EFiled: Feb 17 2021 04:45PM EST
Transaction ID 66348076
Case No. 2018-0722-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BGC PARTNERS, INC. DERIVATIVE LITIGATION	))	CONSOLIDATED C.A. No. 2018-0722-AGB

REDACTED VERSION--
Filed: February 17, 2021

THE INDEPENDENT DIRECTORS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

OF COUNSEL:

Joseph De Simone
Michelle J. Annunziata
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Matthew E. Fenn
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Raymond J. DiCamillo (#3188)
Kevin M. Gallagher (#5337)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants Linda Bell, Stephen Curwood, William Moran, and John Dalton

Dated: February 10, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Court should grant summary judgment in favor of the four defendants who comprised the Special Committee that evaluated and negotiated the 2017 transaction at issue in this litigation: John Dalton, Stephen Curwood, Linda Bell, and William Moran (the "Independent Directors"). At the pleading stage, the Court allowed this case to proceed against the Independent Directors under a standard that required it to accept the facts in the complaint as true and resolve all reasonably conceivable inferences in plaintiffs' favor. Summary judgment is different. Three years of motion practice and extensive discovery have established that plaintiffs' central allegations are false or insufficient to support their claims. There are no material facts in dispute; the Independent Directors should not be in this case.

In July 2017, BGC Partners, Inc. ("BGC"), a global financial-services firm, agreed to acquire Berkeley Point Financial LLC ("Berkeley Point"), a leading commercial real estate-finance company, from Cantor Real Estate Company, L.P. ("CCRE"). BGC also agreed to invest in CCRE's commercial mortgage-backed securities ("CMBS") business (collectively, the "Transaction"). Because both BGC and CCRE are affiliates of Cantor Fitzgerald, L.P. ("Cantor"), BGC formed a Special Committee to evaluate the Transaction.

All four of the Independent Directors who comprised the Special Committee were accomplished and respected at the top levels of their fields of government,

business, and education. John Dalton has served as Secretary of the Navy under President Clinton, President of Ginnie Mae, Chairman of the Board of the Federal Home Loan Bank, and President of the Housing Policy Council of the Financial Services Roundtable. Stephen Curwood is a Pulitzer Prize-winning prominent journalist with more than forty years of experience at NPR, CBS News, and the *Boston Globe*. Linda Bell is the Provost at Barnard College, has taught at Harvard and Princeton, and was an economist at the Federal Reserve Bank of New York. William Moran had a thirty-year career at JPMorgan Chase & Co. ("JPMorganChase"), where he served as the bank's General Auditor and an Executive Vice President.

To assist with its evaluation of the Transaction, the Special Committee retained world-class independent legal and financial advisors: Debevoise & Plimpton ("Debevoise") and Sandler O'Neill ("Sandler"). Over the course of four months, the Special Committee and its advisors, committed to safeguarding the interests of BGC's public stockholders, conducted extensive due diligence on the proposed Transaction. This process included *nineteen* formal meetings, six lengthy PowerPoint presentations, and scores of additional communications among the Special Committee, its advisors, and Cantor. The Special Committee and its advisors negotiated fiercely—and at arm's length—against the Cantor team, and extracted substantial concessions before ultimately agreeing to deal terms. Sandler

issued written fairness opinions on both parts of the Transaction. As the Special Committee and its advisors concluded, the Transaction would benefit BGC and its public stockholders by creating a fully integrated real estate company better able to compete against other market participants.

Plaintiffs nonetheless brought this lawsuit not just against Lutnick and certain Cantor entities, but against the Independent Directors. Notably, plaintiffs do not, and could not, challenge the strategic rationale underlying BGC's acquisition of Berkeley Point—as one of the country's largest originators of multifamily loans through government-sponsored entities ("GSEs"), such as Fannie Mae and Freddie Mac, Berkeley Point provides obvious synergies with BGC's Newmark multifamily real estate sales and brokerage business. Instead, plaintiffs allege that defendants caused BGC to *overpay* when it acquired Berkeley Point.

As to the Independent Directors, plaintiffs face a heavy burden, because they are protected by a certificate of incorporation provision exculpating them from liability except in limited circumstances. Under Delaware law, plaintiffs must demonstrate that the Independent Directors (1) harbored self-interest adverse to the stockholders' interests, (2) acted to advance the self-interest of an interested party, or (3) acted in bad faith. *In re Cornerstone Therapeutics Stockholder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015). Plaintiffs have never contended that the Independent Directors were "interested" in the Transaction—that they stood on both

sides of it or personally benefited from it. Plaintiffs can survive summary judgment only by raising a genuine dispute on the second or third *Cornerstone* prongs. They cannot do so; indeed, discovery has eviscerated their central allegations.

First, the principal allegation in plaintiffs' complaint is that the Independent Directors were motivated to advance the interests of Lutnick—the CEO and controlling stockholder of Cantor and BGC—because each had a "close personal friendship" with Lutnick that would compromise his or her independence. That allegation is simply wrong: The undisputed facts demonstrate that Lutnick and the Independent Directors were professional, business colleagues, not close personal friends. In other words, the Independent Directors had the kind of relationship with Lutnick that just about *anyone* would have with a fellow board member. And in any event, plaintiffs cannot prove that the Independent Directors were so "beholden" to Lutnick that their ability to evaluate the Transaction was "*sterilized*," as required under well-established Delaware law. *See Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) ("*MFW*") (emphasis added). There is no such evidence.

Second, plaintiffs allege that the Independent Directors received "benefits," either from their BGC board membership or their relationship to Lutnick, that they would have been reluctant to lose if they crossed him while evaluating the Transaction. The Court placed great emphasis on these allegations at the pleading stage. And many are demonstrably false. To name just a few:

- Plaintiffs allege that Secretary Dalton lacked independence because, for the past five years, he derived 40-50% of his income from Cantor-affiliated entities. Compl. ¶¶50-51. Not so. From 2012 to 2017, that compensation averaged [redacted] of his yearly income.

- Plaintiffs allege that Curwood "directly benefits from Lutnick's donations to Haverford College." *Id.* ¶34. Not so. Although Curwood and Lutnick both share an affinity for Haverford, Curwood was only minimally involved in fundraising and *never* solicited funds from Lutnick; Curwood's positions at Haverford were not tied in any fashion to Lutnick's contributions.

- [redacted] That allegation was nothing more than *ad hominem* from the start, and discovery has proven it baseless.

- Plaintiffs allege that Moran "derives his sole income from serving on the BGC Board." *Id.* ¶45. Wrong again. From 2010 to 2017, his BGC-related compensation averaged [redacted] of his yearly income ($135,655 vs. [redacted]

Third, plaintiffs cannot come close to the required showing of bad faith under the final *Cornerstone* prong: an "extreme set of facts" or a decision "so egregious or irrational that [it is] essentially inexplicable on any ground other than bad faith." *Stritzinger v. Barba*, 2018 WL 4189535, at *4 (Del. Ch. Aug. 31, 2018). "[E]ven one plausible and legitimate explanation for the board's decision would negate a reasonable inference [of] bad faith." *In re MeadWestvaco Stockholders Litig.*, 168 A.3d 675, 684 (Del. Ch. 2017). Here, working with its sophisticated, independent advisors, the Special Committee spent four months analyzing data about the deal terms, the transaction structure, transaction multiples, historical and projected metrics, comparable-group analysis, and illustrative returns. The Special Committee

used all this information to negotiate aggressively with Cantor, gaining several *substantial* concessions:

- Structural changes that would give BGC 100% control over Berkeley Point immediately and provide greater liquidity for BGC's investment;
- A *$125 million reduction* in the purchase price for Berkeley Point from $1 billion to $875 million;
- A *33% reduction* in the amount of BGC's investment in the CMBS business from $150 million to $100 million; and
- Significantly reducing the risk of the CMBS investment by convincing Cantor to accept a "catch-up" provision: if BGC's yearly preferred return falls under 5%, then the profits in the years that follow, if higher, will supplement the shortfall.

At bottom, plaintiffs' complaint is that the Special Committee should have negotiated a lower transaction price. But that disagreement does not establish a non-exculpated claim. The record shows that the Special Committee acted with the highest regard for its fiduciary duties—vigorously, independently, and with sophisticated expert advisors at hand—and obtained fairness opinions from Sandler. The facts developed in this case over almost three years reveal not even a hint of bad faith or an absence of neutrality.

This Court should grant summary judgment in favor of the Independent Directors.

STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

I. BGC and the Cantor Defendants

Nominal Defendant BGC is a global financial-services firm. Compl. ¶12. Defendant Cantor is a Delaware limited partnership; it is the parent company of a variety of affiliates, including BGC, of which it is the controlling stockholder. *Id.* ¶13. Defendant CF Group Management, Inc. ("CFGM"), a New York corporation, is Cantor's managing general partner. *Id.* ¶14. Defendant Lutnick has served as Chairman and CEO of BGC and its predecessors since 1999. *Id.* ¶18. Lutnick has the same roles at Cantor and owns a controlling interest in CFGM. *Id.* ¶19.

During the relevant time (February 11 to September 8, 2017), non-party CCRE, a subsidiary of Cantor, consisted of two parts: (i) Berkeley Point, a leading commercial real estate-finance company; and (ii) a CMBS business. *Id.* ¶17. During this time, BGC offered commercial real estate services through Newmark, a leading commercial real estate brokerage and advisory firm serving corporate and institutional clients. *Id.* ¶59. Newmark and its affiliates collectively have hundreds of commercial real estate brokers. *Id.*

[1] All exhibits are cited as "Ex. __" and attached to the Affidavit of Kevin Gallagher, filed herewith. The complaint is cited as "Compl. ¶__" and attached as Ex. 1.

II. The Independent Directors

The four defendants who are the subject of this motion—Dalton, Curwood, Bell, and Moran—served on BGC's board of directors during the relevant time. Because plaintiffs have challenged these defendants' independence based on their background, their connections to Lutnick, and the income they derived from their board service, we describe in detail the undisputed facts relevant to these issues.

A. John Dalton

Credentials: Before joining the BGC Board, Secretary Dalton had an extensive career at the highest levels of real estate, business, and government.

Secretary Dalton graduated from the U.S. Naval Academy and served in the Navy for five and a half years. Ex. 2 at 21:17-20. He then earned an MBA from the Wharton School of Finance at the University of Pennsylvania. *Id.* at 21:20-22:3.

After working for six years at Goldman Sachs, Secretary Dalton was appointed to three significant roles in government. *Id.* at 22:11-20. First, he served as President of Ginnie Mae. *Id.* at 22:20-22. Next, he was tapped as Treasurer for the Carter/Mondale Presidential Committee. *Id.* at 22:22-24. He then served as Chairman of the Board of the Federal Home Loan Bank. *Id.* at 22:24-23:4.

After this government service, Secretary Dalton went on to work in prominent real estate and investment-banking positions as President, Chairman, CEO, and Managing Director of several real estate companies and banks, including Gill

Savings Association, Sequin Savings Association, Freedom Capital Corporation, Mason Best Corporation, and Stephens. *Id.* at 23:5-24:2.

In 1993, President Clinton appointed Secretary Dalton as Secretary of the Navy. *See John Howard Dalton*, NAVAL HISTORY AND HERITAGE COMMAND, Ex. 3. Secretary Dalton served in this position until November 1998. *Id.* During that time, the National Security Caucus presented him with the prestigious International Security Leadership Award. *Id.* The award recognized Secretary Dalton's "leadership and vision in promoting American seapower and a bipartisan maritime strategy." *Id.*

Secretary Dalton later served as President of IPG Photonics, a company that designs and manufactures amplifiers and lasers for the telecommunications and industrial markets. Ex. 4 at 4. Among other corporate and charitable boards, Secretary Dalton served on the boards of Washington FirstBank and Fresh Del Monte Produce. *Id*. He also worked for twelve years as President of the Housing Policy Counsel of the Financial Services Roundtable ("HPC"). *Id*. In that role, he led the representation of twenty-three leading national mortgage lenders on a variety of housing- and mortgage-related matters, including GSE reform. Ex. 5 at 51-52. Secretary Dalton retired from the HPC in 2017. Ex. 6 at 8.

Interactions with Lutnick and Board Service: Before joining the board of the Cantor Exchange, an affiliate of Cantor, in 1999, Secretary Dalton had no

relationship with Lutnick—business, personal or otherwise. Ex. 7 at 8-9. While serving as Secretary of the Navy, Secretary Dalton first met Lutnick at a charity event on the U.S.S. Intrepid hosted by Zachary Fisher, a philanthropist and businessman. *Id*. Fisher asked Secretary Dalton to introduce Lutnick as a speaker at the dinner. *Id.* Secretary Dalton spoke to Lutnick at the event but had little to no contact with him afterward until Secretary Dalton's government service concluded in November 1998. *Id*. Lutnick contacted Secretary Dalton and asked him whether he would be interested in joining the board of the Cantor Exchange. *Id.* Secretary Dalton joined the board and served on it until 2002. *Id.*

Secretary Dalton served as a director on the board of BGC (and its predecessor entity eSpeed, Inc.) from 2002 until 2017. Ex. 4 at 4; Ex. 8 at 39. In December 2017, Secretary Dalton transitioned to the board of Newmark when it became a public company. Ex. 7 at 12-13. Secretary Dalton retired several months later in 2018. Ex. 9 at 2.

Secretary Dalton and Lutnick were professional colleagues, not close friends. Ex. 10 at 4; Ex. 11 at 39. During the nineteen years that Secretary Dalton served with Lutnick on BGC or Cantor-related boards (1999-2018), they attended *only two* non-BGC/Cantor functions together: (i) in 2002, Secretary Dalton invited Lutnick to the annual Alfalfa Club black tie event, which he "often" did for "CEOs and other executives with whom he was affiliated"; and (ii) in the early 2000's, Secretary

Dalton attended an event for former President Clinton at Lutnick's residence in Manhattan. Ex. 10 at 4-5. Secretary Dalton does not recall any private dinners with Lutnick. *Id*. They *never* took vacations together. *Id*. at 6. Secretary Dalton *never* attended any Lutnick-family birthday parties, bar mitzvahs, weddings, or holiday events. *Id*. at 4.

Apart from BGC/Cantor, Secretary Dalton and Lutnick did *not* have any business dealings together or serve on any boards together. *Id.* at 3-4. Nor was Secretary Dalton involved with Lutnick in any significant political fundraising, charitable fundraising, or university fundraising.[2] *Id*. at 6. The two men rarely corresponded by email or text message, and often set up calls through Lutnick's assistant rather than calling each other directly—exactly what business colleagues (as opposed to friends) typically do. Exs. 14-15.

Income: As of December 2017, Secretary Dalton's net worth was [redacted]. Ex. 16 at 5-6. His 2017 director compensation from BGC—$258,000—was approximately [redacted] *Id.*

[2] Indeed, there were only two such events over nineteen years. First, in 2015, Secretary Dalton attended a political fundraiser at Cantor's offices for Hillary Clinton's presidential campaign; he attended as a show of support for Secretary Clinton and did not attend the smaller event afterwards at Lutnick's residence. Ex. 12. Second, both Lutnick and Secretary Dalton attended the Leatherneck Ball in 2015; Secretary Dalton introduced Lutnick, who was receiving an award. Ex. 13.

Plaintiffs' complaint alleges that "Dalton has earned 40-50% of his income from Cantor and Lutnick-controlled entities." Compl. ¶51. That allegation is false. Secretary Dalton's income during the relevant time [redacted] Ex. 16 at 5. For example, in 2014, his yearly income [redacted] while his BGC director income was $128,250 [redacted] *Id.* From 2012 to 2017, his BGC director compensation averaged [redacted] of his yearly income. *Id.* Indeed, during a similar period (2010-2017), Dalton earned substantially more from [redacted] than BGC (averaging $152,906). *Id.*; *compare* Compl. ¶50 (alleging that he earned more from BGC than Fresh Del Monte).

Notably, during Secretary Dalton's deposition, plaintiffs failed to ask him a *single* question related to his income or net worth, effectively abandoning the allegations in their complaint.

B. Stephen Curwood

Credentials. Curwood has had a long, successful career in several fields—as a prominent journalist, environmentalist, and in business.

Curwood graduated from Harvard College and still lectures there. Ex. 17 at 13:7-9; Ex. 4 at 5. He has been a journalist for more than forty years with experience at NPR, CBS News, and the *Boston Globe*. Ex. 18. Curwood was a part of the *Globe*'s team that won the 1975 Pulitzer Prize for Public Service. *Id.* In 1979, he

began at NPR as a reporter and host of *Weekend All Things Considered*. *Id.* He also hosted NPR's *World of Opera*. *Id*.

Curwood has long been a promotor of environmental awareness; he has received the 2003 Global Green Award for Media Design, the 2003 David A. Brower Award from the Sierra Club for excellence in environmental reporting, and the New England Environmental Leadership award from Tufts University. *Id.* For many years, Curwood has been the President of World Media Foundation, Inc., and hosts its weekly public-radio program "Living On Earth," broadcast on more than 200 stations. Ex. 17 at 16:7-23.

Curwood was also the founder and a Senior Managing Director of SENCAP LLC, which he used initially to develop sustainable energy projects in Mozambique and southern Africa, and then as a business-development operation for other projects and consulting. *Id.* at 16:24-17:15. He was a principal at Mamawood Ltd., a media holding company based in South Africa with a minority position in Velocity Films. *Id.* at 17:24-18:8. Curwood also served as a trustee of both the Woods Hole Research Center, a research lab and group of leading scientists looking at climate disruption and renewable energy, and the Pax World Fund, a $2.5-billion group of investment funds focused on sustainability and socially responsible investments. Ex. 8 at 5.

Around 2000, Curwood was recruited to join the Haverford College Corporation and Board of Managers by Mary Patterson McPherson, then-President

of Bryn Mawr College, which is affiliated with Haverford. Ex. 7 at 4-5. McPherson thought Curwood would be an excellent addition for a variety of reasons, including his outstanding record of achievement in news organizations, business, academia, and philanthropy, and the perspectives he added as a person of color. *Id.* Lutnick played no role in recruiting Curwood at Haverford. *Id.*

Interactions with Lutnick and Board Service. When Curwood joined the Haverford College Board of Managers, he met Lutnick for the first time. *Id.* at 6. During his tenure on this board, Curwood served on several committees, including the investment committee, the social investment responsibility committee, and the institutional advancement committee. Ex. 17 at 28:10-38:17. Lutnick also served on the Haverford College Board of Managers and some of the same committees. *Id.* at 38:12-17. Curwood and Lutnick were not friends at Haverford. Ex. 7 at 4, 6; Ex. 10 at 7-11; Ex. 17 at 56:8-15. They had virtually no interactions outside of board meetings and Haverford functions. Ex. 7 at 6; Ex. 10 at 8.

Curwood was only minimally involved in fundraising for Haverford and never solicited funds from Lutnick. Ex. 17 at 39:11-41:13; Ex. 10 at 11. Curwood received no compensation for his service to Haverford, and his positions on the Board of Managers and the other Haverford-affiliated entities were not tied in any manner to Lutnick's contributions to Haverford College. Ex. 10 at 11.

Curwood joined the BGC board in 2009 and had served for eight years at the time of the Transaction. Ex. 7 at 4. He has *never* served on any other Lutnick- or Cantor-affiliated board. *Id.* at 12. During this period, too, the interactions between the two men were minimal. Ex. 10 at 7-11. From time to time, Curwood attended events related to Haverford or BGC that Lutnick also attended. *Id*. at 8-9. For example, Curwood recalls a small number of dinners that he attended with Lutnick related to the BGC/Cantor Hampton University Fellowship Program—a program that seeks to support diverse undergraduate and graduate students at Hampton University, provides a potential pipeline to employment at BGC or Cantor, and promotes BGC's and Cantor's diversity initiatives. *Id.* at 9. Curwood has also gone on two trips in connection with charitable events coordinated by the Cantor Relief Fund—one to Puerto Rico after Hurricane Maria and another to Houston after Hurricane Harvey. *Id.* at 10. Lutnick joined those trips and interacted briefly with Curwood, who was helping distribute resources. *Id.*

During his time on the BGC board, Curwood's and Lutnick's interactions were almost exclusively work-related. They were not close friends. Ex. 10 at 7-11; Ex. 17 at 56:8-15; Ex. 11 at 38. They had no other business dealings together. Ex. 10 at 7.

Income. [redacted]

[redacted]

From 2010 to 2017, Curwood earned an average of $164,500 for his BGC board service. Ex. 16 at 4. This was, on average, [redacted] of his total household income. *Id.* But while Curwood has acknowledged that his BGC director compensation helped give him flexibility to pursue several non-profit and charitable endeavors, he has made clear that he was not "dependent" on this compensation; he had "plenty of other options" given his extensive credentials and connections. Ex. 17 at 121:4-124:19. His speaking fee alone is [redacted] *Id.* at 116:8-11.

C. Linda Bell

Credentials. Bell has a long and distinguished career in academia and economics. She did her undergraduate work at the University of Pennsylvania and went on to receive a Ph.D. in labor and applied microeconomics from Harvard. Ex. 19 at 17:12-21.

Bell began her career as an economist at the Federal Reserve Bank in New York. *Id.* at 17:22-24. After receiving several promotions, Bell went on to teach at Princeton, Harvard, and Haverford. *Id.* at 17:25-18:7. By 1995, Bell had earned tenure as a professor in economics at Haverford, and been appointed chair of the economics department. *Id.* at 25:18-26:9.

In 2007, Bell was asked to serve as Provost at Haverford; she served in that role until 2012. *Id.* at 18:22-23. The Provost is essentially "the chief academic

officer of the institution"—"the number two position in any university." *Id.* at 18:16-22; Ex. 20. Bell's main focus as Provost remained academics, and she had only a minor role in fundraising: she was occasionally asked to present academic initiatives and programs to alumni and the Board of Managers. Ex. 19 at 29:4-33:2. She was rarely involved in direct solicitations, and *never* from Lutnick or anyone at BGC or Cantor. *Id.* The principal point of contact for fundraising was the President, and the next most important point of contact was the Chief Development Officer. Ex. 10 at 20. Fundraising had no effect on how Bell was compensated or evaluated during her time as Provost at Haverford, nor did any contributions Lutnick made to Haverford during that time. *Id.*; Ex. 19 at 41:21-25.

In 2012, Bell left Haverford to become the Provost, Dean of Faculty, and Claire Tow Professor of Economics at Barnard College. *Id.* at 18:25-19:7. That is her current position. *Id.*

Interactions with Lutnick and Board Service. Bell met Lutnick around 1992 when she was a junior faculty member at Haverford. Ex. 19 at 33:3-34:5; Ex. 7 at 7. She volunteered to host a dinner in her home with members of the Board of Managers, and Lutnick was one of the four board members randomly assigned to her home. Ex. 19 at 33:7-34:5; Ex. 7 at 7. After that dinner, Bell had minimal interaction with Lutnick until she became Provost in 2007. Ex. 19 at 36:18-37:6; Ex. 7 at 7. As Provost, Bell interacted with Lutnick three or four times a year when

she attended and presented on the academic state of affairs at meetings of the Board of Managers. Ex. 19 at 38:25-39:18; Ex. 7 at 7.

Bell joined the board of ELX Futures L.P. ("ELX"), an affiliate of BGC, in 2009. *Id.* She served in that capacity until 2013, when she joined the BGC board. Ex. 19 at 87:15-17. Her interactions with Lutnick continued to be entirely professional in nature; they were business colleagues, not close friends. Ex. 10 at 16-20; Ex. 19 at 60:21-23 (Q: Would you consider Lutnick one of those friendships [with former Haverford colleagues]? A: No, I would not."); *id.* at 93:23-94:4 (Q: Did you ever socialize with Lutnick outside of board meetings? A: I have—I do not believe that Lutnick and I or our spouses ever socialized in any context outside of the BGC context or Haverford context."); Ex. 11 at 38-39.

Like her colleagues, Bell attended various board lunches and dinners with Lutnick. Ex. 10 at 17. While she served as Provost of Haverford, Bell attended certain Haverford events that Lutnick also attended. *Id.* And Bell has been involved with some of Cantor's and BGC's charitable initiatives, including the annual September 11, 2001 Charity Day at Cantor and BGC. *Id.* at 19-20.

Neither Bell nor her immediate family has attended any wedding, bar mitzvah, or other social function with Lutnick or his immediate family. *Id.* at 17; Ex. 19 at 93:23-94:4. Aside from the work-related events for BGC and Haverford, neither Bell nor her immediate family has ever been to Lutnick's residences. Ex. 10 at 20.

They have never vacationed with the Lutnicks. *Id.* They have never had any other business dealings with the Lutnicks. *Id.* at 16. And contrary to plaintiffs' irresponsible allegation that [redacted]

Income. From 2010 to 2017, Bell's annual average income from her ELX/BGC board positions was $118,823. Ex. 16 at 3. During this same period, her average annual household income [redacted] *Id.* She therefore derived an average of [redacted] of her annual income from her ELX/BGC board position, and this income was [redacted]

D. William Moran

Credentials. Moran worked for three decades at JPMorganChase (1975-2005), where he served as the General Auditor for the company and Executive Vice President. Ex. 7 at 2. Before joining JPMorganChase, he spent nine years at KPMG. Ex. 23 at 20-21. He is a member of the American Institute of Certified Public Accountants and the New York Society of Certified Public Accountants. *Id.*

During his career, Moran gained extensive experience with acquisitions involving mortgage originators and servicers, including the financials behind such transactions. Ex. 24 at 111:4-24. Moran is also no stranger to working with powerful executives at large companies. He reported to Jamie Dimon at JPMorganChase, and worked closely with Chase Manhattan Bank executives Walter Shipley and Thomas Labrecque. *Id.* at 34:25-35:16.

Moran has been on several boards other than BGC. He served as a director of Santander Bank, Sovereign Bancorp, Lighthouse International, and the Marconi Institute of Technology, as well as the advisory board of the Marist College School of Management. Ex. 23 at 21; Ex. 24 at 53:5-54:14.

Interactions with Lutnick and Board Service. In 1999, Moran was approached by Frederick Varacchi, President and COO of BGC's predecessor company, eSpeed, about serving on the board. Ex. 7 at 2-3; Ex. 24 at 14:13-19:2. Moran had served as Varacchi's mentor when Varacchi worked at JPMorganChase.

Ex. 7 at 2-3. It was Varacchi's idea—not Lutnick's—to have Moran join the board. *Id*. Indeed, Moran had *never met* Lutnick prior to the interviewing process for the eSpeed board position. *Id.*; Ex. 24 at 14:13-17:14. Upon completing his service on the eSpeed board in 2005, Moran did not work on any BGC or Lutnick-related board until 2009. Ex. 10 at 12; Ex. 4 at 5.

From 2009-2013 Moran served on the board of ELX, and then from 2013-2017 on the board of BGC. Ex. 7 at 13; Ex. 23 at 26.[3] Like the other three Independent Directors, Moran was a professional or business colleague of Lutnick; they were not close friends. Ex. 24 at 82:15-83:1 (explaining difference between business colleagues and friends); Ex. 10 at 11-15; Ex. 11 at 37. Moran *never* attended any Lutnick-family birthday parties, bar/bat mitzvahs, weddings, or other holiday events. Ex. 10 at 11-13. They *never* took a vacation together. *Id.* at 15. Moran has *never* visited Lutnick's beach residence. *Id*. So far as Moran could recall, the two men never had a private dinner together. *Id.* They did *not* have any other business dealings and did *not* sit on any boards together other than those related to BGC. *Id.* at 12.

During the nineteen years that Moran knew Lutnick (1999-2017), the two had only limited interactions. Like his colleagues, Moran periodically attended board

---

[3] During a brief period in 2015, Moran also served on the board of GFI Group when it merged with BGC. Ex. 24 at 50:18-51:7.

lunches or dinners where Lutnick was present. *Id.* at 13. Occasionally, spouses (including Moran's late partner, Barbara Saltzman) attended these BGC board dinners. *Id.* Moran also attended the Clinton campaign event at Lutnick's residence described above, which took place immediately after the earlier portion of the event at Cantor's offices. *Id*. at 15.

Plaintiffs' complaint places great emphasis on two events that took place years before the Transaction in 2017. Compl. ¶¶41-42. Ten years before the Transaction in 2007, Moran, a board member of the Lighthouse International charity, invited Lutnick and his wife to attend the Lighthouse Gala in New York. Ex. 10 at 14. Lutnick attended and was photographed with Moran and Saltzman. *Id*. There is no evidence of any other interaction between Moran and Lutnick at this event. Second, on March 29, 2014, Saltzman, a trustee for the SUNY Optometry Board, presented an award to Lutnick's sister, Edie Lutnick, a director of the Cantor Fitzgerald Relief Fund, for her work for the families of those who lost loved ones on 9/11. *Id*. Saltzman did not know Edie Lutnick beforehand, and Howard Lutnick did not attend the event. *Id.* Although plaintiffs optimistically claimed that "Moran and his wife [sic], Barbara Salzman [sic], regularly attend public events with Lutnick" (Compl. ¶41), discovery has shown only two events in nineteen years.

Income. As of December 31, 2017, Moran's net worth was approximately [redacted] Ex. 25 at 3.

Plaintiffs' complaint alleges that Moran "derives his sole income from serving on the BGC Board." Compl. ¶45. That allegation is false. Moran's yearly income during the relevant time was [redacted] In 2012, for example, his total income [redacted] while his BGC-related income was $41,250 [redacted] Ex. 16 at 6. From 2010 to 2017, his BGC-related compensation averaged [redacted] of his total income ($135,655 vs. [redacted] *Id.* By way of comparison, [redacted] which was more than he made in any year as a director for his Lutnick-related companies from 2010 to 2014. Ex. 26 at 138. His director compensation from BGC in 2017 was [redacted] of his net worth. *Id.;* Ex. 25 at 3.

As Moran testified, [redacted] Ex. 24 at 22:2-18. The complaint's conception of Moran's finances has no relation to reality.

III. The Transaction

A. BGC Management Proposes the Transaction.

BGC's management and board had been discussing a potential acquisition of Cantor's real estate assets—Berkeley Point and the CMBS business—since 2015. Exs. 27-28. For example, at an audit committee meeting on August 5, 2015,

management discussed strategies "to acquire and combine certain of Cantor's commercial real estate businesses with and into the company's Newmark [ ] assets," in order to "unlock higher multiples in the real estate services businesses." Ex. 27 at CDBGC00104821.

Eighteen months later, on February 11, 2017, Lutnick informed the audit committee that BGC management was considering moving forward with a potential acquisition of Berkeley Point. Ex. 29 at BGC0001263. Berkeley Point is a designated underwriter and servicing ("DUS") lender for multifamily homes from sources like the Department of Housing and Urban Development, Freddie Mac, and Fannie Mae. *Id.* Lutnick again explained the compelling rationale for the potential transaction: an acquisition of Berkeley Point would "give [BGC] a DUS business of scale to compete with [other] commercial real estate peer companies," "each of whom have their own DUS businesses." *Id.* More specifically, BGC would be able to combine Berkeley Point's multifamily loan origination business with Newmark's multifamily investment sales business, thereby driving earnings growth for Newmark and, by extension, BGC. *Id.* Lutnick "commented on [a] potential purchase price in the low $700 million range."[4] *Id.*

[4] The undisputed facts adduced in discovery demonstrate that the "comment" of a potential price in the "low $700 million range" was a rough approximation intended to provide the Independent Directors with the scale of the proposed acquisition. Ex. 17 at 171:12-172:17, 174:3-175:3 (drawing an analogy with a contractor offering first estimate for a house renovation, where "[y]ou don't take that [number] to the

Lutnick explained that the second potential part of the Transaction was an investment of $150 million into the CMBS business of CCRE. Among other things, this would allow BGC to "obtain valuable information and data about properties that could be beneficial to the brokerage business." *Id.* at BGC0001264.

The Independent Directors needed more information, and began by questioning Lutnick. For example, Secretary Dalton—who had served for twelve years as President of the HPC leading some of the most sophisticated mortgage-finance companies in the United States in their analysis of a variety of similar matters—"asked various questions about the market, proposals from the new administration regarding multi-family housing and other potential issues." *Id.* Curwood "asked questions about potential details of the transaction as well as financial considerations, including potential tailwinds." *Id.* Moran proposed that the audit committee engage independent advisors to consider the proposed transactions. *Id.* at BGC0001265. Because the transaction would likely qualify as

---

bank," but interpret it "as simply a matter of scale"); *id.* 247:4-248:9 ("There was never a price of low 700s on the—that was never presented to us as a real price. This was a notional discussion that happened back in February."); Ex. 19 at 195:5-196:24 ("I remember that as the scaling of the project scope so that we understood that this was a substantial acquisition."). It was *not* an offer on price by Cantor. The undisputed facts show that the first offer from Cantor was delivered to the Special Committee on April 21, 2017. Ex. 45. Indeed, the Special Committee was not even created by board resolution and empowered to consider a potential transaction until March 14, 2017. Ex. 30 at BGC0001268.

an affiliated transaction, the audit committee authorized the four Independent Directors to act as a Special Committee to evaluate and negotiate the Transaction. *Id.*

B. The Independent Directors Vet Experienced Legal and Financial Advisors (February 12 to March 14, 2017).

Immediately after the meeting, the Independent Directors began vetting potential legal and financial advisors. On the legal side, the Independent Directors favored William Regner, the Deputy Co-Chair of the Corporate Department at Debevoise. Ex. 31. The Special Committee discussed other firms, but ultimately settled on Regner and Debevoise because of their experience representing special committees, their sterling reputation in this area, and the good experience some of the Independent Directors had from working with Regner on prior transactions. Ex. 17 at 202:14-204:5.

For financial advisors, the Independent Directors considered at least three potential firms, including Houlihan Lokey ("Houlihan") and Sandler. Ex. 31; Ex. 32 at BGCPSC0019634. Moran initially suggested Sandler because he had been impressed by its work during his time at JPMorganChase. Ex. 24 at 184:7-21; Ex. 33. Bell testified that the Special Committee had experience with Sandler and liked its work. Ex. 19 at 236:10-237:7; Ex. 34. After submitting detailed written proposals for the Transaction, Sandler and Houlihan participated in interviews. Ex. 19 at 236:10-237:7; Exs. 33-34.

C. The Special Committee Is Established, Begins Formal Meetings, and Retains Advisors (March 14-15, 2017).

On March 14, 2017, the BGC board executed resolutions formally establishing the Special Committee. Ex. 30. The resolutions gave the Special Committee broad power "to review and evaluate, recommend or reject," the proposed Transaction. *Id.* This power included the "full and exclusive power and authority of the Board to the fullest extent permitted by law to evaluate and, if appropriate, negotiate terms of any Proposed Transaction." *Id.*

The next day, on March 15, the Special Committee held its first official meeting. Ex. 35. The Committee deliberated on the selection of chairpersons, legal advisors, and financial advisors, which the Independent Directors had been discussing since February 12. *Id*. First, the Committee voted to select Moran and Bell as its co-chairs. *Id.* Second, following a report from Moran regarding discussions with both Sandler and Houlihan, and consideration of written materials about their qualifications and fees, the Committee voted to retain Sandler. *Id.* Third, it voted to retain Debevoise as legal counsel. *Id.*

D. The Special Committee and Its Advisors Begin Their Extensive Due Diligence (March 16 to April 20, 2017).

The advisors to the Special Committee assembled experienced teams to assist in evaluating and negotiating the potential Transaction. The Debevoise team consisted of Regner, Sue Meng (an M&A partner), Andrew Jamieson (counsel,

Financial Institutions), and Julia Ahn (an associate). The Sandler team included Brian Sterling (Principal & Co-Head of Investment Banking), Joe Stengl (Principal, Investment Banking), Kyle Heroman (Managing Director), Jean Suh (VP), and John Plantemoli (associate).

The day after its first meeting, the Special Committee and its advisors began a four-month due-diligence process. Ex. 36. Sandler immediately began requesting access to more data about the deal, and along with Moran, followed up repeatedly with Cantor about these requests. *Id.*; Exs. 37-38 ("I have been following up on progress . . . . Is this the amount of information you understood was going to be in the data room on Friday???? I am told that we have not [been] provided the data that [Sandler] will need."); Ex. 39 (emails from Moran and his advisors to Cantor about the need for additional due-diligence information). The Special Committee and its advisors' repeated efforts to obtain diligence materials from Cantor became a familiar refrain during this process.

At the same time, Sterling was having productive calls with Cantor representatives about the *substance* of the Transaction. For example, on March 19, Sterling had a call with Charles Edelman of Cantor to discuss the structure of the Transaction. Ex. 40. Sterling pushed Cantor to send a term sheet and reported that Sandler was working on due-diligence lists. *Id*.

On March 20, Sandler sent its preliminary due-diligence list to BGC. Ex. 41. When faced with skeptical questions from the other side about why the Special Committee needed diligence on its own company, Sandler pushed back aggressively, explaining that (i) Sandler needed to understand the potential impact of the deal on the buyers and reflect that impact in its analysis; and (ii) there was a possibility that BGC would issue securities to pay for the acquisition, in which case Sandler would need to understand the value of these securities to determine the transaction's fairness. Ex. 42. Sandler received the requested documents.

The next day, Sandler issued a comprehensive eight-page preliminary diligence list to Cantor. Ex. 43. When Sandler did not hear back about its requests within a reasonable time, both Sterling and Regner reached out to Cantor to demand the documents. Ex. 44 at BGCPSC0001625-26. When they still did not hear back, Moran emailed Lutnick directly (and subsequently his assistant, Matthew Gilbert) to demand responses to his advisors' requests. *Id.* at BGCPSC0001624-25.

E. The Special Committee and Its Advisors Receive and Evaluate the First Cantor Proposal (April 21 to May 1, 2017).

On April 21, 2017, Cantor delivered a written term sheet and offer to the Special Committee and its advisors (the "First Cantor Proposal"). Ex. 45. The First Cantor Proposal set forth a complex deal whereby BGC would invest $1 billion in CCRE in exchange for certain limited partnership rights and monetary terms, with $150 million allocated to the CMBS business and $850 million to BGC's 95% share

of Berkeley Point. *Id.* BGC and Cantor would split the *governance* of Berkeley Point equally. *Id.* at BGCPSC0000686. The term sheet also proposed granting to BGC a put option: the $30 million price of the put option, paid five years after closing, would allow BGC to obtain the remaining 5% of Berkeley Point, and the return of its $150 million investment in the CMBS business. *Id.* at BGCPSC0000685. Essentially an 'escape hatch,' the put option would have allowed BGC to end its investment in CCRE five years after closing. *Id.*

Lutnick sent an email to the Special Committee two days later, stating that the term sheet had been delivered and the data room populated. Ex. 46. He acknowledged that the delay was on Cantor's end, writing, "Why did it take this long? I can't understand but it's all a go starting now." *Id.* Regner followed up with an email on behalf of the Special Committee, asking for a call among Cantor, Debevoise, and Sandler to walk through the First Cantor Proposal. Ex. 47. That call took place on April 27. Ex. 48. "Sandler/Debevoise expressed surprise that the structure was different than an outright purchase of Berkeley Point and an investment in CCRE." *Id.* Sandler made a number of new diligence requests to help it understand the Transaction structure. *Id.* Debevoise told Cantor that its respective tax lawyers would need to speak with each other to discuss the put option, governance issues, and other tax issues arising from the proposed structure. *Id.* Debevoise and Sandler also pushed back on the price of the deal, pointing out that

the proposal required a $1-billion investment by BGC, whereas earlier discussions mentioned an investment of $875 or $900 million. *Id.*

F. The Special Committee and Its Advisors Receive Presentations from Cantor and Newmark and Continue Extensive Due Diligence (May 2-19, 2017).

During early May 2017, the Special Committee and its advisors continued their due diligence and discussions with Cantor about the First Cantor Proposal. Sandler requested additional information about sources and uses of funds, the price of buying out CCRE's outside investors, tax-structure information, and detailed internal financial modeling and projections, among other things. Ex. 49. In addition, the Sandler team and Barry Gosin, CEO of Newmark, exchanged diligence materials, and Sandler solicited Gosin's input on the proposed Transaction. Exs. 50-52. On May 5, the Sandler and Debevoise teams sent a consolidated list of open information requests and questions to Cantor. Ex. 53.

On May 11, the Special Committee and its advisors held a meeting at which Cantor representatives made a presentation on the first proposal. Exs. 54-55. Lutnick and Edelman discussed the proposed valuation and key terms of the Transaction, an overview of Berkeley Point and the CMBS business, and potential future growth opportunities and synergies with BGC's businesses. *Id.* The minutes reflect a discussion in which the Special Committee and its advisors questioned Lutnick and Edelman. Ex. 54.

The next morning, the Sandler team began assembling slides analyzing the Transaction for the Special Committee. Ex. 56. Sandler spent the next week crunching numbers and analyzing data, and on May 19 met with the Special Committee to hear Gosin present Newmark's analysis of the Transaction. Ex. 57. Gosin described the strategic importance of the Transaction for BGC and Newmark, explaining that the Transaction could be "transformative due to potential future growth opportunities and synergies with Newmark's existing business." *Id.* He believed that the Transaction would result in a "a fully integrated lending platform, competitively positioned to provide a greater variety of services to its customers." *Id.* Gosin also pointed out that multifamily DUS lenders like Berkeley Point are highly valuable and rarely sold, and explained the value of the acquisition of data from CCRE's CMBS business. *Id.* Throughout the course of the presentation, members of the Committee and its advisors asked Gosin questions. *Id.*

G. Cantor Makes Its Second Proposal And Sandler Presents Its Preliminary Valuation Analysis (May 20 to June 1, 2017).

The last week of May and the first week of June 2017 were a period of intense work and analysis for the Special Committee and its advisors. On May 23, Cantor's outside counsel, Wachtell, sent the Special Committee and its advisors a revised term sheet for the Transaction (the "Second Cantor Proposal"). Ex. 58. After two days of analysis of the proposal by its advisors, the Special Committee met on May 25 to

discuss the revised term sheet and receive preliminary perspectives from Sandler on the valuation of the Transaction. Ex. 59.

Sandler explained that Berkeley Point had grown significantly since being acquired by Cantor, and that it was expected to continue to grow substantially in 2017 and 2018. *Id*. Sandler walked the Special Committee through a PowerPoint covering several topics: (i) an overview and analysis of the revised term sheet; (ii) an overview of Berkeley Point; (iii) an overview of CCRE's CMBS business; (iv) BGC sources and uses; and (v) a post-transaction valuation of CCRE. Ex. 60. Sandler reviewed Berkeley Point's financials with the Special Committee, performed its own comparative analysis to eight similar companies, and compared Berkeley Point with the most comparable company, Walker & Dunlop, using a variety of different metrics (including adjusted EBITDA, forward-earnings multiples, and book-value multiples). *Id.* at DEB00005047-53.

Sandler also examined the historical financials of CCRE's CMBS business, reviewed comparable senior unsecured debt offerings, and mapped out illustrative returns at various preferred rates of return under different income and loss scenarios. *Id.* at DEB00005034-62. The Special Committee asked questions throughout the presentation, and continued to press for information from Cantor. Ex. 59.

Through this period of meetings and detailed discussions with its advisors, the Special Committee developed a deep understanding of the strategic importance and

synergies of the potential Transaction. As Curwood explained, the proposed acquisition of Berkeley Point would create "a more integrated real estate company that could not only serve as a broker but gather data for its own facilities and other brokering and steer people to finance." Ex. 17 at 261:15-25. Bell similarly discussed the benefits to BGC from the proposed Transaction, including synergies if Newmark received "a portion of the data and information that the CMBS business provided." Ex. 19 at 172:25-173:7. And Moran explained that although the Special Committee liked the proposed deal, there would be no agreement without concessions from Cantor on price. Ex. 24 at 282:12-16 ("Think we will get there with a price that is right. . . . We don't have a deal, Howard, until we get a price we like.").

The next day, Sandler propounded additional information requests to Cantor, and Cantor sent responses several days later. Exs. 61-62. Sandler presented this new data at a Special Committee meeting on June 1, along with other information about the Transaction. Exs. 63-64. The Committee and its advisors then discussed remaining diligence items. Ex. 63.

The Special Committee met again at the end of the day on June 1 with six representatives from Cantor and Wachtell. Ex. 65. The Committee and its advisors reiterated and pressed their open information requests. *Id.*; Ex. 67. The two sides then discussed the current Transaction proposal comparing it to the similar economic

metrics of Walker & Dunlop, the company most comparable to Berkeley Point. Ex. 65.

H. The Special Committee and Its Advisors Develop Their Negotiating Strategy Against Cantor (June 2-6 2017).

After months of fact gathering and analysis, the Special Committee and its advisors began to prepare more directly to negotiate against Cantor on the material terms of the Transaction. Sandler commenced drafting an advocacy presentation (the "Advocacy Presentation") of proposed leverage points for negotiations. Ex. 67; Ex. 68 at 282:8-283:7, 286:7-287:13 (Sterling explaining that the document contained arguments and potential leverage points, not his valuation analysis); Ex. 69 ("It is not fairness support but a negotiating document to get better terms.").

The Special Committee met again on Sunday, June 4, prepared with a 43-page presentation by Sandler, to discuss Sandler's valuation perspectives and proposed arguments for negotiating against Cantor. Exs. 70-71. During the meeting, Sandler walked the Committee through updated valuation metrics and a deck that incorporated responses to recent information requests. Ex. 72 at BGC0000091-114. Sandler once again identified Walker & Dunlop as the most comparable publicly traded company to Berkeley Point, and noted "the significant increase in Walker & Dunlop, Inc.'s multiples since February 2017." Ex. 70.

After reviewing the financials and valuation analysis for the Transaction, Sandler reviewed the draft Advocacy Presentation with the Special Committee.

Sandler "provided an overview of potential advocacy cases for changes to the terms" of the Transaction. *Id.*; Ex. 72 at BGC0000115-130 ("advocacy case" portion of deck entitled "Draft Presentation to Cantor"); Ex. 24 at 383:13-14 ("This was a negotiation document."); Ex. 73 ("I think we lay the argument out convincingly and correctly."). Sandler, Debevoise and the Special Committee members worked collaboratively on the Advocacy Presentation, with the Special Committee members "asking questions of Sandler" and "providing feedback on how they believed the Committee should respond to Cantor's proposals." Ex. 70. Their goal was to work together to finalize an Advocacy Presentation that the Special Committee would use to convince Cantor to change material terms to BGC's benefit. Ex. 72. The undisputed facts adduced in discovery show that this document was *not* Sandler's "honest assessment" or "recommendation" as to valuation, as plaintiffs allege—it was an advocacy piece that contained a series of arguments designed to convince Cantor to change the terms of the proposal. Ex. 68 at 286:7-287:13.

On Monday, June 5, Sandler incorporated the comments of the Special Committee members into the Advocacy Presentation and distributed a revised version to the Committee and Debevoise. Ex. 74-75. The Special Committee held another meeting that evening. The minutes reflect that at the meeting, the parties discussed: (i) a Debevoise presentation on the Special Committee members' fiduciary duties regarding their evaluation and negotiation of the Transaction; (ii)

current events and potential changes relating to GSEs; and (iii) revisions to the "advocacy presentation." Ex. 76. Sandler, Debevoise and the Special Committee members discussed and refined the arguments in the Advocacy Presentation. *Id*. The Committee members asked questions and provided their feedback on the document. *Id*. After discussion, "the Committee instructed Sandler O'Neill to incorporate its feedback into a response and then transmit the response to the terms of the Proposed Investment to Cantor." *Id*.

Sandler sent the final version of the Advocacy Presentation to Cantor in the pre-dawn hours of June 6. Ex. 77. In the document, the Special Committee and its advisors argued, among other things, for (i) a reduction in the price for Berkeley Point, (ii) structural changes that would allow BGC greater control over Berkeley Point at an earlier date and provide greater liquidity for BGC's investment; and (iii) a reduction in BGC's investment in the CMBS business on more beneficial terms and with less risk by virtue of a "catch-up" provision. *Id.* at 123-28. In the negotiation that followed, the Special Committee extracted *significant* concessions from Cantor on *all* of these key points.

I. The Special Committee and Its Advisors Negotiate At Arm's Length With Cantor and Extract Significant Concessions.

On June 6, the Special Committee and its advisors met with seven Cantor representatives, including Lutnick, Edelman, and David Lam of Wachtell, to negotiate the Transaction. Ex. 78. Cantor's initial offer was that BGC (i) "acquire

a majority interest in Berkeley Point for $880 million, or acquire all of Berkeley point for $1 billion"; and (ii) "invest $150 million in CCRE's CMBS business." *Id*.

Sterling led the discussion on the Advocacy Presentation, which had been delivered to Cantor beforehand. *Id*. The Cantor side was displeased by both the vigor and the substance of Sterling's presentation—which aggressively challenged a large swath of Cantor's terms and analysis. Ex. 79 at 659:11-15; Ex. 68 at 356:10-358:18 ("[Lutnick] was required to sit through, you know, a couple of hours of me going point by point as to why we weren't going to pay what he wanted us to pay."). Sterling then presented the Special Committee's counteroffer: BGC would pay $720 million for a majority interest in Berkeley Point, and invest $100 million in the CMBS business "with several additional changes to the security proposed by Cantor." *Id.*

For five hours, there was heated, animated, and sometimes frustrating debate over the terms of the Transaction, with the sides leaving to caucus and returning with counterproposals. *Id.* at 29-30; Ex. 2 at 341:22 ("a heated meeting and voices were raised"); Ex. 68 at 353:20-356:22. There were "arguments and pushback on every single thing." Ex. 68 at 359:13-14; Ex. 79 at 283:23-24 ("It was a long, drawn-out, lots of back and forth all day."); Ex. 2 341:23-24 ("people expressed strong opinions to the Cantor representatives"). Indeed, at one point, after there had not been "a lot of movement," the Special Committee was "pretty dug in and . . . ready to walk

away." Ex. 17 at 360:5-19. At another point, the Special Committee sent Bell to negotiate personally with Lutnick and Cantor, on the theory that Lutnick had particular respect for Bell's analytic skills. Ex. 19 at 356:7-359:13. During the negotiations, as the situation changed quickly and counterproposals were advanced and considered, the Special Committee worked hand-in-hand with Sandler and Debevoise to obtain a deal that would be fair and reasonable for BGC's public stockholders. Ex. 17 at 352:9-353:14; Ex. 24 at 388:19-389:14.

The Special Committee's preparation and strategy paid off. It extracted several critical concessions identified in the Advocacy Presentation, including:

- A sale of 100% of Berkeley Point to BGC—BGC would have *complete* and *immediate* control over Berkeley Point, not just potentially five years down the line, as contemplated by the First Cantor Proposal and the Second Cantor Proposal. Ex. 78.
- A *substantial* reduction in the purchase price from $1 billion to $875 million—saving $125 million for the BGC public stockholders. *Id.*
- A *substantial* reduction in the amount of BGC's investment in the CMBS business from $150 million to $100 million (33%), thereby reducing risk. *Id.*
- Inclusion of a "catch-up" provision to reduce the risk of the CMBS investment—if BGC's yearly preferred return fell under 5%, following-years' returns, if higher, will supplement the shortfall. *Id.*

In short, BGC agreed to pay $875 million for 100% and full control of Berkeley Point; it agreed to invest $100 million in the CMBS business for a period of five years with a preferred 5% yearly return; and it obtained a prohibition on

distributions to Cantor from the CMBS business until BGC received its preferred return. *Id.*; Ex. 80.

J. The Special Committee and its Advisors Negotiate Definitive Transaction Documents (June 7-July 12, 2017)

The day after the parties came to a handshake agreement on these terms, Sandler continued double-checking all aspects of the agreement at the Special Committee's request. Ex. 81. Sandler confirmed that the "[n]umbers are very supportive of $875" for Berkeley Point. *Id.*

Over the next few weeks, the Special Committee and its advisors continued to meet, exchange emails, and work through additional diligence requests as they negotiated drafts of the transaction agreements and disclosure schedules. Ex. 82. When Cantor did not respond quickly enough, the Special Committee and its advisors pressed hard for responses. Ex. 83 (email from Sterling to Cantor asking for a "firm deadline" on when they can expect responses); Ex. 84 (email re open issues); Ex. 85 (same). The Special Committee met several times during this period to discuss financing for the Transaction, revisions to the deal documents, and other open issues. Exs. 86-97. Debevoise delivered a presentation to the Special Committee on its fiduciary duties and responsibilities under Delaware law. Ex. 98.

K. Sandler Issues Fairness Opinions and the Transaction Is Executed (July 13-17, 2017).

On July 13, the Special Committee met to receive a presentation from Sandler. Ex. 99. Sandler presented a 35-page PowerPoint and two written fairness opinions that contained a detailed analysis explaining the basis for Sandler's conclusion that the price for Berkeley Point was fair, and that the terms of BGC's investment in the CMBS business were reasonable. Exs. 100-102. After discussing these materials with its advisors, the Special Committee adopted resolutions stating that the Transaction was fair and reasonable to BGC's stockholders and recommending that the board authorize the Transaction. Ex. 99.

On July 16, the board adopted the Special Committee's recommendation and voted to approve the Transaction. Ex. 103. The parties executed the Transaction agreements on July 17, and the Transaction closed on September 8. Ex. 104.

IV. Procedural History

Following BGC's document production pursuant to a books and records demand, plaintiffs filed derivative actions in this Court challenging the Transaction in October and November 2018. Then, in February 2019, plaintiffs filed their First Amended Stockholder Derivative Complaint (the "Complaint"). Plaintiffs assert three counts of breach of duty against the defendants. Count One, the sole count against the Independent Directors, alleges that the Independent Directors breached their fiduciary duties by acting for the benefit of Lutnick and Cantor rather than

BGC, because they were beholden to Lutnick and Cantor due to extensive personal relationships and material income from their director compensation.

Defendants moved to dismiss the complaint for failure to make demand upon the board, and the Independent Directors also moved to dismiss for failure to state a claim pursuant to Rule 12(b)(6). In September 2019, this Court denied defendants' motions ("MTD Op."). The parties then conducted extensive fact and expert discovery. Fact discovery has revealed that many of the allegations in the Complaint were simply not true. For a representative list of allegations confirmed to be false, *see* Ex. 105.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). The burden "is initially on the moving party, and the Court views the evidence in the light most favorable to the nonmoving party." *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009). But "once the moving party has satisfied its initial burden of demonstrating the absence of a material factual dispute, the burden shifts to the nonmovant to present some specific, admissible evidence that there is a genuine issue of fact for a trial." *Id.* "It is not enough that the nonmoving party put forward a mere scintilla of evidence; there must be enough evidence that a rational finder of fact could find some material

fact that would favor the nonmoving party in a determinative way." *Id.* The Delaware Supreme Court has directed courts to apply the law with a general principle in mind: the law should not "create incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders would cause them to remain as defendants until the end of any litigation." *Cornerstone*, 115 A.3d at 1184.

ARGUMENT

The Court should grant summary judgment in favor of the Independent Directors because plaintiffs cannot establish a non-exculpated claim against them. The undisputed facts leave no genuine dispute that the Independent Directors were not "beholden" to Lutnick, such that their judgment on the Transaction was "sterilized," or that they negotiated and approved the Transaction in bad faith.

I. To Establish A Claim For Breach Of Fiduciary Duty Against The Independent Directors, Plaintiffs Must Establish That The Defendants Were Beholden To Lutnick Or Acted In Bad Faith.

The Independent Directors are protected by a provision in BGC's certificate of incorporation that exculpates them from liability except under limited circumstances stated in Section 102(b)(7) of the Delaware General Corporation Law. Ex. 106 at Art. VII. Section 102(b)(7) was adopted out of "fear that directors who faced personal liability for potentially value-maximizing business decisions might be dissuaded from making such decisions." *Cornerstone*, 115 A.3d at 1185. The

Court has therefore held that "[a] plaintiff seeking only monetary damages [in a derivative suit] must plead non-exculpated claims against a director who is protected by an exculpatory charter provision . . . , regardless of the underlying standard of review for the board's conduct." *Id.* at 1175.

"When [ ] independent directors are protected by an exculpatory charter provision and the plaintiffs are unable to plead a non-exculpated claim against them, those directors are entitled to have the claims against them dismissed." *Id.* at 1176. Delaware courts commonly grant summary judgment under these circumstances. *See Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014); *MFW*, 88 at 648-49; *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 785 (Del. Ch. 2011); *Johnson v. Shapiro*, 2002 WL 31438477, at *8 (Del. Ch. Oct. 18, 2002); *Clements v. Rogers*, 790 A.2d 1222, 1248 (Del. Ch. 2001); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *11 (Del. Ch. May 22, 2000).[5]

A plaintiff may establish a non-exculpated claim in three ways: by demonstrating that the directors (1) harbored self-interest adverse to the stockholders'

[5] Indeed, this is the case even if a transaction is evaluated under an entire fairness standard *and* the Court ultimately determines that the transaction at issue was not entirely fair. *See, e.g.*, *Peru Copper Corp*, 52 A.3d at 785 (dismissing special-committee defendants at summary judgment despite questionable valuation and fairness analyses and ultimate finding at trial that transaction was not entirely fair); *cf. Firefighters' Pension Sys. v. Presidio, Inc.*, 2021 WL 298141, at *47-48 (Del. Ch. Jan. 29, 2021) (dismissing independent directors under *Cornerstone* while case continued against primary defendants).

interests, (2) acted to advance the self-interest of an interested party, or (3) acted in bad faith. *Cornerstone*, 115 A.3d at 1179-80. Plaintiffs have never invoked the first *Cornerstone* prong: they have never claimed that the Independent Directors stood on both sides of the Transaction, or received a personal benefit from it. To survive summary judgment, plaintiffs must raise a genuine dispute as to whether the Independent Directors (1) were so beholden to Lutnick that their ability to evaluate the Transaction was "sterilized," or (2) acted in bad faith. *MFW*, 88 A.3d at 648-49 (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)). Plaintiffs must make this showing for *each* director; "group pleading" will not suffice. *In re Tangoe Stockholders Litig.*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20, 2018).

II. Plaintiffs Have Failed To Raise A Genuine Dispute That The Independent Directors Were So Beholden To Lutnick That Their Ability To Evaluate The Transaction Was "Sterilized."

Plaintiffs have not adduced sufficient evidence showing that any of the Independent Directors was so "beholden" to Lutnick that his or her "discretion would be sterilized." *MFW*, 88 A.3d at 648-49. Plaintiffs base their claim under the second *Cornerstone* prong on two main allegations: (a) that the Independent Directors had various personal connections with Lutnick that made them "close friends"; and (b) that the compensation they received as members of Lutnick-affiliated boards was material to them. Compl. ¶¶26-51. Plaintiffs' allegations are either false or insufficient.

A. The Independent Directors Were Not Friends With Lutnick, Much Less Close Enough Friends To Undermine Their Judgment.

It is well established that "[a]llegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam ex rel. Martha Stewart Living Omnimedia v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). Instead, to call a director's independence into question, "a relationship must be of a *bias-producing nature*." *Id.* (emphasis added). "Some professional or personal friendships, which may *border on or even exceed familial loyalty and closeness*, may raise a reasonable doubt" about a director's impartiality. *Id.* (emphasis added). But the fact that a director "move[s] in the same social circles, attend[s] the same [events]," or "developed business relationships before joining the board, . . . are insufficient." *Id.* at 1051. The question is whether the relationship rises to the level that the "non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." *Id.* at 1052.

Critically, this is the standard that a court must apply when evaluating demand futility at the *pleading stage*. *Id.* at 1057. At summary judgment, a plaintiff must present *facts* establishing that the independent directors were beholden to the interested party. *MFW* is illustrative. There, the Supreme Court upheld a grant of summary judgment where the plaintiffs did not raise a triable issue that three "Special Committee members . . . were beholden to [an interested director] because

of their prior business and/or social dealings." 88 A.3d at 647. The Court explained that plaintiffs had not established a lack of independence for one director who shared a "longstanding and lucrative business partnership" with the interested party that spanned 20 years, because the plaintiffs had not shown that this relationship *affected* "his ability to evaluate the [transaction] impartially." *Id.* The Court also rejected the proposition that a second director's independence was compromised by the fact that he was a professor at the Georgetown University Law Center, and an interested party sat on Georgetown's board, because "[n]o record evidence suggested that [the interested party] could exert influence on [the director's] position at Georgetown based on his recommendation regarding the [transaction]." *Id.*

It is also instructive to look at the cases on the other side of the line, where—as this Court explained at the pleading stage—the "Supreme Court has reversed Court of Chancery findings of director independence in the demand futility context." MTD Op. at 25. Again, it is important to view these cases in the context of their procedural posture, where the plaintiffs' allegations were "afford[ed] all reasonable inferences." *Id.* But the facts nonetheless illustrate the depth of personal relationships that the Supreme Court has deemed sufficient. In *Delaware County Employees Retirement Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015), "the plaintiffs pled not only that the director had a close friendship of over a half a century with the interested party," but also that the director "donated $12,500 to [the interested

party's] campaign" for governor, and that "the director's primary employment (and that of his brother) was as an executive of a company over which the interested party had substantial influence." *Id.* at 1019-20. In *Sandys v. Pincus*, 152 A.3d 124 (Del. 2016), the plaintiff alleged that the interested CEO and the director "co-own[ed] an unusual asset, an airplane," which the Court deemed "suggestive of an extremely intimate personal friendship" akin to "family ties" because it "require[d] close cooperation in use" and "detailed planning." *Id.* at 126, 130. And in *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019), the plaintiff alleged that the director "owe[d] his *entire career*" to the interested party's father, who "hired [the director] as his administrative assistant in 1981 and promoted him five years later to the position of CFO, a position [he] maintained until . . . 2014." *Id.* at 808 (emphasis added).

The facts of this case are far afield from those in *Sanchez*, *Sandys*, and *Marchand*—and, for that matter, from those in *Beam*, where a challenge to director independence was *dismissed* on the pleadings. The undisputed facts show that the Independent Directors were not even friends with Lutnick, much less close enough friends to create concerns about bias.

Dalton. It is remarkable that plaintiffs are still pursuing a claim against Secretary Dalton, who was 75 years old at the time of the Transaction and retired from his service on all BGC-related boards *less than one year later*. Compl. ¶51. He had no conceivable incentive to favor Lutnick, let alone jeopardize his

extraordinary legacy in government and business. pp. 8-12 *supra.* To say that the two were not "friends" is an understatement; they had virtually no relationship outside of BGC matters. They had only met a couple of times when Lutnick asked Secretary Dalton to his first Cantor-related board. *Id.* And during Secretary Dalton's years of service on Cantor and BGC-related boards, they never had private dinners, took vacations, attended family events, or had other business dealings. *Id.* They barely even communicated with each other one-to-one, preferring to arrange calls through Lutnick's assistant. *Id*. In light of the record, plaintiffs' claim against Secretary Dalton borders on the frivolous.

Curwood. When it comes to Curwood (as with Bell), plaintiffs' consistent strategy has been to invoke the name "Haverford" as many times as possible. But at the end of the day, their claim boils down to one straightforward fact: both men served on the Haverford College Board of Managers and other school committees. It is undisputed that Lutnick had *nothing* to do with Curwood's appointment to any of these positions; Curwood was appointed because of his outstanding credentials. pp. 12-16 *supra*. Curwood was only minimally involved in Haverford fundraising, he *never* solicited funds from Lutnick, and his position on the Haverford committees was not tied in any way to Lutnick's contributions to Haverford. *Id.* These facts are strikingly similar to *MFW* where the Supreme Court held that the relevant parties' positions at Georgetown did not call the defendant's neutrality into question absent

evidence that the controller "could exert influence on [the director's] position." 88 A.3d at 647.

Like Secretary Dalton, Curwood had minimal interactions with Lutnick outside of board meetings—they were limited to a handful of board dinners and lunches, diversity initiatives at BGC, and BGC-related service mission trips to aid disaster victims. pp. 14-15 *supra*. Delaware courts have granted summary judgment even when "the evidence *only* shows that [the defendant] had a longstanding friendship with [the interested party]." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 179 (Del. Ch. 2005) (emphasis added). "The relationship between" Curwood and Lutnick "does not rise to even this level." *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369 (Del. Ch. 2008).

Bell. Bell was the Provost at Haverford, so naturally, she interacted with members of Haverford's board, including Lutnick. pp. 16-19 *supra*. But there is no evidence to support plaintiffs' allegation that Bell *personally* "benefitted" from Lutnick's contributions to Haverford. Compl. ¶26. Bell's main focus was academics, not fundraising, and certainly not fundraising from Lutnick or anyone at BGC or Cantor. pp. 16-17 *supra*. Fundraising had no effect on how Bell was compensated or evaluated. *Id*. And even if Bell received some attenuated "benefit" by virtue of Lutnick's contributions to her college—a benefit she would presumably share with every student, professor, administrator, alumnus, and maintenance

worker at the college—she left Haverford in 2012, *five years* before the Transaction. These facts are similar to *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808 (Del. Ch. 2005), where the Court rejected the argument that the President of the Museum of Natural History was beholden to JPMorganChase because it had "contribut[ed] to the museum" in the past; the plaintiffs offered no evidence of "how JPMC's contributions could, or did, affect the decision-making process of the president of one of the largest museums in the nation." *Id.* at 822.

Notably, Bell testified that she *did* make lasting friendships with people at Haverford, but that Lutnick was *not* "one of those friendships." pp. 17-19 *supra*. She never "socialized [with Lutnick] in any context outside of the BGC context or Haverford context." *Id.* Bell has never even been to Lutnick's home outside of a few work-related instances. *Id.* And discovery has refuted plaintiffs' baseless theory that [redacted] Bell's relationship with Lutnick was purely professional—and even that relationship was limited.

Moran. The same is true of Moran. pp. 20-23 *supra*. Lutnick was not responsible for Moran's appointment to his first BGC-related board; Frederick Varacchi was. *Id*. Moran never attended any Lutnick-family events, or had any private dinners with Lutnick, or had any private business dealings with Lutnick. *Id*.

He visited Lutnick's residence only once outside of board functions, during a Clinton campaign fundraiser. *Id*.

Scraping the bottom of the barrel, plaintiffs have relied heavily on a single photograph showing Moran and his late partner, Saltzman, attending the same gala as Lutnick in 2007; and on the fact that Saltzman presented an award to Lutnick's sister (whom she did not know prior to the event) for her charitable work with the Cantor Relief Fund in 2014. *Id.* But while these isolated interactions make for catchy graphics in the complaint, they cannot substitute for substantive evidence of a real friendship.

In short, the Independent Directors' interactions with Lutnick are nothing more than the kind of "social-circle" contacts that courts have regularly deemed insufficient to demonstrate a lack of director independence. *Beam*, 845 A.2d at 1050-54; *Frank*, 2014 WL 957550, at *23; *Transkaryotic*, 954 A.2d at 369. And more fundamentally, plaintiffs have not *attempted* to draw a connection between these interactions and the Independent Directors' *ability to evaluate the Transaction*. Nothing in the record shows that the Independent Directors' relationships with Lutnick were "of a bias-producing nature," or that they would be "more willing to risk [their] reputation[s] than risk [their] relationship[s] with [Lutnick]." *Beam*, 845 A.2d at 1050-52. The evidence is just to the contrary.

B. The Income The Independent Directors Received From BGC Was Not Material To Their Ability To Fairly Evaluate The Transaction.

Plaintiffs survived the pleading stage in large part by alleging that the Independent Directors' BGC-related compensation was "financially material" to them, such that there was a "reasonable doubt as to [their] independence." MTD Op. at 32. At this stage, that argument fails as a matter of both law and fact.

As a legal matter, the fact that "directors are paid for their services as directors"—even compensation that is significant relative to their total income—is insufficient "without more" to establish that the director is beholden to a controlling party. *Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988). For example, in *In re Walt Disney Derivative Litig.*, 731 A.2d 342 (Del. Ch. 1998), the plaintiffs alleged that because a director's "salary as a teacher [was] low compared to her director's fees and stock options," she was necessarily beholden to the interested party. *Id.* at 359. The Court explained that adopting this theory "would be to overrule the Delaware Supreme Court." *Id.* at 360. And it would "discourage the membership on corporate boards of people of less-than extraordinary means." *Id.* "Such 'regular folks' would face allegations of being dominated by other board members, merely because of the relatively substantial compensation provided by the board membership compared to their outside salaries." *Id.*; *Chester Cty. Emps.' Ret. Fund v. New Residential Inv.*, 2017 WL 4461131, at *8 (Del. Ch. Oct. 6, 2017) (same as applied to a director who had worked as a civil servant and had "not accumulated great wealth") (citing

Disney); *Robotti & Co. v. Liddell*, 2010 WL 157474, at *14 (Del. Ch. Jan. 14, 2010) (low six-figure director compensation, standing alone, cannot form the basis for lack of independence).

In any event, most of plaintiffs' factual allegations about the Independent Directors' income are simply false. Plaintiffs alleged that Secretary Dalton derived 40-50% of his income from Cantor-affiliated entities over the last five years (Compl. ¶¶50-51); the actual percentage [redacted] (less than what he earned from another directorship around the same time), and in 2017, it was [redacted] pp. 11-12 *supra*. Plaintiffs alleged that Bell's BGC-related compensation "represented over 30% of her total income" (Compl. ¶29); the actual percentage [redacted] of yearly income from 2010-2017. *Id.* Plaintiffs alleged that Moran "derives his sole income from serving on the BGC Board" (Compl. ¶43), when it in fact constituted [redacted] of his yearly income from 2010 to 2017, and [redacted] pp. 22-23 *supra*.[6] Plaintiffs' position—that these directors would be unwilling to risk a low six-figure income despite their [redacted] net worths—does not withstand scrutiny.

[6] Moran purchased additional BGC stock during this time period, Ex. 24 at 36:19-37:21, which courts have found to indicate director independence. *Transkaryotic*, 954 A.2d at 369.

That leaves Curwood, [redacted] whose BGC-related compensation was [redacted] of his total household income. pp. 15-16 *supra*. As discussed above, this fact on its own is insufficient as a matter of law to establish that Curwood is beholden to Lutnick. *Grobow*, 539 A.2d at 188; *Disney*, 731 A.2d at 359-60; *Chester*, 2017 WL 4461131, at *8; *Liddell*, 2010 WL 157474, at *14. And that is particularly true in light of Curwood's unique background and circumstances. Perhaps more than any of the other Independent Directors, Curwood has devoted his life to public service—as a prominent journalist, environmentalist, and lecturer at prestigious universities. That is not the type of legacy a person abandons to increase the wealth of another. As Curwood explained at his deposition, he was in no way "dependent" on his BGC compensation, and had "plenty of other options." pp. 15-16 *supra*. Plaintiffs have offered *nothing* to rebut this testimony—they adduced no facts showing that Curwood was focused on retaining his board seat and compensation instead of the fairness of the Transaction.

* * *

This was no ordinary Special Committee. Plaintiffs needed to prove that the Independent Directors—the former Secretary of the Navy, a Pulitzer Prize-winning journalist, the Provost of a prestigious university, and a 30-year senior executive at JPMorganChase—were incapable of standing up to Lutnick and evaluating the Transaction fairly. The record shows the opposite—that even if their BGC board

positions disappeared because they refused to approve the Transaction, they would have been just fine. There is no genuine dispute on the second *Cornerstone* prong.

III. Plaintiffs Have Adduced No Evidence—Much Less An "Extreme Set of Facts"—Showing That The Independent Directors Consciously Disregarded Their Duties Or Acted In Bad Faith.

At the pleading stage, this Court did *not* adopt plaintiffs' claim that the Independent Directors acted in bad faith. This claim has not aged well.

To establish bad faith, plaintiffs had to prove an "extreme set of facts" or show that the Transaction was "so egregious or irrational that [it is] essentially inexplicable on any ground other than bad faith." *Stritzinger*, 2018 WL 4189535, at *4. "[E]ven one plausible and legitimate explanation for the board's decision would negate a reasonable inference of bad faith." *MeadWestvaco*, 168 A.3d at 684. *Tilden v. Cunningham*, 2018 WL 5307706, at *15 (Del. Ch. Oct. 26, 2018) (finding of bad faith is a "rare bird" in Delaware corporate law). Just because a decision-making process is *imperfect*, *flawed*, or even *incompetent*, that does not mean the decision was made in bad faith. *See Clements v. Rogers*, 790 A.2d 1222, 1248-49 (Del. Ch. 2001) ("Despite all the unsettling evidence in the record regarding the Special Committee process, there is no evidence that [the outside directors] acted in bad faith or out of a conflicting self-interest. Any lack of effectiveness on their part emerges as a consequence of misunderstanding their duties or failing to apply adequate time and attention to the assignment given to them."); *McElrath v. Kalanick*, 2019 WL

1430210, at *10 (Del. Ch. Apr. 1, 2019) ("Bad faith requires an intentional dereliction; there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties."); *Chen v. Howard-Anderson*, 87 A.3d 648, 683 (Del. Ch. 2014) ("As long as a board attempts to meet its duties, no matter how incompetently, the directors did not consciously disregard their obligations.").

Plaintiffs' complaint alleged that the Independent Directors engaged in a "perfunctory process" that lacked "any meaningful negotiations" (Compl. ¶¶116-17); ignored the advice of their advisors (*id.* ¶¶118-19); and enabled Lutnick to manipulate the process (*id.* ¶120). There is not a shred of evidence to support these allegations. Rather, the undisputed record shows that the Independent Directors acted in good faith at every step of the process.

As discussed in detail above (pp. 23-41 *supra*), the undisputed facts show that the Special Committee conducted a careful, diligent process assisted by experienced outside advisors. The Special Committee and its advisors repeatedly requested due-diligence information about Berkeley Point, CCRE, and BGC, and aggressively followed up when they did not hear back. The Independent Directors conducted *nineteen* Special Committee meetings and communicated with their advisors and among themselves dozens of additional times over the span of four months to discuss and review, in detail, their diligence of the financials of Berkeley Point and the

CMBS business, as well as their analysis of the Transaction. Sandler meticulously walked the Special Committee through *five* detailed PowerPoint presentations at *five* different Special Committee meetings analyzing and discussing a variety of key issues, including valuation. The negotiations against Cantor were at times heated, frustrating, and above all, serious. There were times, in fact, when the Special Committee was "*ready to walk away*." pp. 38-39 *supra* (emphasis added).

The diligence of the Independent Directors is apparent not just from the *process* but from the *result*. The Independent Directors and their advisors won important concessions from Cantor on deal price, deal structure, and key terms. *See* pp. 4, 39-40 *supra*. Plaintiffs' allegation that the Special Committee "ignore[d] its own advisor" is based almost entirely on a *single* PowerPoint presentation, block quoted over four pages of the complaint. Compl. ¶¶38-42. Plaintiffs allege that "[i]nstead of taking the advice of Sandler," the Independent Directors "gave Cantor and Lutnick almost everything they wanted." *Id.* ¶¶42, 90. That is absurd. As discussed above, the PowerPoint at issue was an *Advocacy* Presentation that "provided an overview of potential advocacy cases for changes to the terms" of the Transaction. pp. 35-37 *supra*. The Special Committee worked *collaboratively* with Sandler, as well as with Debevoise, to draft the presentation, and used it as a *negotiating tool* to convince Cantor to change material terms to better favor BGC's

public stockholders. *Id*. This is exactly what the plaintiffs believe that *disinterested* and *independent* directors are supposed to be doing.

Perhaps most importantly, the Special Committee ultimately received fairness opinions from Sandler on the Berkeley Point acquisition and the investment in CCRE's CMBS business. p. 41 *supra*. Delaware courts have held that reliance on such opinions are inconsistent with a finding of bad faith. *Frank*, 2014 WL 957550, at *25 (fairness opinion is evidence that special committee attempted to "obtain the best value reasonably available" even where questions of fact surround the financial projections); *Nat'l Corp. S'holders*, 2000 WL 710192, at *23 (special committee relied on its advisors to be fully informed).

Both the process and outcome of the Transaction were beyond serious reproach, as was the conduct of the Independent Directors. Plaintiffs' claims fail.

CONCLUSION

The Court should grant summary judgment in favor of the Independent Directors.

OF COUNSEL:

Joseph De Simone
Michelle J. Annunziata
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Matthew E. Fenn
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Dated: February 10, 2021

/s/ Raymond J. DiCamillo
Raymond J. DiCamillo (#3188)
Kevin M. Gallagher (#5337)
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Defendants Linda Bell, Stephen Curwood, William Moran, and John Dalton

Words: 13,983