IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

POST-TRIAL BRIEF OF DEFENDANT WILLIAM MORAN

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INTRODUCTION

At summary judgment, the Court ruled that only one of the four independent directors originally sued in this case—William Moran—potentially "faces a non-exculpated claim." MSJ Op. at 2. To establish such a claim, plaintiffs had to make two showings at trial: (1) that Moran "could not be presumed to act independently" from Howard Lutnick (the "independence prong"); and (2) that Moran "acted to advance the self-interest" of Lutnick (the "advancement prong"). *Id.* at 27 (quoting *In re Cornerstone Therapeutics S'holder Litig.*, 115 A.3d 1173, 1180 (Del. 2015)). Plaintiffs have failed to make either showing. The Court should therefore enter judgment in favor of Moran.

Independence. Plaintiffs had a narrow path to proving that Moran lacked independence from Lutnick. The Court has recognized that the compensation Moran earned from his BGC board membership was "hardly material to him given his net worth of nearly $20 million and pension." *Id.* at 23. And the Court has found that there were "no apparent close social or familiar ties between Moran and Lutnick" (*id.* at 24); despite knowing each other for nearly twenty years, they have attended only "a handful of social, charitable, or political events together" (*id.* at 10). The Court identified only one factual dispute relating to Moran's independence: whether Moran's "respect" and "admiration" for Lutnick, although "well placed," would

have "*sterilize[d] his discretion*" as he negotiated and evaluated the transaction. *Id.* at 24-25 (emphasis added). For two reasons, the answer is no.

First, the evidence demonstrates that the *nature* of Moran's respect for Lutnick was not the kind that would affect his judgment. To cast doubt on a director's independence, "a relationship must be of a *bias-producing* nature." *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004) (emphasis added). The evidence confirms that any unique respect Moran had for Lutnick was due to Lutnick's "work supporting the families of those Cantor lost in the [9/11] attacks." MSJ Op. at 24.

This respect was "considerable" (*id.* at 24), and at times produced emotional responses from Moran because of his own connection to the 9/11 tragedy; he was a director of eSpeed on September 11, 2001. But nothing in the record suggests that this admiration would have caused Moran to defer to Lutnick's *business decisions*—that is, to make him "more willing to *risk his . . . reputation than risk the relationship* with" Lutnick. *Beam*, 845 A.2d at 1052 (emphasis added). Moran testified without rebuttal that his respect for Lutnick's response to 9/11 was entirely unrelated to their business dealings together on the BGC board. Tr.808:8-10. Indeed, Moran's respect for Lutnick is not even properly considered a "relationship." It is an *opinion* about Lutnick's response to a discrete, extraordinary event that was unconnected to—and over fifteen years prior to—the transaction. There was nothing meaningful for

Moran to "risk," much less something that he would sacrifice his reputation to *avoid* risking.

Second, the evidence at trial belies plaintiffs' conception of the *degree* of Moran's respect for Lutnick. A professional relationship may undermine a director's independence if it "border[s] on or even exceed[s] familial loyalty and closeness." *Beam*, 845 A.2d at 1050, 1052. Moran's relationship with Lutnick does not come close to that level; it was "[a]rm's length" and "pure business." Tr.805:9, 808:11. His respect for Lutnick "didn't influence [his] judgment," and did not prevent him from "tell[ing] Howard no" on many occasions, at times with "a snide letter." Tr.808:13-18. When asked whether he "revere[d]" Lutnick, Moran's response was unequivocal: "No, no, that's—no." Tr.808:20. Plaintiffs did not even attempt to get Moran to back away from this testimony; the most they could elicit from Moran was that he "think[s] highly" of Lutnick. Tr.875:24. That cannot be sufficient; if it were, directors would have an incentive to hire executives whom they do *not* respect.

Advancement. Plaintiffs also failed to satisfy *Cornerstone*'s advancement prong—the evidence shows that Moran did not "act[] to advance Lutnick's interests during negotiations" over the transaction. MSJ Op. at 33. Importantly, the test is not simply whether Lutnick benefited from Moran's conduct; it is whether Moran knowingly "acted in [Lutnick's] interest and *against* the interests of the common stockholders." *In re Oracle Corp. Deriv. Litig.*, 2021 WL 2530961, at *7 (Del. Ch.

June 21, 2021) (emphasis added). In other words, plaintiffs had to prove that Moran actively attempted to promote Lutnick's interests *at the expense* of the stockholders. As the Court explained, if "Moran engaged in hard-fought, arms-length negotiations to benefit BGC and its stockholders," plaintiffs' claim fails. MSJ Op. at 34.

The evidence overwhelmingly shows that Moran fought vigorously for the interests of BGC's stockholders—often to the great *detriment* of Lutnick. Moran knew from the start that his role was to "work for the shareholders" to ensure that they got "the best price and the best structure." Tr.812:3-18, 827:13-23. He and the Special Committee's advisors repeatedly pushed Lutnick and Cantor to obtain expansive due diligence related to the transaction. During a process that included nineteen Special Committee meetings and six detailed PowerPoint decks, Debevoise and Sandler educated the Special Committee members on all details necessary to evaluate, negotiate, and approve or reject the proposed transaction. Moran specifically directed Brian Sterling, the Special Committee's lead negotiator, to take an aggressive stance against Lutnick and Cantor in the negotiations. Tr.263:13-21. As Sterling testified, Moran told him to "go at [the negotiation] hard" and "negotiate from . . . a zealous or aggressive standpoint" against Lutnick and Cantor. *Id*.

The Special Committee used these tactics to great effect, rejecting three of Cantor's deal proposals before finally settling on a deal with the structure and price the Committee wanted. Moran told Lutnick that Cantor's first proposal was "too

complex" and inconsistent with BGC's structural objectives. Tr.1408:13-1409:4. When Cantor advanced two more proposals that still did not satisfy the interests of BGC's stockholders, the Committee was "prepared . . . to walk away from the deal," and Moran delivered a blunt message to Lutnick: "Howard, it ain't happening. The deal's not going down the way you have it constructed." Tr.837:1-2, 844:10-12. These efforts worked: The Special Committee won critical concessions that left Lutnick and Cantor exceedingly frustrated—not just at the time, but four years later at trial.

As the Court explained at summary judgment, Moran and the Special Committee at times updated Lutnick and Cantor on their progress. MSJ Op. at 33-34. But the Special Committee independently—and unanimously—exercised its judgment at every step, guided by their experienced financial and legal advisors. There is no evidence that any exchanges with Lutnick skewed the process in his favor—plaintiffs did not even attempt to demonstrate, for example, that BGC's stockholders would somehow have been better off with advisors other than Sandler and Debevoise. Nor could they, given the impeccable reputation and experience of these firms when it comes to advising special committees on M&A transactions; Sterling's and Regner's previous success advising eSpeed's special committee on a large related-party transaction against Lutnick and Cantor; and the extraordinary result they helped BGC obtain on the price and structure for the transaction at issue.

Plaintiffs have failed to prove a non-exculpated claim. In addition, Moran joins the arguments in the Cantor defendants' brief that demand on the board was not futile and the transaction was entirely fair to BGC's stockholders. The Court should enter judgment in favor of Moran.

STATEMENT OF FACTS

The Court is familiar with the structure of the transaction and the relevant entities (which are discussed again in the Cantor defendants' brief). Because the issues relating to Moran are narrow, this brief will focus on two sets of facts: those related to (a) Moran's independence; and (b) the transaction process.[1]

A. William Moran

1. Moran Leads A Distinguished Career Marked By A Fiercely Independent Approach With Senior Colleagues.

Moran has had a long and distinguished career in the banking industry. For the past 55 years, he has worked at major financial or accounting institutions; many of those years were spent as a senior executive or independent director. Tr.837:7-838:11. Much of Moran's success was built on the exact quality at issue in this case: independence.

Moran studied at Marist College on a full academic scholarship; four years later, he graduated cum laude and valedictorian of his class. Tr.793:20-794:2. After

[1] The facts related to Stephen Curwood's independence—which go to demand futility—are addressed in the argument section. *See* pp. 53-60 *infra*.

a year of teaching English at a high school, Moran enrolled at Columbia Business School. Tr.794:4-22. Armed with an MBA from Columbia, Moran joined KPMG, then known as Peat Marwick Mitchell & Co. Tr.794:19-22. He worked there for nine years, rising to the position of senior manager. Tr.794:23-795:2. Moran spent his final years at KPMG running the banking practice in White Plains. Tr.795:3-18. This position required him to interact frequently with senior executives and board members of a variety of banks, a recurring aspect of his career. *Id.*

In 1975, Moran left KPMG to join the Chase Manhattan Bank, which ultimately became JPMorgan Chase & Co. ("JPMorgan Chase"). Tr.795:19-796:12. Moran worked in the auditing department, eventually becoming the bank's Executive Vice President and General Auditor. Tr.795:19-796:5. As General Auditor, he supervised 600-700 employees, and reported to the chairman of the audit committee and various chairmen of the bank, including Thomas Labrecque, Walter Shipley, and Jamie Dimon. Tr.796:6-799:13.

During his time at JPMorgan Chase, Moran often interacted with the "powerful people" at the bank who ran one of the largest and most sophisticated financial institutions in the world. Tr.796:20. Moran consistently took a direct, honest approach with his senior colleagues. Shipley, for example, would "rely[]" on Moran "to always tell me what I don't want to hear but what I need to know." Tr.799:7-9. Ed Pratt, the chairman of Pfizer and an independent director at

JPMorgan Chase, recognized Moran's skills and potential; he thought Moran would someday "be a director" because he knew that Moran had the willingness to "align [his] interests with the shareholders." Tr.797:7-14.

Although Moran, with "an extraordinarily affable personality," sought to keep things "cool, calm, civil, kind, [and] thoughtful," he retained a "secondary management style" when necessary, which he called "Attila the Hun." Tr.577:15-16, 837:7-24. As he put it, "I don't like people trying to push me around. I've been doing this for 55 years. I've had some people try to push me around, and I thank them for their time. . . . I take advice, I make decisions, and I do the right thing." Tr.838:1-11; Tr.575:23-577:18 (Dr. Bell: Moran is "a man of extraordinary character [who] doesn't suffer fools lightly"); Tr.837:9-24 (colleagues at JPMorgan Chase described Moran as a "grizzly bear" rather than a "teddy bear" in negotiations).

2. Moran Applies The Same Independent Approach To His Relationship With Lutnick.

In 1999, Moran was approached by Fred Varacchi, a friend Moran had mentored at JPMorgan Chase; Varacchi was becoming the president of a new company, eSpeed, and wanted Moran on its Board. Tr.799:15-800:12. Moran had not heard of eSpeed or its chairman, Howard Lutnick. *Id.* At Varacchi's direction, Moran met Lutnick over a two-hour lunch to discuss the role. Tr.799:20-802:7. At the end of the lunch, Moran reminded Lutnick: "[M]y job someday may be to say

'no' to you as an independent director." Tr.802:4-5. Moran served on the eSpeed board until 2005 (Tr.802:11-17); on the ELX board from 2009 to 2013 (JX0860 at 13); and on the BGC board from 2013 to 2017 (JX0846 at 26).

True to his word, Moran "said no to Howard" "from time to time," which he described as "beautiful to watch." Tr.802:9-10. And he often gave Lutnick "news that he [didn't] really want to hear but he need[ed] to hear." JX0890 55:14-57:9. As a result, Moran "tangled" with Lutnick "[m]ore [times] than I can remember." *Id.* Sometimes, Moran would even "write a snide letter" to Lutnick when the two disagreed or when he felt Lutnick was not being responsive to requests. Tr.808:11-15. But Lutnick admired Moran's independence: "like a great marriage," they would "fight and make up at the end of the day." Tr.878:11-19.

Moran's relationship with Lutnick has always been "arm's length"; the two are "business colleagues" (Tr.805:7-9), not "close friends" (Tr.805:12-13). Moran testified that he is "not social friends" with Lutnick. Tr.805:17. They have never gone on a vacation together. Tr.805:20-21. Moran has never attended a Lutnick family bar or bat mitzvah. Tr.805:22-24. Nor has he attended a Lutnick family wedding, birthday party, or holiday event. Tr.806:1-4. They do not belong to the same social clubs. Tr.806-5-7. And they have never engaged in any joint business ventures other than Moran's board service. Tr.806:11-14. As the Court found at

summary judgment: "there are no apparent close social or familiar ties between Moran and Lutnick"; their relationship was "professional." MSJ Op. at 23-24.

Like many professional colleagues, Moran and Lutnick have respect for one another. Tr.808:16-18. And Moran testified that he "think[s] highly of Mr. Lutnick" not just as professional, but also as a human being. Tr.875:24. This respect is based on Lutnick's response to the 9/11 tragedy, when Cantor lost more than 600 employees, including Lutnick's brother. Tr.807:8-19. Lutnick rebuilt the company and dedicated a portion of its future profits to the families of those who died. MSJ Op. at 24. Moran testified at his deposition that "the fact that [Lutnick] continued to function, that he brought the company back, that he took care of the families," means that he "deserves recognition as a great human being." JX0890 at 86:22-87:3.

But while the events of 9/11 had a strong emotional impact on Moran, who lost his friend Fred Varacchi that day, saw the towers burn, and could have been inside them himself, they affected him "as a person," not "as a businessperson." Tr.806:18-808:18. His respect for Lutnick "didn't influence [his] judgment." Tr.808:16-18. When asked at trial if Moran "revere[s]" Lutnick, Moran had to restrain himself from calling the notion ridiculous, saying simply: "No, no, that's—no." Tr.808:19-20. There was no evidence adduced at trial to contradict Moran's testimony.

B. The Transaction

In 2017, BGC purchased Berkeley Point from Cantor Commercial Real Estate ("CCRE") for $875 million and simultaneously invested $100 million into CCRE's CMBS business (the "Transaction"). MSJ Op. at 1. BGC's Special Committee—Moran, Curwood, Dr. Bell, and Secretary Dalton—and their advisors negotiated on behalf of BGC, and Lutnick negotiated on behalf of Cantor and CCRE. Tr.817:3-11.

1. BGC's Management Proposes The Transaction (February).

BGC's management and board had been discussing a potential acquisition of Cantor's real estate assets since 2015. Tr.537:3-6, 737:21-24, 808:24-809:20; JX0135-36. At an August 2015 meeting, for example, management discussed strategies "to acquire and combine certain of Cantor's commercial real estate businesses with" Newmark, BGC's multifamily real estate sales and brokerage business; this had the potential to "unlock higher multiples in [BGC's] real estate services businesses." JX0136 at BGC0069830.

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, 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. JX1240 at BGC0069946. Lutnick again explained the rationale for the potential Transaction: An acquisition

of Berkeley Point would "give [BGC] a DUS business of scale to compete with commercial real estate peer companies," which was important because "all of [BGC's] competitors had DUS lenders in an integrated platform." Tr.537:20-539:4; JX1240 at BGC0069946. 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. Tr.537:20-539:4; JX1240 at BGC0069946. The strategic rationale for the Transaction was not disputed at trial.

Lutnick "commented on [a] potential purchase price in the low $700 million range." JX1240 at BGC0069946. The uncontested trial testimony was that this "comment" was a rough approximation intended to provide the Independent Directors with the *scale* of the proposed acquisition and the extent of the *procedures* necessary to evaluate it. As Dr. Bell explained, "I saw it at the time and continue to see it as kind of throwing a number in the air to give us a sense of scale and scope. It was a big number. We knew from that number that certain kind of procedures would have to be put into place." Tr.539:11-540:1. Curwood concurred: "I recall that he threw out a ballpark number. This was pretty consistent with what had happened with a number of acquisitions." Tr.738:8-739:14. Moran also agreed, testifying that the $700 million figure "was not a real number," much less a "formal offer"; it was only an "order of magnitude." Tr.811:21-812:18. Sterling, Curwood,

and Bell each specifically testified that this was *not* a formal offer. Tr.216:20-23, 539:11-540:1, 738:8-739:14.

The second part of the Transaction would be an investment of approximately $150 million into the CMBS business of CCRE. Among other things, this would allow BGC to "get[] the data that people have to give up to get a first mortgage," thereby giving BGC "insight into the client companies" and "what their future needs might be." Tr.739:24-740:14. Importantly, this data "would also help give Newmark an advantage in [its] business." *Id.*

Moran found the proposed Transaction "interesting." Tr.810:13-20. He noted that, although he did not have "a lot of information about it," it had "appeal to [him] as a potential." *Id.* Curwood, too, recognized the "advantage in the market" of "one-stop shopping." Tr.737:5-20. In other words, "the proposal was worthy of consideration." Tr.740:15-18.

The Independent Directors asked questions of management at the meeting. Secretary Dalton had served for twelve years as President of the Housing Policy Council, leading some of the most sophisticated mortgage-finance companies in the United States in their analysis of a variety of similar matters; he "asked various questions about the market, proposals from the new administration regarding multi-family housing and other potential issues." JX1240 at BGC0069947.

Curwood "asked questions about potential details of the transaction as well as financial considerations, including potential tailwinds." *Id.*

2. The Independent Directors Authorize The Establishment Of A Special Committee And Then Vet Experienced Legal And Financial Advisors (February 11 to March 14).

From the outset, the Independent Directors recognized that there were "related-party considerations," because "Lutnick had interests in BGC and interests in CCRE." Tr.540:19-541:10. The Independent Directors—and ultimately the board—therefore "authorized the establishment of a special committee" to evaluate the deal. *Id.*

Moran knew from his experience with special committees that it was critical to "take the time to find your advisors." Tr.815:10-20. He proposed that the Audit Committee engage independent advisors to consider the proposed Transaction. JX1240 at BGC0069948. Immediately after the February 11 meeting, the Independent Directors began vetting potential legal and financial advisors.

On the legal side, they favored William Regner, the co-chair of the mergers and acquisitions group at Debevoise. Tr.547:20-548:2; JX0267. The Special Committee discussed other firms, but ultimately settled on Regner and Debevoise. Tr.821:13-17. The firm was "large [and] reputable," which appealed to the Committee, and unlike other large firms, Debevoise was not conflicted based on work with Lutnick or Cantor. Tr.821:11-20. Some of the Independent Directors

also "had intimate knowledge" of Regner's abilities from previous transactions, "and felt a great deal of confidence in his ability to serve the special committee as legal advisor." Tr.547:20-548:2. As a "common courtesy," Moran told Caroline Koster about the Special Committee's plan to hire Debevoise, and testified that if Lutnick had offered "valid reasons" against that decision, the Special Committee would have "take[n] it under advisement." Tr.894:8-20. But the Independent Directors decided on their own to retain Debevoise; Lutnick had no "vote" or "veto power over the committee" on this issue or any other. Tr.954:19-23.

The Independent Directors considered at least three potential financial advisors, including Houlihan Lokey and Sandler O'Neil. JX0267; JX0301 at BGCPSC0019634. Moran initially suggested Sandler and "spoke very highly" of it, because he knew it did "great work" from his time at JPMorgan Chase. Tr.547:2-11, 820:8-24; JX0890 at 184:7-21; JX0271. Other members of the Special Committee, too, had experience with Sandler and liked its work. Tr.547:2-11; JX0899 at 236:10-237:7; JX0272. For example, Secretary Dalton—whom plaintiffs have conceded was fully independent—had worked with Sandler and Debevoise on a prior special committee in 2008 for eSpeed (BGC's predecessor entity) that successfully negotiated a related-party transaction against Lutnick and Cantor. Tr.212:18-213:8. After submitting written proposals for the Transaction, Sandler and Houlihan interviewed with the Special Committee. Tr.547:2-6; JX0899 at

236:10-237:7; JX0271-72. Again, at one point Lutnick may have had the "opportunity to comment" on the choice of financial advisors, but the ultimate decision was made independently by the Special Committee; Lutnick was not given a vote. Tr.898:9-14, 820:1-821:20.

3. The Special Committee Is Established, Begins Formal Meetings, And Retains Advisors (March 14-15).

On March 14, 2017, the BGC board executed a unanimous written consent formally establishing the Special Committee. Tr.543:13-24; JX0313. The resolutions gave the Special Committee broad power "to review and evaluate, recommend or reject," the proposed Transaction. *Id.* The Special Committee was given 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 Committee members understood throughout the process that they had the right to reject the Transaction. Tr.544:13-545:1, 748:24-749:9.

The next day, on March 15, the Special Committee held its first official meeting. JX0319. The Committee voted to retain Sandler as its financial advisor and Debevoise as legal counsel. *Id.* It also voted to select Bell and Moran as its co-chairs. *Id.* Moran was a natural choice because of (a) his deep knowledge of accounting and the financial structures involved, (b) his diligence and work ethic (including his willingness to work late nights and on weekends), and (c) his ability to participate in person at meetings. Tr.546:6-14, 577:2-8, 778:12-19,

818:11-819:4-16. Dr. Bell was also a clear choice due to her keen intellect and extensive economic background, including a Ph.D. in economics and a career as an economics professor and chair at two of the country's preeminent colleges. Tr.546:15-21 (Dr. Bell: "This was a quite complicated structure and deal . . . it was a vote of confidence in my ability to analyze that deal."), 791:1-12 (Curwood: Dr. Bell helped the Committee "understand[] the numbers"), 818:11-20 (Moran: Dr. Bell was the "quant" on the team and "one of the most brilliant people I know").

4. The Special Committee And Its Advisors Begin Extensive Due Diligence (March 16 to April 20).

The Sandler and Debevoise teams provided independent, world-class advice at the top of their respective fields. Sandler had a "singular focus on financial services" and was the "#1 ranked M&A advisor to financial institutions by number of deals every year since 2011." JX0277 at 47592; Tr.210:16-24. Sterling, the lead negotiator on behalf of the Special Committee against Cantor and Lutnick, was the co-head of investment banking at Sandler and co-chair of the firm's fairness-opinion committee. Tr.206:9-14. During his 30-plus years in the financial services industry, he had personally worked on over 100 completed M&A deals and evaluated fairness opinions on scores of deals per year. Tr.211:3-20; *see* Tr.212:5-17 (Sterling explaining the bases for the firm's independence relating to the BGC assignment). The Sandler team included Sterling's partner, Joe Stengl, with whom Sterling regularly worked on special committee assignments, Kyle Heroman (managing

director), Jean Suh (VP), and John Plantemoli (associate). Tr.215:2-16; JX0272; JX0301.

Debevoise is one of the best corporate law firms in the world. Regner was the co-chair of its M&A group and had substantial experience advising special committees. As Sterling testified, Regner and Sterling had worked together previously "on a number of special committee assignments" on "similar related-party" transactions against "tough and smart" controlling stockholders, such as Carl Icahn and Lutnick himself (on the eSpeed/BGC deal in 2008). Tr.208:23-209:3, 214:14-24. The other members of the Debevoise team included Sue Meng (M&A partner), Andrew Jamieson (counsel, Financial Institutions), and Julia Ahn (associate). JX0301; JX0589.

Sterling and Regner immediately began requesting access to relevant due-diligence data from Cantor, and along with Moran, followed up repeatedly with Cantor about these requests. JX0331-32 ("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."); JX0339 (emails from Moran and the Committee's advisors to Cantor about the need for additional due-diligence information). Cantor's delays in supplying data became an issue at certain points in the process. Tr.822:6-21 (Moran: "[W]e had a problem with getting the data that our advisors needed in order

to come to a conclusion on fair value for the shareholders . . . . And it wasn't coming. Okay. . . . [T]hat's a major problem."). But the Special Committee and its advisors continued to press Cantor on each request. JX0331-32, JX0339.

Meanwhile, Sterling and Regner began having productive calls with Cantor representatives about the *substance* of the Transaction. On March 19, 2017, for example, Sterling had a call with Charles Edelman—Cantor's head of M&A—to discuss the structure of the Transaction. JX0335. Sterling pushed Cantor to send a term sheet. *Id*.

On March 21, Heroman of Sandler sent an eight-page, single-spaced diligence list to Edelman. JX1033; Tr.218:5-24. When Sandler did not hear back about its requests, both Sterling and Regner reached out to Cantor for the documents. JX0377 at BGCPSC0001625-26. When they still did not hear back, Moran emailed Lutnick directly (and later his assistant, Matthew Gilbert) seeking responses to his advisors' requests. *Id.* at BGCPSC0001624-25. This time, the Special Committee and its advisors were able to get ahold of the requested materials, which taught Sterling an important lesson: "[W]hat we found . . . with respect to Cantor[] is that, you know, sometimes you had to go to the top of the house. And Moran would have conversations at times with Lutnick and tell him that we needed information and he needed to accelerate the timing of giving us that information." Tr.219:1-22.

5. The Special Committee And Its Advisors Evaluate The First Cantor Proposal (April 21 to May 1).

On April 21, 2017, Cantor delivered the first written term sheet to the Special Committee (the "First Cantor Proposal"). Tr.548:24-549:9; JX0385. As Sterling testified, rather than a straightforward sale of Berkeley Point, Cantor's written offer was a complicated structured investment by BGC into a newly-created CCRE vehicle: BGC would invest $1 billion in CCRE in exchange for certain *limited partnership* rights to 95% of the net income and net losses of Berkeley Point, with $150 million allocated to the CMBS business and $850 million to Berkeley Point. Tr.220:19-24; JX0386. Cantor (not BGC) would be the general partner of CCRE. *Id*. The general partner had the power to make profit distributions from Berkeley Point to BGC. JX0386 at BGCPSC0000683-84 ("Distributions shall be made on an annual basis *unless the General Partner determines otherwise*" (emphasis added)). As Sterling explained, the draft allowed Cantor to "block all flows of funds and earnings and cash out of the business," (Tr.224:3-4), and "Cantor would then control the business," (Tr.223:3-14). BGC was granted a put option: it could obtain the remaining 5% of Berkeley Point *if* it paid $30 million five years after the closing, and Cantor would collect 5% of the net profits of Berkeley Point during each of those five years. JX0386 at BGCPSC0000685.

On April 27, the parties had a phone call to walk through the First Cantor Proposal. JX0397. Sterling testified that his reaction to the term sheet was one of

"[d]isappointment and annoyance" (Tr.220:14-16), which he and Regner expressed on the call (*id.*). *See* Tr.827:11 (Moran: the proposal was "entirely too complicated"). As Sterling explained, the proposed deal contained "a very different structure than we . . . had expected," which was an "outright purchase of 100 percent of [Berkeley Point]." Tr.220:17-221:1. He testified that the main problem was that if "BGC was a limited partner, it [ ] would have less control over the business." Tr.222:14-16. This was inconsistent with one of BGC's key strategic objectives: "to acquire Berkeley Point and . . . incorporate it in its Newmark business." Tr.223:10-11; Tr.234:15-16 ("[P]art of the importance of [the Transaction] was to actually integrate [Berkeley Point] with Newmark.").

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 a total payment by BGC of $875 or $900 million. JX0397; Tr.221:21-24 (Sterling described the $1 billion investment as "certainly bigger than the numbers we had been expecting"). At the Special Committee's direction, Sandler and Regner made a number of new diligence requests to help it understand the new transaction structure. Tr.226:13-228:10; JX0397. Among other things, 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 new structure. *Id*.

6. The Special Committee Receives Presentations From Cantor And Newmark While Continuing Due Diligence (May 2-19).

During early May 2017, the Special Committee and its advisors continued their due diligence and discussions with Cantor about the term sheet. Based on the proposed new structure, Sandler and Debevoise requested new information, including CCRE's detailed internal financial modeling and projections, financial statements of Berkeley Point and CCRE as of March 31, 2017, the basis of pricing for buying out the outside investors in CCRE (including valuation), the sources and uses of funds for the Transaction, the cap table for ownership of CCRE following the proposed Transaction, and tax requests. Tr.227:1-229:7; JX0422; JX0453.

To better understand the proposed Transaction, the Special Committee invited Cantor representatives to make a presentation on the First Cantor Proposal. As Sterling explained, "it was important to hear from management [ ] on why they thought this [proposal] was strategically attractive," and "it was a way to understand what Cantor's [ ] negotiating position would be." Tr.230:3-13.

On May 11, Cantor representatives met with the Special Committee and its advisors. Tr.229:23-230:13; JX0465. Lutnick and Edelman discussed the proposed valuation and key terms of the First Cantor Proposal. *Id.* The Special Committee and its advisors "spent a lot of time asking a lot of questions" (Tr.232:2-23), and "pushed back on [Cantor] . . . as hard as [they] could" (Tr.232:10-11 (Sterling)), but at the end of the meeting, they "did not feel that [the proposal] was the answer"

(Tr.828:15-829:2 (Moran)). As Moran testified: "We still didn't like it and told Howard and Edelman we'd [get] back to them after we had more information massaged." *Id.*

At 12:46am that night, Moran sent Sterling and Regner an email saying that "our team did a highly credible job" at the meeting, but that "[w]e need to talk" tomorrow and that "[m]uch more needs to be done." JX0475. Sterling agreed that "there was more diligence work to be done"; "[t]here were meetings with the committee to make sure that everyone was up to speed," and a need to "formulate a counterproposal" and then "negotiate[]" it. Tr.232:2-23.

The Sandler team got to work right away, assembling slides and analyzing the deal. JX0475. After a week of analysis, the Special Committee and its advisors met on May 19 with Barry Gosin, the CEO of BGC's commercial real estate division Newmark, to hear Newmark's analysis of the deal. JX0488. Gosin reiterated the importance of integrating Berkeley Point into Newmark. Tr.233:10-19 (Sterling: "Gosin's view of the strategic fit and desirability of having the business was quite important. . . . And it was his desire, strong desire, to have, from a competitive standpoint for Newmark, the capability that Berkeley Point gave them."). This would give Newmark "the opportunity not only to . . . work with tenants and developers, but also to finance them," creating a "kind of one-stop shopping for their customers." Tr.233:23-234:2. Gosin also pointed out that multifamily DUS lenders

like Berkeley Point are highly valuable and rarely sold. JX0488. The Special Committee asked Gosin a number of questions. *Id.*

7. Cantor Makes Its Second Proposal And Sandler Presents Its Preliminary Valuation Analysis (May 23 To June 1).

On May 23, Cantor's counsel—Wachtell—sent the Special Committee a revised term sheet (the "Second Cantor Proposal"). JX0501. The deal structure in the Second Cantor Proposal was similar to the prior one. *Id*.

After analyzing the Second Cantor Proposal, the Special Committee met on May 25 and Sandler presented its "preliminary perspectives on [ ] valuation." JX0510. Sterling walked the Committee through a 28-page PowerPoint presentation that Sandler had prepared, which provided a detailed analysis of the term sheet (at 4-10); Berkeley Point's business and financial overview (at 12-14); the comparable-group analysis compared to eight similar companies (at 15-17); an analysis of forward-earnings multiples and book-value multiples (at 18-19); and an analysis of the CMBS business overview, historical financials, comparable senior unsecured debt offerings, and illustrative returns (at 20-28). JX0514.

The Court experienced a flavor of Sterling's presentation at trial, as Sterling walked through the same slides and provided similar detailed analysis in the courtroom over twelve pages of testimony. Tr.235-247. For example, Sterling examined slides showing Berkeley Point's impressive growth metrics since Cantor had acquired it. Tr.236:11-15. He also examined slides showing Berkeley Point's

financials and explained the slides comparing it to eight similar companies, including its "most similar" competitor, Walker & Dunlop—one of the only "predominantly multifamily, mortgage origination, and agency origination" businesses with public financials available for comparison. Tr.238:11-12.

Sterling also reviewed for the Court the slides examining the merits of investing in CCRE's CMBS business, discussing CCRE's finances in "granular detail" and explaining how the company's unique access to certain real estate data could prove "extremely valuable strategically" to BGC/Newmark. Tr.241:1-10. He then delved into the slides relating to the analysis of comparable senior unsecured debt offerings, and illustrative returns at various rates under different income and loss scenarios. Tr.286:10-287:7. Sterling described the Special Committee members' active engagement throughout the process. Tr.296:3-298:15.

At trial, Sterling explained in plain English many of these complex economic concepts and analytics, as he had done for the Committee on May 25. His comprehensive understanding of the material and his attention to detail and diligence were evident from his engaging testimony and demeanor, as he walked the Court through this and other (see below) PowerPoints. For good reason, Dr. Bell termed Sandler an "extraordinarily effective" financial advisor. Tr.547:12-15. And based on Sandler's presentations to the Committee, she was able to recount, in detail, her

understanding of the value and benefits that the Transaction would provide to BGC. Tr.553:9-557:4.

After receiving additional due-diligence materials from Cantor, Sterling walked the Special Committee through another detailed PowerPoint at a meeting on June 1. JX0526. The Committee met a second time later that day with six representatives from Cantor and Wachtell. JX0527. At this meeting, the Committee and its advisors reiterated their outstanding information requests. *Id.*; Tr.349:6-18. The two sides then engaged in discussions and negotiations on the Second Cantor Proposal, including comparative metrics of Walker & Dunlop. JX0527.

8. The Special Committee And Its Advisors Refine Their Negotiating Strategy Against Cantor (June 2-6).

After months of fact-gathering and analysis, the last week of May and the first week of June was a time of intense work for the Special Committee and its advisors. On Friday, June 2, the Sandler team began drafting an advocacy presentation that was intended to "make all of [BGC's] arguments for a lower price" and reflect BGC's "best arguments" for negotiations. Tr.248:4-9; JX0550; JX0552. The team worked diligently throughout the weekend.

The Special Committee and its advisors met on Sunday, June 4, to discuss Sandler's 43-page PowerPoint, which set forth its updated valuation perspectives and the draft advocacy presentation. JX0553. Sandler walked the Committee through updated valuation metrics, which again identified Walker & Dunlop as the

publicly traded company most comparable to Berkeley Point, noting "the significant increase in Walker & Dunlop, Inc.'s multiples since February 2017." *Id*. Sandler then "provided an overview of potential advocacy cases for changes to the terms" of the Transaction. *Id.*; JX0554 at BGC0000115-130; Tr.353:15-16. The Special Committee members questioned Sandler about the advocacy points and "provid[ed] feedback on how they believed the Committee should respond to Cantor's proposals." JX0553. Sterling "felt it was important that the committee not only be aware of those arguments, but understand them, agree with them, and have input into them" (Tr.249:14-17), and testified that the Committee and Sandler engaged in "a collaborative effort" (Tr.249:20-21). They continued to work on the advocacy presentation until it was finalized.

The unrebutted evidence at trial demonstrated that the advocacy presentation contained the Committee's best *arguments* designed to convince Cantor to change certain key terms to those that favored BGC's public stockholders, not Sandler's *valuation* of the proposed deal for a fairness analysis. Tr.397:19-399:11 (Sterling explaining that the presentation "was a negotiating document" and Sandler was not tasked with "com[ing] up with a specific value of the business."); Tr.561:24-562:3 (Dr. Bell: "This was a [ ] set of arguments which were intended to present the case, the best case forward for the acquisition from BGC's point of view, from a pricing point of view."); Tr.840:1 (Moran describing the deck as "our opposition").

On June 5, Sandler incorporated the Special Committee's comments and distributed an updated version to the Committee. JX0569. The Special Committee held another meeting that evening. JX0559. At that meeting, Debevoise presented on the Special Committee members' fiduciary duties regarding the evaluation, negotiation, and approval or rejection of the Transaction; Sandler discussed revisions to the draft advocacy presentation. *Id.* The Special Committee members provided additional feedback, instructing Sandler to incorporate their comments and then send the final version of the advocacy presentation to Cantor. Tr.566:14-18.

Sandler sent the final version of the advocacy presentation to Cantor in the pre-dawn hours of June 6. JX0571. In the presentation and the negotiation against Cantor that followed, the Committee and its advisors argued for a reduction in the price of Berkeley Point; structural changes that would provide greater liquidity and allow BGC greater control over Berkeley Point at an earlier date; and a reduction in the amount of the investment in the CMBS business on more beneficial terms with less risk. *Id.* at BGC0003976-83. The Special Committee extracted *significant* concessions from Cantor in *each* of these areas.

9. The Special Committee And Its Advisors Negotiate With Cantor And Extract Significant Concessions (June 6).

The negotiations culminated in a five-hour meeting on June 6, 2017. That day, the Special Committee and its advisors met with seven Cantor representatives, including Lutnick, Edelman, and David Lam of Wachtell. JX0570. Cantor's offer

going into the June 6 meeting was that BGC (a) "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 opened the negotiation with a point-by-point review of the advocacy presentation. Tr.265:23-24. The presentation "elicited a lot of comments," "a lot of reaction," "a lot of frustration," "and a lot of pushback on the arguments" from the Cantor side. Tr.266:1-3. Lutnick "expressed a great deal of frustration" that the Committee was not going to agree to his financial or structural terms. Tr.266:14-17. Sterling testified that he was struck by Lutnick's response: "I don't think he sits in a lot of meetings for a couple hours where people tell him that . . . he's 20 percent off on price, and . . . he's not going to get the deal that he proposed, and on his structure." Tr.266:11-17. Sterling's presentation concluded with 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, along with several additional changes. JX0570.

Over the course of the five-hour meeting, the parties engaged in heated debate over the terms of the Transaction, with both sides periodically leaving to caucus before returning with further arguments. As Moran testified, Sterling and Lutnick "went nose to nose, point by point on why we [BGC] wanted to pay what we wanted to pay, and we were not going to pay what he wanted us to pay because we didn't

think that was good for the shareholders." Tr.842:20-24. On "several instances," "the Cantor people left in a huff" over the Committee's fervent opposition to Cantor's preferred structure. Tr.571:7-13, 743:21-744:4 (Curwood: "John Dalton . . . started pounding, metaphorically, his shoe on the table, saying that this deal makes no sense, especially for a partial acquisition of Berkeley Point, . . . and that management is not thinking clearly if they think that it's worth more than that.").

The Special Committee was "prepared to walk out if [it] didn't reach a deal that was attractive" to BGC. Tr.272:3-5 (Sterling), 837:1-4 (Moran: "[W]e were prepared at this point to walk away from the deal . . . because we had certain things that we felt were not good for the shareholders."), 956:4-8 ("We were prepared to walk away. At that five-hour meeting, we decided . . . if this is their final offer, we're going to give them a final offer. Thanks for the trouble. We're not doing the deal."). At one point, Moran personally delivered this message to Lutnick: "Howard, it ain't happening. The deal's not going down the way you have it constructed." Tr.844:11-12. When that proved unsuccessful, the Special Committee sent Dr. Bell to negotiate personally with Lutnick and Cantor. Tr.945:6-11, 270:7-14. As Lutnick recalled, "I do remember . . . Mr. Moran and, separately, Dr. Bell pushing that they were no longer interested in the structure that we had spent months preparing—and as I have testified, it was deeply disappointing—and that

they were not interested in a structure other than an outright purchase. Just repeating that." Tr.1412:18-1413:1.

The Special Committee's preparation and strategy paid off. At 4:30pm, over four hours into the meeting, the Cantor representatives rejoined the meeting for a final round of negotiations. Tr.270:15-18. Ultimately, Cantor and the Special Committee came to an agreement that "surprised" Sterling because "it involved a significant value difference for them," and "was, frankly, significantly positive for us." Tr.271:6-11. It involved several critical concessions:

- Cantor would sell 100% of Berkeley Point to BGC, giving BGC *complete* and *immediate* control over Berkeley Point—not just potentially five years down the line, as contemplated by the First and Second Cantor Proposals. JX0570; Tr.272:6-273:13, 572:12-573:18, 745:1-11, 845:16-847:1.

- BGC would pay $875 million rather than $1 billion for Berkeley Point—saving $125 million for the BGC stockholders. *Id.*

- BGC would invest $100 million in CCRE's CMBS business rather than $150 million (33% savings)—thereby reducing risk while reaping all of the data-access benefits of the relationship. *Id.*

- Under a "catch-up" provision, if BGC's yearly return on the CMBS investment fell under 5%, the following-years' returns, if higher, would supplement the shortfall. *Id.*

In short, as Sterling testified, the Special Committee was the "prevailing party" on the "structure" of the Transaction, the price of Berkeley Point, and the price and nature of the CMBS investment. Tr.272:6-273:13. The Special

Committee and Cantor reached an agreement on these terms, subject to the completion of due diligence and the negotiation of definitive agreements. JX0570.

This result left Lutnick and Cantor frustrated. By his own account, Lutnick was "very upset" by the Special Committee's aggressive counter-negotiations and the final deal structure and price, and communicated his "unhappiness" to the Special Committee as "many times as [he] could" during the meeting. Tr.1285:17-20. Nevertheless, the Special Committee members refused to "budge off of their position." Tr.1285:21-23. As Lutnick testified, by the conclusion of the June 6 meeting, it was clear to him that Cantor was not getting the deal they wanted and "there was no other place to go"—they were going to have to sell all of Berkeley Point, and at a price they weren't happy about. Tr.1286:24-1287:19.

10. Sandler Issues Fairness Opinions And The Parties Finalize The Transaction (June 7-July 13)

After the parties agreed to the handshake deal on June 6, the Special Committee and its advisors continued working diligently for the next five weeks on supplemental due diligence and the drafting of the written agreement. JX0679 (June 25 meeting); JX0681 (June 27); JX0627 (June 29); JX0683 (July 7); JX0684 (July 10). On July 13, 2017, Sandler presented the Special Committee with a 35-page PowerPoint and two written fairness opinions explaining Sandler's conclusion that the price for Berkeley Point was fair and the terms of the CMBS investment were reasonable. JX0658-59, JX0663.

Sterling—co-chair of Sandler's fairness-opinion committee—testified about his company's "rigorous" review process, which required approval from at least three Sandler partners *not* involved in the Transaction, as well as a member of the general counsel's office. Tr.275:15-276:18. Sterling also explained that Sandler was a private partnership at the time, meaning that its fairness opinions put not only the company's reputation and business at stake, but also the partners' capital. Tr.275:24-276:6. The Special Committee placed a great deal of importance on Sandler's fairness opinions, and would not have approved the deal without them. Tr.276:22-277:3, 575:2-12, 847:23-848:12.

At trial, Sterling walked through the fairness opinion PowerPoint. Sterling explained the slides relating to the key terms of the written agreement, including the payment terms (Tr.278:15-21); Berkeley Point's "very strong growth trajectory" (Tr.279:8-280:3); and the value of Berkeley Point's origination volume, mortgage-servicing rights, and remaining book value (Tr.280:5-281:22). He also touched upon the slides relating to Sandler's final comparable-group analysis (Tr.282:1-18), and the side-by-side comparison of the key metrics and multiples of Berkeley Point and Walker & Dunlop (Tr.282:20-286:6). As per the chart below, in *nine* different modeling calculations that Sandler performed valuing Berkeley Point using Walker & Dunlop's current multiples, their computations yielded a purchase

price for Berkeley Point significantly *higher* than $875 million, ranging from $971.1 million to $1.354 billion:

Implied Transaction Multiples: Walker & Dunlop Basis

($ in Millions)	WD Current[1]	Implied BGCP Deal[2]	BGCP Actual Multiples
Transaction Price[3] / Book Value	2.54x	$1,291.7	1.72x
Transaction Price[3] / Book Value With Market Value of MSR	2.10x	$1,066.8	1.72x
Transaction Price[3] / LTM Net Income[4]	11.5x	$1,066.5	9.5x
Transaction Price[3] / 2017E EPS[4]	11.9x	$1,354.0	7.7x
Enterprise Value[5] / LTM WD Method Adjusted EBITDA[6]	11.2x	$978.0	9.8x
Enterprise Value[5] / 2017E WD Method Adjusted EBITDA	9.4x	$971.1	8.4x
Enterprise Value[5] / 2018E WD Method Adjusted EBITDA	8.8x	$1,168.0	6.4x
Transaction Price[3] Less MSR Equity / LTM Origination Vol.	3.9%	$814.9	4.7%
Implied BGCP Deal Value with One-Day Control Premium[7]		$1,098.2	
Implied BGCP Deal Value with One-Month Control Premium[7]		$1,138.1	

JX0663 at DEB004990; *see* Tr.285:20-286:6.

Finally, Sterling testified to the detailed analysis of the terms of the CMBS investment; for example, he reviewed similar offerings and explained that those yields were "closer to 3 or below 4" compared to the 5% preferred return that BGC would receive on its CMBS investment. Tr.286:8-287:7.

Sterling's fairness PowerPoint presentation confirmed the Committee members' understanding that they had negotiated a fair deal for BGC's public stockholders. As Moran explained: "They are advisors. They're putting their

reputation on the line. . . . [The fairness opinion] says that we're paying a fair price, which, again, was the mission of the special committee to be sure the shareholders got the best possible deal." Tr.at 848:2-8; Tr.575:9-12: ("Q. And did the opinions that Sandler provided give the special committee comfort that it had negotiated a good deal for BGC. [Dr. Bell:] Yes, very much so."); Tr.746:6-12 (Curwood: the fairness opinion "was an important point of discussion . . . [b]ecause it made no sense to do something that would not be fair").

After receiving signed fairness opinions from Sandler, the Special Committee unanimously concluded that the Transaction was fair and reasonable to BGC's stockholders and recommended that the board authorize the Transaction. JX0656. On July 16, the board adopted the Special Committee's recommendation and approved the Transaction. JX0671. The parties executed the agreements on July 17; the Transaction closed on September 8. JX0713.

ARGUMENT

The Court should enter judgment in favor of Moran. Plaintiffs failed to prove a non-exculpated claim against Moran; they have established neither that Moran lacked independence nor that he acted to advance Lutnick's self-interest. Demand on the board would not have been futile; Curwood also was independent from Lutnick. And as explained in the Cantor defendants' brief, the Transaction was entirely fair to BGC's stockholders.

I. Plaintiffs Failed To Prove A Non-Exculpated Claim Against Moran.

Because BGC's certificate of incorporation contains an exculpatory provision, plaintiffs could establish liability against Moran only by proving one of the three *Cornerstone* prongs: that Moran "(1) 'harbored self-interest adverse to the stockholders' interests'; (2) 'acted to advance the self-interest of an interested party from whom [he] could not be presumed to act independently'; or (3) 'acted in bad faith.'" MSJ Op. at 26 (quoting *Cornerstone*, 115 A.3d at 1179-80). "The plaintiffs . . . are relying exclusively on the second prong of *Cornerstone*." *Id*.

This prong, in turn, contains two distinct requirements: "A director must have 'acted to advance the self-interest of an interested party' *and* the interested party must be one 'from whom [the director] could not be presumed to act independently.'" *Id.* at 27. "Thus, if the director is *either* (1) shown to be independent *or* (2) shown not to have actively furthered the conflicted party's interests, dismissal is appropriate under the second prong of *Cornerstone*." *Id*. at 27-28. Both were shown here.

A. Moran Was Independent From Lutnick.

Cornerstone's independence prong imposes a high burden. "To show that a director is not independent, a plaintiff must demonstrate that the director is beholden to the controlling party or so under the controller's influence that the director's discretion would be sterilized." *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 648-649 (Del. 2014) ("*MFW*"). "[T]he question of independence turns on whether

a director is . . . *incapable* of making a decision with only the best interests of the corporation in mind." *Dieckman v. Regency GP LP*, 2021 WL 537325, at *30 (Del. Ch. Feb. 15, 2021) (emphasis added) (trial decision finding the directors independent and the challenged transaction entirely fair).

At summary judgment, the Court rejected the two principal theories of dependence that plaintiffs alleged in their complaint. The Court found that Moran's "BGC Board compensation is hardly material to him given his net worth of nearly $20 million and pension of something short of a million dollars a year from JPMorgan Chase." MSJ Op. at 23. And the Court found "no apparent close social or familiar ties between Moran and Lutnick." *Id.* at 24. The Court found only one triable issue bearing on Moran's independence: whether "Moran's respect for Lutnick . . . sterilize[d] his discretion" to evaluate the Transaction. *Id.* at 24-25.

The evidence does not support such a claim for two independent reasons. First, the *nature* of Moran's respect for Lutnick was not the kind that would have produced a bias. Second, Moran's respect for Lutnick was not of such a *degree* that his judgment would have been sterilized. Instead, the evidence shows something entirely unremarkable: Moran respected Lutnick because of his response to the 9/11 attacks. That is not dependence.

1. The Evidence Shows That Moran's Respect For Lutnick Was Not "Of A Bias-Producing Nature."

To establish a lack of independence, "a relationship [with a controlling stockholder] must be of a *bias-producing* nature." *Beam*, 845 A.2d at 1050 (emphasis added). The plaintiff must prove that "*because of* the nature of the relationship . . . , 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 (emphasis added). The evidence at trial showed just the opposite.

As the Court has explained, "Moran's respect for Lutnick is considerable." MSJ Op. at 24. At his deposition, he "described Lutnick as an 'inspiration,'" and he has "noted how he is 'proud to be associated with a man [like Lutnick].'" *Id.* (quoting JX0890 at 86:3, 98:25-99:2). But the evidence at trial confirmed the Court's understanding of the *source* of Moran's deep respect for Lutnick: "Lutnick's work supporting the families of those Cantor lost in the [9/11] attacks." *Id.* Moran gave unrebutted testimony on this point during his direct examination. *See* p. 10 *supra*. And Moran was equally clear that his respect for Lutnick's post-9/11 conduct affects him "as a person," not "as a businessperson." Tr.807:8-808:18.

That makes perfect sense. When a director and a conflicted party are family members, close friends, or outside business partners, that kind of relationship supplies the director with some sort of *independent*—albeit often intangible—*benefit*, whether it is love, a close social circle, or a supply of money. In some

situations, those kinds of relationships may be significant enough to suspect that the director—like any human being—might be willing to sacrifice the interests of the company to preserve the relationship. Here, there was nothing outside of business that Moran would be "risking" by standing up to Lutnick. Under plaintiffs' theory, Moran would be incurring the ire of someone Moran considers to be a good person. But why would any director be willing to "risk his or her reputation" with the general public—especially one earned over half a century of work—in order to *preserve* his or her reputation with a single admirable person?

Indeed, we have found no Delaware case holding that a director's respect or admiration for a conflicted party, standing alone, is sufficient to undermine his independence under *Cornerstone*. In its ruling on summary judgment, this Court cited one case for the proposition that "a director's 'exceptionally glowing' admiration for a controller combined with a lengthy relationship can cast 'substantial doubt' on her ability to impartially consider a litigation demand against the controller." MSJ Op. at 24 (quoting *In re NantHealth S'holder Litig.*, 2020 WL 211065, at *7 (Del. Ch. Jan. 14, 2020)). But *NantHealth* only underscores the unique facts necessary to establish an "admiration" theory under *Cornerstone*.

In *NantHealth*, the plaintiff alleged that one of company's directors, Sitrick, was beholden to its CEO, Soon-Shiong, who was also the CEO of three nonprofit entities. *Id.* at *1. Chancellor Bouchard held that the plaintiff had "adequately pled

a constellation of facts that create[d] a reasonable doubt" about Sitrick's independence, including that Sitrick (a) was the CEO of a company that had "provided public relations services to at least one Soon-Shiong-controlled entity and to Soon-Shiong personally since 2002"; (b) "serve[d] as director of one of [Soon-Shiong's] Nonprofits"; and (c) "served as a trustee of the St. John's Health Center Foundation with Soon-Shiong, which [was] the recipient of at least $100 million from that same Nonprofit affiliated with Soon-Shiong." *Id.* at *7. The court then continued: "*In a book he published* . . . just a few months before this action was filed, Sitrick wrote about Soon-Shiong in exceptionally glowing terms that, *combined with his lengthy personal and professional relationship with Soon-Shiong*, cast further substantial doubt on his ability to be impartial." *Id.* (emphasis added).

NantHealth is distinguishable on multiple levels. First, it was decided on a motion to dismiss, not after trial. Second, Sitrick and Soon-Shiong had extensive *business*, *social, personal and client* relationships that went well beyond Sitrick's position as a director at NantHealth. Critically, Sitrick's own company provided public relations services to the controlling stockholder personally for 18 years and to at least one of Soon-Shiong's companies. Third, Soon-Shiong had made an enormous donation to a foundation for which Sitrick was a trustee. Fourth, Sitrick's admiration for Soon-Shiong was so intense that Sitrick wrote about it *in his book* just months before the action was filed. Finally, and perhaps most importantly,

Sitrick's admiration for Soon-Shiong was directly connected to the *work* that Sitrick and Soon-Shiong were doing together *at the time*. There was a reasonable inference—at the motion-to-dismiss stage—that Sitrick might not have been willing to risk a relationship so central to his life and work.

The facts here do not give rise to any such inference. Moran's respect for Lutnick's conduct after 9/11 has no connection to their business interactions as BGC board members. As Moran testified, 9/11—and his admiration for Lutnick's response to it—"has nothing to do with [Moran's] judgment and [his] dealings with Howard or anybody at the firm." Tr.808:8-10. Even referring to this respect for Lutnick as a "relationship" is a stretch; it is a *view* that Moran holds about Lutnick, not a *connection* that Moran would somehow be unwilling to risk by crossing Lutnick. Nothing about Moran's respect for Lutnick is "of a bias-producing nature." *Beam*, 845 A.2d at 1050.

2. The Evidence Shows That Moran's Respect For Lutnick Did Not "Sterilize" His Discretion.

Even if Moran's respect for Lutnick's post-9/11 work *could* give rise to a bias, plaintiffs did not demonstrate at trial that it *did*. The evidence is irreconcilable with plaintiffs' theory that Moran respected Lutnick to a degree that would make him incapable of neutrally evaluating the Transaction.

At summary judgment, the Court found that there was a triable issue as to whether "Moran's *reverence* for Lutnick could have colored his judgment." MSJ

Op. at 25 (emphasis added). But when Moran was asked point-blank whether he "revere[s] Howard Lutnick," he was visibly taken aback by that notion: "No, no, that's—no." Tr.808:19-20. He described his relationship with Lutnick as "[a]rm's length" and "pure business," and testified without rebuttal that his respect for Lutnick "didn't influence [his] judgment." Tr.805:9, 808:11-18. Moran was not just unafraid to "tell Howard no"; he would often deliver that message impolitely, with a "snide letter." Tr.808:13-18. Plaintiffs did not even attempt to get Moran to back away from this testimony, or to elicit contrary testimony from another witness.

Nor did plaintiffs establish that Moran felt a sense of "loyalty" to Lutnick. MSJ Op. at 25. They barely touched on this point, beyond presenting Moran with the portion of his deposition where he referred to his relationship with Lutnick as "sort of like a great marriage." Tr.878:11-14. Plaintiffs knew full well that the context of this quote is flatly inconsistent with their position, so when Moran attempted to provide that context, plaintiffs' counsel hurriedly changed the subject. Moran asked counsel to "read the rest of the quote." Tr.878:16-19. Counsel declined, responding that "[w]e can have the Vice Chancellor see the whole context later in the post-trial briefing." Tr.878:20-22. True enough; the unabridged quote is as follows:

> Q. But has [Lutnick] shown loyalty to you, do you believe?
>
> MR. DE SIMONE: Objection to form. Asked and answered.

> A. I'm not going to answer that question. All right? I'm still on the board in spite of the fact that Howard and I occasionally tangle. Okay? When a powerful person gets news that he doesn't really want to hear but needs to hear, he can go, oh, I—you know, but I'm still here, we're still doing that, and it works reasonably well. So that's possibly loyalty in two directions. It's sort of like a great marriage.
>
> Q. When you say you've occasionally tangled with Lutnick, what do you mean by that?
>
> A. I tell him that he's not going to do what he's suggesting. I don't think that the board will support him, he really ought to rethink it, he ought to change the terms—things like that.
>
> Q. About how many times have you tangled with Mr. Lutnick over the past 20 years?
>
> A. More than I can remember.

JX0890 at 55:14-56:16.

So even plaintiffs' favorite quotation from the record is not a statement of affection, much less *deference*. It is the *opposite*—a statement about Moran's ability to maintain collegiality with Lutnick in spite of their many *disagreements*. More broadly, the evidence shows that these sorts of disagreements were the cornerstone not just of Moran's relationship with Lutnick, but of his entire career. Moran, after all, had cut his teeth in the business world with directors who impressed on him the importance of "align[ing] your interests with the shareholders" and "tell[ing chairpersons] what [they] don't want to hear but what [they] need to know." Tr.797:7-799:9. At his very first meeting with Lutnick, Moran could not have been clearer: "my job someday may be to say 'no' to you as an independent director."

Tr.802:2-5. Moran kept that promise: he "said no to Howard" when the time called for it. Tr.802:9-10; p. 9 *supra*.

It is important to keep in mind that the standard for dependence—particularly at the trial stage—is strict. Longstanding "business dealings" are not enough. *MFW*, 88 A.3d at 647. Nor, for that matter, are "personal friendship[s]." *Beam*, 845 A.2d at 1050. Only "professional or personal friendships" that "*border on or even exceed familial loyalty and closeness*" give rise to doubt over a director's independence. *Id.* (emphasis added); *see Dieckman*, 2021 WL 537325, at *30 (finding outside director independent after trial, where he "credibly testified that while he views [the controller] as a friend, he spends little time and is not particularly close to [the controller], who is a generation younger than [the director]"). It is one thing if a director has been "close friend[s]" with the interested party for "over a half century" and donates to his campaign for governor (*Delaware Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1019-20 (Del. 2015)); or if a director and a CEO have such an "intimate personal friendship" that they own an airplane together (*Sandys v. Pincus*, 152 A.3d 124, 126, 130 (Del. 2016)); or if a director "owes his *entire career*" to the family of the interested party (*Marchand v. Barnhill*, 212 A.3d 805, 808 (Del. 2019) (emphasis added)). It is quite another thing where a director is a highly successful, self-made businessperson whose relationship with the interested party is marked by *almost no social interactions* (pp. 9-10 *supra*), and where the only thing

unique thing about their *purely business* relationship is the director's respect for his colleague's "[l]audable behavior in the wake of a national tragedy." MSJ Op. at 25.

That is "hardly . . . the sort of emotional depth necessary to show a lack of independence." MSJ Op. at 20. If Delaware law barred directors from serving on boards with people they consider good human beings (or great ones), the resulting moral hazards would require little imagination. The Court should therefore adopt the first inference identified at summary judgment: "Moran's admiration for Lutnick did nothing to sterilize his discretion." MSJ Op. at 24-25. Plaintiffs have not satisfied *Cornerstone*'s independence prong.

B. Moran Did Not Act To Advance Lutnick's Interests At The Expense Of BGC's Stockholders.

Moran is entitled to judgment for an independent reason: plaintiffs failed to prove that he "actively furthered [Lutnick's] interests" at the expense of BGC's stockholders. MSJ Op. at 27-28. In other words, even if the Court finds that Moran's ties to Lutnick created a *risk* that he would promote Lutnick's interests over BGC's, Moran never *in fact* did so. To the contrary, he zealously advocated for the interests of BGC's stockholders throughout the process—including when those interests diverged sharply from Lutnick's.

The legal standard is again critical. The question is not simply whether Moran took actions that benefited Lutnick; it is whether Moran knowingly "acted in [Lutnick's] interest and *against* the interests of the common stockholders." *Oracle,*

2021 WL 2530961, at *7 (emphasis added). Moran can be held liable only for actions taken "in furtherance of [Lutnick's] self-interest to the *detriment* of the other stockholders," *id.* (emphasis added), and only if Moran *knew* that he was making this tradeoff. *See, e.g.*, *United Food & Commercial Workers Union v. Zuckerberg*, 250 A.3d 862, 898 (Del. Ch. 2020) ("To support a contention that Thiel acted disloyally or in bad faith, the complaint would have to allege that Thiel believed that preserving founder ownership was harmful to Facebook, and that he nevertheless supported the Reclassification out of personal loyalty to Zuckerberg. As long as Thiel acted based on a sincerely and rationally held belief that his actions would benefit Facebook, his bias in favor of founders maintaining control is not disqualifying."). As the Court explained at summary judgment, if "Moran engaged in hard-fought arms-length negotiations to benefit BGC and its stockholders," plaintiffs have no claim against him.

That is exactly what the evidence shows. From day one, Moran and the Special Committee approached the Transaction "very conscious of [their] responsibility to the shareholders." Tr.953:21-24. Moran knew that his job was to "work for the shareholders" to ensure that they got "the best price and the best

structure." Tr.812:3-18; 827:13-23. As he put it: "That's your job on the special committee. Period. End of discussion." Tr.816:8-13.[2]

Moran had both the willingness and the ability to perform that role. As Dr. Bell testified: "Mr. Moran was an obvious choice to be a co-chair of this committee. He was chair of the audit committee. He had a long, distinguished career as a lead general auditor for JPMorgan Chase and deep knowledge of the financial structures involved." Tr.546:6-14, 818:13-15; pp. 6-8 *supra*. He was known for working intense hours, including late nights and weekends. Tr.230:24-231:2 (Sterling: Moran "often work[ed] on this deal late hours, after midnight"), 829:15-18 (Moran: "It is my practice in my entire working life, unfortunately, to work as late as it takes to complete the tasks I want done that day."). And because he resided in New York near BGC's offices, and was the only retired director, Moran could easily participate in person at meetings, while staying on top of open issues. Tr.819:4-10.

Moran performed exactly as expected. He was the one who proposed that the Special Committee engage independent advisors to consider the Transaction. JX0241 at BGC0001265. He suggested Sandler to lead the negotiations against Cantor and Lutnick. Tr.547:2-11, 820:8-24. He was the director who most

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[2] Moran testified that he has consistently owned a substantial amount of BGC stock, so his financial incentives were also aligned with BGC's stockholders. Tr.797:11-19.

vigorously pushed Cantor on outstanding data requests (Tr.219:15-22), including by emailing Lutnick directly (JX0377). He was the one who told Lutnick that it was impossible for the Transaction to close by March (Tr.815:14-20), and later told Cantor's general counsel to "get off [his] back" about the timing (Tr.835:4-836:18; JX0524). He was the director who told Lutnick directly that the First Cantor Proposal was "too complex" and that the Special Committee was "not interested in the tax structure at all." Tr.966:15-22; 1408:13-1409:4, 1411:14-16. He was the director who emailed Sterling and Regner in the middle of the night after the May 11 meeting to tell them that "[m]uch more [diligence] needs to be done." JX0475. He was the director who told Sterling to be "zealous [and] aggressive" in his negotiations with Lutnick. Tr.163:10-21. And he was the director who delivered the bluntest message to Lutnick at the pivotal June 6 meeting: "Howard, it ain't happening. The deal's not going down the way you have it constructed." Tr.844:11-12. Lutnick and Cantor then came back to the Committee with dramatically more favorable terms. Tr.844:16-24.

The evidence at trial shows that Moran pursued BGC's interests at every step of the way. And it refutes plaintiffs' various attempts to poke holes at the Transaction process, several of which the Court identified at summary judgment. First, the Court pointed to Moran's deposition testimony that Lutnick "could negotiate for BGC with himself as Cantor." MSJ Op. at 33. Plaintiffs' counsel did

not bother to ask Moran what he actually *meant* by this (Tr.890:10-14); on redirect, he confirmed that this testimony was nothing more than a clumsy way of saying that Lutnick was on both sides of the Transaction—and that this is why the Special Committee was formed in the first place. Tr.953:13-18; *see also* JX0890 at 161:17-23. When asked "[w]ho was negotiating this deal for the BGC public shareholders," Moran answered without hesitation: "Brian [Sterling], with the support of the independent directors. He was the lead negotiator. We evaluated the data that he prepared and accepted as the recommended pricing and structure." Tr.953:1-7. Moran consistently testified that the Special Committee and its advisors—not Lutnick—negotiated the Transaction on behalf of the BGC public stockholders. Tr.815:16-20, 816:8-817:9, 827:20-23, 848:5-8.

Sterling confirmed Moran's understanding: "Bill [Moran] had explained that we would be negotiating across the table [from] Mr. Lutnick and his -- and several of his colleagues from Cantor." JX0893 72:7-19. He further testified that "[o]ur instructions were that it was going to be a hard negotiation. That we should expect it to be hard, that we should go at it hard, that . . . we should take strong positions, we shouldn't deviate from those positions, and that we had to negotiate from . . . a zealous or aggressive standpoint on behalf of the independent directors and independent shareholders." Tr.263:13-21; 297:9-298:2 (Sterling: Moran "was

consistently encouraging us to take the lead in negotiations and to do so in a very direct and active way").

Second, the Court noted that "Moran testified that he was mindful of Lutnick's opinion regarding the Special Committee selection of its legal advisor," and "ran potential financial advisors past Lutnick before one was retained." MSJ Op. at 33. Lutnick and Cantor were indeed updated on the progress of the selection of advisors (*see* pp. 14-16 *supra*), and there were important reasons to do so. As both Moran and Lutnick explained, some firms would pose conflicts, including conflicts about which the Special Committee might not be aware, but Lutnick would know as BGC's CEO. Tr.821:11-16, 1259:21-1261:6. Moran also understood the basic principle that negotiators "will not be effective if [the other side] hates [them]." JX0890 180:16-181:11. But Lutnick was given no "vote" over the decisions, let alone a "veto power"; the decisions were made independently by the Special Committee. Tr.898:10-11, 820:1-821:20, 954:19-23.

In any event, there is no evidence that BGC's stockholders were *harmed* by these updates, or that Lutnick *benefited* from the selection of the advisors. Plaintiffs have not attempted to show that the stockholders would have been better off, and Lutnick worse off, with advisors other than Sandler and Debevoise—and they have certainly cast no doubt on the extraordinary reputations and performance of these firms.

Third, the Court found at summary judgment that "[c]ertain evidence suggests that [Moran] may have viewed BGC's timetable for the transaction as at least partially driven by Lutnick." MSJ Op. at 33-34. This factual dispute, too, was resolved at trial in favor of Moran. The evidence shows that Lutnick wanted the deal to close by March 2017 (Tr.1368:16-20), but it did not close until the following *September* (JX0713). More importantly, it was *Moran himself* who immediately pushed back against Lutnick's proposed timing: "I told him, it's not going to happen, Howard, because I know from previous dealings, as an independent director on special committees, you take the time to find your advisors, legal and banker, and then go through the process of pounding the data to see what the best price is for the shareholders." Tr.815:14-20.

On several occasions, Lutnick and Cantor wanted to move more quickly, and the Independent Directors slowed the pace to conduct due diligence. Tr.305:10-11 (Sterling was "told initially that [the Transaction] was on a very fast timeline."); 822:11-17 (Transaction was slowed because Committee "had a problem with getting the data that our advisors needed"). At other times, Lutnick and Cantor were moving *slowly*, and the Special Committee and its advisors pushed for answers. Tr.219:7-12 ("It took longer to get the material than we wanted. At times, there was pushback from Cantor as to some of the information that we requested . . . but it was filled in the end."), 558:23-24 ("We continued to press Cantor to get the data room

populated."); pp. 18-19 *supra*. There is nothing to support plaintiffs' narrative: that Lutnick forced a rushed process and thereby undermined the Committee's ability to conduct appropriate due diligence or analyze the proposed Transaction.

Finally, the Court noted that Moran "communicated directly with Lutnick about the deal process on several occasions." MSJ Op. at 34. That is true, precisely *because* Moran was often the person best situated to deliver *difficult news* to Lutnick. Moran did not talk to Lutnick to advance Lutnick's interests, but to advance the due-diligence process, the deal process, and the BGC stockholders' interests. pp. 18-19 *supra*. As Sterling testified, Moran was frequently the right person "to go to the top of the house" and press Lutnick for information or results in a way that no advisor could. Tr.219:13-22, 231:17-21, 576:23-577:18. He would then "br[ing] back all important information . . . to the special committee." Tr.701:3-16 (Dr. Bell). Plaintiffs offered no evidence demonstrating that there is something wrong with this. In fact, had Moran *not* pushed back at Lutnick personally, plaintiffs would presumably be arguing that Moran allowed Lutnick to walk all over him. Moran's engagement with Lutnick supports Moran's position, not plaintiffs'.

In short, "Moran engaged in hard-fought, arms-length negotiations to benefit BGC and its stockholders." MSJ Op. at 34. Moran declined to abide by Lutnick's timeline; refused to let Cantor get away with any shortcuts on due diligence; was part of the Committee's decision to reject three different proposals from Cantor; and

was ready to walk away from the Transaction if Cantor refused to concede to the Committee's negotiating preferences for structure, cost, and risk. *See* pp. 29-31 *supra*. Even four years later, Lutnick admitted that Cantor's concessions "still make[] me upset." Tr.1429:6-12. Under any reasonable view of the evidence, Moran's efforts were an important contributing factor to the success for BGC's stockholders.

Because Moran was independent from Lutnick, and did not act to advance Lutnick's self-interests, plaintiffs have not proven a non-exculpated claim and judgment should be entered in Moran's favor.

II. Demand On The Board Would Not Have Been Futile Because Curwood Was Independent From Lutnick.

The Cantor defendants' brief explains why the Court should enter judgment for all defendants based on plaintiffs' failure to prove demand futility. Although Curwood has been dismissed as a defendant, we thought it important to address the evidence showing that Curwood is independent from Lutnick.

At summary judgment, the Court found "that Curwood did not undertake actions to advance Lutnick's self-interest in the Transaction"; there was "nothing" about the process "implicating Curwood individually" as a defendant. MSJ Op. at 32. But the Court held that Curwood's "BGC Board compensation alone creates a genuine issue of material fact as to his independence from Lutnick" because it "supplied him with more than half of his household income from 2010 to 2017." *Id.*

at 21. The Court recognized Curwood's deposition testimony that he "was not dependent on his board-related income because he has 'plenty of other options.'" *Id.* at 23. It explained that this "may well be so," and "Curwood's subjective belief as such may prove determinative," but concluded that this "matter [is] best addressed at trial." *Id.* The evidence at trial confirms defendants' position.

A. Curwood Has Built A Reputation For Independence Over A Long And Illustrious Career.

Curwood is an award-winning journalist, a lecturer on climate and environmental issues, and an investor focused on sustainable development. His career in journalism spans over half a century, during which he has reported for numerous major news outlets on a host of important matters. After graduating from Harvard, Curwood began his career as a reporter at the *Boston Phoenix*; in 1970, his reporting on the Polaroid Corporation's dealings with the South African government spurred one of the first major apartheid-related boycott movements. Tr.714:17-715:7. At the *Boston Globe*, Curwood contributed to reporting on Boston's school-desegregation efforts that received the 1975 Pulitzer Price for Public Service. Tr.715:24-716:6. Curwood later joined NPR as a reporter in its Washington bureau and the weekend host of *All Things Considered*, before creating *Living on Earth* in 1990—a weekly radio program on environmental issues that has aired for over 30 years—and founding a production company. Tr.718:22-719:6, 711:18-712:9. Curwood's environmental reporting has garnered him numerous

accolades, including awards from Tufts, the Sierra Club, and the Radio, Television, and News Directors Association, as well as an honorary induction into Phi Beta Kappa from Harvard, to name just a few. Tr.716:16-24.

Beyond journalism, Curwood has long demonstrated a willingness to speak his mind on important issues. Curwood serves as a professor at the University of Massachusetts Boston's School for the Environment and as a lecturer in environmental science, public policy, and public health at Harvard. Tr.720:14-18, 713:12-16. He is frequently sought out by universities for independent speaking engagements on topics relating to environmental justice. Tr.721:20-722:3. Curwood founded SENCAP, LLC, which invested in biofuel and water-development projects in southern Africa, and Mamawood Pty. Ltd., a South African media holding company (Tr.722:4-24), and has served as a board member for Pax World Funds, a sustainable-investment firm (Tr.723:9-12). Curwood also has extensive experience in the nonprofit sector, serving as a trustee of the Woods Hole Research Center, a director for the New England Aquarium, and a board member for the American Friends Service Committee. Tr.723:21-724:7. Curwood's outstanding resume provides balance, insight and diversity to the BGC board, an important benefit to the company's public stockholders.

B. Curwood's BGC Compensation Does Not Make Him Dependent On Lutnick.

The evidence at trial confirms that "Curwood was not dependent on his board-related income." MSJ Op. at 23. Before joining the BGC board in 2009, Curwood was fully capable of providing for himself and his family using the compensation he received from sources that have no connection to Lutnick. Tr.732:4-7. His longtime position as President of the World Media Foundation provides an annual salary of $140,000. Tr.712:13-17. Curwood's academic positions have yielded annual compensation ranging between $20,000 and $70,000. Tr.714:2-3. For speaking engagements, which have included lectures at 20 to 30 different venues over his career, Curwood typically collects a speaker's fee of $15,000 per appearance. Tr.721:3-8. And Curwood has received advances for books in the neighborhood of $100,000, in addition to fees for a film option. Tr.732:13-16.

Curwood also has substantial financial sources beyond income. He has the option to draw a pension of about $2 million from World Media, as well as smaller pensions from the *Boston Globe* and Harvard University. Tr.734:4-8. And he and his wife own three properties: one outside of Durham, New Hampshire; another in northern Maine; and one in Cape Town, South Africa. Tr.734:9-14.

It is therefore no surprise that compensation had nothing to do with Curwood's decision to join the BGC board or his conduct on the board. As he testified in

response to the Court's questioning, Curwood agreed to join the BGC board because of concerns about "corporate America's behavior" and his belief that he could "make a difference" as a director. Tr.790:5-10. To that end, Curwood uses his board position to promote diversity at BGC and in the financial industry by advocating for internship programs like the Hampton University Fellowship Program, which supports diverse undergraduate and graduate students at historically black universities, and provides a pipeline to employment at BGC. Tr.790:11-15; JX0869 at 9. Curwood has also attended service trips in connection with charitable work coordinated by the Cantor Relief Fund—one to Puerto Rico after Hurricane Maria and another to Houston after Hurricane Harvey. JX0869 at 10.

Since joining the BGC board, Curwood has not hesitated to voice disagreements with Lutnick. For example, when Curwood became chair of the BGC Compensation Committee, he insisted—over Lutnick's objection—that the committee end its relationship with its existing compensation consultant and hire a new one. Tr.730:4-12. Curwood also pressed Lutnick to form a board-level environmental and social-governance committee, and to clarify BGC's succession plans, even though Lutnick "was not happy when [he] did that." Tr.730:13-24.

Curwood testified that the fear of losing his BGC board compensation never played a role in any decision he made as a BGC director. Tr.732:18-24. For one thing, Curwood has no interest in a lavish lifestyle; in keeping with his Quaker

beliefs, his family does not "live large." Tr.734:21-25. For another, even if he *had* lost his seat, he could easily replace the lost income in numerous ways, such as accepting a greater number of speaking appearances, taking on more academic appointments, or pursuing an offer from one of the numerous other corporate boards that had been "actively recruit[ing]" him for a directorship. Tr.733:11-18.

As for the Transaction itself: Curwood testified without rebuttal that during the negotiating process, the possibility of losing his board seat or the associated compensation never played a role in his decision making. Tr.733:1-10. Curwood was involved in the intense "back-and-forth" between the parties during the five-hour June 6 meeting. Tr.743:8-12. And throughout this process, Curwood was mindful of the fact that his "job[] is to represent . . . the public shareholders in this controlled company," and ensure that whatever deal resulted was "fair to them." Tr.746:13-16. In fact, Curwood's 2017 board compensation was high relative to prior years precisely *because* the Special Committee held an "extraordinary" number of meetings that year to assess and negotiate the Transaction. Tr.787:11-20.

As the Court noted at summary judgment, there are serious "public policy concerns at play when wealth is used as a factor in analyzing independence." MSJ Op. at 22 (citing *Chester Cty. Emps.' Ret. Fund v. New Res. Inv. Corp.*, 2017 WL 4461131, at *8 (Del. Ch. Oct. 6, 2017), which explains that factoring wealth into an independence analysis could "discourage the membership on corporate boards of

people of less-than extraordinary means"); *see Grobow v. Perot*, 539 A.2d 180, 188 (Del. 1988) (director compensation is insufficient "without more" to establish lack of independence); *In re Walt Disney Deriv. Litig.*, 731 A.2d 342, 359-60 (Del. Ch. 1998) (court "especially unwilling" to hold that director's lack of wealth from outside sources rendered her beholden, because doing so would "discourage the membership on corporate boards of people of less-than extraordinary means"). Trial has confirmed that plaintiffs' attack on Curwood's independence is based *entirely* on his wealth. The Court should reject it, particularly because Curwood's BGC compensation is "customary and usual in amount" for his position. *Orman v. Cullman*, 794 A.2d 5, 29 n.62 (Del. Ch. 2002); *see also Ryan v. Gursahaney*, 2015 WL 1915911, at n.45 (Del. Ch. Apr. 28, 2015) (rejecting challenge to director's independence absent showing of "materially excessive directors' fees having been paid to the Director Defendants").

At bottom, plaintiffs' theory is that Curwood would be willing to sacrifice his impeccable reputation and integrity—which he has built over half a century—in exchange for board compensation he does not need and could easily replace, or to ingratiate himself with a man he virtually never sees outside of work. Curwood squarely rejected that proposition at trial. Tr.735:8-19. And plaintiffs offered no evidence at trial to support it. As the Court saw firsthand, Curwood is a person who has built his entire career on the bedrocks of integrity, impartiality, and exposing

systemic problems and injustices. This is not a man who would sacrifice his ideals and his reputation—earned over decades of highly regarded, award-winning public-interest work—for a BGC board seat.

CONCLUSION

The Court should enter judgment in favor of Moran.

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