IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE BGC PARTNERS, INC, DERIVATIVE LITIGATION	No. 359, 2022 Court Below: Court of Chancery of the State of Delaware C.A. No. 2018-0722-LWW

ANSWERING BRIEF OF DEFENDANTS-APPELLEES HOWARD LUTNICK, CF GROUP MANAGEMENT, INC., AND CANTOR FITZGERALD, L.P.

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GLOSSARY

Appellants or Plaintiffs	Roofers Local 149 Pension Fund and Northern California Pipe Trades Trust Funds
Appellees or Defendants	Howard Lutnick, CF Group Management, Inc., Cantor Fitzgerald, L.P., Dr. Linda Bell, Stephen Curwood, and William Moran
BGC	BGC Partners, Inc.
Board	BGC's board of directors
Cantor	Cantor Fitzgerald, L.P.
Cantor Defendants	Cantor Fitzgerald, L.P., CF Group Management, Inc., and Howard Lutnick
CCRE	Cantor Commercial Real Estate Company, L.P.
CFGM	CF Group Management, Inc.
CMBS	Commercial mortgage-backed securities
Debevoise	Debevoise & Plimpton
GSEs	Government-Sponsored Enterprises
Houlihan	Houlihan Lokey, Inc.
IPO	Initial public offering
OB	Appellants' Opening Brief
Op.	Post-Trial Decision (Aug. 19, 2022) (*see* Exhibit B to Appellants' Opening Brief)
Sandler	Sandler O'Neill + Partners L.P.
Special Committee or Committee	Special Committee established by the BGC Board to evalauate the potential Transaction; members Bell, Curwood, Dalton, and Moran
Transaction	BGC's acquisition of Berkeley Point in 2017

NATURE OF PROCEEDINGS

After a five-day trial featuring live testimony from eleven fact witnesses and three experts, and over a thousand exhibits, the Court of Chancery held that BGC's 2017 acquisition of Berkeley Point from Cantor was entirely fair to BGC shareholders. In so holding, the court carefully weighed the voluminous record evidence, made credibility determinations, and issued extensive findings of fact. On some issues (such as demand futility), the court agreed with Plaintiffs. On others (such as burden shifting), the court agreed with Defendants. And, where appropriate, the court acknowledged imperfections in the process. But in the end, after examining the totality of evidence and applying exacting scrutiny, the court had little difficulty finding that the evidence was not in equipoise: the entire fairness standard had been satisfied, both on process and on price.

Plaintiffs now want to retry this case on appeal. They raise the same arguments based on the same evidence they relied on in the trial court. Once again, Plaintiffs cherry-pick their favorite snippets of evidence and, taking them out of context, attempt to impugn BGC's Special Committee. But contrary to Plaintiffs' contention, the court did not ignore this evidence; it simply disagreed with Plaintiffs' characterization of this evidence or found other evidence more weighty or credible.

Plaintiffs never acknowledge—let alone attempt to overcome—the controlling clear-error standard of review. There is no issue of law on appeal. It is undisputed the Court of Chancery correctly articulated the entire fairness standard. The court looked at process and price, examined a variety of factors, and reached a single judgment that the transaction was entirely fair. As its 112-page decision makes clear, the court's scrutiny was rigorous and logical. And far from giving Defendants every "benefit of the doubt," the court's decision was remarkably balanced. Plaintiffs' bare disagreement with the court's factual findings provides no ground for reversal.

Which leaves Plaintiffs' rhetoric that the sky is falling. It is not. Entire fairness is an exacting standard. But it is not strict liability. For decades, courts have found that conflicted transactions can, and sometimes do, satisfy entire fairness—and this Court has affirmed those decisions.[1] There is nothing novel about what the Court of Chancery did here. This Court should affirm.

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[1] *See, e.g.*, *Kahn v. Lynch Commc'n Sys., Inc.*, 1995 WL 301403, at *2-3 (Del. Ch. Apr. 17, 1995), *aff'd*, 669 A.2d 79 (Del. 1995); *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *1 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018); *S. Muoio & Co. v. Hallmark Ent. Invs. Co.*, 2011 WL 863007, at *2 (Del. Ch. Mar. 9, 2011), *aff'd*, 35 A.3d 419 (Del. 2011); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *44 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1153-55 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995); *see also Dieckman v. Regency GP L.P.*, 2021 WL 537325, at *26-27, *48 (Del. Ch. Feb. 15, 2021) (incorporating entire fairness standard into "fair and reasonable" contractual standard), *aff'd*, 264 A.3d 641 (Del. 2021).

SUMMARY OF ARGUMENT

1. Denied. In holding that the transaction was entirely fair, the Court of Chancery correctly held that the process was fair. Plaintiffs' purported "legal" arguments are merely disagreements with how the Court of Chancery resolved disputed questions of fact, and Plaintiffs come nowhere close to establishing the clear error required to set aside those findings.

2. Denied. In holding that the transaction was entirely fair, the Court of Chancery correctly held that the price was fair. Plaintiffs again challenge how the Court of Chancery resolved disputed questions of fact. They misrepresent the court's findings or claim that the court ignored evidence. The court considered all of the evidence; it simply weighed that evidence differently than Plaintiffs would like.[2]

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[2] Plaintiffs' third question presented is separately addressed in the brief submitted by Defendants Bell, Curwood, and Moran. *See* Answering Brief Of Defendants-Below/Appellees Linda Bell, Stephen Curwood, And William Moran, filed concurrently.

COUNTERSTATEMENT OF FACTS

A. Factual Background

Defendant BGC Partners, Inc. ("BGC") is a brokerage and financial technology company incorporated in Delaware and headquartered in New York. Op. 4. Cantor Fitzgerald, L.P. ("Cantor") is a privately owned financial services and brokerage firm, whose managing partner is defendant CF Group Management, Inc. ("CFGM"). Op. 4-5. At the time of the transaction at issue (the "Transaction"), defendant Howard Lutnick was the Chairman and CEO of both BGC and Cantor and the sole stockholder of CFGM. *Id.* Lutnick also had voting control of both BGC and Cantor. *Id.*

1. BGC's Acquisition Of Newmark

In 2011, BGC began to build a real estate platform by acquiring a commercial real estate services company, Newmark. Op. 5. Newmark then acquired several other brokerage firms that focused on multifamily properties. *Id.* But Newmark's ability to grow its platform in the multifamily space was limited because, unlike its competitors, it did not have an in-house "agency lender." *Id.* An agency lender is pre-approved to originate and sell multifamily and commercial loans for U.S. government-sponsored enterprises ("GSEs"), like Fannie Mae and Freddie Mac. *Id.* Agency lenders are prized businesses because GSE lending finances a large majority of the multifamily commercial market, yet is virtually risk-free. Op. 5-6.

2. A Cantor Affiliate's Acquisition Of And Investment In Berkeley Point

Berkeley Point is one of a limited number of agency lenders. Op. 6. Despite that status, Berkeley Point found itself in decline in the early 2010s—more so than the industry-wide decline facing agency lenders generally. *See* A325 (Day 17:17-18:3). From 2012 to 2013, for example, the book value of Berkeley Point's mortgage-servicing rights—reflecting the company's primary business—decreased year-over-year. B395 (JX949 at 1). And Berkeley Point's loan originations declined by 23.9%, nearly double the rate of the market as a whole. *See* B397 (*id.* at 3); *see also* Op. 6-7, 99. Through April 2014, Berkeley Point had a negative net income. B399 (JX949 at 5).

In 2014, Cantor Commercial Real Estate Co., L.P. ("CCRE")—a commercial mortgage-backed securities ("CMBS") business owned by Cantor and other outside investors—acquired Berkeley Point for $259 million. Op. 6-7, 98-99, A296 (¶ 75). From 2014 to 2016, CCRE made investments in Berkeley Point that substantially improved its performance. Op. 7. While Berkeley Point's growth was directionally consistent with a general increase in GSE loan originations, Berkeley Point easily outpaced the market, increasing its market share of GSE loan originations by 10% in less than two years under CCRE's ownership. *Id.*

3. Newmark's Commercial Relationship With Berkeley Point

Because Newmark lacked an agency lending function of its own, it attempted to simulate the same "one-stop shopping" as its competitors through a referral relationship with Berkeley Point—but without complete success. Op. 7-8. Although both Newmark and Berkeley Point were affiliated with Cantor at that time, the two entities were part of different companies and were operationally separate. *See* B108 (JX107 at 1). Newmark worried that this competitive disadvantage would cause it to lose top multifamily brokers to more fully integrated competitors and that its multifamily platform (which is heavily reliant on GSE loans) would cease to exist. Op. 8. Newmark's CEO, Barry Gosin, and others urged an acquisition of Berkeley Point to bring its agency lending operation in-house. *See* A636 (Gosin 980:4-17).

Around that same time, Cantor initiated discussions to buy out CCRE's outside investors. Op. 9. Per CCRE's limited partnership agreement, those outside investors were restricted from selling their stake without Cantor's approval. A751-53 (Lutnick 1247:21-1253:8). Lutnick handled the negotiations and offered to buy out the CCRE investors based on their original capital contributions and the contractual rate of return set forth in CCRE's limited partnership agreement. Op. 9, 104. In February 2017, Cantor reached an agreement in principle to pay approximately $1.1 billion for the 88% of CCRE it did not own—including both

Berkeley Point and CCRE's CMBS business. Op. 9; A767 (Lutnick 1308:18-1309:5).

On February 9, 2017, BGC made public that it had filed a registration statement with the U.S. Securities and Exchange Commission for an initial public offering ("IPO") of Newmark. *Id.* The following day, a representative of the investment bank Sandler O'Neill + Partners L.P. ("Sandler") contacted BGC and expressed interest in a potential underwriting role for the IPO. Op. 9-10. It is "not clear" whether BGC ever responded. Op. 10.

4. BGC's Initial Authorization Of A Special Committee

On February 11, 2017, Lutnick informed the BGC board of directors (the "Board") that BGC's management was considering an acquisition of Berkeley Point from Cantor. Op. 10-11. Lutnick "commented 'on [a] potential purchase price' for Berkeley Point 'in the low $700 million range.'" Op. 11 (alteration in original) (citation omitted). This figure was "not based on any type of valuation modeling," but rather was "a back-of-the-envelope estimate." *Id.* None of the Board members viewed this comment as an offer. *Id.*

Because Lutnick was an officer and controlling stockholder of both BGC and Cantor, BGC's Board authorized its Audit Committee to serve as a special committee (the "Special Committee"). Op. 12. The Special Committee would be charged with engaging legal and financial advisors, and considering and negotiating the potential Transaction—and would consist of all four members of the Audit Committee. *Id.* Those members included: John Dalton, former Secretary of the Navy and president of Ginnie Mae; Dr. Linda Bell, Provost Dean of Faculty, and Claire Tow Professor of Economics at Barnard College; William Moran, former General Auditor of JPMorgan Chase; and Stephen Curwood, a Pulitzer Prize-winning journalist who focuses on issues of environmental justice. Op. 10, 12; *see also* Answering Brief Of Defendants-Below/Appellees Linda Bell, Stephen Curwood, And William Moran at 7-9, filed concurrently ("Directors' Br.").

After the February 11 meeting, Lutnick asked Moran and Bell whether they would consider chairing the Special Committee. Op. 13. Moran then began seeking legal and financial advisors for the Committee, and he told Lutnick which advisors he was considering. Op. 13-15. The Special Committee preliminarily chose Debevoise & Plimpton ("Debevoise") as its legal advisor and, in early March, Debevoise and Moran had phone calls with two prospective financial advisors, Sandler and Houlihan Lokey, Inc. ("Houlihan"). Op. 14, 16. As BGC's CEO, Lutnick joined those calls to provide background about the proposed Transaction and to ensure there were no conflicts between the prospective advisors and BGC. A754-55 (Lutnick 1259:10-1262:16); A811 (Lutnick 1362:23-1363:14).

5. Establishment Of The Special Committee And Due Diligence

On March 14, 2017, the Board formally established the Special Committee. Op. 17 & n.85 (citing B112-19 (JX313)). It granted the Special Committee "full and exclusive power" over the potential Transaction. *Id.* (quoting B112 (JX313 at 1)). Among other powers, the Special Committee had the authority to "evaluate and, if appropriate, negotiate the terms of any Proposed Transaction"; "enter into such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, investment bankers, consultants and agents as the Special Committee in its sole discretion may deem necessary or appropriate"; and "do all acts as may be necessary or appropriate in [its] judgment to carry out the duties of the Special Committee." B112-14 (JX313 at 1-3).

The day after the Special Committee was established, it met and selected Moran and Bell as co-chairs. Op. 17. The Committee then approved its independent legal and financial advisors. The Special Committee formally approved Debevoise as its legal advisor, Op. 14, 18, 63, in large part because the lead partner for the Debevoise team had previously advised certain members of the Special Committee, which gave the Special Committee "a great deal of confidence in his ability." A494 (Bell 547:19-548:2). After considering two potential financial advisors, the Committee selected a team led by Brian Sterling at Sandler, which regularly advises special committees and had previously worked with members of the BGC Special Committee. Op. 14-15, 17-18. Lutnick did not attend this meeting. Op. 17.

After retaining its advisors, the Special Committee engaged in extensive due diligence regarding the potential Transaction—meeting nine times between March 15 and June 6. Op. 18-19 & n.92; A297-99. All told, Sandler issued more than 175 due diligence requests on more than 30 topics, encompassing at least five years of historical data and two years of future projections. *See* B414-21 (JX1033 at 2-9); A1275-77 (JX445 at 2-4); A1265 (JX422 at 1); A1500 (JX659 at 2). On March 17, Moran emailed Lutnick, "pressing him for additional data" on Cantor. Op. 18. On April 6, after Cantor stated that Sandler's information requests were still "in progress," Moran emailed Lutnick asking whether he had changed the timeline for the deal. Op. 18-19 (citation omitted). Lutnick responded several days later, saying that Cantor should be able to move more quickly at the end of the week, but the deal "[s]tructure" had "bec[o]me the driver." Op. 19 (citation omitted).

Cantor was focused on the deal structure because of tax advice it had received. *Id.* Based on that advice, it formulated a structure that would be tax-efficient for Cantor by selling most of its economic interest in Berkeley Point but retaining operational control as general partner. Op. 19-20; *see* B123, 126 (JX386 at 1, 4). That structure would enable Cantor to defer, and potentially avoid altogether, tens-of-millions of dollars of tax liability. Op. 19-20. As for price, a Cantor investment banker had determined that Cantor could get more than $1 billion for Berkeley Point from a Newmark competitor. Op. 31; A751 (Lutnick 1244:11-1245:9).

6. Months Of Negotiations And The Parties Reach A Deal

On April 21, 2017, Cantor submitted its first offer to the Special Committee: a $1 billion investment in CCRE. Op. 20-21, 28. Of that amount, $850 million represented the purchase price for a 95% economic interest in Berkeley Point, with Cantor maintaining control of Berkeley Point after the sale. Op. 20-21; *see* B123, 126 (JX386 at 1, 4). BGC would then have the option to purchase the remaining 5% for $30 million in five years. Op. 21. The other $150 million represented an investment in CCRE's CMBS business, whereby BGC would receive a preferred return and have an exit option, as well as access to CCRE's valuable data on refinancing and sales. Op. 21-22, 108 & n.485. The Special Committee did not accept the offer.

On May 2, Lutnick attended an Audit Committee meeting and discussed the timing of the deal, stating that his plan was to close the deal by the end of the month. Op. 23. Caroline Koster, BGC's Chief Counsel and Cantor's Associate General Counsel, indicated that Lutnick had "lit a fire" under the Special Committee. Op. 13, 23 (citation omitted). But the Special Committee was unmoved. Op. 23. The Committee and Sandler pressed forward with information requests, including for multiyear projections for Berkeley Point's business. Op. 23-24. Berkeley Point, however, did not create projections in the ordinary course. Op. 24. So Berkeley Point CFO Ira Strassberg met with management and reviewed a wide range of information, including historical financial performance and the company's pipeline of future business, to create the requested projections. *Id.* After Strassberg reviewed more granular forecasts and spoke with additional people at the company, he revised his projections upward. Op. 25.

As the Special Committee continued its due diligence, it asked to meet with Gosin, Newmark's CEO. Op. 21, 26. In preparation for that meeting, Gosin sought input from Beekman Advisors, which had advised CCRE during its 2014 acquisition of Berkeley Point. Op. 26. Gosin's point of contact at Beekman estimated that Berkeley Point's value was "probably $462M-$672M," *id.* (citation omitted), even though the lower end of this range was below Berkeley Point's book (or liquidation) value, A665 (Gosin 1096:14-24). On May 19, the Special Committee met with Gosin to hear his qualitative assessment of the proposed Transaction; Gosin was not asked to provide a quantitative assessment of the proposed Transaction. Op. 26. Gosin informed the Committee that acquiring Berkeley Point could be "transformative" for BGC due to "potential future growth opportunities and synergies with Newmark's existing business." Op. 26-27 (citation omitted). Gosin did not mention the estimate from Beekman because he found it unreliable. *Id.*

At a May 25 meeting, the Special Committee stated that it needed "to better understand the economic terms, including valuation, of CCRE's acquisition of Berkeley Point in 2014, and the prices at which CCRE's outside investors invested and will exit." Op. 27. The Committee also considered an updated term sheet from Cantor, but several diligence items remained outstanding. Op. 28. Sandler continued pressing for any missing information, telling Cantor that it "would be in a position to discuss valuation with the Committee" after receiving and processing all information requests. *Id*. (citation omitted). Cantor ultimately provided Sandler with the outstanding information. *Id.*

On June 6, 2017, Cantor and the Special Committee held a series of meetings and breakout sessions to negotiate the Transaction. Op. 30. Going into the meeting, the Special Committee decided that it had a strong preference for acquiring 100% of Berkeley Point. Op. 31. Cantor opened the negotiations with two options: (1) a sale of 95% of Berkeley Point for $880 million, or (2) a 100% sale for $1 billion. Op. 29-31. Speaking on behalf of the Special Committee, Sterling walked Cantor through a negotiating presentation that argued for a lower price for Berkeley Point. Op. 31-32. In an effort to steer the discussion toward an outright sale, the Special Committee countered with a low-ball offer of $720 million for a 95% interest—signaling to Cantor that any sale of less than 100% would require a steep discount. *See* A488 (Edelman 522:9-23). The counteroffer was based on a number of considerations, including an illiquidity discount of roughly 20% off Cantor's proposed $880 million ask. Op. 29-31.

Cantor "didn't react well" and left the meeting to discuss its next move. A602 (Moran 843:22-844:6); *see* Op. 32. Moran and Bell separately met with Lutnick, telling him that the Committee wanted 100% of Berkeley Point and "would not budge" on structure, which meant that Cantor would have to pay the hefty tax it had spent weeks trying to avoid. Op. 32, 73-74 & n.351; *see* A761 (Lutnick 1285:2-17, 1287:8-14). The parties eventually reached a handshake deal for BGC to buy 100% of Berkeley Point for $875 million and an investment of $100 million into CCRE's CMBS business. Op. 33. The $875 million figure was based on Berkeley Point's "book value as of March 31, 2017," which was the last date of audited financials for Berkeley Point. Op. 33, 36. The parties agreed that BGC would pay Cantor a true-up for any appreciation in Berkeley Point's book value between March 31 and closing. Op. 36.

The parties' handshake agreement was "subject to the completion of due diligence and negotiation of definitive agreements." Op. 34 (citation omitted). Over the next five weeks, the Special Committee and its advisors met seven times. *Id.*; *see* B384-85 (JX679); B386-87 (JX681); B326-27 (JX627); B388-89 (JX683); B390-91 (JX684); B328-31 (JX656); B378-83 (JX667). Sandler performed additional diligence. Op. 34. Sandler prepared a fairness presentation that provided an overview of its analysis, including an explanation of the projected increase in Berkeley Point's book value for 2017. Op. 78 n.373. An internal Sandler committee composed of partners who were not involved in the Transaction reviewed and approved the diligence and resulting fairness opinions. *See* A389-90 (Sterling 275:2-277:3). On July 13, 2017, after reviewing Sandler's fairness presentations and receiving its verbal fairness opinion, the Special Committee unanimously concluded that the Transaction was in BGC's best interest and recommended it for Board approval. Op. 34-35. The Board adopted the recommendation. Op. 35-36.

The Transaction closed on September 8, 2017, and BGC's commercial real estate platform was consolidated with Newmark. Op. 36. On December 15, 2017, Newmark conducted an IPO. B392 (JX787 at 1).

B. This Lawsuit, Pretrial Rulings, And Trial

In the months and years following the transaction, not a single investor, banker, or analyst ever questioned the strategic rationale underlying BGC's acquisition of Berkeley Point or the price that BGC paid. *See* A763 (Lutnick 1294:18-1295:7); A887-88 (d'Almeida 1667:23-1669:3); A333 (Day 49:5-11). The expected synergies were realized and Berkeley Point has continued to grow its origination volumes under the Newmark umbrella. A331-33 (Day 44:12-49:11); A1522 (JX792 at 6).

Then, in 2018 and 2019—more than a year after the Transaction closed—Plaintiffs Roofers Local 149 Pension Fund and Northern California Pipe Trades Trust Funds (together, "Plaintiffs") filed derivative complaints against Cantor, CFGM, and Lutnick (together, the "Cantor Defendants") and each of the Special Committee members (collectively, "Defendants"), alleging they breached their fiduciary duties by causing BGC to enter into the Transaction on unfair terms. Op. 37, 51. No pre-suit demand was made on the BGC Board.

On September 30, 2019, the Court of Chancery denied Defendants' motion to dismiss. *See In re BGC Partners, Inc.*, 2019 WL 4745121 (Del. Ch. Sept. 30, 2019). Accepting Plaintiffs' allegations as true, the court determined that Plaintiffs had adequately alleged that making pre-suit demand on the Board would have been futile. *Id.*; Op. 39. On April 20, 2021, Plaintiffs voluntarily dismissed their claims against Dalton. Op. 38. On September 20, 2021, the Court of Chancery granted in part and denied in part Defendants' motions for summary judgment. Op. 38 & n.222 (citing *In re BGC Partners, Inc. Derivative Litig.*, 2021 WL 4271788, at *10 (Del. Ch. Sept. 20, 2021)). The court dismissed the claims against Bell and Curwood, holding that "no rational trier of fact could find both that they lack independence from Lutnick and that they acted to advance Lutnick's interests." 2021 WL 4271788, at *1. But the court denied the motion as to Moran because Plaintiffs were "entitled to inferences favoring their position" at summary judgment. *Id.* The court again declined to dismiss the case on demand futility grounds because certain "disputes of fact" needed to be resolved. *Id.* at *6.

In October 2021, the Court of Chancery held a five-day trial. Op. 4, 38. At trial, the court heard live testimony from 11 fact witnesses and 3 expert witnesses, and considered 1,260 exhibits, including 18 deposition transcripts. Op. 4. The parties submitted post-trial briefing and the court held closing arguments. Op. 38. The court then ordered supplemental briefing to further address Berkeley Point's valuation. Op. 38 & n.225.

C. Post-Trial Decision

On August 19, 2022, the Court of Chancery granted judgment for Defendants. In a detailed, 112-page decision, the court made extensive factual findings and credibility determinations based on the evidence presented at trial and concluded that the Transaction was entirely fair to BGC and its minority stockholders.

1. Demand Futility

The Court of Chancery began by revisiting the question of demand futility. *See* Op. 39-48. The court concluded that demand would have been futile as to Curwood and Moran (and, of course, Lutnick). As to Curwood, even though his "strength of character is obvious," because his "director['s] fees" allowed him to support his family and pursue his passions, the court could not "conclude that [his] desire to continue in his role as a BGC director would not have clouded his judgment had he been faced with a demand to sue." Op. 43-45. But the court "emphasized" that its determination about how Curwood might respond to a theoretical demand was distinct from whether Curwood lacked independence or acted to further Lutnick's interests during the negotiations with Cantor. Op. 45. On Moran, the court concluded that he *was* independent, Op. 46-48, but that he faced a "substantial likelihood of liability" on certain claims—as evidenced by the fact that the litigation survived pre-trial motions. Op. 48. The court accordingly declined to enter a post-trial dismissal of the claims on demand futility grounds.

2. Entire Fairness

Because Lutnick stood on both sides of the Transaction, the Court of Chancery proceeded to assess whether the Transaction satisfied the "entire fairness" standard. Op. 48. That standard, the court explained, "has two basic aspects: fair dealing and fair price," which the court ultimately reviews "as a whole." Op. 49 & n.262 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)). The court determined that the Cantor Defendants were entitled to burden shifting under *Kahn v. Lynch Communication Systems, Inc. (Lynch I)*, which provides that controlling stockholders can shift the burden of persuasion when the transaction has been approved "by an independent committee of directors," 638 A.2d 1110, 1117 (Del. 1994)—here, the Special Committee. Op. 49-50. But the court noted that such burden shifting "d[id] not affect [its] conclusions on entire fairness," because the evidence was "not in equipoise," and "[r]egardless of who has the burden . . . the transaction was entirely fair to BGC and its minority stockholders." Op. 50.

a. Fair Process

The court first assessed process under the *Weinberger* factors, looking to (i) "timing and initiation," (ii) "structure," and (iii) "negotiations and approval." Op. 52. The court found that the process had "some defects." Op. 51. But it also recognized that "[p]erfection is an unattainable standard that Delaware law does not require." *Id.* (alteration in original) (citation omitted). After examining all of the "evidence in its totality," and engaging in the required balancing, the court found that the process was fair. *Id.*

Timing And Initiation. The court found that the timing and initiation of the Transaction did not disadvantage BGC. Op. 52-54. The court acknowledged that Lutnick suggested the Transaction and initially "sought to drive the timeline." Op. 53. But the court found that "the deal was not completed on" Lutnick's timeline. *Id.* "Despite Lutnick's prodding," the court explained, the Special Committee took the time to engage in "several months of diligence and discussions." *Id.* And the court found that "[e]ven if Lutnick had achieved his preferred timeline," the timing did not harm BGC in any way. Op. 53-54.

Structure. The court next addressed the key procedural protection built into the Transaction's structure: the "fully empowered Special Committee of independent directors, advised by independent advisors, [which] negotiated the transaction on BGC's behalf and voted to approve it." Op. 54-55.

First, the court reviewed the Special Committee's composition, and the court found that "at least a majority of [the Special Committee's] members were independent." Op. 55-56. Plaintiffs had conceded Dalton's independence, and the court had determined at summary judgment that both Bell and Curwood were independent while negotiating the Transaction. *BGC*, 2021 WL 4271788, at *13-14. In its post-trial decision, the court confirmed that there was "no evidence" that Curwood lacked independence during the negotiations. Op. 57. Curwood "credibly testified that he was committed to walking away from the deal" if the price was not good "for BGC and its minority stockholders." Op. 58. The Court found "no basis to doubt that Curwood was independent—and acted independently." *Id.*

As for Moran, the court found that he "lacked meaningful ties to Lutnick" and there was "little basis to question Moran's independence." *Id.* The court considered Moran's early communications with Lutnick, and deemed it "questionable behavior." Op. 59. But after observing Moran's testimony and weighing the evidence, the court found that "Moran was not beholden to Lutnick or blinded by a 'controlled mindset.'" *Id.* (citation omitted). The court explained that Moran "pushed back firmly on Lutnick" during negotiations; that he "knew his job was to advocate for the stockholders"; and that he "was a positive force when it came to the ultimate price and terms reached." Op. 59-60. The court found "no evidence" that Moran jeopardized the Committee's independence. Op. 60.

The court also examined Lutnick's initial involvement in suggesting the Committee chairs, and recognized it was "not a process strength." Op. 55. But the court found that this "misstep was . . . largely remedied after the Special Committee was fully empowered and voted to designate Bell and Moran as co-chairs" at the March 15 meeting. Op. 55-56. Lutnick, the court explained, did not attend or influence that meeting. Op. 56. The court found that the Committee selected Moran based on "his experience as the lead general auditor for JPMorgan Chase," "his work ethic," and other leadership qualities. Op. 56 n.286. As for "Bell[,] she was selected in great part due to her quantitative background." *Id.*

Second, the court addressed the Committee's financial and legal advisors. Op. 61-62. It was undisputed that Sandler and Debevoise were both qualified and that Debevoise was independent; Plaintiffs had questioned only Sandler's independence and Lutnick's initial involvement in preliminary discussions about and with advisors. Op. 62. While the court agreed that Lutnick's involvement was a "flaw," it found that the "advisors were qualified, independent, and not beholden to Cantor." Op. 62, 64. As the court explained, the Special Committee was empowered to choose its own advisors, unanimously chose them without Lutnick's influence, and did so largely because Committee members had previously worked with both Debevoise and Sandler. Op. 63.

The court additionally found "no evidence" that Sandler's desire for a role in Newmark's IPO affected its independence. Op. 63-64. And the record was "devoid" of evidence that Sandler's retention benefited Lutnick or harmed BGC. Op. 64. To the contrary, the court found that Sandler "pressed Cantor for information that Cantor was initially hesitant to provide," "questioned Cantor's changes to the deal structure," and "bargained hard on the Special Committee's behalf." *Id.*

Transaction Negotiations and Approval. The court found that the Special Committee's conduct during the negotiations reflected the "strength" of its process. Op. 65; *see* Op. 65-75. During three months of negotiations, the court explained, the Committee obtained all the necessary information to make a well-informed decision, met at least nine times, was "'very hardworking,'" and ultimately "exerted [its] bargaining power against Lutnick and prevailed in obtaining consequential concessions." Op. 65 (citation omitted).

In so holding, the court rejected Plaintiffs' contention that Cantor withheld information from the Committee. The court explained that although some of the requested information "was initially held back," Sandler ultimately received it all—as Plaintiffs "acknowledged after trial." Op. 66-67.

The court next rejected Plaintiffs' assertion that Gosin "skewed the Special Committee's perception of Berkeley Point's value" during the May 19 meeting. Op. 67; *see* Op. 26. The "record shows," the court explained, that both the Special Committee and Gosin understood he was providing only a "qualitative view." Op. 67. As for Plaintiffs' assertion that Gosin withheld the Beekman email, the court found that Gosin "made the reasoned choice not to share it because . . . it was unrealistic" in its valuation. Op. 68. That finding was based on "unrebutted" testimony. Op. 68-69. The court also noted that Plaintiffs never deposed the author of the Beekman email or called him at trial, thus leaving the court with no explanation of the email's scant valuation analysis (and no indication that Beekman would even stand by its hastily composed estimate). *Id.*[3]

As to Plaintiffs' contention that the Special Committee failed to engage in arm's length negotiations, the court disagreed. Op. 71. The court found, for example, that the Committee won the fight over the structure of the Transaction. Op. 73. Committee members "testified consistently and credibly" as to their preference for acquiring 100% of Berkeley Point. *Id.* And this was a contentious

[3] The Court of Chancery also rejected Plaintiffs' claim that Berkeley Point's CFO, Strassberg, gave the Special Committee manipulated projections. Op. 69-70. Although Plaintiffs discuss those projections at length in their statement of facts, they press no argument relating to them—and cannot do so for the first time in reply. *See* Appellants' Opening Brief ("OB") 46 n.6 (claiming to "maintain" such an argument without making one); *infra* at 35 (citing cases on waiver).

point because of the significant tax burden an outright sale would create for Cantor. Op. 19-20, 73. And while the court noted some questions about exactly how the parties arrived at the final deal, there was no question that the Committee prevailed—with BGC acquiring 100% of Berkeley Point, including full operational control. Op. 72-73; *see* A1438 (JX566 at 6).

The court finally rejected Plaintiffs' argument that negotiations were not arm's length because the "$875 million price for Berkeley Point was $150 million more than" Lutnick's "early mentions of a deal in the 'mid 700s' or $725 million." Op. 74 (citation omitted). The court found, based on "consistent[]" trial testimony, that nobody believed those "were true offers." *Id.*

b. Fair Price

The court next turned to fair price. Op. 76-109. Fair price, the court explained, relates to all relevant "'economic and financial considerations of the [transaction],'" and may "draw upon valuation techniques or methods that are generally recognized as acceptable in the financial community." Op. 76 & nn.365-66 (alteration in original) (quoting *Weinberger*, 457 A.2d at 711, 713). The court's task is "not to pick a single number, but to determine whether the transaction price falls within a range of fairness." Op. 76-77 (citation omitted).

The court's fair-price analysis focused on the $875 million price figure.[4] In assessing that price, the court considered the four valuations provided by the parties' experts, the fair process that produced the price, and the analyses performed by Sandler. Op. 78-81. Defendants' expert, Glenn Hubbard, provided valuations using several methods including an event study and a comparable company analysis, Op. 78-79, and valued Berkeley Point in the range of $772 to $1.489 million, Op. 79. Plaintiffs' expert, Jamie d'Almeida, used a single method: a guideline transaction analysis that produced a valuation of approximately $586 million. Op. 79 & n.376 (citing A867 (d'Almeida 1585:5-12)).

Defendants' Expert. Hubbard's first valuation methodology was an event study. Op. 82-83. The court agreed that the event study "may be of some use in confirming that the market felt the overall transaction was favorable to BGC," but afforded it only "little weight given the more reliable methods available." Op. 84.

The court then addressed Hubbard's comparable company analysis—"a standard valuation technique whereby financial ratios of public companies similar to the one being valued are applied to a subject company." *Id.* Hubbard provided three approaches for selecting comparable companies, but the court determined that

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[4] The Court of Chancery separately analyzed and found that BGC's investment in the CMBS business was also entirely fair. *See* Op. 105-09. Plaintiffs do not challenge that finding on appeal. *See* OB 1 n.1.

only one of those companies—Walker & Dunlop—was a proper comparator. Op. 84-85. The parties were in "general agreement" that Walker & Dunlop was "the closest public company comparable." Op. 88. Plaintiffs' own expert conceded this point. Op. 88 & n.408. And Strassberg, previously CFO for both Berkeley Point and Walker & Dunlop, called the firms' business models "very comparable" and testified that Berkeley Point used Walker & Dunlop as a benchmark. Op. 88-89 (citation omitted). Market analysts agreed too. Op. 89 & n.411. And so the court found that "this single comparable generates meaningful evidence of value." Op. 87 & n.403.

As of July 17, 2017, Walker & Dunlop traded at a 10.2x price-to-earnings multiple and a 2.3x price-to-book multiple. Op. 89. Applying those multiples to Berkeley Point produced valuations of $924 million and $1.164 million, respectively. *Id.* The court found those figures to be "reliable indicators of Berkeley Point's value at the time of the acquisition." *Id.*

Plaintiffs' Expert. The court next turned to d'Almeida's guideline transaction analysis. *See* Op. 96-104. d'Almeida used a single transaction for his analysis: CCRE's 2014 acquisition of Berkeley Point. Op. 96. He selected four multiples from that acquisition to estimate Berkeley Point's value in 2017, yielding an average value of $586 million. Op. 97.

The court found d'Almeida's approach flawed. Despite the preference for multiple valuation methodologies to "triangulate a value range," d'Almeida had used only one method and that method used "just one comparable transaction" that was three-years old. Op. 97-99. The court rejected three of d'Almeida's multiples as ill-suited for financial service firms, leaving only the "Price/Book Value multiple." Op. 100-04. But even as to that multiple, the court found a fundamental "deficiency" stemming from the "primary assumption underlying d'Almeida's methodology." Op. 98. d'Almeida failed to apply any adjustment to the multiple based on his incorrect assumption that "the market would have assigned the same multiples to Berkeley Point in 2014" and 2017. *Id.*

That assumption, the court explained, was unsound for at least four reasons. Op. 99-100. *First*, Berkeley Point in 2017 "was coming off of multiple years of significant growth," unlike its "steep decline" in 2014, and it was therefore "unlikely that the market would view Berkeley Point's future prospects equivalently in 2014 and 2017." Op. 99. *Second*, d'Almeida used certain metrics to assess only revenue, ignoring the significant increase in Berkeley Point's profitability. *Id. Third*, d'Almeida relied on "Real Estate (Operations & Services)" metrics for his opinion about general market trends, but the database he used lists Berkeley Point under "Financial Services (Non-bank & Insurance)," and in *that* class, a range of financial metrics meaningfully increased between 2014 and 2017. *Id. Fourth*, while forecasted growth for multifamily loan origination was generally lower in 2017 than 2014, the volume of GSE loans had grown, and that trend benefited Berkeley Point because of its nearly exclusive reliance on such loans. Op. 99-100. After correcting for these flaws, the court found that d'Almeida's analysis produced a value of $805 million. Op. 103.

d'Almeida also "cross-checked" his guideline transaction analysis with a study of the 2017 CCRE buyouts, which yielded a valuation of $624 million. Op. 79, 104. But the court rejected d'Almeida's "cross-check" because the buyout prices were based on the contractual terms of a "limited partner agreement," not on market forces. Op. 104.

The court ultimately concluded that the evidence established a fairness range for Berkeley Point of $805 million to $1.164 million. Op. 105. Because the $875 million acquisition price fell well within (and at the lower end) of that range, the court found that the price was fair. *Id.*

3. Unitary Fairness Analysis

The court concluded by addressing both components of the analysis together to reach a "single judgment" on whether the Transaction was entirely fair. Op. 109 (citation omitted). While again noting that there were some "flaws" in the process, the court found "no evidence that those problems rendered the process unfair." *Id.* The court found that the Special Committee "undertook good faith, arm's length negotiations with the guidance of independent advisors that resulted in a deal with a favorable structure and a fair price." Op. 109-10. The Transaction was accordingly "fair in all respects to BGC and its minority stockholders." Op. 109.

ARGUMENT

Review under the entire fairness standard consists of two overlapping considerations, fair process and fair price. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). The fair-process inquiry reviews the transaction's timing and initiation, structure, negotiations and approval. *Id.* The fair-price inquiry considers all relevant "economic and financial considerations" that "affect the intrinsic or inherent value of a company's stock." *Id.* Although courts may address the two components separately, they must ultimately make a "single judgment that considers each of these aspects." *Cinerama, Inc. v. Technicolor, Inc. (Cinerama I)*, 663 A.2d 1134, 1139-40 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995); *see Weinberger*, 457 A.2d at 711 ("All aspects of the issue must be examined as a whole since the question is one of entire fairness.").

"[P]erfection is not possible, or expected." *Cinerama, Inc. v. Technicolor, Inc. (Cinerama II)*, 663 A.2d 1156, 1179 (Del. 1995) (quoting *Weinberger*, 457 A.2d at 709 n.7); *Kahn v. Lynch Commc'n Sys., Inc.* (*Lynch I)*, 638 A.2d 1110, 1121 (Del. 1994); *Leal v. Meeks (In re Cornerstone Therapeutics Inc., S'holder Litig.)*, 115 A.3d 1173, 1184 n.43 (Del. 2015). And a "determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability." *Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001). That is because conflicted transactions may well benefit the corporation and its minority stockholders. *See*

Kahn v. Lynch Commc'n Sys., Inc. (*Lynch II)*, 669 A.2d 79, 85 (Del. 1995) (noting benefits of conflicted transaction); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 942 (Del. 1985) (same); *see also, e.g.*, *Dieckman v. Regency GP L.P.*, 2021 WL 537325, at *33-34 (Del. Ch. Feb. 15, 2021) (same), *aff'd*, 264 A.3d 641 (Del. 2021); *S. Muio & Co. v. Hallmark Ent. Invs. Co.*, 2011 WL 863007, at *15, *17 (Del. Ch. Mar. 9, 2011), *aff'd*, 35 A.3d 419 (Del. 2011) (same). The critical inquiry is whether the transaction is one unaffiliated parties bargaining at arm's length might have agreed to. *See Rosenblatt*, 493 A.2d at 937-38.[5]

The Court of Chancery correctly articulated and applied this entire fairness standard—as to process, as to price, and as a whole. Plaintiffs' arguments are mere disagreement with the court's credibility determinations, factual findings, or consideration of the evidence. Calling these disputes "legal errors" does not make it so. The court's analysis was a textbook example of how to apply the entire fairness standard and its factual findings easily satisfy the deferential clear-error review.

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[5] *See also, e.g.*, *Weinberger*, 457 A.2d at 709 n.7; *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *22 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 6, 1991).

I. THE COURT OF CHANCERY CORRECTLY FOUND THAT THE PROCESS WAS FAIR

A. Question Presented

Whether the Court of Chancery clearly erred in concluding that the process leading to the Transaction was fair. The Cantor Defendants raised fair process below, *see* A977-84, and the Court of Chancery considered that issue, *see* Op. 51-76.

B. Scope Of Review

Plaintiffs cite *Lynch II*, and assert that this Court should review the Court of Chancery's decision with "no deference." Appellants' Opening Brief ("OB") 30. That is incorrect. This Court will "defer" to the Court of Chancery's factual findings "unless they are clearly erroneous or not arrived at through a logical process." *Lynch II*, 669 A.2d at 84 (citing, *inter alia*, *Lynch I*, 638 A.2d at 1114). That is the ordinary standard of review that applies across a wide range of appeals: clear error for factual findings and *de novo* for legal errors. *See, e.g.*, *Dep't of Fin. v. AT&T Inc.*, 253 A.3d 537, 547 & n.33 (Del. 2021) (citing *Lynch I*, 638 A.2d at 1114).

The clear-error standard is highly deferential and applies broadly to "findings of historical fact that are based on physical or documentary evidence or inferences from other facts." *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016). When there are "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* The deference due to the Court of

Chancery's findings is "enhanced" when those "factual findings are based on determinations regarding the credibility of witnesses." *Id.* "When [a trial court's] determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, those factual findings must be given great deference by an appellate court." *New Castle County v. DiSabatino*, 781 A.2d 687, 690 (Del. 2001).

In the context of "entire fairness," the "ultimate question" is whether the Court of Chancery "carefully analyze[d] the factual circumstances in the context of how the board discharged all of its fiduciary duties, appl[ied] a disciplined balancing approach to its findings, and articulate[d] the basis for its decision." *Lynch II*, 669 A.2d at 90 (citing *Cinerama II*, 663 A.2d at 1179). If so, this Court will affirm. *Id.*

C. Merits Of Argument

Plaintiffs contend that certain missteps during the early stages irrevocably undermined the possibility of a fair process. *See* OB 32-41. They assert their version of the facts as if the Court of Chancery had never held a trial or made factual findings. And when Plaintiffs do acknowledge the court's findings, they either misrepresent them or incorrectly claim the court "ignored" countervailing evidence. The reality is, the court simply disagreed with Plaintiffs. None of Plaintiffs' arguments reveal any error—let alone clear error—in the Court of Chancery's fair-process analysis.

1. The Court Of Chancery Did Not Clearly Err In Finding That The Transaction's Timing Was Fair

Plaintiffs do little to challenge the Court of Chancery's finding that the Transaction's timing was fair. They just repeatedly assert that the Special Committee "allowed Lutnick to dictate the timing" of the deal. OB 43, 51. That argument was squarely rejected by the Court of Chancery. As the court found, "the deal was not completed on" Lutnick's timeline. Op. 53.

Lutnick initially wanted the deal completed by the end of the first quarter of 2017 but was delayed by concerns over tax liability. *Id.* But after those concerns were resolved and Lutnick purportedly "lit a fire" under the Special Committee, the Committee pushed back on Lutnick's timeline and proceeded with its diligence. *Id.* (citation omitted). Sandler was unwilling to proceed with a valuation until Cantor responded to all of its information requests. Op. 28. And even after the handshake deal, Sandler and the Special Committee conducted five additional weeks of diligence before Sandler issued its fairness opinion. Op. 34, 53.

The Court of Chancery also correctly found that, even if (counterfactually) the timing had been dictated by Lutnick, it did not harm BGC or its stockholders. Op. 53-54. As the case law makes clear, "[c]ontrolling the timing of a merger is not sufficient by itself . . . to demonstrate unfair dealing by a controller." *Dieckman*, 2021 WL 537325, at *27. The question is whether the Transaction, "as timed, financially injured the minority shareholders or enabled [the controller] to receive value at the minority's expense." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *12 (Del. Ch. Mar. 7, 1991). Plaintiffs do not address the court's alternative finding regarding the absence of any harm, and they have now waived the right to contest that finding on appeal. *See Cinerama II*, 663 A.2d at 1172 (challenge to timing waived by failure to raise in opening brief).

2. The Court Of Chancery Did Not Clearly Err In Finding That The Transaction's Structure Was Fair

The Court of Chancery found that the Transaction's structure was fair because it incorporated a "fully empowered Special Committee of independent directors, advised by independent advisors." Op. 54-55. That finding was well supported by the record evidence, and Plaintiffs' arguments to the contrary are without merit.

a. The Special Committee's Independence

Although a majority of independent members would have sufficed to establish the Special Committee's independence if no member dominated or controlled the others, *see Malpiede v. Townson*, 780 A.2d 1075, 1098 (Del. 2001), here the court found that *each* of its members was independent, Op. 55-61. On appeal, Plaintiffs challenge the independence of Bell, Moran, and Curwood. OB 32-39. As to each of these directors, Plaintiffs' challenge is without merit. *See* Directors' Br. at 20-43.

Starting with Bell, Plaintiffs challenge the Court of Chancery's summary judgment ruling that she was independent from Lutnick. *See* OB 38-39 (citing *In re BGC Partners, Inc. Derivative Litig.*, 2021 WL 4271788, at *7-8 (Del. Ch. Sept. 20, 2021)). Plaintiffs argue that the court purportedly "ignored" five pieces of evidence that impugned Bell's independence. *Id.* Not so. The court fully considered the evidence that Plaintiffs raised at summary judgment. *See BGC*, 2021 WL 4271788, at *2-3, *6-8, *12. The court acknowledged the length of Bell's acquaintance with Lutnick, *id.* at *3; Lutnick's role in Bell's appointment as Provost of Haverford College (*i.e.*, his vote to approve her promotion as a member of Haverford's board), *id.* at *3, *7; Lutnick's introduction of Bell "to a wealthy family whose child was interested in attending Barnard," *id.* at *3; and Lutnick and Bell's conversations about Lutnick's son, *id.* at *3, *8.

That leaves only the purported evidence that "Bell used Lutnick as a reference to support her candidacy for Barnard's Provost position." OB 38. But the only evidence cited (OB 9) is Bell's deposition testimony, where she "speculat[ed]" that she "likely listed [Lutnick] as a potential reference" simply because he was "on the board during [her] time as provost at Haverford," and she never discussed the matter with him. A2242 (Bell Dep. 67:19-68:6). That comes nowhere close to establishing the "'sense of "owingness"'" necessary to doubt a director's loyalty to the corporation. *BGC*, 2021 WL 4271788, at *7 (quoting *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 1192206, at *1 (Del. Ch. Oct. 3, 2001)).

For Curwood, Plaintiffs acknowledge that "impugning a director's independence with respect to voting on a transaction should be more difficult than for demand futility purposes." OB 33. Yet they argue the Court of Chancery erred by "elevat[ing] Curwood's self-serving testimony" over the "objective evidence of his lack of independence" that the court relied on to support its demand futility ruling. *Id.* And Plaintiffs claim that relying on such testimonial evidence "renders Delaware law utterly unpredictable" and "reduces the independence analysis to a director's willingness to testify at trial." *Id.*

Plaintiffs appear to misunderstand the purpose of a trial. At trial, the factfinder hears live testimony, makes credibility determinations, and then incorporates those findings into its evaluation of the evidence. That is precisely why this Court gives heightened deference to credibility determinations. *See CDX Holdings*, 141 A.3d at 1041. After trial, the court found that Curwood "credibly testified that he was committed to walking away from the deal" if it did not benefit "BGC and its minority stockholders"; that there was "no evidence that Curwood lacked independence" during the negotiations; and that there was "no basis to doubt that Curwood was independent—and acted independently—throughout the negotiations." Op. 57-58; *see also* A395 (Sterling 297:1-7) (corroborating testimony from Sterling). Plaintiffs' bare disagreement cannot disturb those findings.

As to Moran, Plaintiffs focus on his "personal relationship[]" with Lutnick, OB 34-35, and his interactions with Lutnick during the Transaction which, they say, evidenced a "controlled mindset," OB 35-38 (quoting Op. 59-60). The fundamental problem with this argument is that, after hearing Moran testify live at trial—including a lengthy cross-examination by Plaintiffs—and after reviewing all of the evidence, the court specifically found that he was not operating under a controlled mindset. Op. 59. Plaintiffs are asking this Court to elevate a thin sliver of the paper record over the Court of Chancery's first-hand observations and findings. OB 35.

Plaintiffs, for example, disagree with how the court interpreted Moran's "emotional testimony" about Lutnick, as well as a "muddled" part of that same testimony. OB 35, 37. But after hearing Moran's explanation, the court concluded (correctly) that Moran's tears were "driven by his own connection to the 9/11 tragedy," Op. 46-47, and that he was simply acknowledging that "Lutnick was on both sides of the deal," Op. 60 n.304. And while the court was critical of Moran's interactions with Lutnick, Op. 58-59, it recognized that virtually all of the challenged behavior occurred "before [the Special Committee] was formally reestablished and fully empowered." Op. 58. "When it came to substantive negotiations, Moran pushed back firmly on Lutnick on multiple occasions." Op. 59. He "knew his job was to advocate for the stockholders," and "he was a positive force when it came to the ultimate price and terms reached." Op. 60. That the court rejected Plaintiffs' one-dimensional portrayal of Moran hardly demonstrates error.

b. Selection Of Co-Chairs And Advisors

Plaintiffs argue that Lutnick's initial input regarding co-chairs and advisors should have doomed the fairness of the Transaction—no matter what happened after. OB 39-41. Plaintiffs' bright-line rule is contrary to the law and the facts. On the law, entire fairness is a holistic and fact-specific inquiry. *See Cinerama II*, 663 A.2d at 1179. On the facts, the Court of Chancery found that any initial missteps were remedied and caused no harm to the independence of the Committee or the effectiveness of its negotiations. Op. 55-64.

Plaintiffs' argument that Lutnick "chose" the Special Committee chairs and its advisors, OB 40-41, was expressly rejected as false by the Court of Chancery, Op. 16-17, 55-64. Backed by ample record evidence, the court found that the Special Committee ultimately chose the co-chairs: Moran based on his leadership experience and Bell based on her quantitative background. Op. 55-56 & n.286 (citing testimony from Bell, Sterling, Moran, and Curwood). The court likewise found that "the Special Committee members"—*i.e.*, *not* Lutnick—"had the authority to choose their own advisors." Op. 63; *see* A754-55 (Lutnick 1259:12-1261:15); A811 (Lutnick 1362:23-1363:14). And it determined that the Special Committee chose Sandler and Debevoise because Committee members had previously worked with those firms, and had "high regard" for them and "confiden[ce]" in their abilities. Op. 63. Those findings were similarly well supported. *See* Op. 16-17 & nn.80-89 (citing testimony from Bell and documentary evidence); Op 63 & nn.315-16, 318 (citing testimony from Bell and Sterling).

Plaintiffs compare this case to *Kahn v. Dairy Mart Convenience Stores, Inc.*, 1996 WL 159628, at *8 n.6 (Del. Ch. Mar. 29, 1996), and *Kahn v. Tremont Corp.*, 694 A.2d 422, 429-30 (Del. 1997). *See* OB 39-40. Both are readily distinguishable.

In *Dairy Mart*, the Court of Chancery denied the defendants' motion for summary judgment, declined to shift the burden to the plaintiffs, and found that there were genuine disputes of fact on the fairness of both the process and price of an abandoned transaction. 1996 WL 159628, at *8-10. In a footnote, and in the context of burden shifting, the court expressed concerns about the special committee's selection of advisors because the committee chose its legal and financial advisors based solely on the recommendation of a former board member "without having conducted an interview or additional investigation." *Id.* at *8 & n.6. And there, "[t]he undisputed facts establish[ed] that the [special] committee was not permitted the full range of negotiating authority," and the transaction was potentially structured in an unfair manner. *Id.* at *8-9.

Tremont is similar. There, again, the court addressed the issue in the burden-shifting context. 694 A.2d at 429-30. And the Court of Chancery itself had cast substantial doubt on the independence of the special committee's selected advisors. *Id.* at 429. That was because the financial advisor's affiliate received "significant fees" from the controller's other companies, and its legal advisor had been simultaneously retained by the controlling stockholder on another matter. *Id.* at 430.

The Special Committee here, in contrast, had phone calls with both Houlihan and Sandler. Op. 14, 16. Both were advisors with whom the Committee had prior experience and comfort. Op. 63. There was no evidence of any restrictions on Sandler's negotiating authority. Op. 63-64. Sandler was not concurrently representing or receiving any financial benefits from Lutnick. Op. 14, 63-64. And Plaintiffs have never disputed that Debevoise was qualified and independent. Op. 62, 64.

As for Plaintiffs' claim that they are aware of "no case" finding entire fairness when a controller provided early input regarding committee advisors, OB 41, the Court of Chancery's decision itself cites one: *In re Cysive, Inc. Shareholders Litig*, 836 A.3d 531 (Del. Ch. 2003) (cited at Op. 63 n.319). There, the court found that a special committee's financial advisor was not conflicted even though it had worked with the controlling stockholder to facilitate the transaction at issue, because "an independent board majority" had subsequently approved the retention and the advisor "acted as a vigorous negotiator on the committee's behalf." *Id.* at 554; *see also, e.g.*, *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16-17 (Del. Ch. Oct. 2, 2009) (financial advisor independent even though simultaneously soliciting underwriting role in offering from acquiror, where controlling stockholder had an interest).

That leaves Plaintiffs' grab bag of critiques of Sandler—which are contrary to the record evidence, to the court's factual findings, or both. OB 41. Plaintiffs' claim that Sandler asked Cantor for "ammunition" to distinguish the 2017 buyout is not supported by the record. Plaintiffs rely on a *Cantor employee's* email characterizing Sterling's purported description of a request from the Special Committee for "ammunition" to distinguish the 2014 and 2017 CCRE transactions. A1361 (JX519). At trial, the *only* evidence on this attenuated characterization was Sterling's testimony denying the accusation:

> Q. So you had told your negotiating adversary at Cantor that requests were coming from the special committee for information that they could use to prepare ammunition about why those data points were distinguishable; right?
>
> A. No.

A405 (Sterling 339:18-340:8). Sandler *did* perform its own independent analysis on Berkeley Point's projections, though Sandler did not place much weight on the projections anyway. A392-93 (Sterling 288:15-290:2). The Special Committee fully understood the consequence of the March 31 balance sheet date. Op. 33, 70 & n.340, 78 & n.373. And Sandler did not "allow[] Cantor to bully the Committee on timing," OB 41, as already discussed, *see supra* at 34-35.

Finally, Plaintiffs' argument that Sandler "botched" its analysis related to the 2017 buyouts is flawed on multiple levels. OB 41; *see* OB 24-26. This argument rests entirely on a demonstrative chart (OB 25) that was never introduced at trial. The figure on the left shows quick calculations that Sandler circulated on May 31, 2017, for CCRE as a whole (not just Berkeley Point), and for informational purposes only. B293 (JX523 at 1). Those figures were *not* part of Sandler's fairness presentation, which addressed *Berkeley Point's* book value and was provided to the Special Committee more than a month later. A1475 (JX657 at 12); A1499-503 (JX659). And there is no dispute Sandler used the correct figures there. *Compare* A1475 (JX657 at 12), *with* OB 25. As for the figure on the right, these calculations do not appear to exist anywhere in the trial record. That is because the purported error that Plaintiffs now deem so critical was never even raised at trial. *See* B103 (Cantor Defs' Post-Trial Reply Br. 33). Plaintiffs never confronted Sandler's witnesses with these figures. Nor have they been able to cogently explain Sandler's purported mistake. In any event, and as the court explained, the 2017 buyout numbers are not useful because they were based on the limited partnership agreements and were not indicative of market value. *Infra* at 55-56.

In light of the actual evidence and arguments at trial, the court did not clearly err in finding that Sandler "plainly advocated for the Special Committee against

Cantor," "pressed Cantor for information," "questioned Cantor's changes to the deal structure," and "bargained hard on the Special Committee's behalf." Op. 64.[6]

3. The Court Of Chancery Did Not Clearly Err In Finding That The Special Committee Engaged In Arm's Length Bargaining

Plaintiffs also challenge the Court of Chancery's finding that the Special Committee did not have a "controlled mindset" and that it did conduct arm's length negotiations. OB 41-44. Plaintiffs' "controlled mindset" argument simply restates their attacks on the Committee's independence, which lack merit for the reasons discussed above. OB 42-43; *see supra* at 35-38. The only additional point worth noting is that Plaintiffs seem confused on the law of burden shifting but, ultimately, it does not matter. *See* OB 42 (criticizing the court for placing the burden on Plaintiffs); OB 1, 30, 32 (referring to Defendants' "burden"). The Court of Chancery (correctly) found burden shifting appropriate under this Court's case law, but expressly stated that any burden shifting "d[id] not affect [its] conclusions on entire fairness" because the evidence was "not in equipoise." Op. 50.

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[6] Plaintiffs contend the Court of Chancery erred by "overlooking proof that Sandler *did* secure an IPO role." OB 40. But Plaintiffs acknowledged that Sandler merely obtained the role of IPO co-manager, A1987 (Sterling Dep. 394:7-395:22)—a role so "unsexy" that Plaintiffs argued below that "[w]hether Sandler ultimately secured the IPO role it sought is *irrelevant*" to assessing its independence. A1073 n.286 (Plaintiffs' Post-Trial Br. 58 n.286 (emphasis added)). The court found "no evidence" that Sandler's advocacy was tainted by its desire for an IPO role. Op. 63-64.

Plaintiffs also argue that the bargaining was not arm's length because the Committee did not obtain any meaningful concessions. OB 44-45. The Court of Chancery's findings detail at length why that is wrong—in terms of both the deal's structure and price. Op. 71-75.

On structure, Plaintiffs dispute whether the Special Committee prioritized a deal structure that would allow BGC to acquire 100% of Berkeley Point. OB 44-45. But as the court found, the "Special Committee members testified consistently and credibly that they became focused on an outright purchase of Berkeley Point during the course of the parties' negotiations." Op. 73 (citing testimony from Sterling, Bell, Curwood, and Moran). And while Plaintiffs make much of the Special Committee's counterproposal to acquire 95% of Berkeley Point for $720 million, the trial testimony established this offer was intended to signal to Cantor that any sale of less than 100% would require a steep discount. *See* A488 (Edelman 522:9-23). Any suggestion that the preferred deal structure was not a meaningful concession also flies in the face of undisputed evidence that Cantor—and Lutnick, in particular—vehemently opposed an outright sale of Berkeley Point because they knew it would trigger an immediate tax bill of nearly $100 million. Op. 19-20. It is precisely because of that looming tax bill that Cantor sought to retain a 5% economic interest in, and operational control over, Berkeley Point. *See id.*; B123, 126 (JX386 at 1, 4).

Plaintiffs also argue that it "contravenes common sense" for the Special Committee to have preferred a full acquisition of Berkeley Point for "liquidity reasons." OB 45. But as the court explained, it makes perfect sense. Op. 31, 74-75. The Committee's preferred structure would give BGC full control over Berkeley Point (rather than leave Cantor with complete operational control as a general partner), and that structure would afford BGC "liquidity" in the sense that it would enable a sale of Berkeley Point if BGC so desired. *See* A1438 (JX566 at 6) (reflecting Sandler's concerns with Cantor's proposed structure, including its "illiquidity" and "limits" on BGC's "ability to exercise control over BP," making operating Berkeley Point "on a fully coordinated basis with Newmark more difficult" and delaying "true operating consolidation"); A633 (Moran 966:12-22) (saying he "didn't like the complexity" the 95% structure created and that "[w]hen you are reporting to the public, it's more simple" to own 100%); A498-99 (Bell 563:11-565:22) ("[I]lliquidity and control are kind of mixed. They go together.").

On price, Plaintiffs claim the Special Committee extracted no meaningful concessions because the *real* starting offer was the $725 million figure Lutnick first mentioned when suggesting the potential acquisition to the BGC Board. OB 45. Again, the Court of Chancery found otherwise. The court found that *nobody* thought that number represented a "true offer[]." Op. 74. The Special Committee members consistently testified to that effect, stating that none of the participants viewed the "mid 700s" range as a "'real number'" or "'formal offer.'" Op. 74 & n.360 (citation omitted). The court further found that the documentary evidence corroborated that testimony, including the fact that all of Cantor's pre-deal models included bracketed "plug" numbers for the deal price. Op. 74. Plaintiffs adduced no evidence at trial to support their efforts to transform "a back-of-the-envelope estimate" into an opening offer. Op. 11; *see also infra* at 56-57.

4. The Court Of Chancery Did Not Clearly Err In Finding That The Special Committee Was Properly Informed

Plaintiffs take issue with the Court of Chancery's factual finding that the Special Committee received all of the information it needed to make an informed decision. *See* OB 45-49; Op. 66-71. That argument is similarly without merit.

Plaintiffs first contend that Newmark's CEO, Gosin, withheld a specific email from the Special Committee. *See* OB 46-48. At the risk of repetition: the Court of Chancery reviewed the evidence and disagreed. Based on the "record" evidence and "unrebutted" testimony, the court found that Gosin "made the reasoned choice" not to share the purported valuation because "it was unrealistic" and "unsound." Op. 68-69. Plaintiffs claim Gosin testified that he withheld the valuation email for "probably no reason," but they take that quote out of context. OB 21 (quoting A665-66 (Gosin 1096:2-1101:4)); OB 47. Gosin's testimony, read as a whole, makes clear he thought the valuation in the email was "dead wrong." A665 (Gosin 1096:17). And, of course, the Court of Chancery heard that testimony live. The court also explained that Gosin's decision as CEO of Newmark was "not attributable to Cantor in any event," Op. 68—a point that Plaintiffs do not address, but which fatally undermines their efforts to cast Gosin's presentation as a process failure.

Plaintiffs next claim the Special Committee did not receive the information it sought about the terms of the 2017 CCRE buyouts. *See* OB 48-49. Plaintiffs again merely restate factual assertions the Court of Chancery considered and rejected as inconsistent with the record evidence. *See* Op. 23-24, 27-28. Plaintiffs purportedly rely on an email where the participants are just mistaken about what had been transmitted at that time. Specifically, Plaintiffs cite a June 1 internal Cantor email to suggest that Sandler had not yet received the information it was requesting about the 2017 buyouts. OB 24, 48 (citing A1382 (JX533)). But on *May 31*, Sandler sent the Special Committee a presentation that contained the information that Plaintiffs claim was missing, including both the exact price CCRE paid for Berkeley Point in 2014 and the buyout prices for CCRE's investors. B293, 296, 305 (JX523 at 1, 4, 13); A755-56 (Lutnick 1263:20-1265:7). In any event, the Court of Chancery properly concluded that the 2017 buyout numbers were not informative as to Berkeley Point's value. *Infra* at 55-56.

Plaintiffs also claim the Special Committee did not realize that Berkeley Point's value could go up between closing and March 31, 2017, so it agreed to a true-up payment "without understanding the consequences of that agreement."

OB 49. Not so much. As the court found, the "Special Committee was aware that it had agreed to delivering Berkeley Point at closing with a book value as of March 31, 2017 and that significant increases in Berkeley Point's book value were projected for 2017." Op. 78 n.373 (citing, *e.g.*, B357-59 (JX663 at 16-18)). What's more, Plaintiffs and their expert never even considered the true-up amount to be part of their claim for damages. Op. 78 n.373.

Ultimately, Sandler obtained all the information it deemed necessary to evaluate the Transaction, and the Special Committee was entitled to rely on Sandler's sound judgment in that respect. *See* 8 *Del. C.* § 141(e) (committee members entitled to rely in good faith on opinions of expert advisors); *Cinerama II*, 663 A.2d at 1175; *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *22-23 (Del. Ch. May 22, 2000).

After conducting an exhaustive review of the evidence, the court found unequivocally that the Special Committee and its advisors were independent and negotiated aggressively and effectively on behalf of BGC. Plaintiffs' various efforts to retry this case on appeal provide no basis to reverse the court's well-supported findings.

II. THE COURT OF CHANCERY CORRECTLY FOUND THAT THE PRICE WAS FAIR

A. Question Presented

Whether the Court of Chancery clearly erred in concluding that the Transaction price was fair. The Cantor Defendants raised fair price below, A984-1002, and the Court of Chancery considered that issue, Op. 76-105.

B. Scope Of Review

Plaintiffs again misstate the standard of review, claiming this Court "reviews a trial court's fair price determination for abuse of discretion." OB 51 (citing *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015)). It does not. *RBC* articulated the standard for reviewing *damages* calculations. 129 A.3d at 866-68. As with fair process, this Court defers to the Court of Chancery's factual findings unless clearly erroneous or not arrived at through a logical process, and reviews legal errors *de novo*. *See supra* Part I.B.

When the Court of Chancery is "faced with differing methodologies or opinions" during the fair-price inquiry, "the court is entitled to draw its own conclusions from the evidence." *Lynch II*, 669 A.2d at 87. This Court provides "'a high level of deference'" to the "Court of Chancery['s] findings based on the evaluation of expert financial testimony." *Cinerama II*, 663 A.2d at 1179 (quoting *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 175 (Del. 1991)). And provided the court's "ultimate determination of value is based on the application of recognized valuation standards, its acceptance of one expert's opinion, to the exclusion of another, will not be disturbed." *Lynch II*, 669 A.2d at 87-88.

C. Merits Of Argument

In challenging the court's finding that the price was fair, Plaintiffs argue that the court did not rely on evidence it should have and did rely on evidence it should not have. Plaintiffs' disagreement with the Court of Chancery's weighing of the evidence is no basis to ask this Court to supplant the Court of Chancery's fair-price analysis with Plaintiffs' own.

1. The Court Of Chancery Did Not Minimize Or Disregard Plaintiffs' Evidence On Price

Plaintiffs argue that the court erred by "[i]gnoring" or "[d]isregarding" three categories of the most "reliable market and record evidence": (i) the 2014 Berkeley Point acquisition by CCRE; (ii) the 2017 buyout of CCRE's outside investors by Cantor; and (iii) Lutnick's purported "$725 million" opening offer. OB 52-60. The court addressed each of these categories at length, and did not clearly err by disagreeing with Plaintiffs.

a. The Court Did Not Clearly Err In Its Assessment Of The 2014 Acquisition

Plaintiffs' expert, d'Almeida, used a single valuation approach and a single (and dated) transaction for his analysis: CCRE's 2014 acquisition of Berkeley Point. Op. 96. The Court of Chancery still considered d'Almeida's "myopic" approach, Op. 98, but adjusted the price-to-book multiple upward to arrive at a "reliable indicator of Berkeley Point's value at the time of the acquisition." Op. 103. The court could have easily rejected d'Almeida's valuation altogether; among other things, it ignored the undisputed and pronounced improvement in Berkeley Point's performance under CCRE's ownership. But there is no world in which the court's adjustment to the price-to-book multiple was error, much less clear error.[7]

As the Court of Chancery explained, Berkeley Point faced "a year of steep decline in 2014," whereas it was "coming off of multiple years of significant growth in 2017." Op. 99. The court thus naturally found it "unlikely that the market would view Berkeley Point's future prospects equivalently in 2014 and 2017." *Id.* The court further found that while d'Almeida focused purely on *revenue* metrics for his opinion that the multiples should not change, the evidence showed Berkeley Point had become more *profitable* between the two transactions. *Id.* As the court observed, one of the databases used by d'Almeida showed that the multiples in Berkeley Point's industry class, "Financial Services (Non-bank & Insurance)," had "increased meaningfully between 2014 and 2017." Op. 99-100. And the court further noted that because 95% of Berkeley Point's loans were GSE loans, it would

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[7] Plaintiffs' footnote (OB 53 n.8) seeking to preserve (but not actually make) an argument regarding d'Almeida's other multiples for valuing Berkeley Point should be disregarded. *See Lum v. State*, 101 A.3d 970, 972 n.8 (Del. 2014) ("Footnotes shall not be used for argument ordinarily included in the body of a brief." (quoting Supr. Ct. R. 14(d))).

be expected to benefit from the "industry-wide trend towards GSE loans during the relevant period." *Id.*

The Court of Chancery also specifically incorporated industry "tailwinds" into its approach and, as a result, moderated its adjustment of Berkeley Point's multiple. Op. 103. The court would have been justified in finding that Berkeley Point's price-to-book multiple increased by 51.5% between 2014 and 2017. *Id.* After all, that was the amount Walker & Dunlop's price-to-book multiple increased during that period—and Berkeley Point had been growing *faster* than Walker & Dunlop. *See, e.g.*, A1482 (JX657 at 19). The court instead took a conservative approach, finding that the multiple would have increased by only 20.3%, the increase that had been calculated for Berkeley Point's broader industry class. Op. 103.

Plaintiffs insist that the court's focus on the "Financial Services sector" and Walker & Dunlop's price-to-book multiples was itself "myopic[]," and suggest that Defendants somehow agreed the increase in industry price-to-book multiples was irrelevant. OB 54. In support, Plaintiffs cite to where Hubbard corrected a mistake in d'Almeida's multiples analysis—where d'Almeida had actually used the wrong years to calculate his price-to-book industry multiples. OB 54 (citing A3085 (JX928

¶ 68), A3106 (JX928 at 42)).[8] When corrected, it showed that the price-to-book multiples did, in fact, increase, rather than stay the same as d'Almeida had originally suggested. A3085 (JX928 ¶ 68). Nor did Defendants argue, as Plaintiffs contend, that "nobody should assess changes in a single multiple to the exclusion of others." OB 54. Defendants pointed out the mistake in d'Almeida's multiples analysis to show that d'Almeida's refusal to adjust Berkeley Point's multiples was not only unsound in light of the significant changes to the company, but was also based on incorrect data.

Plaintiffs also argue that the Court of Chancery erred in concluding that Berkeley Point's multiples would have risen between 2014 and 2017 because, according to Plaintiffs, "[i]ndustry price-to-earnings multiples *fell* by 38.1% over that period." OB 54-55. That is just more cherry-picking. Of the various price-to-earnings multiples for the financial services sector listed in d'Almeida's report, Plaintiffs focus only on the "Current PE" multiple, which did decrease by 38.1%. A3106. But d'Almeida lists several other industry price-to-earnings multiples that significantly *increased* over the same period, including the "Aggregate Market Capitalization/Net Income" multiple that increased by *322.7%*. *Id.* Indeed, in the

[8] The multiples are recorded with a one-year lag, *e.g.*, 2017 multiples are in the "2018" data, not the "2017" data, which is retrospective looking at 2016. *See* A3085 (JX928 ¶ 68).

Damodaran database that d'Almeida used, most of the price-to-earnings multiples for the financial services sector increased between 2014 and 2017. *Id.* Plaintiffs offer no reason, much less evidence, compelling the court to give dispositive weight to the "Current PE" multiple and to ignore the other multiples that increased over the same period.

b. The Court Did Not Clearly Err In Its Assessment Of The 2017 Buyout

Plaintiffs argue the Court of Chancery gave "[n]o [w]eight" to d'Almeida's theory that Cantor's 2017 buyout of the other CCRE investors implied a valuation for Berkeley Point of $624 million. OB 56. True, but that is because the court correctly determined it was entitled to no weight. Op. 104.

As the court explained, Cantor's buyout of CCRE was "governed by a limited partner agreement that included a preferred rate of return for the limited partners that were bought out." *Id.* Performing its own calculation, the court found that the buyout prices "aligned with the preferred returns in the agreement," thus confirming that the buyout prices were based on a contractual formula, not an "arm's-length" negotiation reflective of "the value of Berkeley Point." *Id.* That explains why Sandler ultimately did not consider the information relevant to its fairness opinion. A1464-83 (JX657); *see* A406-07 (Sterling 342:12-345:15). Plaintiffs note that the buyout amounts were not contractually fixed, OB 58, but that misses the point. The buyout reflected the "limited partners' expected returns and the relative illiquidity of their stakes" because, for instance, the investors *could not sell* their stakes in CCRE without Cantor's permission. Op. 104. As the Court properly recognized, a buyout of captive investors in a private company based on their preferred rate of return does not establish what the market would have paid for Berkeley Point.

Plaintiffs assert that the Court of Chancery should have accorded d'Almeida's 2017 buyout analysis some weight because the court found elsewhere that Cantor was obligated to share the buyout information with the Special Committee during due diligence (which it did). *See* Op. 28. But the mere fact that Cantor agreed to share information with the Special Committee during due diligence does not mean the court was required to accept a party's expert valuation based on that information.

c. The Court Did Not Clearly Err In Disregarding The Purported "Opening $725 Million Proposal"

Plaintiffs claim that the Court of Chancery "ignored" what Plaintiffs characterize as "Lutnick's repeated $725 million demand at the start of the process." OB 58; *see* OB 58-60. Not at all. The Court of Chancery found that it "cannot conclude that Lutnick's early mentions of a deal in the 'mid 700's' or $725 million were true offers." Op. 74 (citation omitted). As the court explained, it heard consistent testimony from the Special Committee members, Sandler's lead banker, and Cantor's lead banker that none of the participants viewed the "mid 700s" range as a "real number" or "formal offer." *Id.* & n.360 (citations omitted). The documentary evidence corroborated that testimony; all of Cantor's pre-deal models included bracketed "plug" numbers for the deal price. Op. 74.

Plaintiffs argue that the court should have considered Lutnick's statements to be relevant market evidence, even if there was no offer. OB 59. And Plaintiffs assert that the "February 11 minutes provide that Lutnick's 'low $700 million' range took into account" such factors as "trading multiples," "expected cash flows," and "changes in the market." *Id.* The February 11 minutes say nothing of the sort. They recount Lutnick's "comment[]" on a "potential purchase price," and then list various other topics that were discussed at the meeting. B424-25 (JX1240 at 1-2). The evidence at trial, including Lutnick's testimony, confirmed that the "low $700 million range" was not based on any formal valuation of Berkeley Point. Op. 11 (citation omitted); *see also* Op. 11-13, 74. That the Court of Chancery declined to adopt Plaintiffs' (mis)characterizations of the evidence is the opposite of clear error.

2. The Court Of Chancery Appropriately Based Its Fair-Price Finding On Multiple Valuations

Plaintiffs argue that the Court of Chancery erred by "conclud[ing] that the Transaction price was fair based solely on its acceptance" of a comparable company analysis that Plaintiffs claim was "performed for 'illustrative purposes.'" OB 60-61 (citation omitted). That argument is doubly wrong: (i) the court's fair-price determination was based on several different analyses, not just Hubbard's comparable company analysis, and (ii) Hubbard's analysis was thoroughly grounded in accepted financial principles, not a "conclusory 'illustrative' analysis." OB 65.

a. The Court's Fair-Price Determination Was Based On A Range Of Evidence

Plaintiffs' contention that the Court of Chancery gave "dispositive weight" to any single analysis in its fair-price inquiry is demonstrably false. OB 61. The court based its finding of fair price on a range of evidence. Before even addressing the expert evidence, the court found that the purchase price "came after months of arm's length negotiations," which was "'strong evidence'" the price was fair because it was "'forged in the crucible of objective market reality.'" Op. 79-80 (quoting *Unimation*, 1991 WL 29303, at *17). The court further found that Sandler endorsed the price "in a detailed fairness opinion," using "a variety of methods," after "more than a month of additional due diligence." Op. 80. Notably, Sandler looked at "eight different Walker & Dunlop multiples" and "found that seven of [them] were substantially higher" than the Berkeley Point multiples implied by the deal price. *Id.* The expert evidence provided further "confirm[ation]" of the "fairness of the acquisition price." *Id.* And the court even relied on Plaintiffs' own expert, incorporating d'Almeida's adjusted guideline transaction analysis (yielding $805 million) into its fairness range. Op. 102-05.[9]

That comprehensive approach was appropriate and consistent with what trial courts in Delaware do on a regular basis. The court did "not adopt either expert's approach wholesale," but instead fashioned its own valuation approach by considering a range of evidence and picking and choosing among the competing experts' valuation methodologies. *Deane v. Maginn*, 2022 WL 16557974, at *26 (Del. Ch. Nov. 1, 2022).[10] Plaintiffs' quibbles with that approach only illustrate why this Court accords a "high level of deference" to the Court of Chancery's findings based on expert financial evidence. *Cinerama II*, 663 A.2d at 1179 (citation omitted). "When faced with differing methodologies or opinions[,] the [Court of Chancery] is entitled to draw its own conclusions from the evidence." *Lynch II*, 669 A.2d at 87. "So long as the court's ultimate determination of value is based on the application of recognized valuation standards, its acceptance of one expert's opinion,

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[9] While the court accorded Hubbard's event study "little weight," it still observed that the "event study may be of some use in confirming that the market felt the overall transaction was favorable to BGC." Op. 82-84.

[10] *See, e.g.*, *Deane*, 2022 WL 16557974, at *20-31 (in calculating damages, the court adopted part of one expert's analysis, with modifications); *In re Mobilactive Media, LLC*, 2013 WL 297950, at *24 (Del. Ch. Jan. 25, 2013) (considering both experts' reports but not adopting either in their entirety).

to the exclusion of another, will not be disturbed." *Id.* at 87-88. The court's analysis here easily clears that modest bar.

b. Hubbard's Comparable Company Valuation Was Sound

Nor is there any merit to Plaintiffs' argument that Hubbard's comparison to Walker & Dunlop was merely "illustrative." OB 3. Hubbard called the valuation "illustrative" because it was an intermediate step in his exceptionally conservative "standalone" valuation of Berkeley Point that excluded *all* potential synergies from the anticipated combination with Newmark. *See* A2863-66, A2869-70, A2904 (JX916 ¶¶ 25-33 & n.35, 44, 155). In other words, the valuation was "illustrative" only in the sense that it *decreased* Berkeley Point's value by artificially removing synergies that would normally be included under Delaware law. *See, e.g.*, *Cinerama I*, 663 A.2d at 1143. Hubbard's conservative approach—seeking the bottom of the range of fairness—also explains why he provided the *unadjusted* multiples from Walker & Dunlop. *See* OB 63. Hubbard's use of the term "illustrative," and the conservative assumptions underlying his methodology, cannot somehow transport his standard comparable company analysis outside the realm of accepted financial principles. *See Weinberger*, 457 A.2d at 711, 713.

The Court of Chancery also reliably applied the comparable company analysis. Op. 84 & n.392. Specifically, the court applied Walker & Dunlop's March 31, 2017 price-to-earnings and price-to-book multiples to Berkeley Point to arrive at valuations forming the top end of the range of fairness: $924 million and $1.164 million. Op. 87-89, 105.[11] Plaintiffs' many challenges to the court's analysis are unpersuasive.

To begin, Plaintiffs simply repeat, almost verbatim, their argument that Walker & Dunlop was not sufficiently similar to Berkeley Point to justify the use of Walker & Dunlop's March 31, 2017 multiple without adjustment. *Compare* OB 64-65, *with* A1099-100. The Court of Chancery found otherwise based on overwhelming evidence as to the similarities between the two companies. Op. 87-89 & n.403; *cf.* OB 61, 64 (acknowledging Court of Chancery's factual finding). That finding is unassailable. Indeed, if anything, Berkeley Point warranted a higher multiple than Walker & Dunlop because, as compared to Walker & Dunlop, a higher percentage of Berkeley Point's business consisted of higher-margin, lower-risk GSE lending. *See* OB 64-65 (noting that Berkeley Point's business is more purely GSE based (citing A2845-47 ¶¶ 162-64)); *see also* A2768, A2775 (¶¶ 69, 80 & Figure 17) (stating, contrary to Plaintiffs' current position, that a higher percentage of GSE

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[11] As with its adjustment to the price-to-book multiple discussed above, the court's use of the March 31, 2017 multiples was conservative. Walker & Dunlop's multiples had risen even further by the time that Sandler delivered its July 13, 2017 fairness opinion and the BGC board approved the Transaction. *See* Op. 34, 89 & n.412; A1483 (JX657 at 20) (calculating implied price-to-book value of $1,291.7 million based on contemporaneous multiple). By using the earlier date, the Court of Chancery, in effect, applied a *downward* adjustment.

business is *less risky*); A885 (d'Almeida 1657:16-1658:3); A729-30 (Strassberg 1159:24-1161:17).

Plaintiffs also take issue with the use of a single comparator—somewhat ironically, given their own expert's reliance on a single data point. OB 62. And, they claim, the only other case to accept such a single-company analysis is distinguishable because the parties there agreed the companies were comparable. OB 62-63 (citing *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338 (Del. Ch. May 20, 2004)). That is not much of a distinction: Plaintiffs' own expert admitted that Walker & Dunlop was the closest publicly traded company to Berkeley Point. Op. 88-89.

More fundamentally, *Doft* and other cases have recognized that relying on a single comparator *is* appropriate under certain circumstances. 2004 WL 1152338, at *8; *see also, e.g.*, *In re AT&T Mobility Wireless Operations Holdings Appraisal Litig.*, 2013 WL 3865099, at *2 (Del. Ch. June 24, 2013); *cf. Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, 2013 WL 3369318, at *10 (Del. Ch. June 19, 2013) (relying on a single comparable transaction). The Court of Chancery found this to be such a circumstance. As discussed, there was widespread agreement the companies were comparable and the "links" between them "were such that one would benchmark itself against the other and market analysts analyzed the acquisition by looking at Walker & Dunlop's multiples." Op. 87 & n.403. For these reasons, the court found that here "a single comparable generates meaningful evidence of value." *Id.*

Plaintiffs next claim that the Court of Chancery's use of "price-to-earnings and price-to book multiples" in its comparable company analysis is "[i]nconsistent" with its other analyses. OB 65-66. It is not. The court cited a leading treatise noting that both price-to-earnings and price-to-book multiples are accepted metrics for the valuation of financial institutions like Berkeley Point. Op. 102. And while the court did find that net income-based metrics were inappropriate in the context of a particular dividend discount model that Hubbard used, it was because *that* model is supposed to arrive at a valuation based on future *cash flows*—whereas a price-to-*earnings* multiple explicitly is not. *See* Op. 92-95.

Plaintiffs finally suggest that the parties "agreed" that Walker & Dunlop's price-to-book multiple was inappropriate for valuing Berkeley Point. OB 66 & n.11 (citing A879-81 (d'Almeida 1635:8-11, 1638:11-16, 1643:13-22); A893 (d'Almeida 1688:9-1690:1); A838 (Hubbard 1471:12-16)). There was no such agreement. Plaintiffs' support for this claim comes almost exclusively from their own expert's testimony. Their only citation to show Defendants' side of the purported agreement is an irrelevant snippet of Hubbard's testimony related to his price-to-*earnings*-based standalone valuation of Walker & Dunlop. *See* A838 (Hubbard 1471:12-16) (stating that he is using a "price earnings multiple"). The fact that Hubbard *also* performed a price-to-earnings valuation does not diminish his reliance on the price-to-book multiple, A2904-05, A2947 (JX916 ¶ 156 & Ex. 16), and the Cantor Defendants continued to advocate for valuations based on Walker & Dunlop's price-to-book multiple post-trial, *see, e.g.*, A987.

Plaintiffs' critiques of the Court of Chancery's comparable company analysis are also entirely academic. BGC purchased Berkeley Point at a substantial discount (of $200-$300 million) to the values implied by Walker & Dunlop's multiples. OB 64; Op. 80, 105. Plaintiffs give no reason to think that any downward adjustment would move the top of the range of fairness below the deal price. *Cf.* Op. 105.

CONCLUSION

For all of the foregoing reasons, the Court should affirm.

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