

Del. Justices Uphold Toss Of \$875M BGC-Cantor Deal Suit

By **Donald Morrison**

Law360 (August 10, 2023, 5:56 PM EDT) -- The Delaware Supreme Court on Thursday upheld a Chancery Court decision to toss a suit challenging the \$875 million acquisition of Berkeley Point Financial LLC by Cantor Fitzgerald LP CEO Howard Lutnick and Lutnick-controlled BGC Partners Inc. in 2017, agreeing it was a fair deal.

In a single-page order, a five-judge panel on the en banc court adopted the reasoning of Vice Chancellor Lori W. Will, who dismissed the suit in August 2022, concluding the transaction closed at a fair price despite Lutnick's "imperfect" process.

"The Court of Chancery should be affirmed on the basis of and for the reasons stated in its August 19, 2022 memorandum opinion," Chief Justice Gary F. Traynor wrote for the panel.

Union fund investors argued on appeal that Vice Chancellor Will violated Delaware's "entire fairness" standard, which states that transactions involving conflicts of interest must be reviewed under a special standard setting a high legal bar for price and fairness of the merger process. The investors said the vice chancellor shifted the burden of proof onto the defense rather than the plaintiff.

"Entire fairness law has gone off the rails and it's time to put it back on," Counsel for the union fund investors, Gregory V. Varallo of Bernstein Litowitz Berger & Grossmann LLP, said in the May brief. "This is the place to start."

Eric Leon of Latham & Watkins LLP, who serves as counsel for Lutnick, CF Group and Cantor Fitzgerald, responded in an answering brief that the trial court applied the correct legal framework and that Vice Chancellor Will examined every witness directly.

The suit, originally filed in 2019, said Cantor first asked for \$750 million for a 95% stake in Berkeley Point. The price eventually rose to \$1 billion before settling at \$875 million for a 100% stake. The transaction also included a \$100 million BGC acquisition of a 27% interest in Cantor Commercial Real Estate's commercial mortgage-backed securities business.

The merger's initial terms, in addition to \$875 million in cash, included a \$100 million BGC payment to Cantor Commercial Real Estate Co. LP's commercial mortgage-backed securities business. Adjustments afterward pushed the original \$875 million price to \$964.2 million.

Counsel for the investors argued that Lutnick, who allegedly controlled the transaction through Cantor

despite formation of an independent special committee, personally stood to receive 31 cents of every dollar that BGC allegedly overpaid for Berkeley Point because Lutnick's 54% interest in Cantor exceeded his 23% economic interest in BGC.

Vice Chancellor Will said in the 112-page post-trial opinion that although Lutnick "had a hand" in selecting the co-chairs of a BGC board special committee and its advisers, the deal closed at a fair price and under fair terms. The vice chancellor continued by lamenting that no deal is perfect, even under the best of circumstances.

"Perfection is an unattainable standard that Delaware law does not require," Vice Chancellor Will said, "even in a transaction with a controller."

Counsel for the union investors, independent directors and Lutnick did not immediately respond to a request for comment Thursday.

Plaintiffs Roofers Local 149 Pension Fund and Northern California Pipe Trades Trust Funds are represented by Christine M. Mackintosh and Vivek Upadhyia of Grant & Eisenhofer PA, and Jeroen van Kwawegen, Gregory V. Varallo and Andrew E. Blumberg of Bernstein Litowitz Berger & Grossmann LLP.

The independent directors are represented by Raymond J. DiCamillo, Kevin M. Gallagher and Caroline M. McDonough of Richards Layton & Finger PA, and Joseph De Simone, Michelle J. Annunziata, Nicole A. Saharsky, Minh O. Nguyen-Dang and Matthew E. Fenn of Mayer Brown LLP.

Howard Lutnick, CF Group Management Inc. and Cantor Fitzgerald LP are represented by C. Barr Flinn, Paul J. Loughman and Alberto E. Chávez of Young Conaway Stargatt & Taylor LLP, and Eric Leon, Nathan Taylor, Elizabeth A. Morris, Robert J. LaCroix, Richard Frohlichstein, Melissa Arbus Sherry and Michael Clemente of Latham & Watkins LLP.

The case is In re: BGC Partners Inc. Derivative Litigation, case number 359, 2022, in the Supreme Court of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Lakshna Mehta.