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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BGC PARTNERS, INC. DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2018-0722-AGB PUBLIC VERSION - Filed: February 17, 2021

THE CANTOR DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs survived a motion to dismiss under Court of Chancery Rule 23.1 with allegations that the directors of BGC Partners, Inc. ("BGC") harbored personal biases in favor of BGC's controlling shareholder and were so economically dependent on their director positions that they could not be trusted to decide whether to bring this lawsuit. Those allegations were unsupported and, in many cases, contradicted by the discovery record in this case. At summary judgment—where facts, not allegations, count—Plaintiffs' demand futility argument cannot survive.

On February 12, 2019, Plaintiffs filed a Verified First Amended Stockholder Derivative Complaint (the "Complaint") challenging a 2017 Transaction through which BGC acquired a 100% interest in Berkeley Point Financial LLC ("Berkeley Point") from Cantor Commercial Real Estate Company, L.P. ("CCRE"). Given that this was an affiliated transaction, as both BGC and CCRE are owned in part and controlled by Cantor Fitzgerald, L.P. ("Cantor") and Howard Lutnick, BGC formed a special committee of independent and disinterested directors to negotiate the Transaction. Plaintiffs, however, never made a demand on those independent and disinterested BGC directors before filing this suit. When defendants moved to dismiss the Complaint under Court of Chancery Rule 23.1, Plaintiffs argued that demand would be futile because the BGC directors were beholden to Mr. Lutnick. In support, Plaintiffs pointed to a handful of sporadic contacts between Mr. Lutnick

and other BGC Board members and argued that these contacts supported an inference of "***thick friendships***" between Mr. Lutnick and the other BGC Board members. (Ex. 13, June 6, 2019 Hr'g Tr. 71:11-13 (emphasis added).) Drawing all inferences in Plaintiffs' favor, as it was required to do, the Court denied Defendants' motion.

Then discovery happened. And discovery showed that there were no "thick friendships" between Mr. Lutnick and the other BGC directors. In fact, discovery turned up no evidence of any personal friendship or outside business relationship between Mr. Lutnick and any of the other BGC directors. Discovery also debunked Plaintiffs' allegations that the BGC directors derived material income from their roles as BGC Board members. For example, while Plaintiffs alleged that one of the BGC Board members derived over 30% of her annual income from her BGC Board compensation, discovery proved that the real number was [redacted]

It is one thing for Plaintiffs to allege that directors lack independence; it is another thing for Plaintiffs to adduce evidence to support those allegations, and Plaintiffs failed to do that here. The overwhelming and undisputed record of director independence is now the basis for two summary judgment motions. First, the independent and disinterested director Defendants are moving for summary judgment on the ground that there is no evidence that they acted to advance the self-interest of an interested party (Mr. Lutnick) or acted in bad faith. Second, in

conjunction with that motion, Defendants Howard Lutnick, CF Group Management, Inc., and Cantor (together, the "Cantor Defendants") hereby separately move for summary judgment on the ground that there is no genuine issue of material fact as to the independence of the disinterested directors and, therefore, Plaintiffs cannot establish demand futility under Rule 23.1. While demand futility normally is an issue addressed at the pleading stage, Delaware law makes clear that the issue can be revisited at summary judgment where, as here, Plaintiffs' allegations have failed to find support in actual facts. *See, e.g., Good v. Getty Oil Co.*, 518 A.2d 973 (Del. Ch. 1986).

In the event Plaintiffs' claims are not dismissed altogether, the Cantor Defendants alternatively seek summary judgment on the issue of which party bears the burden of proof under the entire fairness standard applicable to BGC's acquisition of Berkeley Point. It is undisputed that the Berkeley Point Transaction was unanimously approved by the Special Committee of the BGC Board tasked with negotiating the Transaction. If the Court determines that the summary judgment record establishes that the committee was independent, empowered, and acted with due care, then under Delaware law, the burden shifts to Plaintiffs to prove that the Transaction was not entirely fair. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994).

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Cantor Defendants adopt and incorporate by reference the Statement of Undisputed Material Facts set forth in the Independent Directors' Motion for Summary Judgment as if fully set forth herein. (*See* Individual Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Ind. Dir. Mot.").)[1] What follows is just a brief overview of those undisputed material facts.

In February 2017, Mr. Lutnick, the Chairman and CEO of BGC, informed BGC's Audit Committee (which at the time consisted of Dr. Linda Bell, Stephen Curwood, John Dalton, and William Moran) that BGC was considering acquiring Berkeley Point. (Ex. 2, Feb. 11, 2017 Audit Committee Minutes (BGC0001263).) Commonly referred to as an "agency lender," Berkeley Point is one of only 17 companies pre-approved to originate and service commercial mortgage loans on behalf of each of the Government Sponsored Entities ("GSEs"), including most notably Fannie Mae and Freddie Mac. In early 2017, Berkeley Point was owned by CCRE, which in turn was owned by Cantor. The BGC Board created a Special Committee—comprised of Dr. Bell, Mr. Curwood, Secretary John Dalton, and Mr. Moran—to negotiate the Transaction on behalf of the BGC shareholders. (Ex. 3, Mar. 14, 2017 Board Unanimous Written Consent (BGC0001268).) The Special

[1] Unless otherwise noted, all capitalized terms shall have the same meaning as in the Independent Directors' Memorandum of Law in Support of their Motion for Summary Judgment.

Committee retained Debevoise & Plimpton ("Debevoise") as its legal advisor, and Sandler O'Neill as its financial advisor.

After nineteen meetings of the Special Committee and several months of negotiation between the Special Committee and the Cantor Defendants, on July 13, 2017, BGC's Special Committee recommended the acquisition of Berkeley Point (the "Transaction") to the BGC Board, which adopted the recommendation. (Ind. Dir. Mot. at 40; Ex. 9, July 13, 2017 Special Committee Minutes and Resolution (BGC0000005).) On July 18, 2017, BGC published a press release announcing the terms of the Transaction, including the purchase price. (Ex. 10, "BGC Partners, Inc. Agrees to Acquire 100 Percent of Berkeley Point Financial LLC.") Interestingly, while Plaintiffs in this case allege that BGC overpaid for Berkeley Point by hundreds of millions of dollars, upon announcement of the deal terms, BGC's stock price ticked up slightly. (Ex. 8, BGC Partners, Inc. Stock Chart, July 13-24, 2017.) On September 8, 2017, the Transaction closed, and BGC filed a Form 8-K that included, among other information, Berkeley Point's financial information dating back to at least 2013. (Ex. 12, BGC Partners, Inc. Form 8-K.) That day, BGC's stock price again ticked up slightly. (Ex. 11, BGC Partners, Inc. Stock Chart, Sept. 4-13, 2017.)

In October and November 2018, two different derivative actions were filed challenging the Transaction, and those actions were consolidated on December 4, 2018. (D.I. 9, Granted Stipulation and [Proposed] Order of Consolidation.)

Plaintiffs filed the Complaint on February 12, 2019. (D.I. 25, V. First Am. Stockholder Derivative Compl.)

In March 2019, the Cantor Defendants moved to dismiss the Complaint under Court of Chancery Rule 23.1 on the ground that Plaintiffs failed to make a demand on BGC's Board of directors before initiating this derivative litigation. (D.I. 36, Opening Br. in Support of Mot. to Dismiss V. First Am. Stockholder Derivative Compl. at 1.) At the time the Complaint was filed, the BGC Board had five members—Mr. Lutnick, David Richards, Dr. Bell, Mr. Curwood, and Mr. Moran. (*Id.* at 3.) There was no dispute that Mr. Lutnick was an interested director, and there was no allegation that Mr. Richards (who did not consider the Transaction) lacked independence. (*Id.*) Thus, the motion to dismiss focused on the three members of the Special Committee—Dr. Bell, Mr. Curwood, and Mr. Moran. (*Id.*)

In opposition to the Cantor Defendants' motion, Plaintiffs argued that the members of the Special Committee were beholden to Mr. Lutnick and, therefore, incapable of independently evaluating a pre-suit demand. (D.I. 46, Pls. Opp. to Mot. to Dismiss at 2-4.) In support of their position, Plaintiffs pointed to a sampling of contacts between the Special Committee members and Mr. Lutnick, and argued that these contacts exposed "deep personal friendships" that undermined the Special Committee's independence. (*See generally, id.*) Plaintiffs also alleged that the income derived by the Special Committee members from their BGC Board service

was so "material" that they would not want to risk their directorships by defying Mr. Lutnick's wishes. (*See, e.g., id.* at 49.) By Memorandum Opinion dated September 30, 2019 (D.I. 70, the "9/30 Op."), the Court denied the motion to dismiss, finding that Plaintiffs' allegations were sufficient to support an inference that Mr. Lutnick and the members of the Special Committee were more than just business colleagues or casual friends. (*See* 9/30 Op. at 31 (Plaintiffs' allegations "suggest[] that the relationship between Lutnick and Moran is a close one and not simply a 'thin social-circle friendship'"); *id.* at 34 ("the particularized facts alleged paint a picture of a close relationship between Lutnick and Bell, both professionally and personally"); *id.* at 36 ("Plaintiffs have plead sufficient facts to create a reasonable doubt concerning Curwood's ability to be independent from Lutnick.").)

The parties then engaged in months of extensive discovery, and Plaintiffs exhaustively explored every historical contact between Mr. Lutnick and the members of the Special Committee. When discovery was over, there was no evidence of the type of close personal friendships suggested by Plaintiffs' allegations. More to the point, the undisputed evidence established that Mr. Lutnick's relationships with the various Special Committee members bore none of the hallmarks of "bias-producing" relationships:

- The Special Committee members, on the one hand, and Mr. Lutnick, on the other, did not attend each other's weddings, *see In re MFW S'holders Litig.*,

67 A.3d 496, 509 n.37 (Del. Ch. 2013) (Strine, C.), *aff'd, Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014);

- None of the Special Committee members were college roommates with Mr. Lutnick, *id*.;

- None of the Special Committee members have ever vacationed with Mr. Lutnick or his family, *id*.;

- None of the Special Committee members co-own real property or other assets with Mr. Lutnick, *see Sandys v. Pincus*, 152 A.3d 124, 129-30 (Del. 2016);

- The Special Committee members, on the one hand, and Mr. Lutnick, on the other, do not socialize outside the work context, either on an individual basis, with significant others, or with families, *id*.;

- None of the Special Committee members is an investor with Mr. Lutnick in any side businesses or in any companies owned or controlled by Mr. Lutnick's family members, *id*. at 133-34;

- The Special Committee members, on the one hand, and Mr. Lutnick, on the other, do not celebrate each other's birthdays or anniversaries, *see MFW*, 67 A.3d at 509 n.37;

- None of the Special Committee members plays golf with Mr. Lutnick or engages in any other social activities with him outside work, *see* Ex. 1, Leo E. Strine, Jr., Documenting The Deal: How Quality Control And Candor Can Improve Boardroom Decision-making And Reduce The Litigation Target Zone, at 689 n. 19 (The Business Lawyer 2015);

- The Special Committee members, on the one hand, and Mr. Lutnick, on the other, have not been close personal friends for any period of time, let alone for decades, *see Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022-23 (Del. Ch. 2015);

- None of the Special Committee members have a close family member who is an executive officer of a company controlled by Mr. Lutnick, *see In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 823 (Del. Ch. 2005) *aff'd*, 906 A.2d 766 (Del. 2006);

- None of the Special Committee members (or their families) lease property to Mr. Lutnick or a company he controls, either at an above-market rate or any other rate, *see Litt v. Wycoff*, 2003 WL 1794724, at *5 (Del. Ch. Mar. 28, 2003);

- Neither Mr. Lutnick nor any entity he controls has made a loan to the employer of one of the Special Committee members at a discounted interest rate, *see In re Goldman Sachs Grp. S'holder Litig.*, 2011 WL 4826104, at *12 (Del. Ch. Oct. 12, 2011);

- Mr. Lutnick never invited any of the Special Committee members to join the ownership group of a professional sports franchise, *see Cumming v. Edens*, 2018 WL 992877, at *17 (Del. Ch. Feb. 20, 2018);

- Mr. Lutnick has not donated the funds to have a building named in honor of any of the Special Committee members, *see Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019); and

- Mr. Lutnick has not employed any of the Special Committee members at any point during their respective industry-leading careers. *Id*.

Discovery also conclusively refuted Plaintiffs' allegations that the Special Committee members were beholden to Mr. Lutnick because the income from their BGC Board service was material to their overall financial picture. Plaintiffs, for example, had alleged that Dr. Bell's BGC-related compensation "represented over 30% of her total income." (Compl. ¶ 29.) Discovery, however, revealed that the actual percentage is [redacted] of her yearly income from 2010-2017. (Ind. Dir. Mot. at 19.) Similarly, Plaintiffs had alleged that Mr. Moran "derives his sole income from serving on the BGC Board." (Compl. ¶ 43.) The facts, however, are that Mr. Moran's BGC-related compensation constituted [redacted] of his yearly income from 2010 to 2017, and [redacted]. (Ind. Dir.

Mot. at 22-23.) [redacted] Mr. Curwood, an award-winning environmental journalist whose BGC-related compensation represented about [redacted] (*Id.* at 16.)

ARGUMENT

A court will grant a motion for summary judgment where, as here, the motion demonstrates that there is "no genuine issue as to any material fact" before the court, *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), and that the moving party is entitled to judgment as a matter of law, Ct. Ch. R. 56(b), (c); *Nash v. Connell*, 99 A.2d 242, 243 (Del. Ch. 1953). A court must grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Burkhart*, 602 A.2d at 59 (citing *Celotex*, 477 U.S. at 322-23).

Furthermore, "summary judgment is appropriately granted even where colorable or insignificantly probative contrary evidence is present in the record, if no reasonable trier of fact could find for the non-movant on that evidence." *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) (quoting *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249-50 (1986) (embedded alterations in original)). Thus, "[t]he 'mere existence of a scintilla of evidence in support of the [non-movant's] position' is not sufficient." *Id.* (quoting *Anderson*, 477 U.S. at 252).

I. PLAINTIFFS CANNOT ESTABLISH DEMAND FUTILITY AS A MATTER OF LAW.

At the motion to dismiss stage, the Cantor Defendants argued that the Complaint should be dismissed under Court of Chancery Rule 23.1 because Plaintiffs had neither demanded that the BGC Board pursue this derivative action nor alleged facts "establish[ing] that pre-suit demand is excused because the directors are deemed incapable of making an impartial decision regarding the pursuit of the litigation." *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008). The Court, drawing all inferences in Plaintiffs' favor, rejected the Cantor Defendants' argument, finding that "Plaintiffs have plead particularized facts that create a reasonable doubt that four of the directors serving on the Demand Board are either disinterested (Lutnick) or independent (Bell, Curwood, and Moran)." (9/30 Op. at 36.)

Plaintiffs' burden to establish demand futility, however, did not end there. "The doctrines of demand refusal and demand excusal are substantive requirements of Delaware law. As a matter of procedure, Rule 23.1 imposes a pleading requirement on a plaintiff that seeks to assert a derivative claim so that the doctrines can be applied at the pleading stage. Rule 23.1 did not create the demand requirement; it is merely the 'procedural embodiment of this substantive principle.'" *United Food & Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162, at *7 (Del. Ch. Oct. 26, 2020) (quoting *Rales v. Blasband*, 634 A.2d 927, 932 (Del.

1993)). "Therefore, [demand excusal's] ultimate consideration does not end when the complaint is found to be sufficient." *Good v. Getty Oil Co.*, 518 A.2d 973, 975 (Del. Ch. 1986). Instead, Defendants are "still free to show on summary judgment by uncontradicted facts that the allegations made are untrue and there is therefore no proper standing." *Kahn v. Tremont Corp.*, 1992 WL 205637, at *2 n.2 (Del. Ch. Aug. 21, 1992). "If a review of the actual facts would show that" the elements of demand futility were not satisfied, "then that may be shown in an application for summary judgment." *Heineman v. Datapoint Corp.*, 1990 WL 15149, at *3 (Del. Ch. Oct. 9, 1990); *Kahn v. Tremont Corp.*, 1994 WL 162613, at *3 (Del. Ch. Apr. 21, 1994 ("[I]t is clear that while a motion under Rule 23.1 is typically directed to the face of the complaint that it need not be so.").[2]

While the Complaint's allegations were sufficient at the motion to dismiss stage to create a "reasonable doubt" as to the independence of the BGC Board, discovery erased that "reasonable doubt." At all times during the pendency of this action, BGC has had five directors: Mr. Lutnick, Mr. Richards, William Moran, Dr.

[2] *See also Good v. Getty Oil Co.*, 518 A.2d at 975 (recognizing that demand futility may be addressed at summary judgment); *Kaufman v. Alexander*, 625 Fed. Appx. 129, 133 n.7 (3d Cir. Aug. 28, 2015) (applying Delaware law: "The District Court initially determined, at the motion to dismiss stage, that Appellant 'ha[d] properly pled that demand [wa]s excused. . . . The District Court's ruling on a motion to dismiss, however, could hardly foreclose a subsequent ruling on summary judgment where a different standard applies.").

Linda Bell, and Stephen Curwood. (Compl. ¶ 113.) Plaintiffs have never alleged, and have not offered evidence, that Mr. Richards somehow lacks independence or impartiality. (*Id.* ¶ 51.) For their part, Defendants do not dispute that Mr. Lutnick was interested in the Transaction. Thus, the pertinent question is whether Plaintiffs have adduced sufficient evidence to create a genuine issue of material fact as to the independence of the three remaining directors—Mr. Moran, Dr. Bell, and Mr. Curwood. If there is no genuine issue of material fact as to even two of these directors, Plaintiffs' claims fail as a matter of law under Rule 23.1.

William Moran. In denying the motion to dismiss, the Court found that the Complaint's allegations suggested "that the relationship between Lutnick and Moran is a close one and not simply a 'thin social-circle friendship.'" (9/30 Op. at 31.) But discovery established that the relationship between Mr. Lutnick and Mr. Moran does not even rise to the level of personal friendship, much less the type of "bias producing" friendship needed to render Mr. Moran unable to impartially consider a pre-suit demand. In all the years they have known each other, Mr. Moran and Mr. Lutnick have not vacationed together, socialized together, attended one another's personal festivities (such as weddings, birthday parties, or anniversary parties), or invested together. (Ind. Dir. Mot. at 20-22.) At most (and even this is a stretch), Mr. Lutnick and Mr. Moran can be said to "move in the same business and social

circles," and that is not enough to impugn Mr. Moran's independence. *In re MFW*, 67 A.3d at 509 n.37.

Nor is the income that Mr. Moran derives from serving as a BGC Board member sufficiently material to cast doubt upon his independence. As noted, it is undisputed that such compensation constituted [redacted] of Mr. Moran's yearly income from 2010 to 2017, and a [redacted]. (Ind. Dir. Mot. at 22-23.) To be blunt, [redacted] the loss of the roughly $135,000 a year he made from serving on the BGC Board [redacted].

Dr. Linda Bell. As for Dr. Bell, the Court found at the motion to dismiss stage that "the particularized facts alleged paint a picture of a close relationship between Lutnick and Bell, both professionally and personally." (9/30 Op. at 34.) But the picture painted by the Complaint faded in the light of the true facts. There is simply no indicia of any type of "bias producing" relationship between Dr. Bell and Mr. Lutnick—no family vacations, no weddings, no birthday parties, no anniversary parties, no social dinners, and no co-investments. (Ind. Dir. Mot. at 17-19.) In fact, the only interaction between Dr. Bell and Mr. Lutnick outside the professional context [redacted] (Ex. 18, Bell Dep. Tr. 164:10-165:11.) And as with Mr. Moran, discovery established that Dr. Bell's BGC-related income is not material to

her overall financial health. Her income from the BGC and ELX Boards represented [redacted] of Dr. Bell's annual household income from 2010-2017, [redacted] (Ind. Dir. Mot. at 19.)

Stephen Curwood. As for Mr. Curwood, discovery established that he and Mr. Lutnick effectively have no relationship other than a professional one. (Ind. Dir. Mot. at 14-15; *see* Ex. 17, Curwood Dep. Tr. 74:3-76:5 (noting that, since joining the Board, he has seen Mr. Lutnick "outside the context of BGC-related meetings" on "one occasion" only).) So the only attack that Plaintiffs can level against Mr. Curwood is that his BGC-related income constitutes a substantial portion of his annual income. (Ind. Dir. Mot. at 15-16.) For very good reason, this Court has held that this factor, standing alone, is not sufficient to cast doubt on Mr. Curwood's independence. *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 649-50 (Del. 2014). Using lack of wealth to undermine a director's independence would create a damaging hurdle to Board service for highly qualified directors like Mr. Curwood, a respected journalist whose professional focus on environmental, social, and corporate governance added a crucial voice to the BGC Board at a time when these issues have assumed much greater importance in the eyes of courts, as well as public company shareholders. *See, e.g.*, *Running the Risks: How Corporate Boards Can Oversee Environmental, Social and Governance Issues*, Harvard Law School Forum

on Corporate Governance, https://corpgov.law.harvard.edu/2019/11/25/running-the-risks-how-corporate-boards-can-oversee-environmental-social-and-governance-issues/.

On the undisputed evidentiary record, Plaintiffs cannot establish a genuine issue of material fact as to whether the three members of the Special Committee were capable of making an impartial determination regarding whether this derivative suit was in the best interests of the BGC shareholders. The Complaint's allegations of deep, personal relationships and financial dependence found no support in fact. Thus, the question of whether to proceed with this lawsuit should be in the hands of the directors of BGC who, absent disqualification, "retain control over corporate claims." *Good v. Getty Oil Co.*, 518 A.2d at 976.[3]

[3] The only other way that Plaintiffs can establish that demand is excused, given that the BGC charter contains a § 102(b)(7) exculpatory provision, is to establish that the Special Committee approved the Transaction in bad faith, and thus the approval "was not a valid exercise of business judgment." *See Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 62-63 (Del. Ch. 2015). Plaintiffs have not adduced evidence of the "extreme set of facts" needed to prevail on this theory. (*See* Ind. Dir. Mot. at 56-59.) On the contrary, as discussed in Section II(D) below, the Special Committee exercised due care in negotiating and approving the Transaction.

II. AT A MINIMUM, THE COURT SHOULD SHIFT THE BURDEN TO PLAINTIFFS TO PROVE THAT THE TRANSACTION WAS UNFAIR.

If the Court does not dismiss the Complaint in its entirety based on Plaintiffs' failure to establish demand futility, the Cantor Defendants respectfully submit that, at a minimum, the Court should shift the burden onto Plaintiffs to prove that the Transaction was not entirely fair. In an affiliated transaction, like this one, the general rule is that "[t]he initial burden of establishing entire fairness rests upon the party who stands on both sides of the transaction." *Lynch Commc'n Sys.*, 638 A.2d at 1117 (Del. 1994) (citation omitted). But Delaware law allows the interested party to shift the burden back to Plaintiffs by using certain procedural safeguards in connection with the challenged transaction. *Id.* Specifically, Delaware law permits the Cantor Defendants to shift the burden "from the controlling or dominating shareholder to the challenging shareholder-plaintiff" by establishing that the Transaction was approved by either (1) "an independent committee of directors" or (2) an "informed majority of minority shareholders." *Id.* The first of these safeguards is present here.

It is undisputed that BGC employed a Special Committee to review and approve the Transaction. This will be enough to shift the burden back to Plaintiffs if, following discovery, no "triable issues of fact remain" as to whether *ab initio*: "(i) the controller condition[ed] the procession of the transaction on the approval of . . .

a Special Committee . . . ; (ii) the Special Committee [was] independent; (iii) the Special Committee [was] empowered to freely select its own advisors and to say no definitively; [and] (iv) the Special Committee met its duty of care in negotiating a fair price." *M&F Worldwide Corp.*, 88 A.3d at 645-46. The purpose of this burden-shifting rule is "not only to encourage the use of special committees, but also to provide a reliable pretrial guide for the parties regarding who has the burden of persuasion." *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1243 (Del. 2012). In that regard, the question of "which party bears the burden of proof must be determined, if possible, before the trial begins." *Id*.

A. The Transaction was conditioned on approval by a Special Committee.

Plaintiffs do not contend that BGC's acquisition of Berkeley Point could have proceeded without the approval of the Special Committee. Nor could they. The undisputed evidence shows that, from the outset, the Transaction was conditioned on the approval of the BGC Special Committee. The Audit Committee of the BGC Board voted to form a Special Committee immediately upon hearing of the potential Transaction. (Ex. 2, Feb. 11, 2017 Audit Committee Minutes (BGC0001263).) The empowering resolutions for the Special Committee—passed unanimously by the BGC Board—gave the Special Committee the "full and exclusive power and authority of the Board . . . to evaluate and, if appropriate, negotiate the terms of any

Proposed Transaction." (Ex. 3, Mar. 14, 2017 Board Unanimous Written Consent (BGC0001268).) And it was only after the Transaction received the recommendation of the Special Committee that it was presented to the full BGC Board. (Ind. Dir. Mot. at 40; Ex. 9, July 13, 2017 Special Committee Minutes and Resolution (BGC0000005).)

B. The Special Committee was independent.

The "independence" required for burden-shifting tracks the same standard applicable to proving a non-exculpated claim under Section 102(b)(7) of the Delaware General Corporation Law, which is the subject of the Independent Directors' motion for summary judgment. (*See* Ind. Dir. Mot. at 43-46.) In particular, courts ask whether the members of the Special Committee were so "beholden" to the controlling party or "so under [the controller's] influence that [the director's] discretion would be sterilized." *M&F Worldwide Corp.*, 88 A.3d at 648-49 (Del. 2014) (citation omitted). As discussed briefly above, and extensively in the Independent Directors' summary judgment motion, there is no genuine issue of material fact as to the independence of the Special Committee members. (*See* Ind. Dir. Mot. at 46-56.)

C. The Special Committee was empowered.

The "empowerment" prong of the burden-shifting analysis examines the Special Committee's ability to "review, evaluate, negotiate, and to recommend, or

reject, a proposed [transaction]." *M&F Worldwide Corp.*, 88 A.3d. at 650 n.35 (quoting *Brickerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 381 (Del. Ch. 2010)). Two of the factors that courts consider under this prong are (1) whether the Special Committee had the ability to "select its own advisors" and (2) whether the Special Committee had the ability "say 'no'" and "make that decision stick." *Id.* at 645, 650; *see also S. Muoio & Co. LLC v. Hallmark Ent. Invs. Co.*, 2011 WL 863007, at *13 (Del. Ch. Mar. 9, 2011) (same).

The analysis of the Special Committee's empowerment begins with the BGC Board resolutions, which, as noted, granted the Special Committee the "full and exclusive power and authority of the Board . . . to evaluate and, if appropriate, negotiate the terms of any Proposed Transaction." (Ex. 3, Mar. 14, 2017 Board Unanimous Written Consent (BGC0001268)); *see M&F Worldwide*, 88 A.3d at 650 n.35 (shifting burden where resolutions gave the Special Committee the power to "review, evaluate, negotiate, and to recommend, or reject, [the] proposed [transaction]") (quoting *Brickerhoff*, 986 A.2d at 381). The resolutions further provided that "the Special Committee [was] authorized and empowered to retain legal counsel to advise it and assist it in connection with fulfilling its duties" and "to retain such other consultant and agents, including, without limitation, investment bankers, as the Special Committee may . . . in its sole discretion deem necessary or

appropriate." (Ex. 3, Mar. 14, 2017 Board Unanimous Written Consent (BGC0001268).)

Having been granted broad powers by the Board resolutions, the record is undisputed that the Special Committee used them. For one thing, the Special Committee "freely select[ed] its own advisors." *M&F Worldwide*, 88 A.3d at 645. The members of the Special Committee recommended each of the proposed candidates they considered as legal and financial advisors, and then made the ultimate decision on who to retain. (Ex. 19, Koster Dep. Tr. 183:16-183:20; 192:18-192:23.) For legal advisors, the Special Committee chose Debevoise because of the Committee members' prior experience working with Debevoise, as well as Debevoise's considerable experience in advising special committees. (Ex. 15, Moran Dep. Tr. 202:14-204:5, 234:15-22.) For financial advisors, the Special Committee selected Sandler O'Neill from among three potential candidates. Each of the Special Committee members testified that they selected Sandler O'Neill because of its reputation and experience. (*Id.* 184:7-21; Ex. 18, Bell Dep. Tr. 236:13-237:2; Ex. 14, Dalton Dep. Tr. 45:7-46:3, 210:15-21; *see* Ex. 17, Curwood Dep. Tr. 208:12-23). In addition, members of the Special Committee had experience working with Sandler O'Neill in connection with prior affiliated transactions that did not result in shareholder challenges. (Ex. 16, Sterling Dep. Tr. 30:24-33:13, 46:24-51:9; *see also* Ex. 18, Bell Dep. Tr. 236:10-237:7 (same); Ex. 15, Moran Dep.

Tr. 184:7-21 (same).) Neither Debevoise nor Sandler O'Neill had previously done work for Cantor or Mr. Lutnick. (Ex. 16, Sterling Dep. Tr. 282:8-283:7.)

Moreover, the Special Committee clearly had the ability to say "no" to Mr. Lutnick, and to make that decision "stick." *S. Muoio & Co.*, 2011 WL 863007, at *13 ("This Court has stated that 'this mandate should include the power to fully evaluate the transaction at issue, and, ideally, include what this court has called the 'critical power' to say 'no' to the transaction.") (quoting *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006)). The best example of this veto power is the Special Committee's rejection of Cantor's proposed deal structure, under which Cantor would retain a 5% ownership interest in Berkeley Point as well as 50% control over the Board after the sale. (Ex. 5, Apr. 21, 2017 Term Sheet (BGCPSC0000683); Ex. 7, June 5, 2017 Sandler O'Neill Presentation (BGC0003967).) As discovery demonstrated, the Special Committee's rejection was no small matter. Cantor and its advisors had invested months of time and resources to develop its preferred deal structure—selling 95% of the equity and 50% of Board control—to allow Cantor to defer, potentially indefinitely, the massive capital gains tax that it would have to incur upon a sale of 100% of Berkeley Point. (Ex. 4, Apr. 14, 2017 Email (BGC0192228); Ex. 21, Edelman Dep. Tr. 301:4-307:14; Ex. 20, Lutnick Dep. Tr. 646:15-648:9.)

The Special Committee, however, refused to accede to Cantor's deal structure, believing it would unnecessarily complicate the Transaction in the eyes of the market and restrict the liquidity of Berkeley Point and its assets. (Ex. 16, Sterling Dep. Tr. 362:12-364:18; Ex. 17, Curwood Dep. Tr. 309:25-310:17; Ex. 18, Bell Dep. Tr. 339:3-340:20; Ex. 20, Lutnick Dep. Tr. 651:21-652:10.) Instead, the Special Committee insisted on acquiring 100% of Berkeley Point and full board control, despite the very negative tax consequences for Cantor. As Mr. Curwood explained, the negotiations over the deal structure were, indeed, "a moment in which [the Special Committee was] prepared to walk away." (*See* Ex. 17, Curwood Dep. Tr. 309:25-310:17 ("We kind of pounded our shoe on the table about this, and at the end of the day, Cantor had to give up owning a -- any share of the Berkeley Point."); *see also* Ex. 18, Bell Dep. Tr. 339:3-340:20; Ex. 15, Moran Dep. Tr. 330:3-22.) Mr. Lutnick's frustration with the Special Committee's intransigence was still palpable during his deposition three years after the Transaction:

> Q. And in fact, you had sent over two term sheets that contemplated an investment in CCRE to avoid this tax liability that we were talking about in part; right?
>
> A. At least.
>
> Q. Right. And so were you surprised that on June 6th, they suddenly tell you, "Look, we're not even considering that"?
>
> A. Yes.

> Q. Did you tell them, "Hey, you could have told me this a couple of months ago"?
>
> A. I think I showed great restraint to not say it 400 times.
>
> Q. And what was the response from Dr. Bell or Mr. Moran when you said, "Look, why didn't you tell me this months ago and we would not have wasted all this time and effort on putting together a structure that would work with the taxes?"
>
> A. My recollection is they said, "We're just not going to do it. It doesn't matter. We're not going to do it."

(Ex. 20, Lutnick Dep. Tr. 653:8-654:9; *see also id*. 651:3-22 ("That's what the special committee wanted to do, and they required it. So it was not up to me."); *id.* 659:11-15 ("I think I showed tremendous restraint. It made me -- I was very unhappy. And actually, while you're talking to me today, it's making me very unhappy.").)

Ultimately, the Special Committee prevailed, forcing Cantor to sell 100% of Berkeley Point to BGC and retain no Board control. (Ex. 6, June 6, 2017 Meeting Minutes (BGC0000029).) As a result of conceding to the Special Committee's deal structure, Cantor was forced to pay [redacted] in taxes with the closing of the Transaction. (Ex. 21, Edelman Dep. Tr. 301:4-307:14; Ex. 20, Lutnick Dep. Tr. 656:16-657:22; *see* Ex. 4, Apr. 14, 2017 Email (BGC0192228) (calculating [redacted]).)

To be sure, the deal structure was not the only instance in which the Special Committee said "no" to Cantor. The Special Committee rejected Cantor's proposed purchase price of $1 billion for a 100% interest in Berkeley Point, and instead negotiated a price of $875 million. (Ex. 15, Moran Dep. Tr. 282:12-16 (testifying that he told Mr. Lutnick "[w]e don't have a deal, Howard, until we get a price we like.").) The Special Committee also rejected Cantor's proposal that BGC make a $150 million co-investment with Cantor in a commercial mortgage backed security business, and instead agreed to invest only $100 million. (Ind. Dir. Mot. at 39.) The various rebuffs by the Special Committee during the deal negotiations make clear that the Special Committee was empowered to say "no" and "make it stick."

D. The Special Committee met their duty of care.

"Due care in the decision making context" looks at "whether the board was reasonably informed of all material information reasonably available at the time it made its decision." *Ash v. McCall*, 2000 WL 1370341, at *8 (Del. Ch. Sept. 15, 2000). The Delaware Supreme Court has held that the "[d]uty of care is measured by a gross negligence standard." *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 768 (Del. 2018). Thus, where the evidence is insufficient to show that the director was "grossly negligent" in informing herself or himself about the Transaction at issue, the Court may find as a matter of law that the director has exercised due care. *Id.* The Plaintiffs cannot credibly dispute this element.

The undisputed record shows that the Special Committee, with the assistance of its experienced advisors, conducted extensive diligence for the Transaction. (*See* Ind. Dir. Mot. at 24-41 (detailing the diligence and analysis conducted by the Special Committee).) The Special Committee and its advisors obtained detailed financial and operational information from Berkeley Point, CCRE, and BGC, and followed up with even more information requests when they felt it was needed. (*Id.* at 27-29, 31-32.) All told, the Special Committee held nineteen meetings over the span of four months and received six formal presentations from Sandler O'Neill related to the Transaction. (*Id.* at 2-3.) In the end, each member of the Special Committee, as well as Sandler O'Neill, agreed that they obtained all the information they believed necessary to approve the Transaction. (*Id.* at 39-40; Ex. 9, July 13, 2017 Special Committee Minutes and Resolution (BGC0000005).)

Any conceivable doubts over whether the Special Committee exercised due care should be conclusively dispelled by the fact that the Special Committee received fairness and reasonableness opinions from its financial advisor before recommending the Transaction to the BGC Board. *See Frank v. Elgamal*, 2014 WL 957550, at *25 (Del. Ch. Mar. 10, 2014) (fairness opinion is evidence that special committee sought to "obtain the best value reasonably available" even where questions of fact surround the financial projections); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *23 (Del. Ch. May 22, 2000) (noting that a special

committee may rely on its advisors to be fully informed). Sandler O'Neill—whose independence and competence have never been challenged—delivered formal opinions to the Special Committee that (1) the price of the Berkeley Point acquisition was fair, from a financial point of view, to the BGC shareholders, and (2) the terms of BGC's co-investment in the CMBS business were reasonable.[4] The Special Committee's insistence on obtaining Sandler O'Neill's conclusion on fairness before recommending the Transaction is proof positive that the members of the Special Committee exercised due care. *Ash v. McCall*, 2000 WL 1370341, at *9 (directors acted with due care where they engaged expert financial advisors that conducted due diligence and opined that the "merger is financially and strategically sound").

Plaintiffs' Complaint amounts to little more than second-guessing the Special Committee's negotiating approach years after the fact. But while Plaintiffs and their experts now contend that the Special Committee should have negotiated a better deal, that is of no moment in the legal analysis. What matters is that the undisputed evidence shows that the Special Committee "function[ed] in a manner which indicates that the controlling shareholder did not dictate the terms of the Transaction and that the committee exercised real bargaining power 'at an arm's length.'" *Kahn*

[4] As Sandler O'Neill team leader, Brian Sterling, testified, because the CMBS investment did not involve a change of control, Sandler O'Neill's practice was to opine on the "reasonableness" of the investment. (Ex. 16, Sterling Dep. Tr. 98:23-101:24.)

v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997). Indeed, the controlling shareholders here, the Cantor Defendants, never would have dictated Transaction terms that required Cantor to incur an immediate tax bill of [redacted] when there was a tax-free alternative structure available. (*See, e.g.,* Ex. 20, Lutnick Dep. Tr. 659:24-660:18 ("I like tax efficient[.]").) Add in the fact that the Special Committee obtained fairness and reasonableness opinions from a well-respected, independent financial advisor, and the undisputed record compels the conclusion that the Transaction was approved by an independent, empowered committee of directors who exercised due care in negotiating a fair price. Thus, if this case is not dismissed on summary judgment, the Cantor Defendants respectfully submit that, at trial, Plaintiffs should bear the burden of proving that the Transaction was not entirely fair.

CONCLUSION

For the foregoing reasons, the Cantor Defendants respectfully submit that the Court enter summary judgment dismissing Plaintiffs' claims for failure to establish demand futility or, in the alternative, enter an Order providing that it will be Plaintiffs' burden at trial to prove the Transaction was not entirely fair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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