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 REPLY BRIEF OF DEFENDANT WILLIAM MORAN

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INTRODUCTION

In their 113-page submission, plaintiffs cite William Moran's brief exactly three times, and they devote three pages to their argument under *Cornerstone*—which consists mostly of a bulleted list of factual allegations copied and pasted from their pretrial brief. There is no other way of putting it: plaintiffs are no longer taking their claim against Moran seriously.

Plaintiffs have accused Moran of violating his fiduciary duties, and they have subjected him to the extensive costs and time of litigating this case, relying on the narrow path to liability that the Court left open in its summary judgment opinion. Moran filed a post-trial brief explaining in detail why, based on the trial evidence and the law articulated in the Court's opinion, plaintiffs have failed to satisfy the *Cornerstone* test. While plaintiffs' brief does contain a series of scattered references to Moran's conduct in the transaction along with conclusory critiques of that conduct, with the exception of a single footnote (page 111 n.501), plaintiffs do not address any aspect of Moran's brief—neither the arguments nor the cited authorities.

Plaintiffs have come dangerously close to waiving their claim against Moran. But there is no reason for the Court to rule on that technical ground; the claim fails on its merits. First, plaintiffs have not shown that Moran lacked independence from Lutnick, both because the nature of Moran's respect for Lutnick was not the kind that would affect his judgment (Moran Br. 38-41), and because the evidence belies

plaintiffs' assessment of the degree of that respect (*id.* 6-10, 41-45). Second, the evidence demonstrates that Moran did not act to advance Lutnick's interests in the transaction, and instead "engaged in hard-fought, arms-length negotiations to benefit BGC and its stockholders." MSJ Op. 34; Moran Br. 11-35, 45-53. For these reasons—in addition to the demand-futility and entire-fairness grounds addressed by the Cantor defendants—the Court should enter judgment for Moran.

ARGUMENT

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

We argued that plaintiffs have failed to satisfy either the independence or advancement prongs of *Cornerstone*. Moran Br. 38-53. As this Court held at summary judgment, if Moran was "*either* (1) shown to be independent *or* (2) shown not to have actively furthered the conflicted party's interests, dismissal is appropriate." MSJ Op. 27-28. The evidence establishes both.

A. Moran Was Independent From Lutnick.

The Court has found only one triable issue bearing on Moran's independence: whether Moran's "respect" and "admiration" for Lutnick would have "sterilize[d] his discretion" to negotiate and evaluate the transaction. MSJ Op. 24-25. Our brief demonstrated that, for two independent reasons, the answer to that question is no: (1) Moran's respect for Lutnick was not "of a bias-producing nature" (*Beam v. Stewart*, 845 A.2d 1040, 1050 (Del 2004); Moran Br. 38-41); and (2) that respect

was nowhere near a *degree* that would make it akin to "familial loyalty and closeness" (*Beam*, 845 A.2d at 1050; Moran Br. 41-45).

Plaintiffs ignore the first point. They do not dispute that Moran's respect for Lutnick was primarily due to Lutnick's support for the families who lost loved ones on 9/11. Moran Br. 38. Nor do they explain why Moran's respect for Lutnick was the kind that would make Moran defer to Lutnick's *business* decisions—to make him "more willing to risk his . . . reputation than risk the relationship with" Lutnick. *Beam*, 845 A.2d at 1052. This case is nothing like the *NantHealth* decision cited by the Court (MSJ Op. 24 & n.108)—which we addressed in detail (Moran Br. 39-41), and plaintiffs ignore entirely. There was nothing concrete for Moran to "risk," much less something that he would consider more important than a reputation he had spent over fifty years building—one marked by a staunchly independent approach over the years in dealings with Chairpersons, CEOs, and board members at JPMorgan Chase, as well as with Lutnick. *Id.* 6-10. Moran respects Lutnick because Lutnick supported the 658 Cantor/eSpeed families that lost loved ones on 9/11—conduct that just about anyone would admire—but the two have no "relationship" outside business.

In response to our second argument, plaintiffs begin with a puzzling assertion: that "[d]espite his best efforts, Moran cannot conceal his great personal respect and affection for Lutnick." Pl. Br. 105. What efforts? Moran has never concealed his

respect for Lutnick; he confirmed it at trial. Tr.807:8-19, 875:24. But if plaintiffs mean that Moran concealed the *extent* of his respect, that is just baseless. Moran was asked point blank, repeatedly, about his relationship with Lutnick: He said that it was "arm's length" and "pure business" (Tr.805:9, 808:10-18); that his respect for Lutnick affects him "as a person," not "as a businessperson" (Tr.806:18-808:18); that it "has nothing to do with [his] judgment and [his] dealings with Howard or anybody at the firm" (Tr.808:8-10); that his respect for Lutnick "didn't influence my judgment" (Tr.808:17-18) and that he "would tell Howard no on occasion," and sometimes "write a snide letter to him" (Tr.808:13-15). When asked at trial if he "revere[s]" Lutnick, Moran had to restrain himself from calling the notion ridiculous, saying emphatically: "No, no, that's—no." Tr.808:19-20. Plaintiffs *did not follow up on these answers* at trial, so Moran's compelling testimony is undisputed and unrebutted.

Plaintiffs contend next that "[t]he Court already knew before trial that: (i) Moran told Lutnick that he is an 'inspiration' to him and that Lutnick's 'courage and kindness is above anything [he had] seen in [his] lifetime'; (ii) when recounting a story about Lutnick's 'courage and kindness' …, Moran grew visibly emotional, cutting himself off for fear of becoming 'teary-eyed'; and (iii) that Moran is '***proud***' to be associated with Lutnick." Pl. Br. 105-06. The Court did indeed know about this testimony, and acknowledged it at summary judgment. MSJ Op. 24. The

problem for plaintiffs, however, is that it only confirms that "Moran's respect for Lutnick is considerable." *Id.*; Moran Br. 2. But, as the Court noted, that respect does not preclude the "reasonable" inference "that Moran's admiration for Lutnick did nothing to sterilize his discretion." MSJ Op. 24-25. And on that issue, trial did not advance plaintiffs' position in the slightest.

Indeed, plaintiffs do not appear to dispute that, unlike a relationship bounded in love, family, close friendship, or money, respect alone does not give rise to a suspicion that a director might be willing to sacrifice the interests of the company. Moran Br. 38-39. That is why they make a last-ditch attempt to reopen doors that this Court has already closed. They first suggest that Moran had a significant *social* relationship with Lutnick, pointing to Moran's testimony that his "significant other (Ms. Saltzman) kept a picture of herself, Moran, and Lutnick on her shelf"; that Moran "used his relationship with Lutnick to fundraise for the SUNY College of Optometry, a cause very important to Ms. Saltzman"; and that "Lutnick arranged for Ms. Saltzman and [her] granddaughters to enjoy a private tour of the Tate Modern in London in April 2017." Pl. Br. 106.

These assertions are misleading. Moran testified without rebuttal that the photograph was valuable to *Saltzman* because it happened to be from the beginning of Moran's relationship with *Saltzman*. Tr.867:6-10 ("It's a beautiful picture of us that she had, and I still like the picture in spite of Howard being in it. . . . And I think

we look great as a couple."). There is no evidence that Lutnick ever donated to the SUNY College of Optometry. And it was Lutnick's assistant, Matthew Gilbert, who arranged for the tour—which Gilbert routinely did for *any* BGC or Cantor employee who asked. Tr.951:14-952:17. Plaintiffs' arguments here are especially weak given the unrebutted evidence at trial that Moran and Lutnick were *not* close friends and had virtually *no* social or familiar interactions. Tr.805:7-806:14; Moran Br. 8-10, 41-45. Finally, these tired arguments were presented to the Court at summary judgment: the Court held that there are "no apparent close social or familiar ties between Moran and Lutnick"; the interactions between the two men outside of BGC amount to merely "a handful of social, charitable, [and] political events." MSJ Op. 10, 24.

Plaintiffs even repeat their worn out argument that Moran was "increasingly dependent on Lutnick for his income." Pl. Br. 106. This claim, too, did not survive summary judgment. 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. 23. From 2010-2017, Moran's average annual BGC-related income was less than 1% of his net worth and a small fraction of his yearly income. The fact that Moran's BGC income generally *increased* from 2010-2017 (except in 2015-2016 when it

decreased) does not mean that he is *dependent* on Lutnick for compensation. Plaintiffs did not even attempt to prove as much at trial.

One group photograph, one fundraising event, and one museum tour over the span of twenty years do not amount to a relationship that "border[s] on or even exceed[s] familial loyalty and closeness." *Beam*, 845 A.2d at 1050. Nor does a feeling of respect, borne out of a response to a discrete national tragedy, which took place fifteen years before the transaction at issue. Plaintiffs have not satisfied *Cornerstone*'s independence prong.

B. Moran Did Not Actively Advance Lutnick's Interests.

Setting aside independence, Moran should be granted judgment because he did not "actively further[]" Lutnick's interests at the expense of BGC's stockholders. MSJ Op. 27-28; Moran Br. 45-53. Plaintiffs respond with an incorrect legal argument and a bulleted list of factual assertions. Pl. Br. 111-13.

1. Plaintiffs Had To Prove That Moran Knowingly Furthered Lutnick's Interests At The Expense Of BGC's Stockholders.

Plaintiffs' sole legal argument as to Moran appears in the 501st footnote of their brief. Their position is that because *Cornerstone*'s bad-faith prong contains a scienter requirement, *Cornerstone*'s advancement prong *cannot* contain such a requirement, and that this Court "already" held as much in its summary judgment opinion. *Id*. 111 n.501. Plaintiffs can get to that conclusion only by crudely chopping up the quote from this Court's opinion. What the Court actually said was:

"There exist scenarios where a director knowingly violates the law or undertakes intentional misconduct unrelated to a desire to advance the interests of a conflicted party. In such cases, prong three applies." MSJ Op. 30.

That is exactly our position: both tests involve knowing conduct, but different motivations. Bad faith typically involves "a *malevolent* motivation to cause harm"—a desire to harm the stockholders out of malice or for self-gain. *Id.* (emphasis added). The advancement test depends on whether the director "knowingly" harmed the stockholders based on a "*desire* to advance the interests of a conflicted party." *Id.* (emphasis added). Vice Chancellor Laster recently confirmed as much in a case cited in our opening brief (at 46), which plaintiffs fail to distinguish. *United Food & Commercial Workers Union v. Zuckerberg*, 250 A.3d 862, 898 (Del. Ch. 2020).

Any other rule would make little sense. Moran cannot be held liable merely if Lutnick benefited from one or more of Moran's decisions; that possibility necessarily follows from Lutnick's ownership interest in both Cantor and BGC. Plaintiffs needed to prove that Moran *wanted* to advance Lutnick's interests over BGC's stockholders, and took "real-world actions" consistent with that "desire." MSJ Op. 29-30. By arguing that they did not *need* to prove this point, plaintiffs all but concede that they cannot. In any event, plaintiffs have not come close to

demonstrating that Moran—intentionally or otherwise—advanced Lutnick's interests over BGC's.

2. Moran Consistently Acted In BGC's Interests.

We demonstrated that, at every stage of the transaction, Moran zealously advocated for the interests of BGC's stockholders. Moran Br. 11-35, 45-53. Plaintiffs respond with an unadorned bulleted list of arguments about Moran's approach to the transaction. Pl. Br. 112-13. We address each below (often for the second and third time in this litigation), followed by a response to various mischaracterizations of the evidence scattered throughout plaintiffs' background section.

Plaintiffs argue that "[t]he record shows that Moran":

"Understood he was duty-bound to represent the interests of BGC and its public stockholders." We agree; it is unclear why plaintiffs believe this fact supports their position. Moran and the Special Committee were, indeed, "very conscious of [their] responsibility to the shareholders"; they knew their role was to "work for the shareholders" and make sure they got "the best price and the best structure." Tr.812:3-18, 827:13-23, 953:21-24. The evidence also showed that Moran's background, work ethic, and knowledge of financial structures and accounting made him uniquely suited for this role. *Id*. 47.

"Understood Lutnick stood on both sides of the Transaction." This is also correct; it is the very reason why a Special Committee was formed. It has nothing to do with the question of whether Moran acted to advance Lutnick's interests.

"Did not care whether Lutnick was financially incentivized to favor Cantor or 'made a few bucks here and a few bucks there.'" This, again, is simply a restatement of the fact that Moran was willing to negotiate the transaction despite Lutnick's conflict—after forming a Special Committee. Sterling explained at trial that Lutnick's relative percentage ownership in BGC versus Cantor was of little relevance because the "going-in assumption" was that Lutnick would negotiate for Cantor *against* the Special Committee (who represented the interests of BGC's public stockholders). Tr.388:20-389:7. Lutnick's negotiating interest was to "*get[] the best deal for Cantor*" regardless of his ownership interests. *Id*. (emphasis added). Further, Lutnick testified at trial that his BGC holdings were *more valuable* than his Cantor holdings. Tr.1239:22-1244:5.

"Allowed Lutnick to negotiate 'with himself.'" We addressed this issue in detail in our brief (at 48-50). Moran testified at his deposition that Lutnick would be negotiating "with himself," but plaintiffs' counsel did not ask Moran what he meant by this at trial (Tr.890:10-14), and on redirect, he explained that this testimony was an inartful way of saying that Lutnick was on both sides of the deal (Tr.953:13-18; JX0890 at 161:17-23). He was then asked "[w]ho was negotiating the deal for

the BGC public shareholders," and he couldn't have been clearer: "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 repeatedly demonstrated at trial his clear understanding that Lutnick was negotiating for Cantor *against* the Special Committee and its advisors, who negotiated for the public stockholders of BGC. Tr.815:16-20, 816:8-817:9, 827:20-23, 848:5-8. Sterling agreed, testifying that it was Moran who contacted Sterling at the beginning of the process and *explained* these roles to Sterling. Tr.207:7-209:18. On cross, Sterling explained that "my understanding of the reason for the special committee was to negotiate against Mr. Lutnick." Tr.307:8-10. Plaintiffs do not respond to any of these points. That Moran—a non-lawyer who was 79 years old at the time of his deposition—conflated the concept of "negotiating for both sides" with "standing on both sides" of the transaction in a short passage of an eight-hour deposition does not change these facts.

"Deferred to Lutnick on the selection of [the] Committee's legal and financial advisors, while allowing Lutnick to interview the financial advisors." This is another argument that we addressed (at 50), without response. The evidence does not remotely suggest that the Special Committee "[d]eferred" to Lutnick on the choice of Sandler and Debevoise. It was Moran who proposed the engagement of outside advisors to begin with (JX0241 at BCG0001265), and who first suggested

Sandler to lead the negotiations against Lutnick based on his understanding of Sandler's expertise from his days at JPMorgan Chase (Tr.547:2-11, 820:8-24). Dalton had worked closely with both Sterling of Sandler and Regner of Debevoise on the BGC/eSpeed special committee in 2008 negotiating against Lutnick. Tr.214:14-24, 309:19-22. Both advisors had a track record of negotiating effectively *against* Lutnick, as well as other powerful controlling stockholders (e.g., Carl Icahn). Tr.214:14-215:16. As Sterling explained, "We had prior relationships and done prior work for committees that Secretary Dalton and Mr. Curwood were on." Tr.309:19-21. The evidence at trial suggests only that Lutnick may have been given the "opportunity to comment" on the choice of advisors (Tr.898:9-14), and that was primarily because some firms would pose conflicts that *only* Lutnick would have been aware of. Tr.821:11-16, 1259:21-1261:6; *see In re W. Nat'l Corp. S'holders Litig*., 2000 WL 710192, at *22 (Del. Ch. 2000) (process "substantively and procedurally sound" where "management merely arranged for the committee to interview advisors that appeared qualified" and lacked conflicts). Lutnick had no "vote" or "veto power" over the decisions. Tr.820:1-821:20, 898:10-11, 954:19-23. At the Special Committee's first meeting on March 15, 2017, the four Special Committee members after debate and discussion voted unanimously to retain Sandler and Debevoise because "they were the [advisors] likely to dig in deeper and do the better job." Tr.547:10-11 (Bell); Tr.820:8-15 (Moran).

In any event, plaintiffs still have made no attempt to explain how BGC's stockholders were harmed by Lutnick's limited input, or even how Lutnick benefited. Moran Br. 50. Plaintiffs have *never* argued that Debevoise was conflicted. Indeed, they neither deposed Regner nor called him as a trial witness. They vaguely insinuate that Sandler had a conflict (*see* Pl. Br. 57), but without any credible evidentiary support. Sandler was, as plaintiffs argue, interested in securing a role in Newmark's IPO, but these communications cited in the answering brief all predated the Special Committee's outreach to Sandler, and the most lucrative roles associated with the IPO had been filled before Sandler knew about Newmark's IPO plan. JX0893 at 60:2-13. Plaintiffs also note that "Sterling was the relationship manager for Lutnick-controlled companies," while acknowledging that Sterling's prior engagements were almost all "against Lutnick." Pl. Br. 57. Plaintiffs nonetheless assert that this "does not assuage th[eir] concern" because it "begs the question why Lutnick was so quick to select Sandler as his negotiating foe." *Id.* But the trial record is clear that Lutnick *did not* "select Sandler"—the Special Committee did by unanimous vote."[1]

[1] Plaintiffs even go so far as to assert that "[t]he Special Committee was conflicted and acted with a controlled mindset." Pl. Br. 66. This broad swipe cannot be squared with their *voluntary* dismissal of Dalton, or with the Court's finding that Bell is independent and Curwood did *not* act to advance the interests of Lutnick. MSJ Op. 18-21. Nor does it square with the presence of a concededly independent

"Asked Lutnick's permission to allow Sandler to negotiate against him." That is a flat mischaracterization of the record. At trial, plaintiffs' counsel showed Moran an email in which Moran asked Lutnick: "Are we going to want [Sandler] to negotiate price????" Tr.904:23-24. Plaintiffs asked Moran if his question was referring to "[t]he price of the deal," and Moran answered: "No." Tr.905:8-9. The email was referring to the "price of our arrangement with . . . Brian Sterling's firm." Tr.905:9-11. Plaintiffs' counsel then sought to confirm that Moran was "asking Howard Lutnick whether [he was] going to negotiate the price of Sandler's retention," and Moran reiterated: "Yes. That's exactly what it was." Tr.906:5-7. Plaintiffs asked no follow-up questions. Plaintiffs argue that his testimony is "facially implausible" because the email used the word "price" rather than "fee." Pl. Br. 22. Not so. In the *same* email, Moran further inquires whether the next step is to "ask for [a] proposal and fee" from Sandler. JX0270. Plaintiffs' strained argument fails.

"Withheld Lutnick's participation and influence over the selection of the Committee's advisors and [the] scope of Sandler's assignment from his fellow Committee members." This argument assumes that there was something untoward about Lutnick's limited role. Not so. As the trial testimony makes clear, Regner

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legal advisor (Debevoise) that guided the Committee process over a course of four months and *nineteen* Special Committee meetings.

and the Debevoise attorneys scheduled calls with Houlihan Lokey and Sandler, respectively, so that Lutnick could provide information to both of the potential financial advisors and answer questions about the proposed transaction for their RFPs. Tr.958:9-10 ("Bill Regner has scheduled Sandler for 3pm and Houlihan for 4pm.") Regner, counsel for the Special Committee, was "running this process" (Tr.958:18-19), led the short informational meetings with the financial advisors and Lutnick, and appeared on the emails with Moran that plaintiffs incorrectly claim were "withheld" from the Special Committee. Tr.958:7-960:7; JX0281; JX0290. Because Debevoise was actively involved overseeing Lutnick's limited role providing information to the potential financial advisors, and because Lutnick was not permitted *any* influence over the selection process or voting for BGC's advisors, this argument fails.

"Pushed to get the Transaction done on Lutnick's timeline while repeatedly reassuring Lutnick that he was committed to Lutnick's Transaction long before receiving valuation information from Sandler." The evidence belies plaintiffs' contention that Lutnick was driving the timetable of the transaction. Moran Br. 51-52. Lutnick wanted the transaction to close by the end of March 2017 (Tr.1368:16-20), but it did not close *until September* of that year (JX0713). The Special Committee slowed the timeline on several occasions (to conduct due diligence), and moved to pick up the pace on other occasions (when Lutnick and Cantor were not

being responsive to information requests). Tr.219:7-12, 305:10-11, 558:23-24, 822:11-21. There is a wealth of evidence on this subject, but a few examples are illustrative:

At the February 11 meeting, when Lutnick first told the Independent Directors that the Transaction should close by March 31, Moran said no: "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. Plaintiffs resist the proposition that Moran "immediately pushed back on Lutnick's timing," arguing that "Moran told Sandler and Debevoise—'several times!'—that Lutnick was 'running a clock' on the Transaction." Pl. Br. 24. While Lutnick may have wanted the Special Committee to move quickly, the fact remains that it never acquiesced to Lutnick. The Special Committee was indeed moving "as quickly as possible"—but the Committee's view of what was "possible" was very different from Lutnick's.[2]

[2] Indeed, Moran told Lutnick that "*we* are running a clock on this deal"—not that Lutnick was. JX0331 (emphasis added); JX 890 at 227:15-25 ("Q: What did you mean 'we are running the clock on the deal'? Who is 'we'? A: We. We. We, the firm. We, the directors. We have a role to play in ratifying or rejecting the deal.")

The Committee again demonstrated this approach on April 27, when "Cantor-GC Merkel told Sandler and Debevoise that 'time [was] of the essence.'" Pl. Br. 32 (quoting JX0397), and on May 2, when Lutnick tried to "li[ght] a fire under the Committee." *Id.* 33 (quoting JX0423). Instead of bowing to Merkel's and Lutnick's pressure, "[o]n May 5, Sandler sent a list of pending diligence requests to Cantor." *Id.*; Tr.822:12-13 (Moran: the Special Committee slowed the transaction because it "had a problem with getting the data that our advisors needed"). Indeed, the Special Committee took *five additional weeks* to continue its diligence and analyze the structure and valuation of the transaction before reaching agreement at the June 6 meeting. Subsequently, Moran "had words with Merkel re pressure on signing off." JX0524. "I told him—I can't use the words—expletive deleted—because I was really pissed this time. This is at 10:00 at night he's calling me, that I told him, when we're ready to approve the deal, we'll approve the deal. If not, get off my back." Tr.835:20-836:2.

Realizing that the Special Committee was not going to budge, Lutnick changed his tone; on May 21, he "texted Bell and Moran, 'checking in' on *the Committee's timing*." Pl. Br. 39 (emphasis added). And then, even after this communication, at its June 1 meeting, "[i]t was the view of the Committee that it would be important to *take the time it needs* to digest the diligence items and better

understand the strategic rationale for the Proposed Investment and valuation of Berkeley Point before responding to Cantor." JX0526 (emphasis added).

Plaintiffs point out that "[o]ver Memorial Day weekend (May 27-29), Lutnick interrupted Sterling's and Moran's time with their families to push them to complete the Transaction." Pl. Br. 39. Again, *Lutnick* may have wanted the deal to move quickly, but no agreement was reached until June 6. Ten days is a long time for investment bankers and lawyers comfortable working over weekends and on tight timeframes. As Moran testified: "[E]verybody in this room knows, when your client engages you for large fees, we expect you to work 24 hours a day for our cause. That is a given. That's the way my team worked." Tr.830:12-19. Between May 27 and June 6, the Special Committee had *five* meetings, and Sandler generated *four* different detailed PowerPoint presentations to the Committee. Plaintiffs cannot be permitted to turn the many nights, weekends, and holidays of work *against* the Special Committee and its advisors.

"Did not push back when Lutnick raised the proposed purchase price to cover Cantor's tax bill." Every word of this sentence is wrong: the "proposed purchase price" referenced by plaintiffs ("low 700 millions," Tr.923:15) was not a formal offer, and the Special Committee most certainly did "push back" at Lutnick's actual proposal with great success.

As our opening brief explains (at 12-35), over five months of negotiations, the structure and pricing of the transaction shifted several times. Rather than address the extensive back-and-forth, plaintiffs fixate on the fact that Lutnick initially discussed a "'*potential* purchase price' for 100% of [Berkeley Point] in the 'low $700 million *range*,'" and that this figure was used in certain early discussions. Pl. Br. 13-15 (emphases added). But as Bell, Curwood, Moran, Edelman, Sterling, and Lutnick *unanimously* confirmed at trial, *no one* viewed the rough $725 million figure as a serious valuation of Berkeley Point or a formal offer. Tr.539:15-16 (Bell: Cantor was "throwing a number in the air to give us a sense of scale and scope"); Tr.216:17-23 (Sterling: figure offered a "sense or understanding of what the economics might look like for the Berkeley Point acquisition at that time"; it was not a "formal offer"); Tr.422:18-22 (Edelman: the figure "never went any further" than a "concept"); Tr.1391:11 (Lutnick: Cantor "didn't make an offer at [$]725" million).

Cantor did not make an actual offer until April 21, proposing that BGC acquire 95% of Berkeley Point for $850 million and invest $150 million in the CMBS business. JX0386. As Edelman explained, Cantor's proposal differed from the "ballpark" estimates because it was developed once his "team was made aware . . . that an unstructured sale of the Berkeley Point business to any party, including BGC, would result in a significant tax liability." Tr.415:19-24.

The Special Committee quickly responded. Sandler and Debevoise convened a call with Cantor on April 27. JX0397. On the call, Sandler and Debevoise pushed back on both deal price and structure; Cantor's notes of the call indicate that "Sandler/Debevoise expressed surprise that the structure was different than an outright purchase of Berkeley Point," and "they did point out that the investment was now for $1 billion not $900 million." *Id*. As to the tax issue, Cantor's notes state that "they appear to appreciate the tax deferral aspect" and that "Debevoise's tax counsel would like to speak with our tax counsel" to address this development. *Id*. Over the coming weeks, Debevoise/Sandler pressed Cantor for additional due diligence on these issues. Tr.228:2-10. The Special Committee recognized that Cantor's desire to avoid tax liability was a useful bargaining chip *for BGC* in the negotiations. JX0558 ("[The Special Committee] would like to understand what is the value of the tax deferral for Cantor from the structure you are proposing."); Tr.253:20-23 (Sterling: "[I]f that's additional value you are getting from this transaction, then we're going to want you to split it with us or share it with us."). And as the Court knows well, BGC acquired 100% of Berkeley Point at a price *below* Cantor's ultimate proposal. Tr.445:15-446:7 (Edelman: Cantor "did not receive the tax-favoring structure it sought" or "the price that it wanted").

"Agreed to acquire BP based on its net assets as of March 31 without attempting to understand the size of the resulting dividend from Cantor." This

argument ignores the testimony at trial and the practical realities associated with *any* acquisition. The value of a company must be pegged to *some* point in time. And here, everyone agreed that the appropriate time was March 31, 2017, because that date reflected the end of the last full quarter that was verifiable in Berkeley Point's financial statements. Tr.483:14-21. This date was not an "unwitting concession" extracted by Cantor (Pl. Br. 47); it was Sandler and the Special Committee who insisted on it. Tr.483:5-21 (Edelman: "the special committee and their advisors had focused on the balance sheet item as of that date"; when Cantor suggested other dates or numbers, "they dismissed those numbers as not being verified").

And without a crystal ball, no one could know how exactly Berkeley Point's balance sheet would change in the three months between the June 6 agreement and the September 8 closing, so no one knew how large any price adjustment would be or whether there would be *any* adjustment at all. Cantor potentially could have owed BGC money. Tr.483:3-21.

"Lutnick controls all." In the background section of their brief, plaintiffs repeatedly point to a portion of an email from Sterling that "Lutnick controls all." Pl. Br. 127. Plaintiffs like this quote because it allows them to suggest that Lutnick was controlling the *transaction*. But the email has nothing to do with the transaction: it was referring to Sandler's efforts to be hired as an underwriter for the Newmark IPO. Tr.302:14-16. Sterling explained at trial that he was describing Lutnick's

ordinary role as BGC's CEO to choose underwriters. *Id.* Sterling also testified unequivocally that Lutnick does *not* have any control over Sandler's work *on behalf of special committees*. Tr.389:23-390:9 ("We've always been hired by representatives of the special committee, talking purely to the chair, co-chairs of the special committee and their counsel.").

The advocacy presentation. Sterling described the advocacy presentation as a "collaborative effort by the committee and ourselves." Tr.249:20-21. The unrebutted evidence shows that the advocacy presentation was just that—a piece of advocacy designed to convince Cantor to change key terms—not a *valuation* of the deal. Moran Br. 26-28. But plaintiffs continue to describe the presentation misleadingly, without any response to the testimony cited in our opening brief. Pl. Br. 43-45. Plaintiffs assert that "Defendants repeatedly attempted at trial to minimize the import of the presentation." *Id.* 43. Not so. The defendants presented extensive testimony on the advocacy presentation from Sterling (Tr.256:8-262:10), Bell (Tr.561:10-567:2), and Moran (Tr.839:19-843:6), among others. It is a key piece of evidence for the *defendants* demonstrating how the Special Committee and its advisors worked *collaboratively* and *diligently* to craft arguments to reduce the deal price, change the deal structure and negotiate successfully against Cantor for the benefit of BGC's stockholders. Tr.248:3-7 (Sterling: advocacy piece was a "best

practices" document "to go through [] with the committee" and "would make all of our arguments for a lower price").

The June 6, 2017 meeting that "no one remembers." The negotiations with Cantor culminated in a five-hour meeting on June 6, 2017. Moran Br. 28-31. But despite the mountain of testimony about this meeting, plaintiffs urge the Court to find that "no one remembers" it and that "not a single witness recalled anything of substance" about it. Pl. Br. 45.

That is absurd. *Everyone* remembers how contentious, long, and frustrating the June 6 meeting was, and *everyone* remembers the many heated caucuses among the Special Committee, its advisors, and Cantor as they attempted to hammer out an agreement on key deal terms. Sterling, for example, testified in painstaking detail about how, at the beginning of the meeting, he walked Lutnick and Cantor through Sandler's advocacy presentation point-by-point. Tr.265:23-266:17. The presentation elicited from Cantor "a lot of frustration," and "a lot of pushback on the arguments." Tr.266:1-3. Sterling was especially struck by Lutnick's displeasure with the arguments. Tr.266:1-17 (Lutnick "expressed a great deal of frustration" and was probably not used to someone telling him "he's not going to get the deal he proposed"); Tr.1285:17-20 (Lutnick was "very upset" and communicated his "unhappiness" as "many times as [he] could"). At the end of Sterling's discussion,

he presented a counteroffer: $720 million for a majority interest in Berkeley Point, and a $100 million investment in the CMBS business. JX0570.

Everyone remembered that, over the course of five hours, there was fiery negotiation over both the price and structure of the deal—the Committee was ready to walk away if it did not get 100% of Berkeley Point for the right price. Tr.571:6-13 (Bell: in "several instances," "the Cantor people left in a huff" over the Committee's preferred structure); Tr.743:21-744:4 (Curwood: Dalton "started pounding … his shoe on the table" to demand a 100% acquisition); Tr.1286:24-1287:19 (Lutnick: "there was no [] place to go other than a total sale of Berkeley Point, and not at the price Cantor wanted"); Tr.956:4 (Moran: "We were prepared to walk away."). In response to the Court's questions, Sterling testified about his recollection of the details of the negotiations on price and structure that led to the handshake deal. Tr.403:14-405:14. Everyone remembered that both Moran and Bell were at various times sent in to drive these points home while the two sides caucused (Tr.270:7-14; 844:8-18; 944:23-945:11; 1412:18-1413:1), with Moran delivering the bluntest message of all: "Howard, it ain't happening. The deal's not going down the way you have it constructed." Tr.844:11-12; Tr.955:21-24 ("We're going to do the deal when the price is right for the shareholders. Not the one you want, Howard. You don't get what you want."). And everyone remembered that, after extracting critical concessions from Cantor, the Special Committee was the

"prevailing party" on the deal "structure" and deal price (Tr.272:6-273:13), while the Cantor team was "very upset" by the outcome (Tr.1285:17).

"Post-hoc, illogical rationale." Finally, rather than recognizing the many advantages BGC obtained by purchasing 100% rather than 95% of Berkeley Point, plaintiffs describe this structural change as "a post-hoc, illogical rationale for agreeing to the unfair deal." Pl. Br. 48. There was nothing "post-hoc" about the Special Committee's focus on structure. From the time that Lutnick proposed the deal in February 2017, all parties understood that a significant purpose of the Transaction was to permit BGC to acquire and seamlessly integrate Berkeley Point's loan-origination business with Newmark's investment-sales business. Tr.537:20-539:4; JX1240 at BGC0069946; Moran Br. 11-12. The Special Committee did not agree to the terms in the First Cantor Proposal precisely because it did not give BGC sufficient control over Berkeley Point. Moran Br. 20-21; Tr.223:3-224:8 (Sterling). As Sterling explained, the proposal had "a very different structure than we had expected," which was an "outright purchase of 100 percent" of Berkeley Point. Tr.220:17-221:1. And of course, the structure of the deal was the point of contention that almost caused the Special Committee to walk away at the June 6 meeting. Moran Br. 28-31.

Plaintiffs contend that the Special Committee's emphasis on structure "makes no sense" because "Lutnick was BP's ultimate controller whether BGC acquired BP

outright or not." *Id.* 48-49. That is an extraordinary argument coming from plaintiffs whose whole claim in this case is that, despite Lutnick's position on both sides of the transaction, the BGC stockholders had the right to be treated as a separate entity from Cantor. The reason 100% ownership was critical was to make the company 100% answerable to BGC's stockholders for how BGC handled Berkeley Point. Lutnick would play an important role in those decisions—but only in his capacity as a BGC officer, not as an officer of Cantor, a company with different goals.

In short, the evidence shows that "Moran engaged in hard-fought, arms-length negotiations to benefit BGC and its stockholders." MSJ Op. 34. As explained in our opening brief (at 47-48) and ignored by plaintiffs, Moran was the one who proposed that the Special Committee engage independent advisors to consider the Transaction. He suggested Sandler to lead the negotiations against Lutnick. He was the director who most vigorously pushed Cantor on outstanding data requests, including by emailing Lutnick directly. He was the one who told Lutnick that it was impossible for the Transaction to close by March, and later told Cantor's general counsel to "get off [his] back" about the timing. He was the director who told Lutnick that the First Cantor Proposal was "too complex" and that the Special Committee was "not interested in the tax structure at all." 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." He was the director who told Sterling to be "zealous [and] aggressive" in his negotiations with Lutnick. 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." Lutnick and Cantor then came back to the Committee with dramatically more favorable terms.

Finally, Sterling's testimony aptly captures the nature of Moran's zealous advocacy on behalf of BGC's public stockholders: "[F]rom the first conversation with Bill Moran, our 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, … 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.

Because plaintiffs have failed both requirements of their *Cornerstone* claim, Moran is "entitled to have the claims against [him] dismissed." MSJ Op. 26; *Benihana of Tokyo v. Benihana, Inc.*, 891 A.2d 150, 175-77 (Del. Ch. 2005) (after trial, granting judgment to independent directors for failure to prove a non-exculpated claim); Moran Pre-Trial Br. 19-20 (citing cases).

II. Curwood Was Independent From Lutnick.

Defendants argued that because Curwood is independent from Lutnick, demand on the board would not have been futile. Moran Br. 53-60. The trial evidence conclusively demonstrated (a) Curwood's impeccable reputation for independence during his accomplished career (*id.* 54-55) and (b) that he is not dependent on his BGC board-related compensation (*id.* 56-60). Plaintiffs respond with a misguided legal argument and a series of meritless factual assertions.

Plaintiffs argue that "Curwood faced a substantial likelihood of liability when the complaint was filed," and that because the Court denied the defendants' motion to dismiss, a demand-futility defense is no longer available. Pl. Br. 107. Plaintiffs do not offer any case holding as much, and it would be a bizarre rule: It would mean that even though the Court held at summary judgment that Curwood is *not* liable and dismissed him from the action, it must now turn a blind eye to that conclusion. It would also mean that it was improper for the Court to analyze demand futility at summary judgment (MSJ Op. 15-25)—an argument that plaintiffs did not even raise at that stage. The Court should reject this eleventh-hour argument.

When addressing compensation, plaintiffs barely engage with the evidence we cited. Curwood is able to generate more than enough income for his family from sources that have no connection to Lutnick. His position with the World Media Foundation provides him with approximately $140,000 annually (Tr.712:10-14); his

academic work has yielded additional yearly income up to $70,000 (Tr.714:2-3); he commands a $15,000 speaking fee (Tr.721:3-8); he has received approximately $100,000 in advances for writing projects (Tr.732:13-16), and his work at funds (e.g., Pax World Funds) has yielded additional yearly income up to $50,00-60,000 (Tr.723:13-19). Beyond his income, Curwood has pensions from multiple non-BGC sources (including World Media Foundation, the *Boston Globe*, and Harvard University) worth millions of dollars (Tr.734:4-8), and he owns *three properties* (Tr.734:9-14).[3]

Plaintiffs argue that a substantial percentage of Curwood's income was derived from his Board position, particularly in 2017. Pl. Br. 107-08. But as he testified, Curwood's BGC compensation was higher in 2017 than in prior years because the Special Committee members were compensated per-meeting, and the lengthy Transaction process required an "extraordinary" number of meetings. Tr.787:11-20. In addition, plaintiffs do not address the significant "public policy concerns at play when wealth is used as a factor in analyzing independence." MSJ

[3] Attempting to turn this fact against him, plaintiffs say that, while they "do not doubt Curwood's religious beliefs, Curwood's ownership of three properties is at odds with Defendants' suggestion that Curwood leads such a frugal, ascetic lifestyle that money is of no moment." Pl. Br. 110 n.494. We agree that the sincerity of Curwood's religious beliefs are beyond reproach and strongly disagree with any innuendo in plaintiffs' brief (argued without any actual evidence) that Curwood's interest in these properties is "at odds" *in any way* with Curwood's beliefs.

Op. 22 (citing cases); Moran Br. 58-59. For example, in *In re Walt Disney Derivative Litigation*, 731 A.2d 342 (Del. Ch. 1998), plaintiffs argued that because a director's "salary as a teacher [was] low compared to her director's fees and stock options," she was beholden to the interested party. *Id*. at 359. The Court explained that adopting this theory "would be to overrule the Delaware Supreme Court," and would "discourage the membership on corporate boards of people of less-than extraordinary means." *Id*. at 360; *Chester Cty. Emps.' Ret. Fund v. New Residential*, 2017 WL 4461131, at *8 (Del. Ch. 2017) (same as applied to a director who worked as a civil servant and had "not accumulated great wealth"); *Robotti & Co. v. Liddell*, 2010 WL 157474, at *14 (Del. Ch. 2010) (same re low six-figure director compensation).

Moreover, there is no dispute that Curwood's compensation is typical for a director of a company of BGC's size and industry. A director's judgment is not compromised simply because she is paid fees that are "customary and usual in amount." *Orman v. Cullman*, 794 A.2d 5, 29 & n.62 (Del. Ch. 2002); *A.R. DeMarco Enters. v. Ocean Spray Cranberries, Inc.*, 2002 WL 31820970, at *5 (Del. Ch. 2002). Any other rule would mean that only wealthy people could be directors.

Plaintiffs speculate next that the residences Curwood and his wife share were "likely purchased with money that Curwood received from BGC." Pl. Br. 109 However, plaintiffs do not identify any evidence about when Curwood acquired

these properties or how he financed or otherwise acquired them, either from discovery or trial.

Plaintiffs next argue that Curwood's "potential to earn money by making speeches . . . cannot possibly suffice" to replace his BGC income. *Id.* Why not? Curwood's undisputed testimony is that his rate for speaking appearances is $15,000, and that he is "constantly being asked" to make such appearances given his expertise on climate issues. Tr.721:8-722:3. And Curwood did not say that speeches are his *only* source of potential alternative income; as discussed above, he pointed to several, including accepting one of the board positions for which he is "being actively recruited" or taking on additional writing projects and academic appointments. Tr.733:11-18. Given Curwood's experience for over ten years as the director of a billion-dollar public company, his expertise in environmental and social governance issues, and his status as a diverse person, it cannot be gainsaid that Curwood could readily replace his spot on the BGC board with a board position at another prestigious public company. The Court noted at trial that "[i]t sounds like [Curwood has] had a lot of opportunities to join boards over the years, given [his] experience." Tr.789:14-16.

Plaintiffs try to sidestep this evidence by focusing on a short note Curwood composed on his phone (JX0066), which they describe as a "contemporaneous document[]" that "confirm[s]" Curwood's dependence on Lutnick. Pl. Br. 108. This

note was not "contemporaneous"; it was composed in 2013, roughly four years before the transaction. JX0066. Curwood listed Lutnick as one of the "Blessings" in his life, noting that Lutnick gave Curwood "the opportunity . . . to serve on [BGC's] board and to make the money that I needed to support my family for the last three years." *Id.* Curwood explained at trial that he frequently writes similar notes on a variety of topics and individuals, usually when "feeling a little crunched," and had maintained this practice for decades. Tr.786:18-787:2. These notes, he explained, help him "appreciate the good in sometimes difficult situations." Tr.776:4-5. This note cannot reasonably be interpreted as an inventory of people and things to which Curwood feels beholden. In addition to Lutnick, Curwood also listed the Harvard Club, the absence of "snowy" weather, and a good workout. JX0066.

Finally, plaintiffs argue that "Curwood's lengthy relationship and admiration for Lutnick" compromised his independence. Pl. Br. 110. However, plaintiffs identify *no* evidence showing that Curwood "would be more willing to risk his . . . reputation than risk [his] relationship with" Lutnick. *Beam*, 845 A.2d at 1052. Indeed, they point only to a slim list of social connections: Curwood's attendance at a single bat mitzvah, Curwood's *wife's* attendance at one fundraiser Lutnick hosted, and Curwood's de minimis *$250* donation to Haverford College in Lutnick's name. Pl. Br. 110. All of this is entirely consistent with Curwood's testimony that he and

Lutnick are not "close friend[s]." Tr.729:19-21; *Del. Cty. Emps. Ret. v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) ("thin social-circle friendship" does not undermine independence).

Plaintiffs also ignore Curwood's unrebutted testimony about his many conflicts with Lutnick during his tenure. Over Lutnick's objection, Curwood, as chair of BGC's compensation committee, successfully pushed to hire a new compensation consultant, and argued with Lutnick to create an environmental and social governance committee and formalize BGC's succession plans, even though Lutnick was "not happy" with Curwood's recommendations. Tr.730:4-24, 769.

Finally, plaintiffs contend that Curwood's *observations* of Lutnick's changed demeanor after 9/11 are indicative of "deep feelings" between the two. Pl. Br. 111. Shortly after the attacks, Curwood, along with multiple "other board members" from Haverford, returned with Lutnick from a meeting. Tr.760:20-22. As they passed the wreckage of the World Trade Center—where Lutnick's brother and hundreds of his co-workers had recently perished—Curwood noted Lutnick's reaction and thought about how Lutnick might move forward. Tr.760:22-24. While Curwood had found Lutnick "brash" in the past, his "demeanor had changed," leading Curwood to conclude that Lutnick may shift his focus toward "other things in the world of finance beyond simply making money." Tr.761:5-15. At no point did Lutnick *actually express* these feelings to Curwood—or to any of the others

watching the same scene—nor did Curwood testify that his speculation about Lutnick's future behavior was based on anything other than what he merely observed. Tr.760:23-24. This is hardly the hallmark of a deep and enduring friendship.

In the end, plaintiffs' theory is that Curwood would be willing to sacrifice his considerable reputation and integrity—which he has built over half a century—in exchange for board compensation he doesn't need and could easily replace, or to ingratiate himself with a man he virtually never sees outside of work. Curwood plainly rejected this argument in his trial testimony. 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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