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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

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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, CFGM, Cantor, Moran, Curwood, Bell
BGC	BGC Partners, Inc.
BP	Berkeley Point Financial LLC
Bell	Special Committee Member Linda Bell
CAB	Answering Brief of Appellees Lutnick, CFGM, and Cantor
Cantor	Cantor Fitzgerald, L.P.
CCRE	Cantor Commercial Real Estate Company, L.P.
CFGM	CF Group Management, Inc.
Curwood	Special Committee Member Stephen Curwood
DAB	Answering Brief of Appellees Bell, Curwood, and Moran
DUS	Delegated Underwriting and Servicing
Gosin	Newmark CEO and BGC executive Barry Gosin
GSE	Government-Sponsored Enterprise
Houlihan	Houlihan Lokey, Inc.
IPO	Initial Public Offering
Narasimhan	Beekman's Managing Partner, Shekar Narasimhan
Newmark	Newmark Group, Inc.
OB	Appellants' Opening Brief
Op.	Memorandum Opinion, dated Aug. 19, 2022
Sandler	Sandler O'Neill + Partners, L.P.
Special Committee or Committee	Special Committee of the BGC Board that was Created to Evaluate the Transaction, Comprised of Bell, Curwood, Dalton and Moran
Transaction	BGC's Acquisition of BP from CCRE

W&D	Walker & Dunlop

PRELIMINARY STATEMENT

Defendants pretend that the trial court's decision reflected a straightforward application of the entire fairness doctrine to a common set of facts. To the contrary, especially in light of findings of fact below and other undisputed facts of record, the trial court's decision turns the entire fairness standard into a test of "partial fairness, maybe," applying a presumption of validity under which all doubts about the process and substance of the challenged transaction are resolved in favor of the conflicted controller. If affirmed, the decision will undermine counsel seeking to encourage clients to insist on independent, informed negotiation with a controller bent on effecting a conflict transaction.

In this case, the process was anything but fair: Howard Lutnick, a notoriously sharp-elbowed executive with a powerful economic incentive to favor Cantor, invaded the province of the Committee by selecting its co-chairs, interviewing its prospective financial advisors, and selecting as his negotiating counterpart a firm (Sandler) that was led in the engagement by the relationship manager for Lutnick-controlled companies (Sterling). Sandler was simultaneously seeking a role from Cantor in the IPO, a fact never disclosed to the Committee, and offered to take the assignment for a far below market rate, a fact which the lower court simply ignored. Moreover, having chosen Gosin as the BGC employee who would respond to Lutnick's presentation with BGC's perspective on value, Gosin was reduced to providing a "qualitative" assessment after having procured written advice from a leading expect—never disclosed to the Committee—that paying $600 million for BP ($275 million less than what BGC ultimately paid) would be erring on the high side of valuation. Instead, Lutnick increased the purchase price to pay for his taxes and then extracted an additional $89.2 million true-up payment through a book value adjustment provision that the Committee simply failed to appreciate.

The flaws in the Committee's process recognized by the trial court are easily attributable to its members' lack of independence: its task of negotiating against Lutnick was led by a director (Moran) who became emotional "thinking about why I like Howard" and who thought that "Howard could negotiate for BGC with himself as Cantor." Moran deferred to Lutnick in the selection of advisors—admitting the Committee would have selected different counsel if Lutnick had not approved—and scope of their engagement, demonstrated in private communications that he viewed himself as aligned with Lutnick, and left the rest of the Committee in the dark about those communications.

The trial court also found fairness of price despite overwhelming contrary market and record evidence. A buyout from months earlier that the Committee viewed as a critical data point implied a value for BP $251 million below the Transaction price. Cantor earned approximately $350 million by buying out CCRE's investors and flipping BP to BGC. Lutnick told everyone in February and

March that the "proposed" purchase price was $725 million. The value for BP implied by CCRE's 2014 acquisition of BP was far below the Transaction price.

Instead of coming to grips with that real-world evidence, the trial court gave dispositive weight to a methodologically unprecedented and unsound comparable company analysis that rested entirely on one company that everyone agreed was not perfectly comparable. After roundly *discrediting* the analyses Defendants' expert relied on, the trial court drew this valuation from an analysis Defendants' expert characterized as "illustrative" and expressly *did not* rely on. No Delaware case has ever found fairness based on a valuation analysis so flimsy and perfunctory.

Instead of applying exacting scrutiny, the trial court overlooked disloyal behavior by at every turn either giving the Committee and the Transaction the benefit of the doubt (if there was any) or by ignoring critical evidence of unfairness. It minimized Lutnick's interference with the selection of the Committee's co-chairs and advisors because the Committee later rubber-stamped Lutnick's selections without him present. It elided Sandler's conflicts, and ignored that Sandler withheld information from the Committee. It all but ignored Gosin's last minute decision, after speaking with Cantor executives, to bury Narasimhan's assessment that BP was worth $275 million less than BGC ultimately paid because Gosin's rambling and longwinded answer to the trial court's question included that he did not find it reliable. It entirely ignored that Gosin coordinated his presentation with Lutnick. It found unambiguous testimony about Moran's affection for Lutnick and belief that Lutnick could negotiate with himself to be "clumsy" and "muddled." It found Curwood independent despite his admission that he was grateful to the controller for allowing him "to make the money that [he] needed to support [his] family." It gave significant weight to how the Transaction was negotiated even though Defendants entirely failed to adduce evidence related to the sole negotiating session and the court thus found that there is "mystery around how the ultimate deal was reached."

Defendants do little more than repeat the trial court's opinion. They have no answer for the alignment between Moran's testimony that Lutnick could negotiate with himself and the original resolutions that allowed him to do just that. They cite no case supporting the trial court's conclusion that Curwood was independent or that the process was fair despite the lead director acting negligently, "perhaps even grossly so," and withholding material information from his fellow Committee members. They make no attempt to harmonize the trial court's finding that the details of the buyouts were among the information the Committee viewed as most important with its contrary finding that the price implied by the buyouts is irrelevant. They make no effort to explain why Lutnick's $725 million "proposed" purchase price was not indicative of value regardless of whether it was a committable offer. They offer no coherent explanation for why BGC paid extra to acquire BP outright.

They offer no meaningful defense of the trial court's sole valuation supporting the Transaction's fairness.

The trial court's opinion reflects a sea change in the application of the entire fairness standard. If the threat of entire fairness review is to shape future behavior by conflicted fiduciaries and their advisors, that decision must be reversed.

ARGUMENT

I. THE PROCESS WAS NOT ENTIRELY FAIR

Defendants concede that legal errors are reviewed *de novo*. CAB 32. As stated in *Kahn v. Lynch Communication Systems, Inc.*, "review of the formulation and application of legal principles … is plenary and requires no deference." 669 A.2d 79, 84 (Del. 1995). And a key element of Plaintiffs' appeal of the trial court's fairness determination is that, as illustrated in this section, the court committed reversible error in applying the fair process prong to its own factual findings and other undisputed facts.

A. THE TRIAL COURT MISAPPLIED THE FAIR PROCESS PRONG IN MINIMIZING ACTIONS THAT "MARRED" THE PROCESS

Individually and collectively, the following circumstances should have precluded any finding that the process was fair.

1. The Process Was "Marred" by Moran's Supine Acceptance—and Hiding—of Lutnick's Involvement in the Selection of the Committee's Leadership and Advisors

The outset of "the process was marred by Lutnick and Moran's actions," and Moran kept his fellow Committee members in the dark about his early communications with Lutnick. Op. 2, 59. Among other things, Lutnick asked Moran and Bell to co-chair the Committee; and Moran withheld from the Committee that Lutnick was given a veto right over the Committee's legal advisor, interviewed the two Committee prospective financial advisors, and was permitted to choose his negotiating foe. OB 40. Even where a controller has only been involved in selecting a committee's financial advisor, this Court and the Court of Chancery have expressed concern about the advisor's ability to simulate arm's-length bargaining and, in turn, the fairness of the process. *See* OB 39 (discussing *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)).

The trial court committed legal error by acknowledging these and other process "flaws," Op. 109, but endorsing the outcome because Sandler and the Committee supposedly bargained hard at the end. Op. 64. Just as one cannot evaluate a film by watching only the final scene, one cannot evaluate the fairness of a process based solely on the final negotiation. In either case, the last act must be evaluated in the context of what came before it. That is why, as Chancellor Allen explained more than three decades ago in *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, the selection of advisors is critically important to the fairness of the process. 45 BUS. LAW. 2055 (1990). A special committee process "will be unmistakably imbued with the character of a genuine attempt to maximize advantage on behalf of the shareholders" only if the financial advisor is independent, "accept[s] in their hearts" that their client is the committee (not the controller) and is "prepared to forego future business." *Id.* at 2062. Respecting the importance of implementing a structure conducive to simulating arm's-length bargaining *ab initio*, *cf. Kahn v. M & F Worldwide Corp.*, 88 A.3d 638 (Del. 2014), the parties and trial court could not identify a single case concluding that a process was entirely fair where the controller overreached to the extent Lutnick did. OB 41.

Defendants claim that "[t]he trial court found that the committee chose its own co-chairs," DAB 56; *see also* CAB 39, but the trial court in fact found that "Lutnick had a role in selecting the Special Committee's chairs." Op. 55. In an instance of judicial deference in place of exacting scrutiny, however, the trial court found that the Committee's effectuation of Lutnick's selections at a later meeting without Lutnick present "remedied" that process flaw. Op. 55-56. In so finding, the trial court ignored that Moran testified that the selection of co-chairs at the meeting Lutnick did not attend was a rubber-stamp formality with no deliberative content, and likely "predetermined." A1761 (215:24-216:17).

Defendants otherwise argue against a strawman. They falsely say that Plaintiffs "claim that they are aware of 'no case' finding entire fairness when a controller provided early input regarding committee advisors," CAB 41, and cite *In re Cysive, Inc. Shareholders Litigation*, 836 A.2d 531 (Del. Ch. 2003) as such a case. *Cysive* is inapposite. In *Cysive*, the full board retained Broadview to sell the company to a third party. *Id.* at 553-54. After no third-party came forward and the controller expressed interest, the committee formed to negotiate against the controller retained Broadview. *Id.* at 554. The court found that Broadview was not conflicted because it had been retained by the board, and ultimately took comfort in the entire fairness of the transaction because Broadview conducted a market check, the committee negotiated for a post-signing market check, and no higher bid emerged. *Id.* at 554-56. None of that happened here.

2. Sandler Was Compromised as a Bargaining Agent and Thus Could not Simulate Arm's-Length Bargaining on the Committee's Behalf

Defendants contend that the trial court correctly held that Sandler was independent, CAB 21-22, but don't engage with the most troubling facts demonstrating that Sandler was not "prepared to forego future business" from Lutnick. Defendants do not address that Sterling was Sandler's relationship manager for Lutnick-affiliated companies. OB 15. Defendants do not address that Sandler was simultaneously seeking an IPO role, withheld that information from the Committee, and that Bell testified she would have wanted to know that. OB 12; *see also In re Rural Metro Corp.*, 88 A.3d 54, 100 (Del. Ch. 2014) ("Most egregiously, RBC never disclosed to the Board its continued interest in buy-side financing and plans to engage in last minute lobbying of Warburg."). Defendants do not address that at the time Sandler had its hand out to Cantor for an IPO role, it offered to represent the Committee for a far below market fee, Op. 16-17, in obvious expectation of being rewarded on the back end. Defendants concede that the trial court clearly erred in holding that Sandler did not ultimately receive an IPO role, but seek to minimize that error by claiming Plaintiffs argued below that the IPO role was irrelevant. CAB 44 n.6. In fact, Plaintiffs argued that Sandler would have been conflicted even if it had not ultimately received the role it did. *See* A1072-73 n.286 (citing *Rural Metro*, 88 A.3d at 100 ("[T]he fact that RBC ultimately did not provide staple financing and receive the buy-side fees it coveted does not mean that RBC did not act consciously to obtain them.")).

Against the backdrop of Lutnick's approval of Sandler, Lutnick's selection of Sandler as his negotiating foe, and Sandler's conflicts, the trial court committed legal error by relying on Sandler to prove that the process reflected arm's-length bargaining. Op. 64. As established in Plaintiffs' opening brief, Sandler's conflict manifested itself in numerous ways: its request of Cantor for "ammunition" to distinguish the 2017 buyouts (OB 24); its deference to Cantor on timing despite its belief that it "had a few more weeks," OB 26, and its concomitant mistake to its key analysis; and its failure to educate the Committee about the impact of backdating the balance sheet to March 31 before agreeing to that term. OB 41.

The trial court ignored this evidence, and Defendants mischaracterize most of it. CAB 42-43. They say the Committee understood the consequences of backdating the balance sheet, CAB 48-49; DAB 52, but cite no evidence demonstrating the Committee's knowledge when it agreed to that term. *See infra* I.A.5. They say

Sandler did not allow Cantor to bully the Committee on timing, CAB 42, but ignore that Lutnick pressured the Committee over Memorial Day weekend, Sandler thereafter lamented the accelerated timeline, and the Transaction was agreed to just five days after the Committee recognized the need "to take the time it need[ed] to digest" diligence that it had not yet received and form a view on value. OB 24, 26. They say Plaintiffs do not address the trial court's ruling that Lutnick's control of the timing did not impact the process, CAB 35, but ignore Plaintiffs' argument that Lutnick's time pressure contributed to Sandler's botched analysis. OB 44.

Regarding that analysis, Defendants fault Plaintiffs for not confronting Sandler with the corrected calculation. CAB 43. Because the calculation is wrong, Plaintiffs did not understand what it purported to show until Sterling's trial testimony. A406-07 (344:7-345:15). After Sterling testified, Plaintiffs provided the corrected calculation to Defendants a day before their expert's examination, and Plaintiffs' expert testified about it on cross. A891 (1680:23-1681:20); *cf.* CAB 43.

Similarly, Defendants mistakenly claim that Plaintiffs never explained Sandler's mistake and the corrected figures are not in the record. CAB 43. Plaintiffs explained in their post-trial brief that the CCRE book value Sandler used was CCRE's book value *after* CCRE partially funded the buyouts. A1055-57 and n.220. The only adjustment Plaintiffs made was to change CCRE's book value to what it was at the time the buyouts were agreed to, which is in the record. *See*, *e.g.,* AR44

(CCRE Consolidated Tab, Column C (total CCRE partners' capital of $1.147 billion)). Regardless, there is no dispute that the value for BP implied by the buyouts was far below the Transaction price. *A fortiori*, Sandler's calculation that BGC got a ***better*** deal was wrong.

Finally, in briefing otherwise dedicated to promoting the province of the fact finder (when convenient to them), Defendants acknowledge that the trial court ignored the key "ammunition" email and ask this Court to weigh evidence and conclude that a contemporaneous email from a Cantor lawyer is less credible than self-serving testimony four years later. CAB 42. That request underscores the trial court's failure to address Sandler's independence holistically and Sandler's lack of effectiveness through the appropriate legal lens.

3. Gosin's Withholding of Narasimhan's Analysis is Comparable to *Weinberger*

The minutes of the April 21 Board meeting and Gosin's subsequent actions to assess BP's value, including his retention of a foremost valuation expert, prove that Gosin's role was to "consider Cantor's valuation analysis and respond with an analysis based on [BGC's] perspective of value." OB 18-19. Narasimhan told Gosin that "it would not be easy to sell [BP] at the price you have indicated to me;" Cantor's valuation was a "stretch" and "not useful at all;" and paying "$600 million for BPC" would be "err[ing] on the high side of valuation." OB 20.

Cantor did not like what Narasimhan had to say. After speaking with Cantor executives the morning of the Committee meeting: (i) Narasimhan did not attend and (ii) Gosin did not speak to the Committee about value, tell the Committee he had retained Narasimhan, or provide Narasimhan's analysis. *Id.* Nor did Gosin tell the Committee he coordinated his presentation with Lutnick or that "whether I got [BP] for $50 million cheaper didn't matter to me." OB 20-21, 46.

Defendants dispute none of this. They don't even dispute that Gosin's coordination of his presentation with Lutnick was a material process flaw. OB 47. Instead, Defendants repeat the trial court's finding that Gosin was not expected to provide a valuation opinion, CAB 47, without addressing the April 21 minutes or Gosin's subsequent retention of Narasimhan. OB 47. And they claim that Gosin's decision to bury Narasimhan's analysis could not be attributed to Cantor but ignore that the decision to bury the analysis came after speaking with Cantor. OB 47-48.

But regardless of whether Cantor directed Gosin to withhold Narasimhan's analysis, or Gosin decided on his own to withhold it for "probably no reason," the Committee was deprived of an objective view that $600 million would be erring on the high side of valuation. In a standard entire fairness analysis, that alone is grounds for finding a process unfair. As Plaintiffs discussed in their opening brief, the burying of the Narasimhan analysis was similar to the withholding of the feasibility study in *Weinberger*, which was a "primary issue mandating reversal." OB 47 (discussing *Weinberger v. UOP, Inc.* 457 A.2d 701, 708-12 (Del. 1983)). Indeed, this case is worse because the hidden valuation was done for the benefit of the Committee, not the controller as in *Weinberger*. Defendants did not even attempt to distinguish *Weinberger*.

4. Sandler Lacked Sufficient Information to "Piece Together" a Comparison of the Buyouts to the Transaction Price

The trial court held that the buyout terms were "among the information that the Special Committee viewed as most important to its process" and if full information regarding the buyouts had "not made its way to the Special Committee, it might have evidenced a lack of fair dealing." OB 48 (quoting Op. 66-67). Plaintiffs' opening brief established that full information did not make its way to the Committee. OB 24-25, 48-49.

Defendants misleadingly claim that the trial court considered and rejected Plaintiffs' arguments. CAB 48. In fact, the trial court never addressed Edelman's June 1 email to Lutnick stating that Sandler lacked the information it needed and never addressed Sandler's miscalculation of the value for BP implied by the buyouts.

Because the trial court ignored this evidence, Defendants again ask this Court to weigh evidence and hold that Edelman and Lutnick, the two Cantor executives most involved in the process, were mistaken about what was provided. CAB 48. But there was no mistake. Cantor provided certain information two days earlier, AR7-12, but Sandler did not have the correct CCRE book value; did not have the ownership percentages of the CCRE investors; and, to use Edelman's words, did not have "a net purchase price for BP in the current transaction" and could not "piece [it] together precisely from what they have received." OB 24-26; A1382. Indeed, the presentation with the incorrect calculation states that Sandler was "not yet sure of dates and details." B296; *see also* A407 (345:16-21). The dispositive proof, which the trial court also ignored, is that Sandler used the wrong numbers and got the wrong result. *See supra* I.A.2.

5. The Committee Did Not Understand the Impact of Backdating the Balance Sheet

On June 6, the Committee unwittingly agreed to set BP's book value at closing equal to its book value as of March 31, and thereby transfer to Cantor all value BP created between April 1 and closing. OB 28. Cantor understood that BP's book value at closing would far exceed its March 31 book value and that, as a result, it would receive a significant distribution on top of the $875 million purchase price. *Id*. No Committee member testified that they understood on June 6 that they had agreed to that term, let alone the consequences of that agreement. The most direct testimony about the Committee's knowledge on June 6 came from Bell, who testified that she believed this term was agreed to at some later date. A517 (637:15-638:2).

Defendants repeat the points made by the trial court in its sole footnote addressing this argument. First, they say that the Committee was both aware that it agreed to this term and that BP's book value was expected to increase between March 31 and closing. CAB 49 (citing B357-59); DAB 52 (citing A587 (782:7-8)). The cited document is the fairness opinion from a month and a half later. The cited testimony is from Curwood about his knowledge of the magnitude of the true-up payment—something he did not know at his deposition (A587 (783:2-5))—and says nothing about the Committee's knowledge on June 6.

Second, Defendants say that the true-up payment was not relevant to Plaintiffs' valuation. CAB 49. It is true that Plaintiffs conservatively excluded a portion of the true-up payment from their valuation based on BP's 2014 multiples.[1] But as Plaintiffs argued below, if one were to apply another company's multiples to BP's economics—as the trial court did in its dispositive analysis—one would have to account for the fact that BP distributed the value it created between April 1 and closing while the other company did not. A1118-19. Defendants' expert accounted for that difference by adjusting the purchase price to $983.8 million, A2868 ¶42, but the trial court ignored it.

[1] Plaintiffs partially accounted for the true-up payment by reducing BP's book value. A872 (1604:9-1605:5).

B. THE COMMITTEE COULD NOT BE RELIED UPON TO SIMULATE ARM'S-LENGTH BARGAINING *EX ANTE* AND DID NOT SIMULATE ARM'S-LENGTH BARGAINING

1. The Committee Was Not Majority Independent

The trial court's erroneous finding that a majority of the Committee was independent infected its fair process analysis, and provides an independent basis for reversal, because the Committee's independence is the "*sin[e] qua non* of the entire negotiation process." *Gesoff v. IIC Indus.*, 902 A.2d 1130, 1146 (Del. Ch. 2006).

(a) Moran

Moran (i) lacked independence based on objective independence criteria and (ii) did not act independently. OB 34-38.

i. The Trial Court Erroneously Found Moran Independent

Moran had myriad professional, social, and philanthropic ties to Lutnick that the trial court improperly ignored by myopically focusing on Moran's respect for Lutnick. OB 7-8, 34-35. Defendants attempt to minimize those ties, DAB 40, but do not meaningfully dispute that the trial court failed to perform a holistic independence analysis following trial. DAB 39-40. That was legal error.

Even if the trial court were correct to focus only Moran's admiration for Lutnick, the trial court's conclusion that Moran's feelings towards Lutnick were not of a bias producing nature was clearly erroneous. OB 35. The trial court (and Defendants) ignored that Moran (i) told Lutnick that he was an "inspiration" to him and that Lutnick's "courage and kindness" were "above anything [Moran had] seen in [his] lifetime," AR43, and (ii) testified that Lutnick "deserves recognition as a great human being." A1729 (86:9-87:3).

The trial court (and Defendants) instead focused only on Moran's teary-eyed testimony about Lutnick, finding that Moran grew emotional about 9/11. Op. 46-47. Defendants proclaim that the trial court's credibility determinations are entitled to deference, but make no attempt to square the trial court's finding with the testimony itself, namely Moran's statement immediately preceding becoming emotional—"***[a]nd I'm proud to be associated with a man that does that kind of work.*** And I'll stop there, because I'll just get teary-eyed"—and the follow-up question and answer:

> Q. Do you need a break, Mr. Moran?
>
> A. No, no, no, no, no. ***I'm just thinking about why I like Howard***, even though he can -- that he's a wonderful – he's a good human being. I'll stop there.

A1732 (98:7-99:9). There was no credibility determination to be made – the testimony is unambiguous. The trial court's conclusion that Moran grew emotional about 9/11 is not "sufficiently supported by the record [or] the product of an orderly and logical deductive process," *Unitrin, Inc. v. Amer. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995) (citation omitted), and thus was clearly erroneous.

But even if this Court agrees with Defendants that Moran became emotional discussing "Lutnick's generosity after the September 11 attacks," DAB 41, that is equally damning. What matters is whether Moran's admiration for Lutnick is of a bias producing nature, not the reason for that admiration. If Moran cannot testify about his admiration for Lutnick's generosity without become teary-eyed, how can he be trusted to negotiate against him?

ii. The Trial Court Erroneously Found that Moran Acted Independently

"Directors must not only be independent, but must act independently." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002). Moran testified that he did not care whether Lutnick "made a few bucks here or a few bucks there." OB 35-36. The trial court found that Moran "agreed to act as the special Committee's chair at Lutnick's request," "worked with Lutnick to identify advisors for the Special Committee,"[2] "asked Lutnick whether Sandler would negotiate the deal price," "communicated with Lutnick about diligence and timing," "did not tell his fellow Special Committee members about those early interactions with Lutnick," and "indicated to Lutnick that the Committee supported the deal before Sandler had formed a view on value." OB 36 (quoting Op. 58-59). Moran testified that "Howard

[2] Defendants claim that "Debevoise, not Lutnick or Moran," set up the calls with prospective financial advisors, DAB 57, but ignore that Lutnick approved of Sandler and Houlihan (AR1-3; AR4); the calls were set around Lutnick's schedule (A1181-82; B110; B111); and co-chair Bell was not even invited. A616-17 (901:16-903:20).

could negotiate for BGC with himself as Cantor," OB 37, and repeatedly used the words "we" and "our" in ways that evidenced he believed he was aligned with Lutnick. OB 36. A director acting independently does not do those things.

Defendants attempt to minimize Moran's use of "we" to refer to him and Lutnick by relying on Moran's testimony—which the trial court did not credit—that "we" referred to the Committee or the Company. DAB 42. But the testimony Defendants ask this Court to credit is flatly inconsistent with the contemporaneous evidence:

- Moran email to Lutnick: "are ***we*** going to want ***them*** [Sandler] to negotiate price????" A1178.
- Moran email to Lutnick: "I am told that ***we*** have not provided the data that ***they*** [Sandler] will need to move the dime very far in the time frame you and I have talked about" and "I have emphasized that ***we*** are running a clock [] on this deal—to both Bill and Brian! Several times!" A1188.
- Moran email to Lutnick: "have you changed ***our*** original timetable for execution???" A1191.

Defendants' argument is also inconsistent with Bell's testimony that Moran's use of "we" and "they" was "all mixed up." A529 (686:12-687:1).

Defendants repeat the trial court's finding that Moran's testimony about Lutnick negotiating with himself was "clumsy," but again fail to engage with the record. DAB 43. Defendants ignore the question and answer following up on Moran's testimony that "Howard could negotiate for BGC with himself:"

> Q. Yeah. So Howard Lutnick was going to be representing both BCG and BP, ***he was effectively going to be negotiating with himself.***
>
> [objection]
>
> A. ***Yeah. And I would say I'd have to admit that's true***. And I repeat, that's why we're here….

A1747-48 (161:10-162:7). They also ignore that Moran's testimony perfectly aligns with the Committee's original resolutions authorizing Lutnick's BGC management team to negotiate against Lutnick's Cantor management team. OB 13. Nothing about Moran's testimony was muddled or clumsy, and the trial court's conclusion that it was—and that he otherwise acted independently—was legal error.

(b) Curwood

No Delaware precedent supports the trial court's finding that Curwood was independent for purposes of negotiating the related-party Transaction. Curwood owed the majority of his income to serving on BGC's board, understood Lutnick could remove him at any time, donated to Haverford in Lutnick's honor, and was ***personally grateful*** to Lutnick for allowing him to support his family. OB 32-33. The trial court found that Curwood's ties to Lutnick related to matters that are "among the most important things in life." Op. 44. Defendants cite no case finding a similarly situated director independent for any purpose but say that finding Curwood to lack independence would "discourage those with 'less-than extraordinary means' from serving on boards of directors." DAB at 32 (citation omitted). Not so. It would at most discourage using directors who are grateful to the controller for allowing them to support their family to negotiate against the controller.

The trial court erred as a matter of law by requiring Plaintiffs to prove independence for Rule 23.1 purposes through trial, determining that Curwood lacked independence under Rule 23.1, but then determining that Curwood was independent for purposes of the Transaction based on an amorphous standard that is apparently higher than the Rule 23.1 standard. Even if "[i]t 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[,]" DAB 33, that maxim is inapposite because Curwood was asked to do more than ***vote*** on the Transaction. He was tasked with ***aggressively negotiating a related-party transaction*** against a controller to whom he felt personal gratitude.[3]

Even if more were required to demonstrate that a director could not impartially negotiate a related-party transaction against a controller than to demonstrate that a

[3] The cases Defendants rely on, DAB 33-34, do not address the same question. *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *13 (Del. Ch. May 2, 2022) (considering board's independence "for purposes of *voting sterilization*"); *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019) (noting that "the decision whether to sue someone is materially different and more important than the decision whether to part company with that person on a vote about corporate governance"); *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003) (assessing independence for purposes of serving on an SLC).

director could not impartially consider a demand, that's not the standard Defendants advocate and the trial court applied. Rather, the trial court replaced the objective independence analysis that Delaware courts have applied for decades in favor of a subjective test that can only be answered at trial based on the trial court's determination as to whether a director's (self-serving) testimony that they were not thinking about their personal gratitude to the controller when they were negotiating was credible. DAB 31-32. This Court should not embrace that standard. To do so would be to substitute fiduciary self-regard for judicial scrutiny.

(c) Bell

Plaintiffs' opening brief detailed the myriad ties between Bell and Lutnick that, properly viewed in their totality, at a minimum created a triable issue as to Bell's independence. OB 38-39. Plaintiffs stand on the arguments in their opening brief other than to respond to Defendants' argument that Bell's "independence" was "specifically evaluated" at trial. DAB 29. The trial court decided at summary judgment that Bell was independent, A261-64, and Defendants argued at trial that "the record on appeal is going to be limited to what was before [the trial court] on summary judgment." A518-519 (643:14-645:9). Defendants cannot now rely on the trial record to cure the trial court's legal error at summary judgment.

2. The Trial Court Erred in Finding that the Committee Did Not Operate with a Controlled Mindset

The trial court's finding that there is no evidence that Moran jeopardized the substance of the Committee's process, Op. 60, is irreconcilable with its finding that Moran did not tell his fellow Committee members about his interactions with Lutnick. Op. 59; *see also* OB 41-42 (citing *Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 835 (Del. Ch. 2011) (burden of whether Committee would have achieved a superior result had it known of Lutnick's interference "must rest with the fiduciaries who created" the uncertainty). Defendants similarly say that "there is no evidence that the committee was harmed" by Moran's actions, DAB 58, but that is incorrect as a matter of law: it is not up to Plaintiffs to prove such harm, but rather is incumbent on Defendants to demonstrate that depriving the Committee the opportunity to retain a truly independent financial advisor did not adversely affect the outcome.[4] Given Sandler's inadequate representation, Defendants could not meet that burden.

Plaintiffs' opening brief further established that the trial court's findings that Moran acted negligently and "perhaps" "grossly so," and "must have known better" are irreconcilable with its finding that the Committee was "well-functioning." OB

[4] Defendants say Plaintiffs ignore that the trial court would have shifted the burden, CAB 44, but Defendants did not argue for a burden shift, Op. 50, and the trial court's rationale for potentially shifting the burden is flawed for all the same reasons its fair process determination is flawed.

42. Defendants offer no response at all to this argument. Neither brief even uses the term "gross negligence," much less attempts to defend the trial court's legal conclusions.

The only controlled mindset arguments Defendants respond to are that the Committee did not bother to consider Lutnick's economic incentives and allowed Lutnick to dictate the Transaction's timing. Regarding economic incentives, Defendants falsely claim that Moran and Curwood simply did not know "Lutnick's precise ownership interests in Berkeley Point compared to BGC." DAB 42. Moran admitted he ***did not consider*** that Lutnick's differing economic stakes might have incentivized him to cause BGC to overpay, A613 (887:24-888:6), while Curwood believed there was ***no circumstance*** under which Lutnick could benefit from causing BGC to overpay. A2109 (179:8-180:13). Regarding timing, as established above, Defendants' claims that Lutnick did not control the Transaction's timing and BGC was not harmed as a result are wrong. *See supra* I.A.2.

3. Defendants Did Not Establish That the Committee Achieved Meaningful "Concessions"

Plaintiffs' opening brief established that the trial court's conclusion that the Committee extracted "meaningful concession[s]" by achieving its preferred structure was unsupported. OB 44-45. The contemporaneous evidence belies the notion that the Committee preferred an outright acquisition of BP; there was no rational reason for the Committee to pay more for its supposed preferred structure;

and the Committee's attainment of that structure did not require a concession from Lutnick in any event because, after accounting for the true-up payment, the price made him economically indifferent between structures. OB 44-45.

Defendants' responses elide facts that undercut each of them. They insist that the Committee's desire for BGC to have full control "makes perfect sense" because it would enable BGC to sell BP "if BGC so desired," CAB 46; *see also* DAB 44, but ignore that (i) Lutnick had control regardless and (ii) preserving the ability to sell BP made little sense in the context of a larger deal designed to spin-off BP and Newmark, the logic of which Defendants insist was unassailable. OB 44. They cite a ***Cantor*** banker for the proposition that the Committee's only documented offer was a strategic way to move the conversation to an outright acquisition, CAB 45, but ignore the Committee's own amendment to Sandler's engagement letter in contemplation of acquiring 95%. OB 44-45.

Defendants focus on whether Lutnick's $725 million "proposal" was an official "offer." CAB 46-47. But whether it was a committable demand is not the same as whether it was indicative of price. OB 59-60; *infra* II.D.3. Even setting that aside, Defendants ignore that the Committee's negotiating "win" was a near-total capitulation after accounting for the true-up payment. Lutnick was economically indifferent between $880 million for 95% and $1 billion for BP outright. OB 45. After accounting for the true-up payment, Cantor received an amount ($964.2 million) that was in line with the price he sought for BP outright. If the difference between $1 billion and $964.2 million is "[t]he most compelling evidence that the transaction resulted from a fair process," Op. 71, the process cannot be entirely fair.

Finally, Defendants strangely argue that "agreeing to the adjustment did not further Lutnick's interests" because BGC would have to pay for the value regardless. DAB 52. But as Plaintiffs established in their opening brief, and Defendants do not dispute, Cantor's $1 billion demand was not tied to a specific balance sheet. OB 44. Fixing the balance sheet as of March 31 was a term Cantor inserted to make up the difference between what Cantor was demanding and what the Committee agreed to as a headline price. OB 28.

* * *

The process bore no resemblance to arm's-length bargaining. The trial court reversibly erred in finding that the process was entirely fair. OB 49-50.

II. THE FAIR PRICE DETERMINATION IS INDEFENSIBLE

Defendants attempt to manufacture a disagreement about the standard of review of the fair price prong, but there is no dispute that the trial court's fair price determination must be reversed if its valuation supporting the Transaction's fairness is not "grounded in relevant, accepted financial principles." *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 22-23 (Del. 2017), cited at OB 3; *see also* CAB 50-51 (trial court's fair price determination must be "based on the application of recognized valuation standards") (citation omitted).

A comparable company analysis using a single comparable without adjustments to account for firm differences even though every witness acknowledged that the firms had meaningful differences is not grounded in accepted financial principles. Neither the trial court nor Defendants cited a case, treatise, article, or other authority endorsing the trial court's methodology. For that reason alone, the trial court reversibly erred by giving dispositive weight to the W&D analysis. But the trial court's fair price errors went much further. The W&D analysis was fatally flawed for several additional reasons, and the trial court's rationale for rejecting market and record evidence universally proving that the Transaction price was unfair does not withstand scrutiny. The trial court's defective fair price analysis independently mandates reversal.

A. Defendants Cannot Defend the Trial Court's Failure to Account for Differences Between W&D and BP

It is undisputed that to perform a comparable company analysis consistent with accepted financial principles, one must account for differences between the public companies and the target company. OB 62. "'[T]he valuation treatises generally view the comparable companies methodology as inferior to other methodologies" because "***it does not take into account the important differences among firms***.'" OB 62 (quoting *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at *33 (Del. Ch. July 19, 2019) (citation omitted), *aff'd sub nom. Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313 (Del. 2020)).

After declining to give meaningful weight to any valuation Defendants' expert relied on, OB 60, the trial court determined that the Transaction price was entirely fair based on a comparable company analysis that does not account for important differences among the firms. Even though the trial court recognized that W&D and BP were not perfectly comparable, OB 63, the trial court applied W&D's multiples to BP's economics without analyzing what adjustments would be appropriate. That was unprecedented. Neither party identified a single case that has ever credited a comparable company valuation based on a single comparable without adjustments, much less one where the court failed even to analyze what adjustments would be appropriate.[5] The trial court's W&D analysis thus does not pass the acceptable financial principles test.

To be fair, the trial court had no basis in the record to perform the W&D analysis in a way that conformed to accepted financial principles because Defendants' expert offered the W&D analysis for "illustrative purposes." OB 61. Defendants claim that it "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." CAB 60. Not true. It was illustrative in the sense that Defendants' expert did not rely on it, and accordingly did not perform any analysis to support it. Defendants' expert's summary of conclusions does not mention a standalone W&D analysis. A2857 ¶10. The body of his report explicitly states that, "***for illustrative purposes*** I also present a valuation of BP based only on the valuation multiples of W&D." A2904 ¶155; *see also* A2869-70 ¶44(a). The footnote accompanying paragraph 155 provides, "[m]y conclusions in this report are based on a number of ***other*** different valuation approaches that ***rely on a larger number of firms***." A2904 ¶155 n.175.

Although Defendants wrongly argue that their expert's analysis was not illustrative, they concede (by silence) that neither Hubbard nor the trial court

[5] For the same reason, the cases cited by Defendants for the proposition that a comparable company analysis using a single comparable could theoretically be appropriate, CAB 62-63, are inapposite.

assessed how to account for differences between the firms. Ultimately, that's what matters, and it requires reversal.

B. ADDITIONAL ERRORS FATALLY UNDERMINE THE TRIAL COURT'S W&D ANALYSIS

Beyond the trial court's threshold error of failing to support the valuation it gave dispositive weight, the trial court's analysis suffered from several flaws that require reversal in their own right.

1. All Record and Market Evidence Prove That Applying W&D's Multiples to BP's Economics Overvalued BP

The record evidence concerning differences between BP and W&D demonstrates that the trial court overvalued BP by applying W&D's multiples to BP's economics. W&D was twice BP's size, had a higher return on equity, and was less risky because of its broader product mix, each of which required downward adjustments to W&D's multiples. OB 64. Defendants concede the first two points but argue that W&D was riskier because GSE loans are low risk. CAB 61. That argument misses the point. W&D was less risky because its broader business mix made it less susceptible to GSE-industry risks, not because GSE lending is more or less risky than non-GSE businesses. OB 64. Regardless, Defendants cannot rescue the trial court's failure to analyze what adjustments to W&D's multiples were appropriate by arguing in their appellate brief that one difference between firms supports an upward adjustment.

Market evidence confirms the need to adjust W&D's multiples downward to value BP. Defendants do not dispute that (i) at the time the 2014 transaction signed, W&D's multiples were significantly higher, OB 64, or (ii) between the IPO and trial, W&D's enterprise value growth far outpaced Newmark's, which would not have happened if W&D and BP were perfectly comparable. OB 64-65. Defendants offer no defense for the trial court ignoring this market evidence.

Finally, Defendants argue that even if the trial court's W&D analysis is defective, there is no proof that downward adjustments would have brought the valuation below the Transaction price. CAB 64. In other words, Defendants argue that the trial court's error was harmless. But it is Defendants' burden to establish that the error was harmless, *Williams v. State*, 98 A.3d 917, 922 (Del. 2014), and they did not even attempt to meet that burden.

2. Price-To-Earnings Multiples and W&D's Price-To-Book Multiple Cannot be Used to Value BP

Even setting aside the trial court's fundamentally flawed methodology and differences between firms that required downward adjustments, the W&D analysis does not pass the accepted financial principles test because (i) price-to-earnings multiples cannot be used to value BP and (ii) W&D's price-to-book multiple undisputedly overstates BP's value.

The trial court correctly found that, due to an accounting quirk, BP's net income does not reflect its actual income. OB 65 (citing Op. 92-95); *see also* Op. 94. A ***price-to-earnings*** multiple is a multiple of ***net income***, and the trial court erred by failing to explain how a net income multiple could be used to reliably assess BP's value when its net income does not reflect its actual income. OB 65-66. Defendants claim that the trial court's real issue with BP's net income was that it was not a proxy for cash flows. CAB 63. That was one issue, Op. 92-93, but the impact of MSRs on net income was a separate issue, Op. 94-95, that renders net income multiples unsuitable for valuing BP.

Applying BP's 2014 net income multiple to its 2017 net income illustrates the point. The 2014 transaction implied a net income multiple of 23.0x. AR15. Defendants say that the 2014 multiples should have been adjusted upward, but even applying the 2014 multiple to BP's 2017 net income yields a value for BP of over $2 billion.[6] No one believes BP was worth $2 billion, proving the unsuitability of that multiple. A879 (1632:1-6).

Applying W&D's ***price-to-book*** multiple to BP's book value necessarily overstates BP's value. Price-to-book multiples are, in part, inversely related to the percentage of assets listed at fair value on the balance sheet, and W&D lists a lower percentage of assets on its balance sheet due to its broader business mix. OB 66.

[6] 23x * $92.5 million (*see* AR15) = $2.1275 billion.

W&D therefore trades at a higher price-to-book multiple than BP. *Id*. Defendants do not dispute the point. Their only argument is that they did not concede the point at trial, CAB 63-64,[7] but they've conceded it now by failing to substantively respond to it.

C. THERE IS NO ALTERNATIVE BASIS TO AFFIRM THE TRIAL COURT'S FAIR PRICE DETERMINATION

Defendants misleadingly claim that the trial court based its findings of fair price on a range of evidence. CAB 58. Although the trial court determined that the Transaction price was "'forged in the crucible of objective market reality,'" Op. 79-80 (quoting *Van de Walle v.Unimation*, *Inc.,* 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991)), it ultimately held based solely on the W&D analysis that the Transaction price fell within a range of fairness and "[t]he price was therefore fair." Op. 105.

Moreover, the Transaction price was not actually "forged in the crucible of objective market reality." It had none of the hallmarks of a transaction in which this Court has endorsed giving heavy, if not dispositive, weight to the deal price. *See DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 349 (Del. 2017) ("[E]conomic principles suggest that the best evidence of fair value was the deal price, as it resulted from an open process, informed by robust public information,

[7] In fact, Hubbard testified that he was using only W&D's price-to-earnings multiple to value BP. A838 (Hubbard 1471:12-16); *see also* AR49 (no mention of W&D price-to-book multiple).

and easy access to deeper, non-public information, in which many parties with an incentive to make a profit had a chance to bid.”). It was a related party transaction “marred” by the actions of the Committee’s lead director and the controller. BP was a private company with no observable trading price or market value. The Committee considered no alternatives. There were no other prospective acquirers. There was no passive market check. There was no stockholder vote. There is no basis to default to deal price here.

Nor is there a basis to affirm based on Defendants’ event study, CAB 59 n.9, which the trial court gave “little weight.” Op. 80. The event study was flawed for several reasons, including that it ignored that BGC disclosed that BP’s pre-tax income was expected to increase by at least ***35%*** in 2017 and 2018 based on the projections that had been created for the deal, AR35; Op. 83, but that BP materially decreased its projections a month after the Transaction closed and ultimately grew just ***4%*** in 2017. OB 28-29; A1520. Indeed, when the market received more information about BP in connection with the IPO, BGC’s market capitalization fell by more than $400 million, OB 29, consistent with the rest of the real-world evidence demonstrating that BGC far overpaid.

D. DEFENDANTS HAVE NO COGENT EXPLANATION FOR THE TRIAL COURT'S DETERMINATION TO IGNORE RELIABLE MARKET AND RECORD EVIDENCE OF BP'S VALUE

The trial court's reliance on a methodologically flawed illustrative analysis is all the more indefensible given the market and record evidence demonstrating price unfairness.

1. Defendants Endorse the Trial Court's Valuation That Supports $70 Million in Damages

The trial court found that CCRE's 2014 acquisition of BP could be used to reliably assess BP's value and that it implied a value for BP of $805 million. OB 52-53.[8] Plaintiffs' opening brief explained that this valuation that implied $70 million in damages nevertheless overvalued BP because it (i) adjusted forward-looking multiples based on past events, (ii) focused on movement in a single multiple to the exclusion of movement in other multiples that supported a countervailing adjustment, (iii) gave added weight to movement in W&D's price-to-book multiple without assessing ***why*** W&D's price-to-book multiple traded up or whether changes

[8] Defendants suggest that this comparable transaction analysis is similar to the W&D analysis because they both rely on a single comparable, CAB 62, but there are several important differences. First, the comparable transaction analysis involved the ***same firm*** that was transacting in the ***same business***. A852 (1525:5-18). Second, Plaintiffs' expert examined at length whether industry or firm-specific differences supported adjusting BP's multiples, *see*, *e.g.*, A2745-56 (¶¶ 35-51), A2760-62 (¶¶ 59-60), A2762-69 (¶¶ 62-71), A2773-78 (¶¶ 78-84); A3218-23, A869 (1592:12-1595:11), thereby providing the trial court a basis upon which to assess whether to adjust BP's multiples. No similar analysis was performed and no similar record exists for W&D.

in W&D's price-to-book multiple would support changes to BP's multiple, and (iv) exacerbated that error by double-counting changes in W&D's multiple. OB 52-56. Even partially correcting for these flaws yields a valuation for BP of $712.52 million, in line with other market and record evidence. OB 56.

Defendants do not argue that the trial court erred in valuing BP $70 million below the Transaction price based on CCRE's 2014 BP acquisition. On the contrary, they claim that "there is no world in which the court's adjustment to the price-to-book multiple was error, much less clear error." CAB 52. They defend the trial court's decision to take "a conservative approach" by "finding that the multiple would have increased by only 20.3%, the increase that had been calculated for Berkeley Point's broader industry class." CAB 53 (citing Op. 103). Plaintiffs agree that may have been a supportable approach, but that's not actually what the trial court did. If it had, it would have determined that the 2014 transaction implied a value for BP of $712.52 million. OB 56. Instead, the trial court averaged changes in W&D's price-to-book multiple and the broader industry class, thereby giving undue weight to (and double-counting) changes in W&D's price-to-book multiple over that period.

Defendants do not attempt to defend the trial court's *sua sponte* reliance on changes in W&D's price-to-book multiple to adjust BP's multiple. They don't mention, much less defend, the trial court's failure to assess why W&D's multiple increased between 2014 and 2017 or whether the reasons for that increase would be relevant to BP's multiple. OB 55. They don't dispute, much less defend, the trial court's error of double-counting changes in W&D's multiple. OB 56.

Defendants' only defense of the trial court's adjustment is their accusation that Plaintiffs are "cherry-picking" by noting that industry price-to-earnings multiples fell 38.1% between 2014 and 2017, CAB 54, but it was the trial court that did the "cherry-picking." While industry price-to-earnings multiples, W&D's price-to-earnings per share multiple, and W&D's EV/EBITDA multiple fell between 2014 and 2017, OB 54-55, Plaintiffs did not argue that a downward adjustment was warranted. Rather, Plaintiffs argued that to assess whether to adjust BP's multiple, one needed to take a holistic view. OB 54-55. Defendants' expert agreed. A3085 ("To develop a more complete understanding of how industry conditions changed between 2014 and 2017, in Exhibit 2B I compare all of the industry-specific valuation multiples…."). But the trial court focused on movement in a single multiple without developing "a more complete understanding of how industry conditions changed between 2014 and 2017." Just as it would have been error to lower BP's 2014 price-to-earnings multiple by 38.1% or increase BP's "Aggregate Market Capitalization/Net Income" multiple by 322.7%, CAB 54, based on industry movement, so too was it error for the trial court to increase BP's price-to-book multiple based solely on industry movement in that multiple.

2. Defendants Offer No Cogent Explanation for the Trial Court's Decision to Give No Weight to the $624 Million Value for BP Implied by the Buyouts

The buyouts were the product of significant arm's-length negotiation and implied a value for BP of $624 million. OB 56-58. Defendants do not dispute that the buyouts were negotiated over a period of several months, the buyout terms were not contractually fixed, the negotiations were "complicated," or that the investors were bought out on different terms. *Id.* Defendants do not dispute that Cantor earned $347 - $368 million in a few months by buying out CCRE's investors and flipping BP to BGC. OB 56-57.

The trial court's finding that "the terms of the 2017 CCRE investor buyouts" was among "the information that the Special Committee viewed as most important to its process," is irreconcilable with the trial court's decision to afford no weight to the value for BP implied by the buyouts. OB 57-58. Sandler calculated the premium to book that Cantor paid CCRE's outside investors and took comfort in its (incorrect) assessment that Cantor was demanding from BGC a lower premium. As Plaintiffs asked rhetorically in their opening brief, OB 58, why would Sandler take comfort in an irrelevant data point?

Defendants have no answer. They repeat the trial court's holding that the buyout prices were similar to the preferred rates of return, CAB 55-56, but ignore that at most demonstrates the investors believed the preferred returns accurately reflected CCRE's value. They make no effort to explain why Sandler and the Committee would have used the premium to book paid to CCRE's investors as a measuring stick to assess the Transaction's fairness if the buyout was irrelevant to value. Instead, Defendants suggest that Sandler ultimately did not consider the buyouts to be relevant. CAB 55 (citing A406-07 (342:12-345:15)). ***That is the opposite of what Sterling said.*** Sterling testified about his team's analysis and (incorrect) conclusion "that we were not paying more than Cantor paid to bring in the outside investors, which had been, as I testified earlier, a concern, and why we wanted to see the data." A406-07 (344:7-345:15).

Defendants also make no effort to explain why the buyout negotiations would have been complicated and lengthy if the terms were set based solely on the limited partnership agreements. They emphasize that the investors could not sell their stakes without Cantor's permission, CAB at 55-56, but fail to explain why that's relevant here when it was Cantor that wanted to buy out the investors to facilitate the sale of BP to BGC. And Defendants have no answer for how Cantor could turn a $350 million profit by buying out CCRE's outside investors and flipping BP to BGC, and the latter transaction nevertheless be entirely fair.

3. Defendants Repeat the Trial Court's Determination that $725 Million was not an "Offer," But Ignore Its Relevance to Fair Price Regardless

Throughout February and March, after agreeing to pay \$1.1 billion to buy out CCRE's investors and when he was attempting to complete the Transaction by the end of March, Lutnick told everyone involved in the process—the Committee and its advisors, Cantor executives, Newmark executives, and BGC executives—that the "potential" or "proposed" purchase price was \$725 million. OB 58-59. To be sure, some (but not all), *e.g.*, A1190; A3147, of the documents with a contemplated \$725 million purchase price were bracketed, likely in recognition that the *seller's* opening demand was unlikely to be accepted and the purchase price would ultimately be lower.

Defendants say that \$725 million was a back of the envelope calculation but ignore that Bell testified that "the \$700 million price was related to obviously business financials, fundamentals of the company at the time as well as business fundamentals and financials of a related company, [W&D] at the time, as well as … other factors, which, you know, a lot of the analysis subsequently … points to." A503 (581:3-10). Bell's testimony was entirely consistent with the minutes, *cf.* CAB 57, which state that Lutnick "commented on potential purchase price in the low \$700 million range, tax strategies, transaction structures and trading multiples in the industry" and "reviewed the DUS business generally, including ongoing revenues from servicing loans, and discussed expected cash flows." A1169-70.

Defendants emphasize that the $725 million price was not based on a "formal valuation," CAB 56-57, but there is no formal valuation from Cantor in the record from any time. So how could one conclude from the absence of a formal valuation at that time that ***Howard Lutnick***—a sophisticated billionaire who had just agreed to pay $1.1 ***billion*** to buy out CCRE's investors—did not have an informed view of BP's value when he told his negotiation counterparty how much he wanted for the business? Stripped of the irrationality of it all, the only argument Defendants have is that it was not a "formal offer," which is irrelevant for assessing whether it was indicative of value. OB 59-60.

The trial court's determination to give no weight to Lutnick's original "proposal" and to otherwise ignore real-world evidence demonstrating that the Transaction price was unfair is an additional basis to reverse separate and apart from the errors pervading its methodologically unsound W&D analysis.

III. MORAN, CURWOOD, AND BELL ADVANCED LUTNICK'S INTERESTS

Plaintiffs' opening brief detailed the many ways in which Moran, Curwood and Bell advanced Lutnick's interests by "creat[ing] the atmosphere in which [Lutnick] could act so freely and improperly." *Mills Acquisition Co. v. MacMillan*, 559 A.2d 1261, 1284, n.32 (Del. 1988). *See generally* OB 68-69. In response, Defendants claim that the Committee "worked to protect the BGC stockholders' interests every step of the way" by (1) "establishing a special committee as soon as they learned of the potential deal," (2) hiring advisors, (3) conducting due diligence, and (4) engaging in "forceful[] and effective[]" negotiations that purportedly involved "winning substantial concessions on price and structure." DAB 44. In other words, the Committee seeks to reduce the entire fairness analysis to a checklist.

But the entire fairness inquiry is far more exacting, and Defendants' surface accomplishments do not withstand scrutiny. As discussed above and in Plaintiffs' opening brief, the Committee failed to advocate for the minority stockholders they purported to represent by, *inter alia*, (i) blinding themselves to Lutnick's incentives, (ii) allowing Lutnick to select the Committee's co-chairs, (iii) allowing Lutnick to increase the price to pay for *his* taxes without pushback, (iv) allowing Lutnick to control the Transaction's timing even when they recognized the need to slow the process, (v) failing to inform themselves of the consequence of backdating the balance sheet and, as a result, effectively capitulating to Lutnick's last-minute $1 billion demand, and (vi) voting for the unfair Transaction.

Moran's disloyal conduct went even further as he "worked with Lutnick to identify advisors for the Special Committee," allowed Lutnick to choose his negotiating counterpart, withheld information from the Committee, viewed himself as aligned with Lutnick, did not care if Lutnick negotiated with himself, and did not care if Lutnick "made a few bucks here and a few bucks there." The trial court found that Moran acted "perhaps" grossly negligent, Op. 111, but also that he "must have known better," *id.*, which plainly implicates the duty of loyalty. Thus, the trial court reversibly erred by finding that Moran and the other Committee defendants did not breach their duties of loyalty.

CONCLUSION

The judgment should be reversed.

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