matter of law, reflect the Company's fair price because that offer was for control of the entire Company and therefore contained a 'control premium'" is nothing more than a distraction.[5] Opening Br. at 18. What the Court of Chancery actually explained is that there *could* be a set of circumstances in which a premium offered by a third-party bidder for the entire company so greatly exceeded the controller's offer for the minority shares that it should lead the board to infer that the controller's offer was inadequate. *See* Mem. Op. at 35 ("If the amount of the minority discount was extreme," it might raise an inference of bad faith.). However, the Court of Chancery recognized that because of the inherent difference between a bid for control and a bid for a minority interest, the disparity would need to be very significant before it alone could create an inference of bad faith. *Id.* at 35-36; *see Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994) ("[T]he fact that [a third-party] was willing to pay more for all of the shares does not, logically, support an inference that the [controllers'] proposal for the non-controlling public shares was not fair.").

[5] Plaintiffs also misstate the Court of Chancery's opinion by claiming that it "determined—as a matter of factual certainty—that the $0.96 (or 30%) difference between Party Y's $4.21 per share offer and the Controller's $3.25 per share offer was entirely attributable to a control premium." Opening Br. at 21. The Court of Chancery did no such thing: as Plaintiffs themselves acknowledge, the Court stated that "[i]t is not possible to infer the exact amount of the premium [or discount]." Opening Br. at 21 (quoting Mem. Op. at 34).

That was not the case here. Party Y's proposal for the entire Company exceeded the Anderson Family's offer for the minority shares by less than 30 percent. A140 ¶ 4. As the Court of Chancery explained, there is nothing inherently suspect about that differential; indeed, it is consistent with the typical premium that a party will pay to gain control of a company, as numerous cases have recognized. Mem. Op. at 35 n.16 (collecting cases, including: *Wilmington Sav. Fund Soc'y, FSB v. Foresight Energy LLC*, 2015 WL 7889552, at *9 n.3 (Del. Ch. Dec. 4, 2015) ("[A] number of studies have found that control premia in mergers and acquisitions typically range between 30% and 50%."); and *Prescott Grp. Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at *13 n.77, *28 (Del. Ch. Sept. 8, 2004) (accepting as "consistent with Delaware law" a control premium valuation range of "30 to 40 percent")). Thus, Plaintiffs' reliance on the disparity between the Anderson Family's offer for the minority interest and Party Y's conditional IOI for the entire Company was insufficient to raise an inference of bad faith or gross negligence: "the difference is not so facially large as to suggest that the Committee was attempting to facilitate a sweetheart deal for the Anderson family."[6] Mem. Op. at 35-36, 39.

[6] In any event, Plaintiffs' argument defies both logic and the undisputed facts because Party Y's IOI plainly *did* incorporate a control premium. Party Y proposed to pay $4.21 per share for the entire Company. A155 ¶ 57. When the Special Committee asked Party Y if it would be willing to make that same proposal

Plaintiffs' lengthy critique of the lower court's discussion of *Mendel* is also misplaced. The Court of Chancery cited *Mendel* for the uncontroversial propositions that (1) a controlling stockholder does not breach its duties to the minority by refusing to sell to a third-party, and (2) a special committee does not act improperly by respecting a controlling stockholder's decision not to sell. Mem. Op. at 31-32. As such, "[t]he Committee could explore third-party offers to test whether the members of the Anderson Family would stick to their buyer-only stance when presented with an opportunity to sell" and use Party Y's non-binding IOI "to assess the value of the Company and determine whether the Anderson Family's bid was so low as to warrant rejecting it outright without presenting it to the minority." *Id*. at 32. As the Court correctly noted, the Special Committee did just that and, "[r]ather than supporting an inference of bad faith, the Committee's actions support an inference of good faith." *Id*.

Plaintiffs' only other arguments advanced regarding the "unfairness" of the price all relate to their assertion that the Transaction undervalued the Company. Those arguments are also readily disposed of because they are premised on faulty assumptions and factual misrepresentations.

First, Plaintiffs tout BAM's financial performance and future prospects as a reason why the Special Committee could have rejected the Anderson Family's

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for the minority shares, Party Y refused. A262. In other words, Party Y would pay $4.21 per share only if that price bought it control of BAM.

offer. Opening Br. at 17. But Plaintiffs ignore the substantial negative aspects of the Company's performance, including: (1) in the year before the Anderson Family made its proposal, the Company had lost 26.7 percent of its value, *see* A535; (2) BAM's total revenue had fallen nearly six percent in the past two years, *see* A328; (3) BAM had substantial negative net income in two of the four preceding years, *see id.*; and (4) BAM had negative net income of more than $11 million in the 26 weeks that ended shortly after the announcement of the Transaction, *see id*. In any event, the Special Committee members considered all these factors in approving the Transaction in their business judgment—and presumably so did the minority stockholders when they voted to accept it. A266-69.

Second, Plaintiffs repeat factual inaccuracies about BAM's real estate properties that were already corrected in briefing below and in the Court of Chancery's decision. Plaintiffs claim that the Transaction's price of $21 million is facially unfair because "BAM owned properties with an appraised value of $50.3 million." Opening Br. at 17. As the Proxy makes clear, those properties were encumbered by mortgages totaling approximately $29.9 million, A292, and the Anderson Family already owned a majority interest in the net value of those properties by virtue of its controlling position in BAM. Mem. Op. at 40-41.

Third, Plaintiffs' vague criticism of one of the valuation analyses by the Special Committee's financial advisor does not establish gross negligence. *M&F*

Worldwide focuses on the Special Committee's process, not the bankers' techniques or the Special Committee's ultimate decision. *See Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (due care in decision-making is "process due care only"). And, tellingly, Plaintiffs do not claim that had the alleged "errors" been corrected, the Transaction price would have fallen outside the DCF fairness range.

Relatedly, Plaintiffs claim that the Special Committee members "should have known in light of their substantial executive and financial experience" that the DCF "was flawed and should have resulted in a higher valuation." Opening Br. at 18. That argument was rejected in *SynQor*. There, although the directors in question were experienced executives and one was a CFO, the Court of Chancery found no reason to believe "at the pleading stage that these directors were experts in valuation" or that "there's any reason why they personally should have called into question the nature of the valuation analysis." *SynQor*, 2014 WL 4470947, at *23. This case is no different. And no matter what the directors' background, quibbles about the beta used in a DCF analysis do not make a 90-percent premium deal "gross negligence."

3. Plaintiffs failed to plead facts supporting a reasonable inference that the Special Committee breached its duty of care by employing an inadequate process.

The Amended Complaint does not support a reasonable inference that the process the Special Committee followed amounted to a lack of due care. As with

their first argument, Plaintiffs must allege that the Special Committee's conduct rose to the level of "gross negligence." *See SynQor*, 2014 WL 4470947, at *21; *Malpiede*, 780 A.2d at 1097 n.77.

Plaintiffs seek to excuse their failure to plead gross negligence based on *M&F Worldwide*'s statement that a special committee must be "effective." Opening Br. at 30. Here too, Plaintiffs attempt to smuggle "entire fairness" review into the threshold determination of whether such review is warranted. But whether a committee was "effective" is a structural and procedural inquiry, not an assessment of the results it obtained. *See MFW*, 67 A.3d at 518 ("For a court to determine whether a special committee was effective in obtaining a good economic outcome involves the sort of second-guessing that the business judgment rule precludes."). Here, the Special Committee was without question "effective" under *M&F Worldwide*—it was independent, it had and exercised authority to retain its own advisors, and it had and exercised the authority to say "no" to the Anderson Family's offers.

Further, none of Plaintiffs' critiques of the Special Committee's process rise to the level of gross negligence; they are merely disagreements about the Special Committee's tactics and judgments.

First, Plaintiffs argue that upon receipt of Party Y's $4.21 non-binding IOI, the Special Committee should have "indicated to the Controllers that it would not

accept an offer lower than Party Y's $4.21 per share offer." Opening Br. at 31. That is nothing more than playing Monday morning quarterback—and particularly unrealistic quarterbacking at that. There were very good reasons for the Special Committee not to counter the Anderson Family's $2.75 per share offer with $4.21 per share—such a dramatic price increase might have caused the Anderson Family to cease negotiating and walk away, as it had done in 2012 when the previous special committee demanded a higher price. A257; A153 ¶ 49. That would have jeopardized the minority stockholders' ability to obtain any premium for their shares at all. Moreover, there is no reason to expect that the Anderson Family would pay the same per-share price that Party Y indicated it might pay for control of the company, which the Anderson Family already had.

The Special Committee instead evaluated its options, including the option of not responding at all, and ultimately concluded that it was in the minority stockholders' best interests to try to get additional consideration, knowing that if the minority stockholders did not like the final deal price, they were free to vote against any transaction. A262. As the Court of Chancery recognized, the negotiated ten percent appraisal rights condition provided even further protection to minority stockholders because, if triggered, the Anderson Family could choose not to close the Transaction. *See* Mem. Op. at 36. Thus, not only did the

Transaction grant minority stockholders the right to reject the Transaction, but a *minority of the minority* even had the potential to put the deal at risk.

In determining the price at which to counter, the Special Committee considered (among other things) the Company's projected performance, the premium to its historical trading prices, and the likelihood that the Anderson Family would accept it. A262. Based on those considerations, the Special Committee made the strategic decision to counter with $3.36 per share, and later with $3.25 per share. A158 ¶¶ 69-71, A262-63. The Special Committee's efforts succeeded, as its two counteroffers caused the Anderson Family to raise its offer by nearly 20 percent. *See* A155 ¶ 58; A158 ¶ 71; A267-68. As in *SynQor*, Plaintiffs' *post hoc* critique is a "matter of strategy and tactics that's debatable and isn't a duty of care violation." 2014 WL 4470947, at *22.

Next, Plaintiffs argue that "the Special Committee either misrepresented the truth or misunderstood the facts" because the "conditions imposed by Party Y and the Controllers were" "identical" and, therefore, "the Special Committee could not credibly reject Party Y's offer on that basis." Opening Br. at 11, 32.

As a threshold matter, the Anderson Family's and Party Y's financing conditions were not "identical." *Id*. at 11. Both parties sought to use the Company's credit facility to finance the transaction, but they needed very different amounts of money. The Anderson Family only sought to borrow $18 million to

close its $21 million purchase of the minority shares. A139 ¶ 3. Party Y, by contrast, required more than three times that amount because it needed enough money to purchase both the minority shares and the Anderson Family's stock, and at a higher price. A157 ¶ 66; A293. The Anderson Family's lending needs were significant enough for the Company to conclude that it needed a solvency opinion; of course, it would have been much more significant if more than triple that amount was needed. A267-68. Party Y's inability to pay also weighed against any strategy of rejecting the Anderson Family's proposal in the hope that it might someday relent and agree to sell the entire Company. The Special Committee reasonably decided not to gamble with the minority stockholders' money, and instead gave them the opportunity to obtain—or reject—a 90-percent premium. *See* A268.

Moreover, the Special Committee could not accept Party Y's non-binding IOI because the Anderson Family was unwilling to sell and had no obligation to sell. A155 ¶ 59; A157 ¶ 69; A262. There were also reasons for the Special Committee to be skeptical of Party Y's non-binding IOI given that, in the past, Party Y had not behaved like a credible buyer. For example, in the 2013 discussions, Party Y did not conduct due diligence or even hire its own financial advisor. A258. Party Y's $4.21 non-binding IOI was also entirely conditional and

required, among other things, due diligence that had not yet been conducted. A159 ¶ 73.

Finally, Plaintiffs argue that the Special Committee breached its duty of care merely by allowing Mr. Bruno to sit in on Houlihan's fairness presentation. Opening Br. at 32-33. The Court of Chancery correctly observed that Mr. Bruno had to hear Houlihan's presentation at some point before the Board's vote on the Transaction because, without him, there would not have been a quorum.[7] *See* A238; A267; Mem. Op. at 22. As the Court of Chancery recognized, "[t]o create a truly pristine process, Houlihan Lokey could have given its presentation twice: once to Wilhelm and Domanico as members of the Committee, then, if they recommended the transaction, a second time to Wilhelm, Domanico, and Bruno as members of the Board." Mem. Op. at 22. But it was not grossly negligent for the

[7] In the Court of Chancery, Plaintiffs argued that Mr. Bruno's presence somehow tainted the process and thereby stripped the Special Committee of its independence. A613. Plaintiffs have abandoned that argument, claiming instead that the Special Committee breached its duty of care by allowing Mr. Bruno to be in the room. Opening Br. at 32-33. In any event, Plaintiffs' allegation that Mr. Bruno had "social and civic relationships" with the Anderson Family does not suffice to challenge his independence. *See MFW*, 67 A.3d at 509 ("[M]ere allegations that directors are friendly with, travel in the same social circles, or have past business relationships with the proponent of transaction . . . are not enough to rebut the presumption of independence."). Nor does Mr. Bruno's lengthy service on the Board, which Plaintiffs misleadingly characterize as a "twenty-three year long business and personal relationship with the Andersons." Opening Br. at 32; *see SynQor*, 2014 WL 4470947, at *20 (fact that director was "historically elected" by controller is "not enough" to challenge his independence).

Special Committee to "decide[] to avoid the need for a repeat performance." *Id.* That is particularly true given that: Mr. Bruno voluntarily removed himself from the process and had not been involved in any of the negotiations with the Anderson Family; Mr. Bruno was only present at the fairness presentation at the invitation of Messrs. Wilhelm and Domanico, who are not alleged to have been conflicted in any way; and Mr. Bruno was excused from the room before the Special Committee's deliberations and vote on the Transaction. A266-67.

Accordingly, the Amended Complaint fails to plead facts supporting Plaintiffs' claim that the Special Committee breached its duty of care in connection with the Transaction.

II. ALTERNATIVELY, THE DISMISSAL OF PLAINTIFFS' CLAIMS AGAINST THE SPECIAL COMMITTEE MEMBERS SHOULD BE AFFIRMED ON OTHER GROUNDS PRESENTED BELOW.

A. Question Presented

Whether Plaintiffs may sustain breach of fiduciary duty claims against the Special Committee members where such individuals are exculpated from money damages for duty of care claims and Plaintiffs did not plead facts supporting duty of loyalty claims? *See* A561-63.

B. Scope of Review

The affirmance on alternative grounds of a decision dismissing a complaint does not require determinations of fact by the appellate court and furthers the "interest of orderly procedure and early termination of litigation." *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del. 1995).

C. Merits of Argument

Even if the Court finds that *M&F Worldwide* does not apply because the Amended Complaint adequately pleads a duty of care violation against the Special Committee—which, for the reasons set forth above, it does not—the dismissal of Messrs. Wilhelm and Domanico from this action still should be upheld because the Court of Chancery correctly ruled that Plaintiffs have not alleged a valid claim against them for breach of the duty of loyalty. Delaware law requires Plaintiffs "to plead a non-exculpated claim against each director who moves for dismissal," *Cornerstone*, 115 A.3d at 1180, and Plaintiffs have never disputed that BAM's

certificate of incorporation exculpates Messrs. Wilhelm and Domanico for breaches of the duty of care pursuant to 8 *Del. C.* § 102(b)(7).[8] *See* B55.

Although Plaintiffs now seek to cabin their allegations concerning the facially disinterested and independent Special Committee in terms of the duty of care, the Court of Chancery examined them in the first instance under the "independence" prong of *M&F Worldwide*. *See* Mem. Op. at 19-37. The Court reasoned that this element encompasses not only independence in the sense of personal or financial relationships, but also any of the other "traditional ways that a plaintiff can establish disloyalty sufficient to rebut the business judgment rule," including bad faith. *Id.* at 24. Even under this broader interpretation of the "independence" prong, the Court held that the Amended Complaint "do[es] not support a reasonable inference that the Committee acted in bad faith . . . [or] that the members of the Committee were not disinterested or independent." *Id.* at 37.

The Court of Chancery's ruling was correct: even if the Amended Complaint pleaded gross negligence against the Special Committee members (which it does not), it does not come close to pleading the "extreme set of facts . . . required to sustain a [non-exculpated] disloyalty claim premised on the notion that [these] disinterested directors were intentionally disregarding their duties." *Lyondell*, 970

[8] Other Defendants made additional arguments to the Court of Chancery in support of dismissal, but the Court found it unnecessary to reach those arguments because all claims fail under *M&F Worldwide*. *See* Mem. Op. at 16.

A.2d at 243. In the interests of orderly procedure and the early termination of litigation, that ruling warrants dismissal as to Messrs. Wilhelm and Domanico under *Cornerstone*, regardless of whether *M&F Worldwide* applies to the Transaction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Chancery.

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January 4, 2017