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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 Court Below: The Court of Chancery of the State of Delaware Consol. C.A. No. 11343-VCL

APPELLANTS' REPLY BRIEF

Dated: January 19, 2017

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PRELIMINARY STATEMENT[1]

The primary question raised in this Appeal is whether Plaintiffs have pled a sufficient set of facts such that it is *reasonably conceivable* that the Special Committee failed to meet its duty of care in negotiating a fair price when it received Party Y's $4.21 per share offer following a limited market check but nonetheless accepted the Controllers' substantially lower $3.25 per share offer? The answer is yes.

As discussed in the Opening Brief and herein, the Court of Chancery's Opinion is laden with improper and erroneous factual and legal conclusions. Defendants rely on those errors (and others) in their Answering Brief, and they have come nowhere close to rebutting Plaintiffs' contentions on appeal that the Special Committee breached at least its duty of care in negotiating the Transaction price.

Defendants' contend that courts should not review the substance of controlling stockholder transactions or the negotiations leading thereto as long as they superficially satisfy the six *M&F Worldwide* conditions. Defendants' position, however, is contrary to *M&F Worldwide*'s requirement that courts examine whether special committees are "effective," meaning that they "function in a manner which indicates that the controlling stockholder did not dictate the

[1] Terms used herein have the meanings as indicated in Appellants' Opening Brief.

terms of the transaction and that the committee exercised real bargaining power 'at an arms-length.'"[2] As Plaintiffs have demonstrated, the Special Committee here was not effective when it negotiated and approved the demonstrably unfair Merger Consideration pursuant to a grossly negligent negotiation process.

As such, Defendants have failed to satisfy all of the *M&F Worldwide* conditions and therefore the Transaction should be subject to entire fairness review. If the Opinion is not reversed, this Court will send a message that feckless special committees that fail to bargain hard and accept inadequate offer prices are sufficient to obtain business judgement rule protection under *M&F Worldwide*. This cannot be the law.

Accordingly, this Court should reverse the Court of Chancery's Opinion, and it should decline Defendants' invitation to rule in the first instance that the Special Committee members did not breach their non-exculpated fiduciary duties.

[2] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 646 (Del. 2014).

ARGUMENT

I. Plaintiffs More Than Sufficiently Alleged That The Special Committee Breached Its Duty Of Care In Negotiating A Fair Price

A. Plaintiffs Demonstrated That The Merger Consideration Was Unfair

Defendants wrongly contend that Plaintiffs cannot obtain entire fairness review of a going-private transaction by demonstrating that the transaction price is unfair.[3] In *M&F Worldwide*, this Court stated that "allegations about the sufficiency of the price [can] call into question the adequacy of the Special Committee's negotiations, thereby necessitating discovery on all of the new prerequisites to the application of the business judgment rule."[4] The Court of Chancery, moreover, also recognized in the Opinion that allegations about the sufficiency of the merger price can demonstrate that the Special Committee breached its duty of care or loyalty.[5] Defendants acknowledged this in their Answering Brief.[6]

The review of the unfairness of the merger price is consistent with this Court's mandated "careful judicial scrutiny" into the effectiveness of the dual

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[3] Ans. Br. at 25.

[4] *M&F Worldwide*, 88 A.3d at 645 n.14.

[5] Op. at 35 ("If the independent directors facilitated a grossly inadequate offer, then it might be possible to infer that they acted in bad faith."); *id*. at 39-40.

[6] Ans. Br. at 31.

procedural protections (*i.e.*, the empowered, independent committee that acted with care and the fully-informed, uncoerced majority of the minority stockholders vote) announced in *M&F Worldwide*.[7] Indeed, the stated purpose behind the two procedural protections is to generate a fair price.[8] It would be odd therefore to blindfold a court from considering the adequacy of the merger price when determining whether the *M&F Worldwide* conditions have been met.

Defendants' contention that "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" is unfounded.[9] The Court's review of the deal price is limited and restricted to the pleadings to determine whether plaintiffs have raised sufficient concerns about the adequacy of the merger price such that the special committee's negotiations and/or independence is called into question. Thus, contrary to Defendants' assertions, this limited inquiry does *not* require an in-depth determination of a company's fair price.

Delaware courts, moreover, are more than capable of reviewing price-based pleadings and determining whether they are sufficient to demonstrate that the

[7] *M&F Worldwide*, 88 A.3d at 645-46.

[8] *Id.* at 644-45 ("[T]he underlying purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: **price**.").

[9] Ans. Br. at 25 (emphasis omitted).

special committee breached its duty of care in negotiating a fair price. In *Swomley v. Schlect*, for example, the Court of Chancery determined that the plaintiff failed to demonstrate that the special committee breached its duty of care in negotiating the merger price when the plaintiff took issue with some of the special committee's banker's valuation decisions. The plaintiff in that case claimed that the special committee's banker did not put a value on an early-stage litigation, and that it did not independently value a patent portfolio, which patents' revenue was already incorporated into the company's projections and used in the financial advisor's more traditional valuation methodologies.[10] This Court affirmed that decision.[11]

The facts of this case are distinct from those at issue in *Swomley*. Here, after the Special Committee directed Houlihan Lokey to reach out to three potential third party bidders *for the purpose of determining the Company's fair price*, Party Y submitted a 30% higher offer than the ultimate Merger Consideration accepted by the Special Committee.[12] Party Y's offer was palpable and objective evidence

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[10] *Swomley v. Schlect*, C.A. No. 9355-VCL, at 19-24, 73-74 (Del. Ch. Aug. 27, 2014) (Transcript).

[11] *Swomley v. Schlect*, 128 A.3d 992 (Del. 1995) (Table).

[12] Defendants for the first time in a footnote attempt to downplay Party Y's premium offer by asserting that "it was merely a non-binding [indication of interest]" rather than a firm offer. Ans. Br. at 27 n.3. However, the Proxy also refers to Party Y's offer as a "letter of intent" and a "proposal." A265-66. Regardless of its name, the fact that Party Y submitted its $4.21 per share offer three separate times over the span of approximately fourteen months, despite being ignored or rebuffed by the Special Committee each time, indicates that Party Y's

of the Company's fair value; it was not some quibble with the banker's analyses like in *Swomley*. As noted in the Opening Brief, this Court has recognized that a "merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value,"[13] and that "[v]alues derived in the open market through arms-length negotiations offer better indicia of reliability than [] interested party transactions[.]"[14]

The allegations here, moreover, are much more persuasive evidence of unfair price (and therefore evidence of the Special Committee's gross negligence) than those presented in *M&F Worldwide*. There, this Court indicated that the well-pled allegations in that case regarding the financial fairness of the buyout price – four indirect indicators of financial unfairness[15] – would have called into question

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offer was sufficiently concrete and reliable, and was significant enough to warrant the Special Committee's rejection of the offer. A266. *See also In re Appraisal of Dell Inc*., 2016 Del. Ch. LEXIS 81, at *126-30 (Del. Ch. May 31, 2016) (finding in an appraisal action that the receipt of "two higher indications of interest" during a go-shop period suggested that the final merger price was unfair).

[13] *M.P.M. Enterprises v. Gilbert*, 731 A.2d 790, 797 (Del. 1999).

[14] *Id*. at 796; *see also Van De Walle v. Unimation, Inc*., 1991 Del. Ch. LEXIS 27, *51 (Del. Ch. Mar. 6, 1991).

[15] Specifically, those allegations were:

> First, the complaint alleged that Perelman's offer "value[d] the company at just four times" MFW's profits per share and "five times 2010 pre-tax cash flow," and that these ratios were "well below" those calculated for recent similar transactions. Second, the complaint alleged that the final Merger price was two dollars per share *lower* than the trading price only about two months earlier. Third, the

the adequacy of the Special Committee's negotiations, and therefore would have survived a motion to dismiss.

Defendants largely fail to address Plaintiffs' specific contentions in this appeal (and in the Court of Chancery) regarding the inadequacy of the Merger Consideration *viz-à-viz* Party Y's offer. Defendants' only contention that the $3.25 per share Merger Consideration was not unfair (notwithstanding Party Y's 30% higher third party offer) is that the Controllers were buying BAM's minority shares, whereas Party Y was offering to buy the entire Company. And because the Court of Chancery determined that "there is nothing inherently suspect" about the 30% differential between Party Y's and the Controllers' offers, Defendants contend, Plaintiffs have not demonstrated that the Controllers' offer was unfair.[16] They are wrong.

Although not directly stated, Defendants' contention rests on the proposition that the Controllers' offer reflected BAM's fair price, and that Party Y's offer did

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> complaint alleged particularized facts indicating that M[FW]'s share price was depressed at the times of Perelman's offer and the Merger announcement due to short-term factors such as MFW's acquisition of other entities and Standard & Poor's downgrading of the United States' creditworthiness. Fourth, the complaint alleged that commentators viewed both Perelman's initial $24 per share offer and the final $25 per share Merger price as being surprisingly low.

M&F Worldwide, 88 A.3d at 645, n.14.

[16] Ans. Br. at 31-32.

not because it necessarily reflected at least a 30% control premium.[17] As explained in the Opening Brief, however, offers to acquire control of a company do not necessarily or inherently contain control premiums, and there is nothing in the record indicating at all that Party Y's offer contained a control premium. Indeed, neither the Special Committee nor Houlihan Lokey considered or performed *any analysis* to determine whether Party Y's offer, in fact, contained a control premium, and if so, the amount of that premium. None of the three Houlihan Lokey presentations made to the Special Committee as disclosed in BAM's Schedule 13E-3 indicate any analysis of Party Y's offer. A470-559.

Defendants nonetheless contend that this Court can infer that Party Y's offer contained a control premium because Party Y refused to buy BAM's minority shares and "Party Y would pay $4.21 per share only if that price bought it control of BAM."[18] Even if the Court were to draw favorable inferences for Defendants, the fact that Party Y was not interested in buying a minority stake of a company that was majority-owned by a family that itself was seeking to take the Company

[17] Defendants state that this control premium issue "is nothing more than a distraction." Ans. Br. at 31. Defendants' attempt to dodge this issue is misplaced because it formed the core of the Court of Chancery's erroneous holding in the Opinion and Defendants' argument below. Op. at 32-36; A226-28, 628, 643-44, 672-74.

[18] Ans. Br. at 32-33 n.6.

private for an inadequate price ($2.75 per share at that time), does not reasonably show that Party Y's offer contained a control premium.

As explained in the Opening Brief, *Mendel v. Carroll*, 651 A.2d 297 (Del. Ch. 1994) does not alter this result. In *Mendel*, the Court of Chancery held that the plaintiffs had not demonstrated that they were entitled to a mandatory injunction that would require the Katy board to grant a dilutive option to a third party, Pensler. The Court of Chancery determined that neither the entire fairness nor the heightened *Revlon* standards of review applied in that case because, unlike here, there was "no threat of exploitation or even unfairness towards a vulnerable minority that might arguably justify discrimination against a controlling block of stock" in light of the fact that the Carroll family withdrew its going-private offer.[19] As such, the special committee in *Mendel* was not under an obligation to engage in a transaction or maximize stockholder value.[20] It was in this narrow context (which is easily distinguishable from this case) that the Court of Chancery stated that Pensler's third party offer and the Carroll family's offer were not comparable,

[19] *Mendel*, 651 A.2d at 304.

[20] The *Mendel* Court did state that, if the Carroll family in fact went forward with taking Katy private (like here), the entire fairness standard of review would have applied, defendants would not have been entitled to dismissal, and the Carroll family would have been under a duty to maximize the minority's value, and would have had to demonstrate that the transaction was the product of fair price and fair dealing. *Id*. at 306 (citing *Kahn v. Lynch Communication Sys*., 638 A.2d 1110, 1119 (Del. 1994)).

and that Pensler was not entitled to the dilutive option (particularly when doing so would cause the Katy board to breach its fiduciary duties to the majority stockholders).[21] Thus, Defendants' and the Court of Chancery's reliance on *Mendel* is misplaced.[22]

In any event, even if Party Y's offer contained a control premium, there is no rule of law stating that a control premium cannot be reflected in a company's fair price or fair value.[23] To the contrary, Delaware courts have recognized that a company's "'sale value,' meaning the sale of an entire subject company, can be a 'very strong indication of fair value,' if there is evidence that that value does not include synergistic elements—meaning, 'the value of the company to one specific

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[21] It has been noted that "[o]ne of the most problematic decisions in any attempt to assess the overall Delaware law on control is *Mendel v. Carroll*," which should be read with the understanding that "[t]he narrow legal issue in *Mendel* was only whether the Katy board was justified in refusing to issue a dilutive option to the hostile bidder that would enable it to obtain control, despite the implacable opposition of the Carroll group." John C. Coffee, Jr., *Transfers Of Control And The Quest For Efficiency: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 DEL. J. CORP. L. 359, 390-93 (1996).

[22] Defendants state that "[t]he 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." Ans. Br. at 33. Although Plaintiffs agree that these propositions are "uncontroversial," it is clear that the Court of Chancery (and Defendants) relied on *Mendel* for more than those propositions.

[23] *See Prescott Group Small Cap, L.P. v. Coleman Co*., 2004 Del. Ch. LEXIS 131, *99 (Del. Ch. Sept. 8, 2004) (stating that one expert's contention that "any control premium" is impermissible and cannot be considered under Delaware appraisal law runs "blatantly counter to the settled Delaware precedent on the subject").

buyer,'"[24] which Defendants cannot show here. Defendants have not and cannot refute these settled legal principles.

It does not matter that the Controllers were only buying BAM's minority shares and Party Y was offering to buy the entire Company. Under Defendants' theory, a company's "fair price" would be different depending on whether the company was being acquired by a third party or by a controlling stockholder in a going-private merger. Delaware courts, however, do not make this distinction when determining a company's fair price. In both the third party and going-private acquisition context, Delaware courts value the target company as a whole to determine the fair price of the company's shares. If Defendants' logic was adopted and used to value the minority stockholders' shares in going-private transactions, the value of those shares would reflect a minority discount, which is contrary to established Delaware law.[25]

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[24] *Id.* at *97 (quoting *M.P.M. Enterprises*, 731 A.2d at 796). In a recent appraisal case, *Merion Capital L.P. v. Lender Processing Servs*., 2016 Del. Ch. LEXIS 189 (Del. Ch. Dec. 16, 2016), the same Vice Chancellor that issued the Opinion found that a company's fair value equaled the third party transaction price, without adjustments for a control premium. *But cf. Dunmire v. Farmers & Merchs. Bancorp of W. Pa*., 2016 Del. Ch. LEXIS 167 (Del. Ch. Nov. 10, 2016) (finding the transaction price did not represent fair value where a controlling stockholder was on both sides of the transaction).

[25] *See* Coffee, *supra* note 21, at 393 ("Unless qualified, *Mendel*'s logic might suggest that minority discounts can reenter the scene by a far more important door than *Cavalier Oil* closed.").

Defendants also rely, without further explication, on the Court of Chancery's erroneous and unsupported conclusions that the 30% difference between Party Y's and the Controllers' offers was entirely attributable to a control premium,[26] and was "not so facially large as to suggest that the Committee was attempting to facilitate a sweetheart deal for the Anderson Family."[27] Defendants failed to acknowledge or address the fact that there is no evidence that the Special Committee determined that the 30% difference was attributable to a control premium or that the Special Committee relied upon the same authorities cited by the Court of Chancery, which developed this analysis on its own, to justify accepting a substantially lower price than Party Y's third party offer. The Court of Chancery's adverse factual findings against Plaintiffs, without regard to the actual evidence (or lack thereof) in this case, is improper on a motion to dismiss and warrants reversal.

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[26] Contrary to Defendants' assertions, the Court of Chancery implicitly determined that the 30% difference was attributable to a control premium because "the bargained-for consideration falls within a rational range of discounts and premiums" of between approximately 30% and 50%, according to the Court of Chancery. Op. at 35. As noted in the Opening Brief, however, control premiums do not necessarily have to be between 30% and 50%, and in fact transactions for control can generate no, or even negative, control premiums. Moreover, even if control premiums must range from 30% to 50%, the Court of Chancery erred by deriving Party Y's premium in relation to the Controllers' offer price rather than BAM's unaffected stock trading price.

[27] Op. at 35-36.

B. Plaintiffs Demonstrated That The Special Committee Was Ineffective And At Least Grossly Negligent In Negotiating The Merger Consideration

Defendants contend that this Court should not review the substance of the Special Committee's negotiations and assert that Plaintiffs are attempting to "smuggle 'entire fairness' review into the threshold determination of whether such review is warranted."[28] Defendants contend that "whether a committee was 'effective' is a structural and procedural inquiry, not an assessment of the results it obtained."[29] Again, Defendants are wrong.

This Court stated in *M&F Worldwide* that, "[f]or the combination of an effective committee process and majority-of-the-minority vote to qualify (jointly) for business judgment review, each of these protections must be effective singly to warrant a burden shift."[30] In *Ams. Mining Corp. v. Theriault*, this Court stated that the Court of Chancery properly concluded that:

> A close look at *Tremont* suggests that the [burden shifting] inquiry must focus on how the special committee actually negotiated the deal — was it "well functioning" — rather than just how the committee was set up. The test, therefore, seems to contemplate a look back at the substance, and efficacy, of the special committee's negotiations, rather than just a look at the composition and mandate of the special committee.[31]

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[28] Ans. Br. at 36.

[29] *Id*.

[30] *M&F Worldwide*, 88 A.3d at 646.

[31] 51 A.3d 1213, 1240-41 (Del. 2012) (citation omitted).

Thus, contrary to Defendants' assertions, courts are required to scrutinize the "substance, and efficacy, of the special committee's negotiations" and cannot simply take a hands-off approach as long as defendants superficially comply with the *M&F Worldwide* conditions.

Here, after receiving Party Y's $4.21 per share offer, the Special Committee never indicated to the Controllers that it would not accept an offer that was lower than Party Y's offer, and never even made a $4.21 per share counteroffer or counter close to that price to the Controllers. Instead, the Special Committee countered the Controllers' offer with only $3.36 per share, and later lowered their counteroffer to $3.25, or a $0.96 per share or 30% discount to Party Y's offer. This fact should be more than sufficient to call into question the fairness of the offering price and thus the effectiveness of the Special Committee on a dismissal motion.

Defendants repeatedly state, as if it were record fact, that "the Special Committee directed Houlihan Lokey to provide Party Y's non-binding IOI to the Anderson Family to see if it would sell its shares at that price."[32] That is not true. The Proxy states only that the Special Committee "directed representatives from Houlihan Lokey to provide Party Y's draft non-binding indication of interest to the Anderson Family Representative." A261-62. The Special Committee never made

[32] Ans. Br. at 9; *see also id*. at 23, 28.

a counteroffer or otherwise requested or suggested that the Controllers pay $4.21 per share.[33] Rather, on April 29, 2015, apparently *without even considering or discussing potentially countering at $4.21 per share*, the Special Committee determined that it would counter the Controllers' offer with only $3.36 per share. A262. Thus, contrary to Defendants' unsupported factual assertions, the Special Committee did not use Party Y's offer as leverage to extract a higher price for BAM's minority stockholders.

Defendants further contend that Plaintiffs are "playing Monday morning quarterback" and that the Special Committee had a good reason not to counter with $4.21 per share because "such a dramatic price increase might have caused the Anderson Family to cease negotiating and walk away."[34] As an initial matter, the Anderson Family should have "walked away" because they were attempting to squeeze out BAM's minority stockholders at an unfair price. Moreover, there is nothing in the record to indicate that the Company faced an exigency that required an immediate sale.

Additionally, as has repeatedly been the case in this litigation, Defendants' contention is not supported by the record and they are not entitled to a favorable

[33] Indeed, Defendants contradict themselves in their brief by also stating that "[t]here 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[.]" Ans. Br. at 37.

[34] Ans. Br. at 37.

inference. The Proxy does *not* indicate that the Special Committee determined not to counter at a higher price due to the risk that the Controllers would walk away. *See* A262. It does indicate, however, that the "Special Committee's determination of the price of $3.36 per share in cash took into account, among other factors, . . . the likelihood, subject to expected negotiations, of acceptance by the Anderson Family." *Id*. Therefore, the Special Committee's admitted decision to counter at $3.36 per share (and later $3.25 per share) was driven by what price the Controllers were willing to pay rather than what price maximized stockholder value and reflected BAM's fair price (which was evidenced by Party Y's offer). This Court has made clear that, notwithstanding the limitations on other alternatives, special committees must protect minority stockholders and maximize the value of their shares, and cannot agree to an unfair price even if it was the best price that the controlling stockholder was willing to pay.[35]

Moreover, if the Special Committee members truly were independent and acted at arm's-length, they would have countered the Controllers at the price a third party was willing to pay. The fact that the Special Committee did not make the $4.21 per share counteroffer, let alone even discuss making it, is evidence that the Special Committee members did not exert actual, arm's-length bargaining power, and it demonstrates their beholdeness to the Controllers and/or

[35] *Lynch*, 638 A.2d at 1119.

"indifference to their duty to protect the interests of the corporation and its minority shareholders."[36]

Defendants repeat the Court of Chancery's erroneous conclusion that the limited outreach to third parties demonstrates the Special Committee's due care and good faith. It defies logic that a market check that results in a materially higher offer that is then ignored and rejected somehow supports dismissal. In *Barkan v. Amsted Industries, Inc.*, this Court recognized that the purpose of a market check, whether it is active or passive, is to evaluate the fairness of a transaction: "A decent respect for reality forces one to admit that . . . advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvas of the relevant market can provide."[37] For these reasons, even the special committee in *Mendel* determined that it could no longer rely on its banker's fairness opinion and determined not to go forward with the agreed-to going-private merger after receiving Pensler's third party offer that was a 12.6% premium to the Carroll family's offer (compared to the 30% premium offered here).[38]

Ignoring these cases, Defendants and the Court of Chancery have attempted to advance several reasons the Special Committee potentially *could have* reached out to third party bidders, which they contend demonstrates the Special

[36] *Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000).

[37] 567 A.2d 1279, 1287 (Del. 1989) (citation omitted).

[38] *Mendel*, 651 A.2d at 301.

Committee's due care and good faith irrespective of Party Y's higher offer.[39] None of those conjectured reasons, however, are supported by the record. Again, the Proxy only states that Houlihan Lokey, at the Special Committee's directive, reached out to Parties X, Y, and Z "to confirm if such parties planned on submitting formal proposals with respect to a transaction with the Company." A261. Because the Special Committee could not sell the Company or force the Controllers to sell their shares, the only reasonable inference is that the Special Committee reached out to these parties to determine the Company's fair value.

Defendants contend that "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," and that "[s]uch a rule would discourage special committees from testing the market in response to controlling stockholders' offers."[40] This is not so. Although it was commendable that the Special Committee reached out to other parties, the Special Committee's actions, or lack thereof, after receiving Party Y's higher offer demonstrate their conscious failure to protect BAM's minority stockholders from the Controllers and constitute a breach of fiduciary duty. A contrary holding would only reward and encourage

[39] *See* Op. at 32, 40; Ans. Br. 28, 33.

[40] Ans. Br. at 28, n.4.

supine special committees and let them know that it is acceptable to accede to the interests of controlling stockholders.

Defendants also repeat another argument that Plaintiffs have refuted as being factually and legally incorrect. That is, Defendants assert that "Plaintiffs argue that the Special Committee breached its duty of care merely by allowing Mr. Bruno to sit in on Houlihan Lokey's fairness presentation."[41] Because Bruno had to hear Houlihan Lokey's fairness presentation, Defendants contend, allowing him to be present at the Special Committee's final meeting for the fairness presentation simply avoided "the need for a repeat performance," and therefore the Special Committee was not grossly negligent.[42]

As was made clear in the Opening Brief, however, Bruno was not only present for Houlihan Lokey's final fairness presentation, but he was also present when the Special Committee discussed, and determined to reject, Party Y's superior offer. A266-67, 612-13.[43] Bruno was conflicted as a result of his at least twenty-three year long business and personal relationship with the Andersons

[41] *Id*. at 40.

[42] *Id*. at 40-41.

[43] Bruno was also present and allowed to participate in discussions with: (i) the Special Committee's legal counsel about, among other things, the terms of the Merger Agreement and other ancillary documents; and (ii) BAM's Chief Financial Officer, Noden (who agreed to rollover his BAM shares in the Transaction), about the potential engagement of a valuation firm that would render a solvency opinion in accordance with the Merger Agreement. A266-67, 612-13.

(A143-44, 608-09), and was *specifically removed from the Special Committee as a result of his "social and civic relationships with the Anderson Family"* (A156, 259). Inviting Bruno and allowing him to participate in the Special Committee's final meeting demonstrates the Special Committee members' lack of care, regardless of whether it was more efficient for their advisors. Moreover, even if Bruno was invited for supposed efficiency purposes, there was no reason (whether for efficiency or any other purpose) for Bruno to be present for, and participate in, discussions concerning the Special Committee's response to and rejection of Party Y's offer.

Defendants also assert that, aside from the Controllers' unwillingness to sell its BAM shares, the Special Committee rejected Party Y's offer because it contained conditions that were different from the Controllers' offer. As noted in the Opening Brief, however, Party Y's offer contained the same conditions as the Controllers' offer, with the exception of the onerous appraisal-out condition imposed by the Controllers.[44] Defendants contend that Party Y's offer was different because it was conditioned on borrowing $65 million on BAM's credit

[44] The Court of Chancery's and Defendants' suggestions that the appraisal-out condition protected BAM's minority stockholders and supports the fairness of the Transaction because it allowed a "minority of the minority" to influence the outcome of the Transaction is nonsensical and ignores the fact that the *Controllers* demanded (and the Special Committee capitulated to) the appraisal-out condition to be able to terminate the deal if there were too many objectors, and the appraisal-out condition's 10% threshold applied to *all* of BAM's outstanding stock, including those shares owned by the Controllers, and not just the minority's shares.

facility, whereas the Controllers only borrowed $18 million. Yet again, Defendants' assertions are unsupported by the record. The Proxy states that Party Y's offer was conditioned on "the transaction being financed using the Company's existing credit facility" (A261); it does not state *how much* of the transaction would be financed through the credit facility. Indeed, the Controllers' initial offer also indicated that "[t]he transaction would be financed through borrowings available under the Company's existing credit line" (A155), yet the Controllers only financed $18 million of the $21 million deal price and not the entire Transaction. As such, Defendants are not entitled to this inference.

Further, Defendants contend that there were "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."[45] This too is not supported by the record. The Proxy makes clear that, although "[t]he Company began to question the seriousness of the discussions" with Party Y back in October 2013 (A258), Party Y continued discussions with the Special Committee and made several serious offers to acquire BAM throughout 2014 and 2015, and the Special Committee itself even solicited a bid from Party Y to acquire BAM in early 2015.

In light of the foregoing and given the Special Committee's actions (or lack thereof) when negotiating the Transaction, the Court of Chancery erred when it

[45] Ans. Br. at 39.

ignored Plaintiffs well-pled allegations and found that the Special Committee was effective and met its duty of care in negotiating a fair price simply because it met several times, submitted two (low) counteroffers, and agreed to a price that was a premium to the stock's trading price.

II. This Court Should Not Dismiss The Special Committee On Alternative Grounds

This Court should not dismiss the Special Committee Defendants on different grounds from the Opinion. In the Opinion, the Court of Chancery simply decided the threshold question of whether Plaintiffs satisfied the six *M&F Worldwide* conditions so as to require the application of the entire fairness standard of review to the Transaction. Because the Court of Chancery answered that threshold question in the negative, it applied the business judgement rule and dismissed the Complaint after finding that the Transaction was not an act of waste.[46]

Although briefed below, the Court of Chancery did not squarely address whether Plaintiffs have sufficiently alleged that each of the Defendants, including the Special Committee members, breached their non-exculpated fiduciary duties in connection with the Transaction, as required by *In re Cornerstone Therapeutics, Inc.*, 115 A.3d 1173 (Del. 2015). It would be premature therefore for this Court to make such a ruling, particularly since Plaintiffs have sufficiently pled that the Special Committee members (and the other Defendants) breached their non-exculpated fiduciary duties. Moreover, even if the Court of Chancery did address the issue, which it did not, the Opinion was riddled with erroneous factual and legal conclusions that should be reassessed by the Court of Chancery on remand.

[46] Op. at 1, 17, 42.

Consistent with this Court's practice, this case should be remanded so that the Court of Chancery can make these determinations in the first instance.[47]

[47] *Sandys v. Pincus*, 2016 Del. LEXIS 627, at *22, n.46 (Del. Dec. 5, 2016).

CONCLUSION

For the reasons stated in the Opening Brief and herein, the Opinion should be reversed.

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