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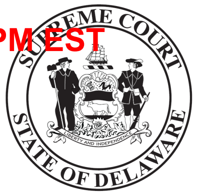

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF DEFENDANTS-BELOW/APPELLEES LINDA BELL, STEPHEN CURWOOD, AND WILLIAM MORAN

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NATURE OF PROCEEDINGS

Plaintiffs, minority stockholders in BGC Partners (BGC), challenge BGC's acquisition of Berkeley Point from Cantor Fitzgerald (Cantor). They claim that the transaction was not fair to BGC and that three of the four independent directors who approved the transaction breached their fiduciary duties to BGC. The Court of Chancery thoroughly considered and rejected those claims. Its judgment is amply supported by the summary judgment and trial records.

Against all that, Plaintiffs' strategy on appeal is to act as though the trial below never happened. They spin an outlandish story about conflicted loyalties and misconduct – but as the trial court found, that story does not reflect reality at all. Rather than grapple with the court's detailed factual findings and well-supported legal conclusions, Plaintiffs simply rehash the arguments they made below. They raise no issue of law on appeal. Instead, they simply disagree with the Court of Chancery's assessment of the facts – without acknowledging the very deferential standard of review for fact findings.

This brief addresses Plaintiffs' claims against the independent directors for breach of fiduciary duty under *In re Cornerstone Therapeutics Inc., Stockholder Litigation*, 115 A.3d 1173 (Del. 2015); the Cantor Defendants' brief addresses Plaintiffs' claim that the transaction was not entirely fair to BGC. Plaintiffs concede

that one of the four independent directors did not breach his fiduciary duties. The Court of Chancery correctly found that the other three did not, either.

When BGC was considering whether to buy Berkeley Point in 2017, BGC's board set up a special committee of independent directors. The board wanted the special committee to assess and negotiate the transaction because Howard Lutnick, a board member, controlled both BGC and Cantor. All four of the independent directors were accomplished and respected at the top levels of their fields. John Dalton served as Secretary of the Navy, President of Ginnie Mae, and Chairman of the Board of the Federal Home Loan Bank. Stephen Curwood is a Pulitzer Prize-winning journalist with more than forty years of experience at NPR, CBS News, and the *Boston Globe.* Dr. Linda Bell is the Provost at Barnard College; she previously taught at Harvard, Princeton, and Stanford and was an economist at the Federal Reserve Bank of New York. William Moran had a thirty-year career at JPMorgan Chase, where he served as the bank's General Auditor and an Executive Vice President.

The special committee conducted an extensive diligence process. It engaged experienced legal and financial advisors, Debevoise & Plimpton and Sandler O'Neill. Over the course of four months, the committee and its advisors met 19 times and thoroughly analyzed the proposed transaction. They looked at the deal terms, the transaction structure, historical and projected metrics, comparable-group

analysis, and illustrative returns. The special committee used this information to negotiate aggressively against Cantor. The committee extracted substantial concessions on price and structure before ultimately agreeing to a deal.

BGC ultimately purchased Berkeley Point in the structure BGC preferred (outright ownership as opposed to a majority interest) and at a very favorable price ($125 million less than Cantor proposed). BGC also made an investment in Cantor's affiliate on attractive terms ($50 million less than Cantor proposed with a preferred rate of return). So the special committee served its intended purpose of ensuring that the transaction was fair and would benefit BGC and its public stockholders.

On appeal, just as at trial, Plaintiffs contend that Bell, Curwood, and Moran had conflicted loyalties and acted to further Lutnick's (rather than BGC stockholders') interests in the transaction. As the Court of Chancery found, Plaintiffs simply did not have the facts to prove that story.

For Bell and Curwood, Plaintiffs provided insufficient evidence of any outside ties to Lutnick that might affect their decision-making and no evidence at all that they had acted to further Lutnick's interests. The court therefore granted Bell and Curwood summary judgment. On appeal, Plaintiffs do not identify any facts the trial court overlooked that would have raised a genuine dispute for trial. And even if they had, the Court of Chancery actually held a trial, where it examined all of the evidence and made detailed factual findings rejecting Plaintiffs' arguments.

For Moran, the court heard all of the trial testimony and correctly found that he did not act disloyally. Plaintiffs ask this Court to reweigh the facts and substitute their view of the evidence for the Court of Chancery's findings. But this Court does not do that; it reviews the Court of Chancery's factual findings deferentially, reversing only in cases of clear error. Plaintiffs have not come close to showing clear error here; the Court of Chancery's findings are fully supported by the record and reflect a fair and balanced view of the evidence.

The Court of Chancery's judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The Cantor Defendants' brief addresses Plaintiffs' first argument, that the transaction process was not entirely fair, and the independent directors join in that brief.

2. Denied. The Cantor Defendants' brief addresses Plaintiffs' second argument, that the transaction price was not entirely fair, and the independent directors join in that brief.

3. Denied. Plaintiffs argue that (i) the trial court erred in finding that Bell, Curwood, and Moran are not liable for advancing Lutnick's interest and (ii) the trial court's holding that all three directors were independent is inconsistent with well-established principles of Delaware law. The Court of Chancery correctly concluded that Bell, Curwood, and Moran were independent from Lutnick and did not act to further Lutnick's interests. The court's factual determinations and legal conclusions are well supported by the summary judgment and trial records and are consistent with Delaware law.

STATEMENT OF FACTS

A. Factual Background

These facts are drawn from the undisputed evidence in the record and the Court of Chancery's post-trial factual findings.

1. BGC And Berkeley Point

Plaintiffs challenge BGC's acquisition of Berkeley Point from Cantor. Cantor is a financial services firm. Post-Trial Mem. Op. (Final Op.) 4, Dkt. 288. BGC is a brokerage and financial technology company that spun off from Cantor in 2004. *Id.* At all relevant times, Lutnick was the Chairman and CEO of both Cantor and BGC and had voting control of both companies. *Id.* at 4-5.

Starting in 2011, BGC sought to establish a full-service real estate platform. Final Op. 5. It wanted to be able to broker the sale of properties, originate loans, and service those loans. *Id.* To that end, BGC first acquired Newmark, a commercial real estate broker. *Id.* But it also needed an agency lender, meaning a finance company preapproved by Fannie Mae and/or Freddie Mac to originate and sell loans. *Id.* at 5-6.

In 2014, Cantor purchased Berkeley Point, an agency lender. Final Op. 6-7. To compete with other companies offering full-service platforms, BGC entered into a referral relationship with Berkeley Point. *Id.* at 7-8. But the companies' joint offering was not as streamlined as those of their fully integrated competitors. *Id.* at 8. BGC's management therefore sought to have BGC acquire Berkeley Point, so

that BGC could merge Berkeley Point with Newmark. *Id.* at 9. Cantor also envisioned that BGC would invest in Cantor's commercial mortgage-backed securities (CMBS) business, which would give BGC access to valuable market data on mortgages. *Id.* at 13; A576 (Curwood Trial (Tr.) 740:2-18).

2. BGC's Independent Directors

On February 11, 2017, Lutnick informed BGC's board of directors that BGC was considering acquiring Berkeley Point. Final Op. 10-11. In addition to Lutnick, the board consisted of four independent directors, each of whom is at the top of his or her field. *Id.* at 10.

Dr. Linda Bell is an economist and academic who is the Provost, Dean of the Faculty, and the Clare Tow Professor of Economics at Barnard College at Columbia University. Final Op. 10. She received her undergraduate degree from the University of Pennsylvania and her Ph.D. from Harvard before starting her 36-year career, first as an economist at the Federal Reserve Bank in New York, A2229 (Bell Dep. 17:2-24), then as a professor at Princeton, Harvard, Stanford, Haverford College (where she also served as Provost), and ultimately Barnard, A2230 (Bell Dep. 18:2-19:7).

Stephen Curwood is a Pulitzer-prize winning journalist and environmentalist who also has had a successful business career. Final Op. 10; *see* A2067 (Curwood Dep. 13:16-21). After graduating from Harvard College, Curwood was a journalist

for over thirty years, including for NPR, CBS, and the *Boston Globe*. B410 (JX998 at 1). Curwood is the President of World Media Foundation and the host of its weekly public-radio program *Living on Earth*, an environmental news program that is broadcast on over 200 stations. A251 (Mem. Op. on Defs.' Mots. for Summ. J. (SJ Op.) 8); A2068 (Curwood Dep. 16:12-17). He also was the founder and senior managing director of SENCAP LLC, which developed sustainable energy projects in Africa, as well as a principal at Mamawood Ltd., a media company in South Africa. A2068-69 (Curwood Dep. 16:24-18:8).

Secretary John Dalton was the Secretary of the Navy under President Clinton. Final Op. 10. He graduated from the U.S. Naval Academy and served in the Navy before earning an MBA from Wharton. A1553-54 (Dalton Dep. 21:17-22:3). After working at Goldman Sachs, he served as President of Ginnie Mae and Chairman of the Board of the Federal Home Loan Bank. A1554 (Dalton Dep. 22:11-23:4). He then returned to the private sector, where he spent twelve years as a senior executive at several real estate companies and banks before being appointed Secretary of the Navy. A1554 (Dalton Dep. 23:8-24:12). Since stepping down as Secretary, he has served on several corporate and charitable boards, including twelve years as the President of the Housing Policy Counsel of the Financial Services Roundtable. B142 (JX393 at 10).

William Moran was an Executive Vice President and the General Auditor of JPMorgan Chase. Final Op. 10. He graduated at the top of his class from Marist College and earned an MBA from Columbia Business School. A589-90 (Moran Tr. 793:20-794:6). He then worked for nine years for KPMG, eventually running its White Plains banking practice, before joining JPMorgan Chase. A590 (Moran Tr. 795:10-23). He worked in JPMorgan Chase's auditing department for thirty years, becoming its General Auditor and reporting directly to the bank's Chairman. A252 (SJ Op. 9); A590 (Moran Tr. 795:23-796:16).

In this appeal, Plaintiffs challenge the actions of Bell, Curwood, and Moran. During summary judgment briefing, Plaintiffs conceded that Dalton was independent and voluntarily dismissed their claims against him. Final Op. 56; A255 (SJ Op. 12).

3. The Special Committee And Its Advisors

In February 2017, BGC's board decided that the four independent directors would form a special committee to decide whether BGC should buy Berkeley Point. Final Op. 12. The BGC board took that step because Lutnick was an officer and controlling stockholder of both Cantor and BGC, and the board wanted to ensure that the transaction would be free from conflicts and would be fair to BGC's other stockholders. *Id.* Everyone understood that the special committee was acting for BGC in the transaction, and that Lutnick was acting for Cantor. *Id.* at 55, 72 n.346;

see, e.g., A630 (Moran Tr. 954:23-955:1) (explaining that Lutnick was "the chief negotiator from the other side").

The BGC board gave the committee the "full and exclusive power and authority of the Board" to "evaluate and, if appropriate, negotiate the terms of any Proposed Transaction and to make any recommendations to the Board" that it "determine[d] in its sole discretion to be advisable." Final Op. 17. It also authorized the special committee to retain any advisors it deemed appropriate. *Id*.

The special committee began meeting right away. Final Op. 17. At its first meeting, the committee voted to designate Moran and Bell as co-chairs. *Id*. The committee picked Moran because of his experience as the lead General Auditor at JPMorgan Chase and deep knowledge of the financial structures involved, and Bell due to her quantitative background. *Id.* at 56 n.286. Although Lutnick initially had asked Moran and Bell whether they would serve as co-chairs, the special committee voted independently to make Moran and Bell co-chairs. *Id.* at 55-56. Lutnick did not attend the meeting in which the vote occurred and there is no evidence that he influenced it. *Id.* at 56.

The special committee engaged two outside advisors. Final Op. 17-18. Its financial advisor was a team from the investment bank of Sandler O'Neil (Sandler), led by Brian Sterling. *Id*. at 18; A372 (Sterling Tr. 207:14-23). Its legal advisor was a team from the law firm of Debevoise & Plimpton (Debevoise), led by William

Regner. Final Op. 18; A494 (Bell Tr. 547:21-548:2). Although Moran initially ran the names of the proposed advisors by Lutnick, the committee's ultimate decision to hire Sandler and Debevoise was independent. Final Op. 62-63.

4. The Diligence Process

The special committee and its advisors engaged in an extensive, four-month diligence process. Final Op. 18. Between March and June 2017, the committee met at least nine times. *Id*. The committee also met with the Cantor team and BGC's CEO to gather information about the proposed deal, *id*. at 22, 26, and its advisors sent Cantor numerous requests for diligence information about Berkeley Point and Cantor's CMBS entity, *id.* at 18-20, 22-24, 27-28.

The special committee and its advisors repeatedly pushed Cantor to provide the information they needed. Final Op. 18. Although Lutnick sought to close the transaction by certain dates he preferred, the committee refused to be rushed: It understood that it was "important to take the time it need[ed] to digest the diligence items and better understand the strategic rationale for the Proposed Investment and valuation of Berkeley Point before responding to Cantor." *Id*. at 28. Ultimately, Cantor provided the special committee with all of the information it sought, and the deal closed only when the committee was satisfied with the diligence process. *Id*.

On April 21, 2017, during the diligence process, Cantor made its first formal proposal to BGC. Final Op. 21-22. Lutnick had previously floated a price "in the

low $700 million range" to give a sense of the magnitude of the potential transaction, but no one understood that figure to be a formal offer. *Id.* at 11. The first formal offer was for BGC to purchase a 95% interest in Berkeley Point for $850 million, with the option to purchase the remaining interest for $30 million five years after closing. *Id.* at 21. Cantor preferred this structure to an outright sale of BGC because of its tax benefits to Cantor. *Id.* at 19-20. Cantor also proposed that BGC invest $150 million into Cantor's CMBS business. *Id.* at 21-22.

The special committee and its advisors did not accept Cantor's proposal and instead pushed back on it. Final Op. 22. Sandler and Debevoise thought that the price was too high for a structure that did not result in BGC immediately owning all of Berkeley Point. *Id.* at 29-30; *see* A375-76 (Sterling Tr. 220:12-221:24) (Sterling's reaction to the term sheet was one of "disappointment and annoyance" on both price and structure). The special committee and its advisors also thought that the proposed investment in Cantor's CMBS business was too large and that its terms were not sufficiently attractive to BGC. Final Op. 29-30. They told Cantor that they would prefer that BGC purchase Berkeley Point outright, so that BGC could immediately combine Berkeley Point and Newmark. *Id.* at 31.

5. The Negotiation And Deal

Over the next few weeks, the special committee met several times to discuss possible terms of the deal. Final Op. 22-30. Cantor sent a revised term sheet, which

the special committee did not accept. *Id*. at 28. Sandler made presentations to the special committee that analyzed the proposed deal in detail. *Id.* at 22, 29. The committee and its advisors worked together on their responses to Cantor's revised term sheet, including developing an "advocacy piece" for use against Cantor at the bargaining table. *Id*. at 29. The committee and its advisors prepared for how they would advocate against Cantor in favor of their preferred terms. *Id*. In particular, the committee decided that acquiring 100% of Berkeley Point was a top priority for BGC and would be a walkaway point in the final negotiations without a major concession on price. *Id*. at 31.

On June 6, 2017, the special committee and its advisors met with Lutnick and other Cantor representatives to negotiate the deal. Final Op. 30. Cantor made essentially the same proposal it had offered before ($880 million for a 95% interest in Berkley Point and $150 million for the CMBS investment), but also included an alternative proposal for BGC to acquire Berkeley Point outright for $1 billion. *Id.* at 30-31. Sterling walked Cantor through the special committee's responses to the Cantor proposal, then concluded by making the special committee's counter-offer: $720 million for a majority interest in Berkeley Point and a $100 million investment in the CMBS business. *Id.* at 31-32.

Cantor was not happy with the counteroffer, and several hours of negotiations followed. Final Op. 32. As the negotiations progressed, the committee insisted on

an outright acquisition of Berkeley Point. *Id.*; *see* A577 (Curwood Tr. 743:19-745:11). The Cantor representatives walked out at several points when they realized that BGC would not adopt their preferred structure. A500 (Bell Tr. 571:6-10). The members of the committee told Lutnick that the deal would not happen as Cantor had constructed it, and made clear that they would walk away if the terms and price of the deal were not right for BGC. Final Op. 32, 74.

Ultimately, "[t]he Committee prevailed." Final Op. 74. The parties reached an agreement under which BGC would buy 100% of Berkeley Point outright for $875 million and would invest $100 million in Cantor's CMBS business with a preferred rate of return. *Id.* at 33. This price was based on Berkeley Point's value as of March 31, 2017, the last date for which it had audited financials, and the parties agreed that BGC would pay a true-up amount for any appreciation in value between March 31 and the closing date. *Id.* at 33, 36; A2651 (Edelman Dep. 347:14-21).

The handshake agreement reached at the June 6 meeting was subject to the completion of due diligence and negotiation of definite agreements. Final Op. 34. Sandler took the next five weeks to complete diligence and analyze the potential deal. *Id*. The special committee met frequently during that five-week period. *See, e.g.*, B384 (JX679 at 1); B386 (JX681 at 1).

Sandler then issued written opinions concluding that the acquisition of Berkeley Point was fair to BGC and that the terms of the CMBS investment were

reasonable. Final Op. 34. Sandler came to those conclusions by comparing Berkeley Point's multiples to those of other real estate companies, including in particular Walker & Dunlop, a close competitor to Berkeley Point, and by analyzing the implied returns of the CMBS investment. *Id*. at 34-35. After Sandler delivered the fairness opinions, the special committee unanimously recommended that the board approve the deal, and the board did so. *Id.* at 35-36. The deal closed on September 8, 2017. *Id.* at 36.

B. Procedural History

1. Plaintiffs' Claims

Plaintiffs are minority stockholders in BGC. They allege that Lutnick presented BGC's acquisition of Berkeley Point as a *fait accompli* to BGC and that the independent directors simply acceded to his demands, to the detriment of BGC's public stockholders. Final Op. 1-2. They argue that the $875 million price was at least $150 million too high, and that the $100 million investment in Cantor's CMBS business would be money losing for BGC. *Id.* at 2, 74.

Plaintiffs originally sued Lutnick, Cantor, and all four independent directors. Final Op. 1. Against Lutnick and Cantor, Plaintiffs claimed that the transaction overall was not fair to BGC. *Id.* Against the independent directors, Plaintiffs claimed that each had breached his or her duty of loyalty to BGC's minority stockholders. *Id.* The independent directors moved for summary judgment. *Id.* In

response, Plaintiffs voluntarily dismissed their claims against Secretary Dalton with prejudice. A144 (Pls.' Br. in Opp. to Mots. for Summ. J. 2 n.2).

2. The Court Of Chancery's Summary Judgment Decision

The Court of Chancery granted summary judgment to Bell and Curwood. A274-76 (SJ Op. 31-33). The court explained that, because BGC's certificate of incorporation contains a provision limiting directors' liability under Delaware General Corporation Law Section 102(b)(7), Plaintiffs could only bring three types of claims against the directors: that the directors harbored self-interest adverse to the stockholders' interest; that the directors were not independent from Lutnick and acted to advance Lutnick's self-interest; or that the directors acted in bad faith. A268-69 (SJ Op. 25-26) (citing *Cornerstone*, 115 A.3d 1173). The court noted that Plaintiffs relied solely on the second type of claim, and for that claim, Plaintiffs had to prove that each director both lacked independence and acted to further Lutnick's interests. A269-71 (SJ Op. 26-28).

With respect to Bell, the Court of Chancery held that Plaintiffs had not presented sufficient evidence to create a fact issue for trial on those issues. A274 (SJ Op. 31). The court reviewed all of Bell's interactions with Lutnick in detail, A249-51 (SJ Op. 6-8), and found no evidence that Bell had any ties with Lutnick sufficient to "raise concerns about her partiality," A261 (SJ Op. 18). The court also

found no evidence that Bell had acted to further Lutnick's interests. A274 (SJ Op. 31).

With respect to Curwood, the Court of Chancery first found no fact issue on whether Curwood acted to further Lutnick's interests, explaining that Plaintiffs had presented no evidence "implicating Curwood individually." A274-75 (SJ Op. 31-32). The court then found a triable fact issue on whether Curwood was sufficiently independent, solely because Curwood derived significant income from his BGC board service. A264-66, 274 (SJ Op. 21-23, 31).

Finally, with respect to Moran, the Court of Chancery denied the summary judgment motion. The court found no evidence of any financial or social ties between Moran and Lutnick that would raise questions about Moran's independence. A266-67 (SJ Op. 23-24). But the court noted that Moran demonstrated "considerable" respect for Lutnick in connection with the September 11 attacks, which could have clouded Moran's judgment. A267-68, 276 (SJ Op. 24-25, 33). The court also held that Moran's interactions with Lutnick early in the diligence process raised a triable fact issue as to whether Moran had acted to further Lutnick's interests. A276-77 (SJ Op. 33-34).

The Court of Chancery also denied Lutnick's and Cantor's motion for summary judgment on the basis of demand futility, concluding that Plaintiffs had produced enough evidence to go to trial on that issue. A261 (SJ Op. 18). The court

found no evidence that Bell lacked independence for demand futility purposes, just as there was no evidence that she lacked independence for purposes of liability under *Cornerstone*. A264 (SJ Op. 21). But the court held that there was enough evidence to go to trial on Curwood's and Moran's independence for demand futility purposes, for the same reasons it had found that there were triable issues about their independence for *Cornerstone* purposes. A266-68, 274-76 (SJ Op. 23-25, 31-33).

3. The Trial And The Court of Chancery's Post-Trial Opinion

The Court of Chancery held a trial, where it heard testimony from thirteen witnesses over five days and received 1260 exhibits into evidence. Final Op. 4. The witnesses included three of the independent directors (Bell, Curwood, and Moran), Lutnick, and Sterling (the special committee's financial advisor). A371-459 (Sterling); A490-533 (Bell); A569-89 (Curwood); A589-632 (Moran); A748-830 (Lutnick). The parties also filed post-trial briefs addressing Plaintiffs' claims.

The Court of Chancery rejected Plaintiffs' claims in a detailed, 112-page opinion. *See* Final Op. 1-112. The court carefully reviewed all of the evidence and made detailed factual findings. The court's bottom line was that "[t]he evidence presented by the defendants . . . carried the day," and so it granted judgment to Moran, Lutnick, and Cantor. *Id.* at 2-3.

Although the Court of Chancery had already granted summary judgment to Curwood on the individual claim, the court reviewed whether Curwood was

independent for purposes of assessing the overall fairness of the transaction. Final Op. 56-58. The court reviewed all of the record evidence and found no evidence showing that Curwood actually lacked independence while negotiating the transaction. *Id.* at 58.

The Court of Chancery then granted judgment for Moran on the individual claim against him, finding both that he was independent and that he had not acted to further Lutnick's interests. Final Op. 58-60, 111. The court found that Moran lacked "meaningful ties" to Lutnick that would have clouded his judgment. *Id.* at 58. The court then determined that although some of Moran's early communications with Lutnick about the transaction were "questionable," Moran's conduct during the diligence and negotiation demonstrated that he had been independent. *Id.* at 58-60. Overall, the court concluded, "the evidence shows that Moran 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." *Id.* at 60. The court accordingly held that Moran was "not liable for breaching his fiduciary duties." *Id.* at 111. And for essentially the same reasons, the court concluded that Moran was independent for purposes of assessing the overall fairness of the transaction. *Id.* at 60.

ARGUMENT

THE COURT OF CHANCERY CORRECTLY REJECTED THE INDIVIDUAL CLAIMS AGAINST BELL, CURWOOD, AND MORAN

A. Questions Presented

Whether the Court of Chancery erred in determining that Bell and Curwood had not breached their fiduciary duties. These questions were raised and decided by the court at summary judgment, *see* A274-76 (SJ Op. 31-33), and after trial on the merits, *see* Final Op. 57-58 & 61 n.309.

Whether the Court of Chancery erred in finding that Moran had not breached his fiduciary duty. This question was raised and decided by the court following trial. Final Op. 58-60, 111.

B. Scope Of Review

The Court of Chancery granted summary judgment to Bell and Curwood. A274-76 (SJ Op. 31-33). Those rulings ordinarily are reviewed *de novo*. *Salzburg v. Sciabacucchi*, 227 A.3d 103, 112 (Del. 2020). But here, the court held a trial and then found that Bell and Curwood were independent and had acted to further BGC's minority stockholders' interests and not Lutnick's interests. Final Op. 57-58 & 61 n.309. Those "'fact dominated'" rulings are "entitled to substantial deference" on appeal and should be affirmed "unless clearly erroneous or not the product of a logical and deductive reasoning process." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d

345, 360 (Del. 1993), *as modified*, 636 A.2d 956 (Del. 1994) (*Cede I*) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989)).

The Court of Chancery granted judgment to Moran following trial, ruling that Moran had been independent and had not acted to further Lutnick's interests. Final Op. 58-60, 111. Those rulings also are reviewed for clear error. *Cede I*, 634 A.2d at 360.

C. Merits Of Argument

Under Delaware law, when a company's certificate of incorporation contains an exculpatory provision limiting independent directors' liability, those directors can only be held liable for monetary damages for breach of fiduciary duty under very limited circumstances. *See* 8 *Del. C.* § 102(b)(7). Delaware law limits liability in that way to encourage qualified individuals to serve as independent directors and to make sound business decisions without fear of personal liability. *Cornerstone*, 115 A.3d at 1185.

A plaintiff seeking to hold an independent director liable under those circumstances faces a heavy burden. The plaintiff must plead and prove one of three theories: that the director "harbored self-interest adverse to the stockholders' interests"; "acted to advance the self-interest of an interested party from whom they could not be presumed to act independently"; or "acted in bad faith." *Cornerstone*, 115 A.3d at 1180. Applying this law, "Delaware courts have often decided director

independence as a matter of law at the summary judgment stage," *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 648-49 (Del. 2014) (*MFW*), *overruled on other grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018); *see, e.g.*, *Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014), and following trial, *see, e.g.*, *Dieckman v. Regency GP LP*, 2021 WL 537325, at *30 (Del. Ch. Feb. 15, 2021); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 175-77 (Del. Ch. 2005), *aff'd*, 909 A.2d 114 (Del. 2006).

Here, BGC's certificate of incorporation includes an exculpatory provision, so Plaintiffs are limited to the three types of claims set out in *Cornerstone*. A268-69 (SJ Op. 25-26) (citing B405 (JX997 art. VII)). They advance only the second type: They contend that Bell, Curwood, and Moran were disloyal to BGC's stockholders in approving BGC's purchase of Berkeley Point and investment into Cantor's CMBS business because they were not independent from Lutnick and acted to advance Lutnick's interests. A269 (SJ Op. 26). To succeed on that theory, Plaintiffs were required to prove that each director both (1) lacked independence from Lutnick with respect to the transaction and (2) actually acted to further Lutnick's interests in the transaction. A271 (SJ Op. 28).

The court below found that Plaintiffs did not prove either element for any director. On appeal, Plaintiffs do not dispute the applicable legal standards, but only argue about the sufficiency of the evidence. This Court reviews the Court of

Chancery's factual findings with great deference, and Plaintiffs have provided no reason to second-guess the Court of Chancery's careful assessment of the evidence.

Notably, Plaintiffs dismissed their claims against the fourth independent director – Secretary Dalton – conceding that he was independent. Final Op. 56. Yet Dalton voted the same way as Bell, Curwood, and Moran at every step of the transaction, and he never expressed concerns about the other directors' independence or their actions, despite having a front-row seat to the transaction. *See* A394 (Sterling Tr. 296:13-19); A1599-639 (Dalton Dep. 43:19-365:2). That confirms that the Court of Chancery got it right, and that this Court should affirm.

1. The Court Of Chancery Correctly Found That Bell, Curwood, And Moran Were Independent From Lutnick

The first element that Plaintiffs must establish is that Bell, Curwood, and Moran lacked independence from Lutnick. A271 (SJ Op. 28). Delaware courts presume that a corporate director is independent. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). To overcome that presumption, "a plaintiff must demonstrate that the director is beholden to the controlling party or so under the controller's influence that the director's discretion would be sterilized." *MFW*, 88 A.3d at 648-49 (internal quotation marks omitted). In other words, the plaintiff must show that the director was "incapable of making a decision with only the best interests of the corporation in mind." *Dieckman*, 2021

WL 537325, at *30 (internal quotation marks omitted). Plaintiffs did not make that showing here for any director.

a. The Court Of Chancery Correctly Found That Bell Was Independent From Lutnick

i. The undisputed evidence shows that Bell was independent

The undisputed evidence overwhelmingly established that Bell was independent from Lutnick. Bell is a distinguished economist and academic, currently serving as Provost and Dean of the Faculty at Barnard College. She had very limited interactions with Lutnick, both before and during the BGC acquisition, and nothing about those interactions (or her BGC board compensation) undermines her independence.

Bell first interacted with Lutnick when she was on the faculty at Haverford and Lutnick was on the college's board of managers. All of those interactions were strictly professional. Lutnick is a graduate of Haverford, serves on the college's board of managers, and is a major donor. A250 (SJ Op. 7). Bell first met Lutnick "briefly" at a dinner for the board of managers in 1992, while she was a junior faculty member. *Id.* (SJ Op. 7 & n.27); *see* A2234 (Bell Dep. 34:4-5). She then had virtually no interaction with Lutnick until she was appointed Haverford's Provost fifteen years later, in 2007. A250 (SJ Op. 7); *see* A2234 (Bell Dep. 36:18-37:7). Lutnick did not play an active role in that appointment; Bell was the only candidate put

forward by the faculty and he voted for her as a matter of course. A250 (SJ Op. 7) (citing A2243 (Bell Dep. 71-72)). As Provost, Bell saw Lutnick a few times per year, at meetings of the board of managers, *id.* (citing A2235 (Bell Dep. 38-39)), and other Haverford functions, *e.g.*, A2237 (Bell Dep. 47:21-48:24). In 2012, when Bell moved to Barnard, she stopped interacting with Lutnick in connection with Haverford. A250-51 (SJ Op. 7-8). That was five years before the transaction at issue.

Bell also had some limited interactions with Lutnick when she served on the board of BGC and another Cantor affiliate. She joined the Cantor affiliate's board in 2009, and served on it until she joined BGC's board in 2013. A249-50 (SJ Op. 6-7). Because of her board service, she attended various meals and functions with Lutnick and other board members, and also was involved in some of BGC's charitable initiatives with Lutnick. A2249-50 (Bell Dep. 94:5-8, 99:14-101:13). None of that was anything out of the ordinary.

Outside of Haverford and BGC, Bell has no social or business ties with Lutnick. A263 (SJ Op. 20). Bell does not consider Lutnick to be a close friend. A2240 (Bell Dep. 60:21-23). Neither she nor her family have attended any social function with Lutnick or his family. A2248-49 (Bell Dep. 93:23-94:4). Her other interactions with Lutnick were that she advised Lutnick's son on academics and

helped him find a tutor and that, at Lutnick's request, she met with a family whose child was interested in attending Barnard. A251 (SJ Op. 8).

Bell's service on BGC's board of directors does not meaningfully contribute to her family's income. A250 (SJ Op. 7). Plaintiffs do not argue otherwise on appeal.

The Court of Chancery carefully considered all of this evidence and correctly concluded that no reasonable factfinder would conclude that Bell's interactions with Lutnick "raise[d] concerns of her partiality." A261 (SJ Op. 18); *see* A274 (SJ Op. 31). The court noted that Lutnick's connection to Haverford did not benefit Bell even while she was at Haverford, much less at the time of the Berkeley Point transaction five years later. A263 (SJ Op. 20). The court also found that Bell and Lutnick did not "socialize[] meaningfully beyond their professional relationship." *Id.*; *see Beam*, 845 A.2d at 1050-54 ("social-circle" contacts not sufficient to find director lacked independence). There is just no factual basis for overriding the Court of Chancery's assessment of Bell's impartiality.

ii. Bell's limited interactions with Lutnick do not suggest she was beholden to him

Plaintiffs barely challenge the Court of Chancery's determination that Bell was independent. *See* Opening Br. 38 n.5. They make only two arguments. First, they contend that the court ignored the full extent of Bell's and Lutnick's connections by focusing only on Bell's and Lutnick's Haverford and social

connections rather than the "full constellation of facts." *Id.* at 38. That is mistaken; the court discussed all of the ties between Bell and Lutnick. *See* A249-51, 261-64 (SJ Op. 6-8, 18-21). It focused on Bell's and Lutnick's limited Haverford and social connections because it correctly recognized that those were the most relevant aspects of their relationship. But that does not mean the court ignored the other evidence. On the contrary, the court expressly stated that it considered "th[ose] interactions *and the other evidence*." A264 (SJ Op. 21) (emphasis added).

Second, Plaintiffs cherry-pick five aspects of Bell's and Lutnick's relationship and argue that those show that Bell "had a 'sense of "owingness" to Lutnick.'" Opening Br. 38-39 (quoting *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 1192206, at *1 (Del. Ch. Oct. 3, 2001)). The Court of Chancery carefully considered each and correctly concluded that none shows a lack of independence.

- *"Lutnick and Bell are friends and have known each other for more than 25 years."* Opening Br. 38. This is both inaccurate and misleading: Bell does not consider Lutnick to be a close friend. They barely interacted for the first 15 years they knew each other and never socialized outside of Haverford or BGC. A250, 263 (SJ Op. 7, 20).

- *"Lutnick supported Bell in her ascension to the role of Haverford's Provost."* Opening Br. 38. This is technically correct but misleading. The Haverford faculty nominated Bell for Provost; she was the only candidate; and Lutnick did not oppose her nomination. A250 (SJ Op. 7). No evidence shows that Lutnick had any special involvement in that process.

- *"Bell used Lutnick as a reference to support her candidacy for Barnard's Provost position."* Opening Br. 38. This overstates Bell's deposition testimony. She testified that she "likely listed" Lutnick as one of several references, A2242 (Bell Dep. 68:2-6), but no evidence shows that anyone ever

contacted Lutnick as a reference, *see id.* (Bell Dep. 86:11-14); A2417 (Lutnick Dep. 99:7-19), or that Bell considered herself indebted to Lutnick for any support he may have given.

- *"[A]fter Bell joined Barnard, Lutnick continued to facilitate Bell's professional success by assisting Bell with fundraising."* Opening Br. 38. This is a mischaracterization. Lutnick introduced Bell to one wealthy family whose child was interested in attending Barnard. A251 (SJ Op. 8) (citing A2248-49 (Bell Dep. 92-94)). Bell did not place any special emphasis on that introduction, and she did not understand that the introduction was intended for fundraising. A2267 (Bell Dep. 166:13-167:24). Plaintiffs also provided no evidence showing that family donated to Barnard.

- *"Lutnick and Bell were close enough for Lutnick to confide in her about his son's academic struggles and other deeply private personal issues."* Opening Br. 39. This is misleading and irrelevant. Bell is a distinguished educator, so it is unremarkable that Lutnick asked her for advice about his son's academics. Anyway, Bell's help with Lutnick's son "would support an inference that Lutnick may feel a sense of gratitude to [Bell]," not "the other way around." A264 (SJ Op. 21). Plaintiffs do not identify any other "deeply private personal issues" that Bell and Lutnick discussed.

These isolated snippets are all that Plaintiffs have to try to show that Bell lacked independence. As the court observed, nothing here indicates a relationship with any "emotional depth." A263 (SJ Op. 20) (quoting *In re MFW S'holders Litig.*, 67 A.3d 496, 511 (Del. Ch. 2013)). This case is thus a far cry from *Ply Gem*, where the court at the pleading stage credited allegations that the independent directors earned significant fees from the controlling shareholder. *See In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 755133, at *8-9 (Del. Ch. June 26, 2001). Here, the most that could be said is that Bell and Lutnick performed ordinary courtesies that

"the cordial among us" engage in daily, A264 (SJ Op. 21) – not that Bell was so beholden to Lutnick that her discretion was "sterilized," *MFW*, 88 A.3d at 649.

In any event, there was a trial where the court heard Bell testify at length, including on all five points raised by Plaintiffs on appeal, *see* A517, 519 (Bell Tr. 640:20-22, 646:4-648:20), and specifically evaluated her independence (in the context of determining the overall fairness of the transaction), *see* Final Op. 61 n.309. The court found that Bell actually was independent, stating that "[t]he record . . . does not support the conclusion that . . . Bell . . . fell victim to a controlled mindset." *Id.* That determination is amply supported by the record. So whether evaluated on summary judgment or after trial, it is clear that the court below did not err in finding Bell independent.

b. The Court Of Chancery Correctly Found That Curwood Was Independent From Lutnick

i. The record shows that Curwood was independent

The record fully supports the court's conclusion, after a lengthy trial, that Curwood was independent from Lutnick. Curwood is a Pulitzer prize-winning journalist and prominent environmentalist, with a long career in business. Like Bell, Curwood interacted with Lutnick at Haverford, where both served on the board of managers, and on the board of BGC. Neither Curwood's interactions with Lutnick nor his BGC board service showed that he lacked independence from Lutnick.

Curwood's relationship with Lutnick at Haverford was minimal and professional. Curwood first met Lutnick when Curwood joined the Haverford board of managers in 2000. A252 (SJ Op. 9). Curwood and Lutnick had virtually no interactions outside of board meetings and other Haverford functions. A2080 (Curwood Dep. 62:22-63:16). They were not friends. A2083 (Curwood Dep. 75:3-4). Curwood's service on the board of managers ended in 2012, five years before the Berkeley Point transaction. A2073 (Curwood Dep. 36:15-21). Around the time he left the board, he made a token ($250) donation to Haverford in Lutnick's name, as Lutnick had just been appointed chair of the board. A2086 (Curwood Dep. 86:18-88:7).

Curwood's interactions with Lutnick during his BGC board service likewise were limited and professional. Curwood joined the BGC board in 2009. A251 (SJ Op. 8). Lutnick and Curwood did not socialize outside of the BGC context and had no other business dealings together. A2087 (Curwood Dep. 91:23-92:9). While on the board, Curwood sometimes did not see eye to eye with Lutnick on matters related to BGC's governance, and Curwood regularly pushed back against Lutnick. A583 (Curwood Tr. 768:5-769:12).

Although Curwood's BGC board compensation was a significant source of his income, the Court of Chancery correctly found that it did not actually affect his impartiality. Between 2010 and 2017, Curwood's board compensation accounted

for just over half (52%) of his income. A290 (Joint Pre-Trial Order 8 ¶ 45); *see* Final Op. 42. Curwood acknowledged that he was grateful for that compensation, because it allowed him to devote time to public radio. A2094 (Curwood Dep. 123:7-21). In addition, over the last thirty years Curwood would regularly write out lists of "blessings" as way of helping him to remember the "good in sometimes difficult situations," A585, 588 (Curwood Tr. 775:23-776:5, 786:10-787:2); on one list, he included the opportunity to serve on the BGC board as one of those blessings, A1130 (JX 66).

But Curwood also made clear at both his deposition and at trial that he was not dependent on his BGC board compensation for his livelihood and that he had "plenty of other options." A2095 (Curwood Dep. 124:15-19). He was earning $150,000 per year outside of his BGC board compensation; he had been actively recruited for other board positions and academic appointments; he charged a speaking fee of $15,000 per engagement; and he was the beneficiary of multi-million-dollar pensions and owned properties in the United States and South Africa. A574-75 (Curwood Tr. 732:4-735:7). Curwood did not consider his board seat or compensation during the negotiations for Berkeley Point. Final Op. 58 (citing A574-75 (Curwood Tr. 732-33)).

In light of all of this evidence, the Court of Chancery reasonably concluded that Curwood was independent from Lutnick for the purpose of negotiating the

Berkeley Point transaction. Final Op. 57-58. The court found that Curwood "credibly testified that he was committed to walking away from the deal if he felt the finances were not appropriate for BGC and its minority stockholders" and that "the loss of his Board seat was never a consideration during negotiations." *Id.* at 58. The court accordingly concluded that there was "no basis to doubt that Curwood was independent – and acted independently – throughout the negotiations." *Id.* That conclusion is amply supported by the testimony and evidence at trial and thus is not clearly erroneous. It should be affirmed. *See Cede I*, 634 A.2d at 360.

ii. Curwood's board compensation did not establish that he lacked independence

In response, Plaintiffs' sole argument is that Curwood could not be independent because his BGC board compensation was a significant amount of money that allowed him to pursue his career in public radio. *See* Opening Br. 32-33. But under Delaware law, a director's board compensation is not itself enough to challenge the director's independence. *See Gobrow v. Perot*, 539 A.2d 180, 188 (Del. 1988), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Otherwise, a director's independence would be under scrutiny any time the director's board compensation was a significant source of income. That approach would serve only to discourage those with "less-than extraordinary means" from serving on boards of directors, depriving boards of the experience and insights of directors from varied backgrounds. *In re Walt Disney Deriv. Litig.*, 731 A.2d 342,

360 (Del. Ch. 1998), *aff'd in part, rev'd in part, and remanded by Brehm*, 746 A.2d 244. Delaware courts are "especially unwilling to facilitate" that result. *Id.*; *see, e.g.*, *Chester Cnty. Emps. Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *8 (Del. Ch. Oct. 6, 2017) (rejecting argument that a director lacked independence because he was a civil servant who had "not accumulated great wealth" (internal quotation marks omitted)).

Plaintiffs rely on the Court of Chancery's demand futility ruling, arguing that if Curwood was not sufficiently independent for purposes of evaluating a hypothetical lawsuit, he could not have been sufficiently independent for purposes of assessing the Berkeley Point transaction. Opening Br. 32-33. But the court below correctly recognized that independence for demand futility and for assessing the transaction are two different questions. As this Court has explained, independence is "contextual," and the fact that a director is not independent for one purpose does not mean that he or she is not independent for other purposes. *Beam*, 845 A.2d at 1049-50. "[T]he nature of the decision at issue must be considered in determining whether a director is independent." *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019). It is easier for a plaintiff to demonstrate that a director lacks independence for demand futility purposes than for the purposes of voting on a transaction, because it is more difficult for a director to decide that someone committed a serious wrong and should be sued than to oppose that person on corporate matters. *Sciabacucchi*

v. Liberty Broadband Corp., 2022 WL 1301859, at *14 (Del. Ch. May 2, 2022); *see Marchand*, 212 A.3d at 819; *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003); *see also* Final Op. 57.

That is why the Court of Chancery separately evaluated Curwood's independence for assessing demand futility and for negotiating with Lutnick about Berkeley Point. Final Op. 57. To be sure, Defendants believe that Curwood was independent for both purposes. *See* B41-50, 58-65 (Moran Post-Trial Br. 36-45, 53-60). But even assuming that the court's demand futility ruling is correct, that ruling does not undermine the court's conclusion that Curwood was sufficiently independent for purposes of negotiating the transaction. Indeed, the court's split ruling shows that the court was very careful in its assessment of the facts and application of the different legal standards.

The trial record amply supported the Court of Chancery's conclusion that Curwood was independent for purposes of the Berkeley Point transaction. The court credited Curwood's testimony that he did not consider the potential loss of his board position during the negotiations and that he would have walked away from the deal if the price was not right. Final Op. 58; *id.* at 44-45 (finding that Curwood's "strength of character is obvious").

Plaintiffs disagree with that ruling because they view Curwood's testimony as "self-serving." Opening Br. 33. But the Court of Chancery "is the sole judge of the

credibility of live witness testimony," and this Court "accept[s]" "factual determinations" that "turn on a question of credibility," *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35-36 (Del. 2005) (*Cede II*) (internal quotation marks omitted), rather than "substitut[ing] [its] judgment for the trial court's," *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 851 (Del. 2015) (internal quotation marks omitted).

Plaintiffs contend (Br. 33) that if a case turns on a director's credibility, it may be difficult to predict whether a court would find that a director lacked independence. That argument simply reflects that sometimes a court's assessment of a director's independence turns on his or her credibility, and that the Court of Chancery is the sole judge of credibility. *See Cede II*, 884 A.2d at 35. Relatedly, Plaintiffs argue that if the Court affirms, a director could establish independence solely by "testify[ing] at trial to things he [or she] would hypothetically have been willing to do." Opening Br. 33. The trial court did not endorse that rule, nor did it rely solely on Curwood's trial testimony; it considered the totality of the evidence in concluding that Curwood was independent. Final Op. 44-45.

Further, Plaintiffs point to no evidence that contradicts Curwood's testimony. No evidence shows that Curwood was unwilling to walk away from the negotiation or that he in fact considered his board position during the negotiations. *See* Final Op. 57. On the contrary, Bell testified that Curwood "ha[d] no hesitancy to bring up questions and to challenge" the transaction. A501 (Bell Tr. 576:11-22). The court

below did not clearly err in relying on the substantial evidence at trial that established Curwood's independence. *See Bank of N.Y. Mellon Tr. Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) (this Court defers to the Court of Chancery's determination of what inferences to draw from the evidence). There is thus no reason to reverse the Court of Chancery's independence ruling on Curwood.

c. The Court Of Chancery Correctly Found That Moran Was Independent From Lutnick

i. The record shows that Moran was independent

The trial record fully supports the Court of Chancery's conclusion that Moran was independent from Lutnick. Moran is a distinguished banker, who capped a 55-year career in finance as an Executive Vice President and the General Auditor of JPMorgan Chase. A252 (SJ Op. 9); *see* Final Op. 10. In that position, he routinely dealt with – and stood up to – powerful financiers. A1716 (Moran Dep. 35:4-16). He interacted with Lutnick only through his service on the boards of Cantor-affiliated companies. Nothing about Moran's board service calls into question his independence from Lutnick.

Nearly all of Moran's interactions with Lutnick were connected to his board service. Moran met Lutnick in 1999, when Moran joined the board of a Cantor subsidiary and Lutnick was the chair of that board. A252 (SJ Op. 9); *see* A591 (Moran Tr. 799:15-19). The subsidiary's president, not Lutnick, recruited Moran to join that board. A591 (Moran Tr. 799:20-800:12).

Moran then served on the board of another Cantor affiliate between 2009 and 2013 and joined BGC's board in 2013. A252-53 (SJ Op. 9-10). At their first meeting, Moran warned Lutnick that his job as an independent director would be to say "no" to Lutnick. A592 (Moran Tr. 802:2-6). True to his word, Moran "tangled" with Lutnick "[m]ore [times]" than he could "remember" over the years, and regularly gave Lutnick "news that he [did not] really want to hear but he need[ed] to hear." A1721 (Moran Dep. 55:18-57:3); *see* Final Op. 48 (finding that Moran was "unafraid to 'tangle[]' with Lutnick when it became necessary").

Moran and Lutnick do not have any significant relationship outside of Moran's board service. *See* Final Op. 46, 48. Moran considers Lutnick to be a "business colleague[]," not a "close friend[]." A594 (Moran Tr. 805:10-17); *see* Final Op. 48 (Moran and Lutnick are "business acquaintances"). Moran has not attended any of Lutnick's family events, such as weddings or bar mitzvahs, and has never vacationed with the Lutnicks. A594-95 (Moran Tr. 805:18-806:10). Outside of work, the two had only a "handful" of social interactions, A253 (SJ Op. 10): Lutnick once attended an event organized by a charitable organization where Moran and his partner were on the board, A1721 (Moran Dep. 57:10-17); Moran once attended a fundraiser for Hillary Clinton at Lutnick's home, A609 (Moran Tr. 871:21-873:16); and Moran once helped arrange for Lutnick's sister to be honored by the SUNY College of Optometry (Moran's partner served on the

college's board), A1723-24 (Moran Dep. 63:24-65:24). Lutnick did not even attend the event honoring his sister. A1724 (Moran Dep. 66:22-25). These interactions, the trial court found, showed that Moran "lacks close social or other ties to Lutnick that would call his independence into question." Final Op. 46; *see, e.g.*, *Frank*, 2014 WL 957550, at *23.

Moran's BGC Board compensation was not material to his income. Final Op. 46; A266 (SJ Op. 23). Moran is very wealthy from his banking career, with a net worth of nearly $20 million, A266 (SJ Op. 23); significant income from investments, A1713 (Moran Dep. 22:15-16); and a JP Morgan pension of just under one million dollars per year, *id*. (Moran Dep. 22:6-9). There is thus no reason to believe that the $136,000 Moran received from BGC on average each year had any material effect on his finances. Final Op. 48; A292 (Joint Pre-Trial Order 10 ¶ 52).

At the summary judgment stage, the only thing that gave the Court of Chancery pause regarding Moran's independence was Moran's "considerable" respect for Lutnick. A267 (SJ Op. 24). Moran admired Lutnick's resilience after the September 11 terrorist attacks, which killed Lutnick's brother and over 600 Cantor employees. A1728-29 (Moran Dep. 85:23-88:3). Moran respected how Lutnick took it upon himself to care for the families of the deceased employees and rescued Cantor. A1729 (Moran Dep. 86:11-24).

Because the Court of Chancery was required to draw every inference in Plaintiffs' favor at summary judgment, it held that a reasonable factfinder might be able to conclude that Moran's admiration for Lutnick would have prevented Moran from acting independently. A268, 276 (SJ Op. 25, 33). But after hearing Moran testify at trial on this issue, the court flatly rejected that notion. Final Op. 46. The court found that Moran's respect for Lutnick was grounded in Lutnick's actions after the September 11 attacks, and was neither so personal nor so "bias producing" that it would have clouded Moran's judgment for purposes of assessing the Berkeley Point transaction. *Id.* at 46-47, 110-11. The court expressly based that conclusion on its evaluation of Moran's credibility at trial and its careful analysis of the record evidence. *Id.* at 46-47 (citing A610 (Moran Tr. 875-76)). The court's conclusion was not clearly erroneous and therefore should be affirmed. *See Cede II*, 884 A.2d at 35.

ii. Plaintiffs' arguments about Moran's independence lack merit

Plaintiffs make three arguments about Moran's independence, none of which has merit.

First, Plaintiffs argue (Br. 34) that the Court of Chancery considered only Moran's admiration for Lutnick in assessing independence. That is incorrect. At summary judgment, the court considered all of Moran's and Lutnick's financial and social ties, and concluded that those ties were not sufficient to question Moran's

independence. A266-67 (SJ Op. 23-24). Then following trial, the court found that "[n]o new evidence was introduced that cause[d] [it] to reconsider [its] view" about Moran's finances or social connections to Lutnick. Final Op. 46; *see id.* at 47 n.254, 48.

Plaintiffs cite four supposed social ties between Moran and Lutnick. The Court of Chancery considered all of them and found that none was significant.

- *"Lutnick invited Moran to join a Cantor-subsidiary board."* Opening Br. 7. That is incorrect. It is undisputed that the subsidiary's president, not Lutnick, invited Moran to join that board. A291 (Joint Pre-Trial Order 9 ¶ 48).

- *Moran used Lutnick "to help his romantic partner raise money for charities that were important to her."* Opening Br. 7. This is incorrect. Moran's partner was involved with two organizations, a charity and an optometry college. A1722-23 (Moran Tr. 61:4-62:4). Lutnick once attended an event hosted by the charity, and Lutnick's sister once was honored by the optometry college (an event Lutnick did not attend). A1721, 1724 (Moran Dep. 57:15-19, 66:15-25). So far as Moran was aware, Lutnick never gave money to either organization. A1724-25 (Moran Dep. 68:7-19, 72:5-18).

- *Moran used Lutnick to "secure invitations to high profile events."* Opening Br. 7. This overstates the evidence. Moran once asked Lutnick's assistant for an invitation to a fundraiser for Hillary Clinton at Lutnick's home that other BGC people attended and that followed an event at BGC's offices. A609 (Moran Tr. 871:7-873:16).

- *Moran used Lutnick to "secure private tours of museums for his family."* Opening Br. 7. This also overstates the evidence. Lutnick's assistant organized a tour of the Tate Modern museum for Moran's partner, A1731-32 (Moran 96:6-97:5), but that was nothing out of the ordinary, because the assistant regularly arranged those tours for Lutnick's acquaintances (including any BGC or Cantor employee who asked), A610 (Moran Tr. 874:6-22).

The court reasonably concluded that this "handful" of interactions (A253 (SJ Op. 10)) did not show that Moran would be "more willing to risk his . . . reputation

than risk the relationship with [Lutnick]." *Beam*, 845 A.2d at 1052; *see* Final Op. 46 & 47 n.254. There is no reason to disturb the court's weighing of the evidence on that point. *See RBC Cap. Mkts.*, 129 A.3d at 851.

Second, Plaintiffs argue (Br. 35) that the Court of Chancery clearly erred in determining that Moran's respect for Lutnick did not bias him. They argue that the court focused too much on Moran's respect for Lutnick's actions after the September 11 attacks rather than on Lutnick's charitable contribution to the Tate Modern museum in London. Final Op. 46-47. But Moran only mentioned the museum contribution in passing in his deposition as part of an emotional discussion of Lutnick's generosity after the September 11 attacks. *See* A1731-32 (Moran Dep. 97:10-99:4). Plaintiffs cross-examined Moran about this supposed source of bias at trial and raised it in their post-trial brief, *see* A610-11 (Moran Tr. 875:22-878:23); A1125-26 (Pls. Post-Trial Br. 110-11), and the court carefully considered and rejected Plaintiffs' arguments on this point, *see* Final Op. 46-47. It found, based on all of the evidence, that "[n]othing in the record" suggests that Moran's respect for Lutnick marred his independence. *Id.*; *see* A593 (Moran Tr. 807:13-808:18) (Moran's testimony that his respect for Lutnick "didn't influence [his] judgment" with regard to the transaction).

Third, Plaintiffs argue (Br. 35-38) that some of Moran's actions and testimony with respect to the Berkeley Point transaction undermined his independence. The

Court of Chancery considered and rejected each argument in light of its assessment of the evidence at trial:

- *Moran was "oblivious to Lutnick's conflicting economic incentives."* Opening Br. 35-36. That is inaccurate and irrelevant. Moran knew that Lutnick was negotiating for Cantor in the transaction and thus was the special committee's adversary for purposes of the negotiations. Final Op. 59; *see* A629 (Moran Tr. 953:8-10). He may not have known Lutnick's precise ownership interests in Berkeley Point compared to BGC, A613 (Moran Tr. 888:7-13), but he did not need to know the exact percentages to negotiate aggressively against Lutnick and uphold his obligations to BGC's public stockholders.[1]

- *Moran "allowed Lutnick to play an improper role in the merger negotiations" because early on, Moran ran the names of potential advisors by Lutnick.* Opening Br. 36. But there was no improper influence. Although Moran may have communicated with Lutnick about the names, the special committee independently chose its advisers without Lutnick present. Final Op. 63. Further, Moran expressly instructed Sandler to negotiate "'zealous[ly]'" and "'aggressive[ly]'" on behalf of the "'independent shareholders.'" *Id.* at 59 (quoting A386 (Sterling Tr. 263)). As the Court of Chancery found, Moran "consistently advocated to achieve the best deal for the minority stockholders – even when it was not the deal Lutnick desired." *Id.* at 47.

- *Moran supposedly used "we" to refer to himself and Lutnick in discussing the transaction.* Opening Br. 36. That is incorrect. The context makes clear that Moran used "we" to mean the special committee or the parties collectively, not only him and Lutnick. *See, e.g.*, A1749 (Moran Dep. 169:8-9) ("We, the committee, didn't know the company."); A1764 (Moran Dep. 227:16-20) ("[Q.] Who is 'we'? A. We. We. We, the firm. We, the directors. We have a role to play in ratifying or rejecting the deal."). Further, the evidence at trial

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[1] Plaintiffs cite (Br. 43) *Frontfour Capital Group LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019), but they overread that case. The director in that case did not even know that the controlling party controlled the acquisition target. *Id.* at *23. *Frontfour* establishes only that a director should know that a controlling party is on both sides of a transaction, not that the director must know the minutiae of the controlling party's ownership interests.

establishes that Moran "knew" that Lutnick represented Cantor and that Moran's job was to represent BGC's other stockholders. Final Op. 60; *see, e.g.*, A629 (Moran Tr. 953:8-10).

- *Moran said at his deposition that Lutnick "could negotiate for BGC with himself as Cantor."* Opening Br. 37 (quoting A1747 (Moran Dep. 160:21-161:9)). That was just a "clumsy" turn of phrase in an hours-long deposition. Final Op. 60 n.304. Moran clarified at trial that he was simply trying to say that Lutnick had interests in both BGC and Cantor. A629 (Moran Tr. 953:13-19). He explained that he knew that Sterling (not Lutnick) was BGC's "lead negotiator." *Id.* (Moran Tr. 953:3-7). The trial court expressly credited Moran's trial testimony. Final Op. 60 n.304.

Plaintiffs thus have provided no reason to overturn the Court of Chancery's assessment of Moran's independence based on the evidence at trial.

2. The Court Of Chancery Correctly Found That Bell, Curwood, And Moran Did Not Act To Further Lutnick's Interests

Plaintiffs had to establish not only that the three directors were not independent, but also that each acted to further Lutnick's interests in the Berkeley Point transaction. *See* A273, 275 (SJ Op. 30, 32) (explaining that "individualized" evidence is necessary and that arguments about the directors as a group "will not suffice" (internal quotation marks omitted)). As the court below found, no evidence showed that any director acted to further Lutnick's interests instead of the BGC stockholders' interests. A274-76 (SJ Op. 31-33); Final Op. 111.

a. The Court Of Chancery Correctly Found That The Directors Acted Solely To Further BGC Stockholders' Interests

The Court of Chancery heard extensive testimony about the special committee's diligence process and received into evidence hundreds of documents detailing that process. It found that Bell, Curwood, and Moran all worked "tirelessly" to further the BGC stockholders' interests, not Lutnick's interests. Final Op. 111; *see id.* at 61 n.309. The record fully supports the court's conclusion, showing that the directors worked to protect the BGC stockholders' interests every step of the way – by establishing a special committee as soon as they learned of the potential deal, hiring sophisticated and independent legal and financial advisors, engaging in a thorough diligence process, and then negotiating forcefully and effectively for BGC and winning substantial concessions on price and structure.

The evidence showed that the directors immediately recognized that Lutnick had a conflict of interest and promptly acted to protect BGC stockholders' interests. Final Op. 12; *see* A492-93 (Bell Tr. 540:13-541:21). The same day that the directors learned of the potential transaction, they voted to establish a special committee (one that did not include Lutnick) to evaluate the deal on BGC's behalf. Final Op. 12.

The special committee retained experienced outside advisors, ultimately selecting Sterling and his team at Sandler and Regner and his team at Debevoise. Final Op. 17-18. Moran, Curwood, and Dalton had worked with Sandler before and

liked its work, *id.* at 63, plus Sandler had extensive experience negotiating against Lutnick, *id.* at 14. The committee selected Debevoise because of its size and reputation and because it had not worked for Lutnick or Cantor in the past. A596 (Moran Tr. 821:1-20). They selected Regner in particular because he had worked with Dalton before and the directors were confident in his abilities. Final Op. 63. The court below found that both Sandler and Debevoise were independent from Lutnick and worked hard for BGC's minority stockholders against Lutnick and Cantor. *Id.* at 63-64.

The evidence also showed that the special committee and its advisors conducted a thorough diligence process. Starting in mid-March 2017, the committee met 19 times and communicated frequently between meetings. A253 (SJ Op. 10); A529 (Bell Tr. 685:15-17). All four directors were actively engaged in each meeting, Final Op. 65; *see* A394-95 (Sterling Tr. 296:6-298:15). Sterling and Regner began requesting diligence data from Cantor almost immediately, then repeatedly followed up on those requests. Final Op. 18; *see, e.g.*, A1188-89 (JX331 at 1-2); B120 (JX339 at 1). Moran also followed up with Cantor to get Sandler and Debevoise the data they needed, recognizing that it would be a "major problem" if they lacked that data. Final Op. 18; *see* A597 (Moran Tr. 822:11-21). Ultimately, the committee received all of the data it wanted. Final Op. 28. Based on this extensive due diligence, the outside advisors developed dozens of analyses, *id.* at

22-30, including, among other things, sophisticated iterative analysis of comparable companies, valuation metrics, and projections, *see, e.g.*, B257-64 (JX514 at 13-20).

The record evidence further established that the special committee negotiated forcefully and effectively for the BGC stockholders. Cantor sent the committee its first formal proposal on April 21, 2017, and an updated proposal on May 23, 2017. Final Op. 21, 28. The committee did not accept either proposal. Both proposals were for BGC to acquire a 95%, limited-partner interest in Berkeley Point for $850 million, with Cantor as the general partner and minority owner of Berkeley Point. *Id.* at 21, 28; *see* B123 (JX386 at 1). BGC also would invest $150 million into Cantor's CMBS business, for a total outlay of $1 billion. Final Op. 21, 28. And BGC would have the option to buy Cantor's remaining interest in Berkeley Point five years after the closing for an additional $30 million. B125 (JX386 at 3). Cantor preferred this structure because it avoided triggering an immediate tax liability for Cantor. Final Op. 20.

The special committee and its advisors pushed back on this structure and price, both initially and over the course of the next few months. Final Op. 22-25, 27-33; *see, e.g.*, A378 (Sterling Tr. 232:4-23). They determined that, because the deal did not provide BGC with complete control over Berkeley Point, BGC would not be able to immediately integrate Berkeley Point with Newmark, which was BGC's main goal in acquiring Berkeley Point. A375-76 (Sterling Tr. 220:12-

223:18). They also decided that the total price ($1 billion) was much more than they had been expecting. A376 (Sterling Tr. 221:19-24).

The parties met for an in-person negotiation on June 6, 2017. The committee's three key objectives in the negotiation were to (1) reduce the price of Berkeley Point, (2) change the structure to give BGC more control over Berkeley Point at an earlier date, and (3) reduce the amount BGC would invest in Cantor's CMBS business and obtain more beneficial terms with less risk. B318-20, 323-24 (JX571 at 12-14, 17-18). The committee succeeded on all three.

Cantor opened the negotiation by proposing that BGC either acquire a 95% interest in Berkeley Point for $880 million or acquire all of Berkeley Point for $1 billion, and in both cases invest $150 million in Cantor's CMBS business. Final Op. 30. Sterling, the lead negotiator for BGC, explained why the committee would not accept that proposal. *Id.* at 31-32; *see* A387 (Sterling Tr. 265:20-24). In response, Lutnick "expressed a great deal of frustration" that BGC would not agree to his proposed price or deal structure. A387 (Sterling Tr. 266:5-17); *see* Final Op. 32.

Several hours of heated negotiations followed. During that time, the special committee decided that BGC needed outright ownership in Berkeley Point, not simply a majority interest. Final Op. 73. The committee thus began to "pound[], metaphorically, . . . on the table" for BGC to acquire Berkeley Point outright, A577

(Curwood Tr. 743:19-744:15) – causing the Cantor representatives to walk out, A500 (Bell Tr. 571:6-8). In response, the committee held firm, making clear it was "prepared to walk out if [it] [did not] reach a deal that was attractive" to BGC. A388 (Sterling Tr. 272:3-5); *see* Final Op. 74. Moran delivered that message personally to Lutnick, telling Lutnick that "[t]he deal[] [was] not going down the way [Lutnick] ha[d] it constructed." A602 (Moran Tr. 844:7-15); *see* Final Op. 111. Bell also negotiated individually with Lutnick, making it clear that BGC needed an outright acquisition of Berkeley Point. Final Op. 32; *see* A627 (Moran Tr. 945:7-8); A824 (Lutnick Tr. 1412:18-1413:1).

Ultimately, "[t]he Committee prevailed" and secured a great deal for the stockholders. Final Op. 74. Cantor agreed to sell all of Berkeley Point to BGC for $875 million, $125 million less than Cantor's offer. A1461 (JX570 at 1). BGC also agreed to invest $100 million into the CMBS business ($50 million less than Cantor had sought), with a catch-up provision in case BGC's annual return on the investment fell below 5%. *Id.* Lutnick was "very upset" by the negotiation and repeatedly communicated his "unhappiness" to the special committee. A761 (Lutnick Tr. 1285:2-23). But he ultimately agreed to the deal, because "there was no other place to go." *Id.* (Lutnick Tr. 1287:6-19).

The committee continued its diligence after securing the deal. Final Op. 53 (noting "over a month" of additional diligence after the June 6 agreement on terms).

The committee and its advisors met seven more times over the following five weeks to complete their diligence. *Id.* at 34; *see* B326 (JX627 at 1); B328 (JX656 at 1); B378 (JX667 at 1); B384 (JX679 at 1); B386 (JX681 at 1); B388 (JX683 at 1); B390 (JX684 at 1). Sterling presented the committee with a 35-slide presentation and two written fairness opinions stating Sandler's view that the price for Berkeley Point was fair and the terms of the CMBS investment were reasonable. Final Op. 34-35; *see* B332-36 (JX658 at 1-5); B337-41 (JX659 at 1-5); B343-77 (JX663 at 2-36). The special committee then unanimously concluded that the transaction was fair and reasonable and recommended that BGC's board authorize the transaction, Final Op. 35, which the board did, *id.* at 36.

Taken together, this evidence established that Bell, Curwood, and Moran were well aware of their obligations to the minority stockholders, acted solely to further those stockholders' interests, and were successful in doing so. The directors thus "could hardly be accused of breaching [their] duty of loyalty." A272 (SJ Op. 29). As the Court of Chancery found after a lengthy trial, "the record demonstrates 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." Final Op. 109-10.

b. Plaintiffs' Arguments Lack Merit

In response, Plaintiffs simply rehash arguments that the court below fully considered and rejected in light of the testimony and evidence in the record. They raise some arguments against the directors collectively and some against each director.

i. Plaintiffs' arguments against the directors collectively are insufficient to establish liability as to any director

As an initial matter, Plaintiffs' arguments about the directors collectively are insufficient to establish liability as to any director, because "[e]ach director has a right to be considered individually when the directors face claims for damages in a suit challenging board action." *Cornerstone*, 115 A.3d at 1182; *see* A273 (SJ Op. 30 & n.127) (citing *In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20., 2018); *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *39 (Del. Ch. Aug. 27, 2015)). That is because "the nature of [the directors'] breach of duty (if any) . . . can vary for each director." *Dole Food*, 2015 WL 5052214, at *39.

Anyway, Plaintiffs' two arguments against the committee members collectively lack merit. First, Plaintiffs argue that the committee "allowed Lutnick to control the Transaction's timing for his own benefit and did not push back after he raised the proposed price." Opening Br. 69. No part of that assertion is correct,

and the Court of Chancery already considered all of the evidence on this issue. Lutnick did not control the timing of the transaction; although he expressed his preferences for the transaction to be completed by certain deadlines, Lutnick "was not successful" because "the deal was not completed on any of the time frames he proposed." Final Op. 53. The committee also "push[ed] back" on Lutnick's proposed pricing, rejecting both of his proposals and ultimately negotiating him down by $125 million. *Id.* at 21, 30, 74.

Plaintiffs' contrary argument relies on a reading of the record that the court below expressly rejected. At the very outset of the process, Lutnick commented that a "potential purchase price" for Berkeley Point could be a "in the low $700 million range." A1169 (JX241 at 1); *see* Final Op. 11. Plaintiffs say (Br. 58) that this was an offer to sell Berkeley Point for $700 million. But every single person who testified about this comment testified that it was not an actual proposal, Final Op. 74 & n.360; *see* A374-75 (Sterling Tr. 216:20-23); A460 (Edelman Tr. 411:5-13); A492 (Bell Tr. 539:11-540:1); A594 (Moran Tr. 811:12-812:18); A758 (Lutnick Tr. 1274:1-1275:13); instead, Lutnick was just estimating the "magnitude" of the transaction, *e.g.*, A594 (Moran Tr. 811:22). The Court of Chancery credited that testimony, finding that the $700 million figure was not a "true offer[]." Final Op. 74. That decision about which "piece[] of testimony" to "accept[] or reject[]" is a

paradigmatic example of a factual determination that this Court does not disturb. *Cede II*, 884 A.2d at 36.

Second, Plaintiffs argue (Br. 69) that the committee did not realize that BGC would have to pay a true-up amount because the negotiated price was based on Berkeley Point's value on March 31 but the transaction did not close until September 8. That is incorrect. The special committee chose the March 31, 2017, valuation date because it was the last date for which Berkeley Point had audited financials. A2651 (Edelman Dep. 347:14-21). It knew that it would have to account for any appreciation or depreciation in Berkeley Point's value between March 31 and the closing date. Final Op. 36, 78 n.373; A586 (Curwood Tr. 780:4-15). And it was fully aware that the amount might be significant, because Berkeley Point's book value was projected to increase significantly during 2017. Final Op. 78 n.373; *see* A414 (Sterling Tr. 375:1-5); A587 (Curwood Tr. 782:7-8); B357-59 (JX663 at 16-18); B423 (JX1229 at 2). Curwood, in particular, testified that the committee "knew that there would be an adjustment" and that the committee specifically approved that adjustment – testimony that the trial court credited. A586-87 (Curwood Tr. 781:5-782:8); *see* Final Op. 78 n.373. In any event, agreeing to the adjustment did not further Lutnick's interests, because BGC would have paid for the appreciation in Berkeley Point's value one way or another (either as a true-up payment or as part of the negotiated price). *See* Final Op. 78 n.373.

So even if the Court were to consider Plaintiffs' collective arguments, none shows that the directors acted to advance Lutnick's interests in the transaction.

ii. There is no evidence that Bell acted to further Lutnick's interests

At summary judgment, the Court of Chancery found "no genuine factual dispute about" whether Bell furthered Lutnick's interests "in negotiating or approving the Transaction." A274 (SJ Op. 31). Then, following trial, the court affirmed that "[t]he evidence shows that . . . Bell . . . engaged in arm's length negotiations to reach an optimal outcome for the minority stockholders," rather than acting to further Lutnick's interests. Final Op. 61 n.309.

Plaintiffs advance just one argument about Bell, that she "allowed Lutnick to choose the Committee's co-chairs." Opening Br. 68. That is incorrect. Lutnick did not choose the co-chairs. As the Court of Chancery explained, although Lutnick initially asked Bell if she would be willing to serve as a co-chair, the committee independently voted to appoint her and Moran as co-chairs. Final Op. 55-56 & 56 n.286 ("Bell was selected in great part due to her quantitative background.").

Lutnick did not attend that meeting, and there is no indication that he influenced it. Final Op. 56. And even if Lutnick had a role in selecting Bell to serve as a co-chair, that decision did not end up furthering Lutnick's interests. To the contrary, Bell regularly pushed back against Lutnick, including when she negotiated

individually with him and Cantor on June 6 and made clear that the committee would not accept his proposed terms. *Id.* at 32; A824 (Lutnick Tr. 1412:18-1413:1).

iii. There is no evidence that Curwood acted to further Lutnick's interests

As with Bell, the Court of Chancery concluded at summary judgment that "there is no genuine dispute that Curwood did not undertake actions to advance Lutnick's self-interest in the Transaction." A275 (SJ Op. 32). Also as with Bell, the court concluded after trial that the evidence showed that Curwood had fought hard for BGC's stockholders during the diligence and negotiation process. Final Op. 61 n.309.

Plaintiffs have virtually no response. Their only argument is that Curwood "did not understand or care about Lutnick's economic incentives in connection with the Transaction." Opening Br. 69. That is the same argument they make about Moran, *see id.* at 35, and it is incorrect for the same reasons, *see* p. 42, *supra.* Curwood was well aware that Lutnick represented Cantor in the Berkeley Point transaction and was adverse to BGC. Final Op. 57-58; *see* A2113 (Curwood Dep. 196:23-197:2). The fact that he may not have known the precise details of Lutnick's economic interests in BGC and Cantor did not matter because he understood that Lutnick was negotiating for Cantor and against the special committee throughout the process and particularly at the June 6 negotiation. *E.g.*, A2154 (Curwood Dep.

358:5-9). The trial court's finding that Curwood did not act to further Lutnick's interests is amply supported by the record.

iv. There is no evidence that Moran acted to further Lutnick's interests

After the trial, the Court of Chancery concluded that Moran had not acted to further Lutnick's interests. The court noted that, at the beginning of the transaction process, Moran had communicated with Lutnick about the selection of the outside advisors, the diligence process, and the timing of the transaction. Final Op. 58-59. But once the diligence process was underway, Moran consistently demonstrated that he "knew" he was working for BGC's stockholders and not Lutnick. *Id.* at 60. And the court found that Moran "was a positive force when it came to the ultimate price and terms reached." *Id.*; *see id.* at 111. The court thus concluded that Moran did not "act[] disloyally." *Id.* at 111.

Plaintiffs argue that Moran advanced Lutnick's interests in six ways. Most of their arguments relate to Moran's actions at the beginning stages of the process; they ignore his tireless and consistent work on behalf of BGC's stockholders throughout the diligence and negotiation process. *See* Final Op. 59-60. And nothing Plaintiffs cite shows that Moran actually acted to further Lutnick's interests. The Court of Chancery considered and rejected all of Plaintiffs' arguments, and Plaintiffs do not show that the court erred (much less that it clearly erred).

First, Plaintiffs argue that Moran (like Bell) "allowed Lutnick to choose the committee's co-chairs." Opening Br. 68. As explained, that is incorrect: The trial court found that the committee chose its own co-chairs, and that there is no evidence that Lutnick influenced that decision. Final Op. 56 & n.286.

Second, Plaintiffs argue that Moran "gave Lutnick a veto right over the Committee's legal advisor," Debevoise. Opening Br. 68-69; *see id.* at 14. That also is incorrect. Moran (not Lutnick) identified Debevoise as a potential legal advisor. A596 (Moran Tr. 821:3-20). He ran Debevoise's name by Lutnick as a "courtesy," A615 (Moran Tr. 896:14-18), in part for conflict reasons because he did not know if Debevoise had previously worked for Lutnick, *see* A596 (Moran Tr. 821:14-17). The committee then voted to engage Debevoise based on the independent directors' previous experience with Debevoise and their confidence in its abilities. Final Op. 63; A494 (Bell Tr. 547:19-548:2). Lutnick did not have a say in that decision, much less a veto. Final Op. 63; A630 (Moran Tr. 954:19-20).

Further, the committee's choice of Debevoise did not further Lutnick's interests. Debevoise "understood [its] role[] and advocated on the Special Committee's behalf." Final Op. 64. Plaintiffs "do not dispute that . . . Debevoise [was] qualified or that Debevoise is independent." *Id.* at 62. Indeed, their opening brief does not contain a single criticism of Debevoise's work.

Third, Plaintiffs argue that Moran "allowed Lutnick to interview prospective financial advisors." Opening Br. 69. But Debevoise, not Lutnick or Moran, set up informational calls between Sandler and another prospective bank and Lutnick. A631 (Moran Tr. 958:9-959:13); *see* B110 (JX290). Those calls were not an opportunity for Lutnick to interview the banks; instead, Lutnick was providing the banks with background information about the proposed transaction and answering questions. *See* B111 (JX298).

The court already weighed all of the evidence and trial testimony on this issue and determined that the special committee decided to retain Sandler without Lutnick's input. *See* Final Op. 17-18, 63. Similarly, the court found that Sandler "plainly advocated for the Special Committee against Cantor," "pressed Cantor for information that Cantor was initially hesitant to provide," "questioned Cantor's changes to the deal structure," and "bargained hard" against Lutnick. *Id.* at 64. So there is no evidence of a benefit to Lutnick here.

Relatedly, Plaintiffs argue that Moran "looked to Lutnick to determine Sandler's scope of representation." Opening Br. 69. That is at most an overstatement; it is based on one email that ultimately did not matter because there was no benefit to Lutnick. Plaintiffs cite an email from Sandler to Moran, where Sandler expressed interest in working for the special committee. *See* A1178 (JX270). Moran forwarded that email to Lutnick with a note about whether Sandler

was to "negotiate price." *Id.* Plaintiffs say that Moran was asking Lutnick whether Sandler was going to negotiate the price of the Berkeley Point transaction, Opening Br. 15, but Moran testified at trial that he was referring to the price of Sandler's engagement, A617 (Moran Tr. 905:6-11). The Court of Chancery considered this email and determined that whatever involvement Lutnick had in the selection of Sandler ultimately did not benefit him, because Sandler did its job and helped the committee obtain the structure it preferred and a significant price reduction, rather than the structure and price Lutnick preferred. Final Op. 64. Plaintiffs have no answer on this point.

Fourth, Plaintiffs repeat their argument that Moran did not understand his relationship with Lutnick and that "Lutnick could negotiate with himself." Opening Br. 69. As explained, the Court of Chancery expressly found that was not true – Moran "knew" that he and the special committee would be negotiating for BGC against Lutnick. Final Op. 60; *see* p. 43, *supra*.

Fifth, Plaintiffs argue (Br. 69) that Moran withheld his early communications with Lutnick about the committee's potential advisors from the rest of the committee. But Debevoise (which represented the committee) was on some of the calls to protect the committee's interests. *See* Final Op. 16; B111 (JX298). Anyway, there is no evidence that the committee was harmed. *See* Final Op. 60 n.305 ("[T]here is no evidence that [Moran] sent anything substantive about the Special

Committee's negotiating strategy to Lutnick."). The committee members unanimously selected Sandler and Debevoise as their advisors because they had previous experience with those firms and held them in high regard. *Id.* at 63. And the court below specifically found that their retention did not benefit Lutnick. *Id.* at 64. Those findings were not clearly erroneous, so they should be upheld.

Sixth and finally, Plaintiffs argue again (Br. 69) that Moran did not fully understand Lutnick's economic incentives. But Moran understood full well that Lutnick was adverse to BGC for purposes of the Berkeley Point transaction. Final Op. 60 n.304; *see* p. 42, *supra.* That Moran may not have known Lutnick's precise ownership interests does not show that he acted to further Lutnick's interests.

In sum, there is no basis for this Court to disturb the Court of Chancery's determinations that Bell, Curwood, and Moran did not act to further Lutnick's interests over those of BGC's minority stockholders. For this reason also, Plaintiffs' claims against Bell, Curwood, and Moran fail.

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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