IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

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

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PRELIMINARY STATEMENT[1]

Plaintiffs have all but conceded their case against the Independent Directors. They respond to the arguments in the Independent Directors' opening brief in less than a page. Opp. 95-96. They do not so much as mention the *Cornerstone* test, much less apply it. They instead invent a new test (with a baffling citation to "Director Defs.' Br. at 43 *et seq.*"); cross-reference their demand futility arguments; and move on. *Id.* at 95.

The Independent Directors have done their best, however, to cobble plaintiffs' response together from other parts of their brief. Importantly, plaintiffs have substantially narrowed their claims. They have abandoned their claim against Secretary Dalton, conceding that he "has limited personal and professional ties to Lutnick." Opp. 2 n.2.[2] Plaintiffs have also dropped any contention that the Independent Directors acted in bad faith. *See id.* at 71 n.318. So at most, there is one issue remaining for the Independent Directors: whether Curwood, Bell, and Moran were so "beholden" to Lutnick that their discretion to consider the Transaction was "sterilized." *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649

[1] "Mot." refers to the Independent Directors' opening brief. "Opp." refers to plaintiffs' opposition brief.

[2] Secretary Dalton was dismissed from the action by order dated April 20, 2021. Trans. ID 66529882.

(Del. 2014); *In re Cornerstone Therapeutics S'holder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015).

On this issue, plaintiffs' brief is most notable for what it does *not* say. Plaintiffs ignore all the evidence the Independent Directors cited showing that they were not close personal friends with Lutnick, including undisputed testimony that they did not socialize with Lutnick outside of the BGC or Haverford board contexts—no birthday parties, no family gatherings, no vacations, no weddings, no holiday events, no social clubs—and that they neither entered into joint business ventures nor owned property together. Plaintiffs also ignore the evidence showing that the compensation Bell and Moran received from their BGC board membership was [redacted] of their yearly income and total net worth, as well as the evidence showing how farfetched it is to suggest that Curwood's income may have altered his judgment. And, of course, plaintiffs ignore the undisputed evidence that the Independent Directors were highly accomplished individuals who were respected widely at the top levels of their fields of government, business, and education.

Instead, plaintiffs attempt to manufacture an independence argument through a series of quotations plucked out of context from the discovery record. Plaintiffs mischaracterize most of these sources. But more broadly, plaintiffs repeatedly conflate *respect and admiration* with *close friendship and dependence.* By

plaintiffs' logic, just about every board member of every corporation would be conflicted. That is not consistent with Delaware law on independence, and the undisputed evidence shows that the Independent Directors did not hesitate to stand up to Lutnick when disagreements (frequently) arose.

And that brings us to the Transaction itself. Although much of their brief is a series of criticisms about the Transaction process, plaintiffs barely address the extensive deliberations involved—including *nineteen* special committee meetings, five lengthy PowerPoint presentations by Sandler, and scores of communications among the Special Committee, its advisors, and Cantor. The Special Committee negotiated fiercely against Cantor and extracted substantial concessions:

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

Again, plaintiffs disregard these facts.

Because plaintiffs have not established a non-exculpated claim against Curwood, Bell, or Moran (and they have disavowed any such claim against Dalton), the Court should enter summary judgment in favor of the Independent Directors.

ARGUMENT[3]

Having abandoned their claim of bad faith, plaintiffs could survive summary judgment only by offering evidence to establish a genuine dispute on the second prong of *Cornerstone*: that the defendants were so "beholden" to Lutnick that their discretion was "sterilized." *MFW*, 88 A.3d at 649; *Cornerstone*, 115 A.3d at 1179-80. Neither (1) defendants' connections to Lutnick, (2) their BGC director compensation, nor (3) the Transaction process suggests that the defendants acted to advance Lutnick's self-interests. They protected *BGC's* interests at every step.

But before addressing the record, it is worth noting plaintiffs' bizarre attempt to rewrite the law. Plaintiffs do not apply or even *cite* the *Cornerstone* test. Instead, plaintiffs argue that "[t]he Director Defendants concede that their motion for summary judgment must be denied if the Court finds there are genuine issues of material fact *calling into question* their purported independence from Lutnick when they approved his desired transaction." Opp. 95 (emphasis added). Plaintiffs cite

[3] Reply exhibits are cited as "Reply Ex. __" and attached to the Reply Affidavit of Kevin Gallagher, filed herewith. Exhibits from the moving brief are cited as "Ex. __" and from the plaintiffs' brief as "Pl. Ex. __". The chart (Reply Ex. _1) responds to the chart at Opp. Pl. Ex. 2.

"Director Defs.' Br. at 43 *et seq.*" for this proposition—the entire argument section of the Independent Directors' opening brief. *Id.* Plaintiffs have not offered any quote or precise citation to illuminate the basis for this supposed "concession." And as the Independent Directors' brief repeatedly makes clear, plaintiffs had to "adduce *sufficient evidence* showing that any of the Independent Directors were so 'beholden' to Lutnick that his or her 'discretion *would be sterilized*." Mot. 45 (emphases added) (quoting *MFW*, 88 A.3d at 648-49); *id.* at 3, 4, 43, 46, 51, 53, 55. Plaintiffs understandably dislike that standard, but they cannot avoid it.

Rather than addressing *Cornerstone*, plaintiffs cabin their discussion of defendants' independence to the section of their brief addressing demand futility. *See* Opp. 72-95. But as plaintiffs acknowledge (*id.* at 75), the two standards are different: "It is . . . easier to say no to a friend, relative, colleague, or boss who seeks assent for an act (e.g., a transaction) that has not yet occurred than it would be to cause a corporation to sue that person." *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 940 (Del. Ch. 2003). Plaintiffs' futility arguments are addressed below, but they should not be permitted to get away with these sleights of hand.[4]

[4] The two cases plaintiffs cite in the section of their brief—*Parfi Holding AB v. Mirror Image Internet*, 794 A.2d 1211 (Del. Ch. 2001) and *Delaware County Employees' Retirement Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015) (Opp. 96 & n.395)—were both decided in response to a demand-futility argument at the pleading stage, not in response to a *Cornerstone* "sterilization" argument at the summary judgment stage.

I. Plaintiffs Have Not Raised A Genuine Dispute That The Independent Directors' Relationships With Lutnick Sterilized Their Judgment.

Every Delaware corporation should want the Independent Directors on their boards. It is undisputed that they have risen to the very tops of their fields, that their lives have been marked by public service, and that they offer diverse outlooks and experiences. Mot. 12-20. Plaintiffs nonetheless contend that the Independent Directors would throw their reputations out the window because of their "deep personal" relationships with Lutnick. Opp. 2. This assertion is utterly unsupported.

As the opening brief explained (at 46-48), plaintiffs had to establish a genuine dispute that each Independent Director's relationship with Lutnick was of such "a bias-producing nature" that he or she "would be more willing to risk his or her reputation than risk the relationship" with Lutnick. *Beam*, 845 A.2d at 1052. "[P]ersonal friendship[s] . . . standing alone, are insufficient." *Id.* at 1050. Courts routinely grant summary judgment when plaintiffs are able to demonstrate *only* a friendship. *See* Mot. 44 & n.5 (citing multiple cases). Plaintiffs' assertion that *MFW* is the "only case" that has done so (Opp. 88) is incorrect. *See also MFW*, 88 A.3d at 649 ("Delaware courts have *often* decided director independence as a matter of law at the summary judgment stage." (emphasis added)).

This case, however, is easier than those cited: the Independent Directors were not even *friends* with Lutnick. Their relationships with Lutnick were limited almost entirely to work—either on BGC or Haverford board matters—and they had

virtually *no social interactions*. As detailed in the opening brief, they did not attend birthday parties with Lutnick; their families never gathered together; they never took vacations together; they never celebrated holidays together; they did not attend each other's weddings; they did not belong to the same social clubs; and they did not even have private dinners together. Mot. 46-52. They were barely spotted in the *same room* outside of BGC or Haverford board events. *Id.* All three Independent Directors accordingly testified that they were not friends with Lutnick—they were business colleagues. *Id.* And Lutnick confirmed that he "is not a close personal friend of the Individual Defendants." Reply Ex. 2 at 29-30.

Plaintiffs ignore just about all of this evidence. Their brief attempts to stretch a handful of fleeting interactions into a deep personal bond. But plaintiffs recognize that the most they can show is that the Independent Directors trust and respect Lutnick, and vice versa. Opp. 2, 19, 24, 76, 81, 84. That is not the kind of relationship that "border[s] on or even exceed[s] familial loyalty and closeness," *Beam*, 845 A.2d at 1050, and it is therefore inactionable under Delaware law. If Delaware law were otherwise, almost *every* director of every corporation would be conflicted. But in any event, there is no evidence suggesting that *these* defendants were beholden to Lutnick.

Curwood. Plaintiffs contend that "Curwood and Lutnick's friendship evolved from their overlapping ties to Haverford, a Quaker institution with which Curwood,

as a member of the Society of Friends, has a religious affiliation." Opp. 82. But despite plaintiffs' use of the *word* "friendship"—and their gratuitous reference to Curwood's religion—the record is clear that Curwood's "overlapping ties" to Lutnick at Haverford began and ended with their service on the Board of Managers and a few committees. Mot. 14. Those ties—and Curwood's service on Haverford's Board of Managers and the committees—ended in 2012, *five years* before the defendants' consideration of the Transaction in 2017. *See Teamsters Union 25 Health Servs. v. Baiera*, 119 A.3d 44, 60 (Del. Ch. 2015) ("[I]t is unreasonable in my view to question Esterow's presumptive independence based solely on an employment relationship that ended in May 2011, almost three years before this action was filed in April 2014."); *In re Western Nat. Corp.*, 2000 WL 710192, *12 (Del. Ch. May 22, 2000). There is no evidence that the relationship between the two men "evolved" past that point.

That is easy to see from the single paragraph of facts that plaintiffs use to show a "friendship" (Opp. 81-82), which involve nothing more than tiny tokens of collegiality. Plaintiffs say, for example, that "Curwood buys Lutnick books as gifts on an *ad hoc* basis." *Id.* at 81 (citing Ex. 17 at 79:3-80:14). It is unclear what plaintiffs mean by "*ad hoc*." But Curwood's actual testimony was that he has "literally rooms full of books that people send" him due to his work in environmental journalism, and that he has occasionally forwarded those that Lutnick "might be

interested in"—an act he compared to passing along a news article. Ex. 17 at 79:22-80:25. Plaintiffs also note that Curwood has "bought [Lutnick] domain names." Opp. 81. Setting aside whether this would ever be a sign of friendship, Curwood bought these domain names *for BGC*, not Lutnick, as part of an effort to rebrand BGC as "Brokers Global Company." Ex. 28. Plaintiffs even think it is important that Curwood "sends Lutnick words of encouragement when things don't go as planned, *e.g.*, 'Go Howard!'" Opp. 81. Plaintiffs presumably also believe that professional athletes are close personal friends with every one of the tens of thousands of people who shout at them at the stadium.

Plaintiffs contend next that it is "virtually impossible to conceive of Curwood walking in to a Haverford committee meeting and telling his colleagues that he had decided to accuse the College's most important benefactor of malfeasance." Opp. 84. That hypothetical does not work for three reasons. First, the relevant question is whether Curwood had the ability to impartially consider the Transaction, not whether he was willing to denounce Lutnick in a meeting. *See Beam*, 845 A.2d at 1051. Second, Curwood no longer attends Haverford committee meetings; he has not done so since 2012. Third, even if Curwood *did* still attend Haverford meetings, there would be nothing "impossible" about this hypothetical: Curwood was only minimally involved in fundraising for Haverford and never solicited funds from Lutnick. Mot. 14. He received no compensation for his service to Haverford, and

his positions were not tied in any way to Lutnick's contributions to the college. *Id.* As plaintiffs point out (Opp. 81), Curwood did once donate to Haverford in Lutnick's *name*, but this donation was so small—$250 (Pl. Ex. 148)—that Lutnick likely never even heard about it (Ex. 17 at 86:22-88:7). In any event, it is hard to see how a contribution by *Curwood* could establish that he was beholden to *Lutnick*.

Plaintiffs cite *Oracle* for the proposition that Lutnick's "donations to Haverford [ ] compromised Curwood's independence." Opp. 83. In *Oracle*, the Court found it unlikely that a special committee member would "vote to accuse [George] Lucas of insider trading" where Lucas had "*recently* donated $50,000 to Stanford Law School" after the special committee member—a *professor* at the law school—had "*made a speech at [Lucas's] request*." 824 A.2d at 943 (emphases added). If anything, *Oracle* only underscores the extraordinary circumstances under which a Delaware court will find independence lacking based on a school contribution. Unlike the special committee member in *Oracle*, Curwood's tenure on the Board of Managers at Haverford ended five years before the Transaction, and he was merely a member of the board, not a professor at the school who had spoken on Lutnick's behalf.[5]

[5] Plaintiffs also cite *Cumming v. Edens*, 2018 WL 992877 (Del. Ch. Feb. 20, 2018), which is even less relevant. There, the alleged controller made substantial donations to a board member's "main employer." *Id.* at *15.

Plaintiffs also briefly assert that "Lutnick appointed Curwood to BGC's Board despite Curwood having no relevant background in real estate finance or commercial loan originations." Opp. 81. This argument reflects a cramped understanding of the kind of experience that was important on BGC's board. BGC offers its customers a broad range of "financial services." Pl. Ex. 11. Curwood had significant experience in the financial sector, including as a trustee for Pax World Funds, a $2 billion private equity fund (Ex. 17 at 127:7-16); as a Senior Managing Director of SENCAP LLP, where he worked with private equity groups in South Africa and Mozambique (*id.* at 124:1-9); and as a reporter for the business section of the Boston Globe (*id.* at 28:16-18). He also had 40 years of experience as an investigative journalist (NPR, CBS News, Boston Globe)—a skill that made him uniquely capable of drilling neutrally into the particulars of a BGC deal. It was for these reasons, among others, that he was recruited to join the Haverford Board of Managers by academic and business heavyweights unaffiliated with Lutnick. Mot. 12-14. As he explained: "They need[ed] a person with my perspective, my understanding, and my public visibility as well." Ex. 17 at 53:5-9. BGC's board needed the same qualities.

Bell. Plaintiffs place a great deal of weight on the fact that Lutnick and Bell "have known each other for more than 25 years." Opp. 84-85. This number is technically correct but not meaningful: It is undisputed that Bell had "minimal" interaction with Lutnick for fifteen of those years until she became Provost at

Haverford in 2007, and she did not join a Lutnick-related board until 2009. Mot. 17-18; *see* Pl. Ex. 19 at 70:15-20 ("Q: . . . it would be fair to say that you have known her for more than 25 years. [Lutnick]: If you count when I met someone until today, than I guess the answer is yes. But I don't know that I interacted with her thereafter for a while.").

And even *after* she became Provost, Bell has interacted with Lutnick only three or four times a year at meetings of the Board of Managers. Mot. 17-18. These interactions—as well as those outside Haverford—were professional, not social. It is undisputed, as Bell testified, that "Lutnick and [Bell] or [their] spouses [n]ever socialized in any context outside of the BGC context or Haverford context." Def. Ex. 19 at 93:23-94:4. Again, plaintiffs disregard all of this evidence; their bald assertion that "Bell and Lutnick worked alongside one another for the entirety of Bell's twenty-year career at Haverford" (Opp. 87) lacks any support.

Plaintiffs contend that Lutnick "supported Bell in her ascension to the role of Haverford's provost" (Opp. 85), but they tellingly omit the nature of that "support." As Lutnick explained, tenured Haverford faculty—the people with real insight into who should be in a leadership role—nominated Bell for Provost; there was *no alternative* nomination, and Lutnick simply did not *oppose* it. Pl. Ex. 19 at 71:8-72:5. That is hardly the "support" that would make Bell beholden to Lutnick.

Plaintiffs also suggest that Bell would have been reluctant to cross Lutnick because of his contributions to Haverford. But like Curwood (*see* p. 10 *supra*), Bell left Haverford *five years before* the Special Committee considered the Transaction. *See Baiera*, 119 A.3d at 60. Plaintiffs' cited cases (Opp. 86 n.365) are therefore easily distinguishable. Both *In re KKR Financial Holdings Shareholder Litigation*, 101 A.3d 980 (Del. Ch. 2014), and *Lewis v. Fuqua*, 502 A.2d 962 (Del. Ch. 1985), involved large donations ($100 million and $10 million, respectively) to a director's institution at the time of the transaction in question.

Although plaintiffs have quietly dropped their baseless allegations about [redacted], they now take aim at [redacted]

There is a simpler way to describe this interaction: Bell is a good teacher. Indeed, she is the leading academic officer at Barnard. [redacted]

[redacted] In any event, it is difficult to imagine how these contacts would make *Bell* feel beholden to *Lutnick*—Bell was the one offering Lutnick the assistance.

As with Curwood, plaintiffs question whether Bell had the appropriate experience to serve on the BGC board, because "Bell had no prior corporate experience and had never previously served as a corporate director." Opp. 22. That is absurd: Bell had a Ph.D. in microeconomics from Harvard, she had risen through the ranks at the Federal Reserve Bank, and she had become a tenured professor of economics and Provost at two of the nation's foremost colleges. Mot. 16-17. Plaintiffs appear to be suggesting that employment at a *corporation* is a prerequisite to service on a corporate *board*. That is not reality.

Moran. Plaintiffs face a unique obstacle in their challenge to Moran's independence: Moran *never met* Lutnick until he interviewed for BGC's predecessor eSpeed in 1999; it was Frederick Varacchi's idea, not Lutnick's, to have Moran join the board. Mot. 20-21.[6] Moran did not socialize with Lutnick. *Id.* at 21-22; Ex. 24 at 19:20-22, 29:21-30:5, 50:12-17. Moran never attended a Lutnick-family birthday party, bar/bat mitzvah, wedding, or holiday event; the two never vacationed together or had a private dinner together; they did not belong to the

[6] Plaintiffs' assertion that "Lutnick invited Moran to join the Board of Cantor subsidiary eSpeed" (Opp. 14) is incorrect (Ex. 24 at 14:25).

same clubs; Moran did not recall ever having met Lutnick's children. Mot. 21; Ex. 24 at 21:19-22, 32:19-22, 32:24-33:3. And when it comes to Moran, plaintiffs cannot even rely on Lutnick's Haverford connection; Moran has no affiliation with Haverford.

Because none of this is in dispute, plaintiffs have attempted to construct a relationship from a variety of sources suggesting that Moran has a "deep admiration [ ] for Lutnick." Opp. 77-78. The most basic problem with this narrative is that admiration and respect are not the same thing as close friendship and dependence, and only the latter can give rise to a claim under *Cornerstone*. If the law were otherwise, directors would have an unusual incentive: to avoid being accused of dependence, they would have to hire executives who they do *not* respect.

The more specific problem with plaintiffs' narrative is that it is misleading. On September 11, 2001, two thirds of Cantor's New York staff, including Lutnick's brother, were killed during the terrorist attacks on the World Trade Center. When plaintiffs provide a bulleted list of "Moran's private statements to Lutnick" and "his emotional deposition testimony," they neglect to mention that *every* item on the list relates to the 9/11 attacks and Lutnick's efforts to help Cantor and its staff recover from them. Opp. 77-78. In other words, these quotes show Moran's admiration for Lutnick's response to a *single* horrific tragedy—not some general veneration for Lutnick that compromised Moran's ability to judge the Transaction.

This is not difficult to discern, because plaintiffs simply remove the references to 9/11 from each quote. They first assert that "Moran told Lutnick in an email, 'You are an inspiration to me. Your courage and kindness is beyond anything I have seen in my lifetime. It is an honor to know you and work with you." Opp. 77. The full quote—from September 17, 2012, around the anniversary of the attacks—is as follows:

> Also on another point—another year has gone by and it is still so clear in my mind—so painful—I can't imagine what it is like for you—you are an inspiration for me—your courage and kindness is above anything I have seen in my lifetime. It is a true honor to know you and work with you!

Pl. Ex. 25.

Plaintiffs also repeatedly point out that "Moran [ ] testified that Lutnick 'deserves recognition as a great human being.'" Opp. 16. This is the full quote:

> [Cantor] lost 650 people on 9/11. All the New York staff, basically. Did you ever lose 650 people? Go to their funerals, virtually every funeral, your brother went down in the building. We were lucky we were not there. Okay? So how Howard gets through every blue sky day with planes flying down the Hudson is a miracle. I only lost one good friend, the little kid that introduced me to Howard. So I think the fact that he continued to function, that he brought the company back, that he took care of the families deserves recognition as a great human being. Period. End of discussion.

Ex. 24 at 86:12-97:3.[7]

[7] Moran is not the first person to express admiration for Lutnick's response to the September 11 attacks. *See* Caroline Hallemann, *How Cantor Fitzgerald Survived September 11*, Town & Country (2016), *available at*

Indeed, although Moran and Lutnick have known each other since 1999, plaintiffs can summon only a handful of conversations between the two about topics outside of BGC board business, and most of these conversations undermine their position. Opp. 76-79. Plaintiffs say, for example, that "Moran felt comfortable enough to ask for an invitation to a private party Lutnick was throwing for Hillary Clinton." *Id.* at 78. That is true: Moran called BGC's offices and spoke to Lutnick's *assistant* to ask if he could come to a Clinton fundraiser because *Lutnick had not invited him.* Ex. 24 at 79:7-12; Ex. 10 at 15. On another occasion, Moran helped connect his partner, Barbara Saltzman, with Lutnick's sister, Edie, in the hope of securing Lutnick's attendance at the Optometry Board's annual fundraiser. Ex. 10 at 14. Lutnick did not attend the event, however, and Moran does not recall him donating anything. *Id.*; Ex. 24 at 68:7-19. Plaintiffs also point out that "Moran checked in with Lutnick the day of the London terrorist attacks to make sure none of Lutnick's friends or family had been injured" (Opp. 78)—an act of basic human decency that is hardly unusual among work colleagues, especially at a company like BGC with large corporate offices in London. In his response to Moran, Lutnick mentioned that he is "going [to London] in 2 weeks" (Pl. Ex. 22), which plaintiffs

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https://www.townandcountrymag.com/society/a7739/cantor-fitzgerald-relief-fund/; Meryl Gordon, *Howard Lutnick's Second Life*, N.Y. Mag. (2001), *available at* https://nymag.com/nymetro/news/sept11/features/5486/.

take as evidence that "Moran and Lutnick frequently texted to discuss their respective vacations" (Opp. 78-79). That interpretation is baffling.

Plaintiffs' favorite quote from Moran's deposition—repeatedly bolded in their brief (Opp. 2, 14-16, 78)—is his description of his relationship with Lutnick as "sort of like a great marriage" (Ex. 24 at 56:3-4). But when this quote is placed in context, it is clear that Moran was not suggesting that the *affection* between the two men is akin to a marital relationship. To the contrary, Moran was explaining that the two managed to maintain respect for one another despite having "tangled" "[m]ore than I can remember." *Id.* at 55:14-57:9. That is exactly *defendants'* point: Moran had no problem standing up to Lutnick when the two disagreed.

Moran made that clear repeatedly from the moment he met Lutnick. When Lutnick interviewed him for eSpeed, Moran warned Lutnick: "As a director, I may occasionally say no, Howard, you can't do that." *Id.* at 15:15-22. So Moran "started out with" the message that he was "going to be an independent director, period, end of discussion." *Id.* And Moran was true to his word, adopting that approach both before and during the Transaction. *See, e.g.*, *id.* at 56:5-12: ("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."); *id.* at 26:21-23 ("I'll tell Howard what I think, and many other people are not willing to tell him that."); *id.* at

153:11-24 (Moran telling Lutnick that Lutnick's originally proposed timeline for the Transaction was infeasible: "Howard, it ain't happening. It can't be done.").

In sum, plaintiffs have not raised a genuine dispute that the Independent Directors had any kind of substantial out-of-work relationship with Lutnick, much less that any such relationship was of such "a bias-producing nature" that their judgment on the Transaction was sterilized. *Beam*, 845 A.2d at 1052.

II. Plaintiffs Have Not Raised A Genuine Dispute That The Independent Directors' BGC Compensation Or The Length Of Their Board Service Sterilized Their Judgment.

Plaintiffs survived the pleading stage primarily based on their allegation that the income the Independent Directors received from BGC would have affected their judgment. Discovery has not been kind to this allegation. Mot. 54-55.

Bell's BGC compensation was [redacted] of her yearly household income from 2010-2017 (not 30%, as plaintiffs alleged)—and [redacted] of her household's net worth, which includes the wealth her husband earned as the Managing Director of Versa Capital Management, a $1.3 billion private-equity fund. *Id.* at 19, 54. Moran's BGC income was [redacted] of his yearly income during the same period (not 100%, as plaintiffs alleged)—and [redacted] of his [redacted] net worth.[8] *Id.* at 22-23. [redacted] Curwood [redacted] of his

[8] Indeed, Moran's average yearly BGC-related income--$135,655--from 2010-2017 was [redacted] of his total net worth of [redacted]. Mot. 23.

total household income from BGC (*id.* at 15-16), his unique background and circumstances—including a life devoted to public service—make it inconceivable that he would sacrifice his reputation to enrich Lutnick (*id.* at 55). *See In re Walt Disney Derivative Litig.*, 731 A.2d 342, 359-60 (Del. Ch. 1998) (rejecting argument that director was beholden to interested party because her "salary as a teacher [was] low compared to her director's fees and stock options"; adopting this theory would "overrule the Delaware Supreme Court" and "discourage the membership on corporate board of people of less-than-extraordinary means").

Plaintiffs have all but abandoned their compensation-related arguments as to Moran and Bell. Their brief says virtually nothing about Moran's BGC compensation. And it makes only two points on Bell: (1) that she "earn[ed] more than $950,000" total from "Lutnick-controlled companies" between 2007 and 2017; and (2) that her BGC compensation "[redacted] of her household income in 2017, a percentage Bell admitted was material." Opp. 87. The first fact is meaningless on its own; an average income of less than $100,000 per year, during a period when Bell's average household income was [redacted] that amount, would not sterilize her judgment. As for the second fact, Bell's layperson's use of the word "material" to describe her BGC income for a *single* year (Pl. Ex. 12 at 126:4-24) cannot possibly satisfy plaintiffs' burden of proof, particularly because she carefully limited her statement to *income*, as distinct from her total wealth and

other assets. Bell was asked whether her 2017 compensation was "a material amount of money," and Bell responded: "I would just caution that these are income, not wealth or assets. . . . So saying it was material to income in that year, yes, [redacted] is material to income in that year. But it would be—but I remind you that wealth and asset positioning is relevant as well." *Id.* Plaintiffs omit that context.

Plaintiffs devote more space to Curwood's compensation (Opp. 79-80), but their arguments are meritless. They first cite two cases—*In re EZCORP Consulting Agreement Derivative Litigation*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016), and *Voigt v. Metcalf*, 2020 WL 614999 (Del. Ch. Feb. 10, 2020)—for the proposition that Curwood's compensation "by itself[] raises a genuine dispute about Curwood's purported ability to impartially consider whether to sue Lutnick." Opp. 80. It is unclear what plaintiffs hope to gain from these citations, because in the next page of their brief, they *concede* the "unremarkable proposition that reliance on director fees, 'standing alone' or 'without more,' does not render a director beholden to an interested party." Opp. 81. In any event, both cases are inapposite. They were decided at the pleading stage, and the plaintiffs alleged not only that the directors received a material amount of income from their positions on the board at issue, but also that they received significant income from *other* longstanding connections with

the interested party.[9] Curwood, by contrast, has served at only one Lutnick-related company (BGC); he has not received compensation from any other Lutnick-related entity; and Lutnick has no ability to influence Curwood's full-time employment as a journalist, environmentalist, lecturer, and businessman.

Plaintiffs then accuse the Independent Directors of "speculat[ing] that Curwood could have replaced [his BGC] income if Lutnick removed him from BGC's Board." Opp. 80-81. But the Independent Directors' argument was grounded in Curwood's *unrebutted* testimony that he was not "dependent" on his BGC compensation and had "plenty of other options," including his speaking fee of [redacted] per engagement. Ex. 17 at 121:4-124:19; 124:7-9 ("So I chose [BGC] among a number of choices and other positions that I could have."). It was also grounded in commonsense: Given Curwood's extensive credentials and connections, it would not have been rational to abandon his legacy for the purpose of preserving his board seat.

Plaintiffs also imply that all three defendants' Lutnick-affiliated board service was unusually long. Opp. 76, 87. It was not. As of 2017, Curwood had served on

[9] *See Voigt*, 2020 WL 614999, at *15 (director worked for and was promoted at controller's portfolio companies for 27 years and earned substantial income from boards of three other of the controller's portfolio companies); *EZCORP*, 2016 WL 301245, at *36 (director was employed by an entity in which the controller owned a 33% share and in which the controller had "substantial influence").

one Lutnick-related board (BGC) for eight years; Bell had served on the board of ELX (2009-2013) and BGC (2013-2017) for a total of eight years; and Moran had served on Lutnick-affiliated boards for fourteen years. Mot. 15-21. These are average tenures for board members at Delaware companies, particularly in the financial sector. *See* Reply Ex. 3; Reply Ex. 4. For example, one study in 2019 found that for companies in the S&P 500, the average director tenure is 13.3 years, and 24.1% of firms had a median director tenure of more than 15 years. *See* Reply Ex. 3 at 25. Another study in 2017 found that for S&P 500 firms, "long-tenured" directors (defined as 10 to 14 years of board service) and "extended-tenured" directors (defined as 15 or more years of board service) comprised 38% of directorships. *See* Reply Ex. 4 at 3. If anything, Curwood's and Bell's tenures were *short*, and Moran's was about average.

Because plaintiffs have not raised a genuine dispute that the Independent Directors were beholden to Lutnick, summary judgment should be granted.[10]

[10] For the reasons discussed above, plaintiffs' halfhearted attempt to distinguish *MFW*—"in light of the deep, rich financial and/or personal relationships Moran, Curwood, and Bell each shared with Lutnick" (Opp. 88-89)—does not withstand scrutiny. Critically, the legal *principle* of the case—that plaintiffs have to prove that the defendants' judgment was sterilized by their ties to Lutnick—is dispositive here.

III. The Transaction Process Does Not Support Plaintiffs' Claim.

Discovery has shown conclusively that the Independent Directors acted in good faith during the process of evaluating and negotiating the Transaction. Mot. 23-41, 56-59. Plaintiffs have therefore conceded that they "do not contend that the Director Defendants acted in bad faith." Opp. 71 n.318. They no longer attempt to assert a non-exculpated claim under the third prong of *Cornerstone*, and rely solely on the second—independence—prong (without actually naming it).

Nonetheless, plaintiffs devote a substantial portion of their brief to attacking the Transaction process (*id.* at 24-70, 89-95), urging the Court that if it "has any lingering doubt about [defendants'] lack of independence, . . . it should resolve that doubt by looking to how the Director Defendants actually acted in negotiating the transaction" (*id.* at 89-90). This theory fails under both the law and the facts.

Law. Plaintiffs cannot properly rely on the Transaction process to support an independence claim. *Cornerstone* delineated three *distinct* avenues by which a plaintiff can advance claims against directors who are exculpated from liability. 115 A.3d at 1179-80; Mot. 43-45. Accordingly, both before and after *Cornerstone*, courts have analyzed (1) the personal, financial, and other ties between the directors and the controllers *separately* from (2) whether the directors acted in bad faith in the process of evaluating and negotiating a deal. *See, e.g.*, *Tilden v. Cunningham*, 2018 WL 5307706, at *10-13 (Del. Ch. Oct. 26, 2018) (analyzing alleged personal and

financial ties); *id.* at *16-19 (addressing whether directors engaged in bad faith in the process of negotiating the transaction); *Chester Cnty. Emps. v. New Res. Inv.*, 2017 WL 4461131, at *7-10 (Del. Ch. Oct. 6, 2017) (same); *Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014) (same); *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *11-15 (Del. Ch. Sept. 30, 2013) (same); *Walt Disney*, 731 A.2d at 356-62 (same).

That makes sense, because otherwise, plaintiffs could do an end-run around the bad-faith prong simply by shoehorning process arguments into the independence prong. A distinct bad-faith requirement is critical for several reasons. First, "independent directors are presumed to be motivated to do their duty with fidelity." *Cornerstone*, 115 A.3d at 1182-83. Second, the law should not "create incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders would cause them to remain as defendants until the end of any litigation." *Id*. at 1184. Third, "[t]he purpose of Section 102(b)(7) was to free up directors to take business risks without worrying about negligence lawsuits." *Id.* at 1185. These goals would be seriously undermined if conduct that is admittedly undertaken in *good faith*—such as negligent conduct—could be deemed proof that a director lacks

independence. This circular logic would make *Cornerstone's* bad-faith prong all but meaningless.[11]

Facts. In any event, as the Independent Directors' opening brief explains (at 23-41, 56-59), the Transaction process was exemplary. The Special Committee took a careful, meticulous approach to the Transaction aided by experienced outside advisors. *Id.* at 27-41. This included *nineteen* Special Committee meetings and numerous additional communications over four months. *Id.* The Special Committee and its advisors repeatedly sought, received, and analyzed extensive due diligence on Berkeley Point, CCRE, and BGC. *Id.* They then incorporated this due diligence into lengthy, detailed PowerPoint presentations with copious analyses of the Transaction, including a variety of financial metrics for Berkeley Point, CCRE, and comparable companies. *Id.* The negotiations against Cantor were not just serious; they were at times heated to the point of hostility, with the Special Committee "ready to walk away." *Id.* at 57-58. The approach worked; the Independent Directors won

[11] Plaintiffs cite two cases for their contrary position. Opp. 90, 95. *In re Southern Peru Copper Corp. Shareholder Litigation*, 30 A.3d 60 (Del. Ch. 2011), was decided before *Cornerstone* and is inconsistent with *Cornerstone*'s careful delineation of three distinct prongs. Plaintiffs' second case—*In re Viacom Stockholders Litigation*, 2020 WL 7711128 (Del. Ch. Dec. 30, 2020)—was decided at the pleading stage and did not address the question of whether the second and third *Cornerstone* prongs should be treated distinctly. The Independent Directors respectfully submit that, to the extent these cases ground their second-prong analysis on the transaction process, they conflict with the weight of authority and should not be followed.

a series of critical concessions from Cantor on items ranging from deal price to deal structure to specific terms, culminating in fairness opinions from Sandler. *Id.* at 39-40, 58.

Plaintiffs ignore this evidence. And they point to no evidence that Curwood, Bell, or Moran consciously approved the Transaction despite believing that it was not in the best interests of BGC's stockholders. They instead provide a bare bulleted list of "evidence of Lutnick's domination of the process." Opp. 93-94. This list does not support any claim, and each assertion is either baseless or misleading.

- Plaintiffs contend that the Independent Directors "[d]id not consider Lutnick's economic incentives.'" *Id.* at 93. That is incorrect. The Special Committee was well aware that Lutnick was on both sides of the deal, and that its role was to safeguard the interests of BGC stockholders. Ex. 24 at 135:17-25. Debevoise explained the fiduciary obligations of the Special Committee members at committee meetings. Ex. 76. Furthermore, Bell explained that "at the time [Lutnick's] ownership rights to Cantor would give him a weighted advantage – would give him a weighted benefit on the Cantor side . . . . [I]t was taken into consideration. I think that's why we held so many meetings." Ex. 19 at 230:5-24.

- Plaintiffs assert that the Independent Directors "[a]llowed Lutnick to choose the Special Committee's co-chairs." Opp. 93. Not so. The Special Committee chose Moran and Bell as its co-chairs. Mot. 27 (citing Ex. 35).

- Plaintiffs accuse the Independent Directors of "[t]reat[ing] the Transaction as a *fait accompli* from the outset, as evidenced by . . . Moran informing Lutnick that he was looking forward to 'getting closure' on the Transaction and that the Special Committee was 'in full support of the deal' before the Special Committee's financial advisor had performed *any* valuation work." Opp. 93. Plaintiffs have again sliced Moran's quotes from their context. Moran testified that when he

said "getting closure," he meant that he was looking forward to proceeding with negotiations now that the data room had finally been populated. Ex. 24 at 253:22-254:21. Moran supported the deal in principle, but only at the right price. *Id.* at 282:5-16.

- Plaintiffs assert that the Independent Directors "[g]ave Lutnick a veto right over the Special Committee's legal advisor." Opp. 93. The record does not support this assertion. Rather, it shows that the Special Committee chose Debevoise because of its background representing special committees (including prior BGC special committees), its sterling reputation in this area, and the positive experiences some of the Independent Directors had from working with Regner on prior transactions. Mot. 26. Lutnick was not involved *at all* in the selection of Debevoise. *Id*.

- Plaintiffs say that defendants "[a]llowed Lutnick to be involved in the selection of, and determine the scope of the engagement of, the Special Committee's financial advisor." Opp. 94. That is wrong. Although there is some evidence that Lutnick was kept *apprised* of the process, he was not directly involved in the selection of a financial advisor or in the scope of engagement. It was Moran who suggested Sandler because he had been impressed by Sandler's work during his time at JPMorganChase; Bell similarly testified that the Special Committee members had good prior experiences with Sandler. Mot. 26.

- Plaintiffs contend that the Independent Directors "[a]llowed Lutnick to negotiate the Transaction with himself." Opp. 94. That is nothing more than an ominous spin on an undisputed fact: Lutnick was on both sides of the deal and conflicted, which is the whole reason a Special Committee was created. Ex. 24 at 161:10-23; Ex. 17 at 196:22-197:8; Ex. 19 at 286:5-7. The Special Committee and its advisors then negotiated the Transaction on behalf of BGC and against Lutnick and Cantor. Mot. 35-41.

- Plaintiffs suggest that the Independent Directors "[l]ooked to Lutnick to determine, and allowed Lutnick to dictate, the timing of the Transaction negotiations." Opp. 94. Wrong again. Even a cursory review of the Transaction timeline reveals that on numerous occasions, Lutnick wanted to move more quickly, and the Independent Directors slowed the pace to conduct due diligence; at other times, Lutnick and

Cantor were moving slowly, and the Special Committee and its advisors pushed for answers. Mot. 28-30; Ex. 24 at 153:11-24 (Moran's response to Lutnick's original timeline: "Howard, it ain't happening. It can't be done."); Ex. 19 at 318:12-19 ("We were not allowing Mr. Lutnick to dictate . . . the terms and timing of the transaction.").

- According to plaintiffs, the Independent Directors "[f]ailed to ask a single question after Lutnick increased the proposed purchase price from $725 million for 100% of Berkeley Point to $850 million for 95% of Berkeley Point." Opp. 94. There are three problems with this assertion: First, Cantor *never* offered 100% of Berkeley Point to BGC for $725 million. Mot. 24 n.4. Second, Sandler and Debevoise immediately pushed back on both price and structure upon receiving the First Cantor Proposal on April 21, 2017. *Id.* at 29-31 (citing Ex. 47). Third, plaintiffs' account omits the *ultimate* deal that the Independent Directors secured from Cantor, which included a sale of 100% of Berkeley Point (not 95%), a $125 million reduction in the purchase price, and a substantial reduction in BGC's investment in the CMBS business. *Id.* at 39.

- Plaintiffs contend that the defendants "[f]ailed to engage in any meaningful negotiations with Lutnick before agreeing to pay $875 million to acquire Berkeley Point . . . and to make a $100 million investment that Sandler believed was 'not compelling.'" Opp. 94. This assertion is baffling in light of the unrebutted record detailing the actual negotiations, which were at times "heated" and "voices were raised," with substantial concessions won on behalf of BGC. Mot. 35-41. Sandler led the negotiations, worked collaboratively with the Special Committee to draft the Advocacy Presentation, and Sterling testified unambiguously that Sandler believed the deal numbers were fair and reasonable. *Id.*; Ex. 68 at 276:11-14.

Two other parts of plaintiffs' "process" story are worth addressing. First, they contend that "no one recalls what actually happened" at the June 6, 2017 meeting at which the Special Committee negotiated the Transaction with Cantor. Opp. 61. But as plaintiffs acknowledge in the same breath, the record contains *minutes* of the

meeting, which describe in detail the initial offer, the various stages of the negotiation, the counteroffers, and the final price. *See* Mot. 37-40 (discussing Ex. 78). Plaintiffs say that "[n]ot a single witness had a clear recollection of what happened." Opp. 61. Yes they did: Bell testified about specific negotiation tactics discussed among the Independent Directors and their advisors at the breaks at the June 6 meeting for use against Cantor (Ex. 19 at 344:8-345:5), discussions with Cantor relating to the Special Committee's counteroffer at the meeting (*id*. at 350:11-351:15) and her discussion with Cantor representatives regarding changes to the deal structure. (*Id*. at 356:10-358:13). Curwood recalled intensive negotiations directly between Sterling and Lutnick "going toe to toe" (Ex. 17 at 340:4-24), discussions among the committee members and Sandler regarding the fairness of the offers before the handshake deal (*id*. at 352:5-353:14), and at times being "pretty dug in and ready—and ready to walk away" (*id*. at 360:17-19). Moran recalled discussion with Lutnick about certain points in the advocacy presentation. Ex. 24 at 383:9-14. Brian Sterling, who led the negotiations at the meeting, recalled how frustrated Lutnick was at certain points during the contentious debate, and remembered relaying information to his colleagues back at the Sandler office to contemporaneously run the numbers leading to the handshake deal. *See* Mot. 38-39; Ex. 17 at 352:9-353:14; Ex. 24 at 388:19-389:14; Ex. 68 at 356:4-358:18.

Finally, plaintiffs say that the Independent Directors were "unknowledgeable about Berkeley Point's and CCRE's businesses." Opp. 4. Plaintiffs cite nothing for this assertion, and it is frivolous in light of the record.[12] The BGC board had been discussing a potential acquisition of Cantor's real estate assets—Berkeley Point and the CMBS business—since 2015. Exs. 27-28 (2015 PowerPoint presentation at BGC audit committee with detailed explanation of both businesses). Both were discussed extensively (often with supporting PowerPoints) at Special Committee meetings throughout 2017. Mot. 24-25, 31-35, 57-59. The Independent Directors' deposition testimony is replete with similar examples.[13]

The Independent Directors conducted a thorough, arms'-length process and obtained a more than fair result for BGC's stockholders—one so positive that it left

[12] Dalton served as President of Ginnie Mae and Chairman of the Board of Federal Home Loan Bank, among other prominent real estate and investment banking positions; Moran had extensive experience as an auditor working with mortgage originators and servicers; Bell is a nationally recognized economist who worked at the Federal Reserve Bank; and Curwood has a body of work in business development and transactions. Mot. 8-9, 13, 16, 20.

[13] *See* Ex. 17 (Curwood) 138:25-139:6 (describing Berkeley Point's business); Ex. 24 (Moran) 111:4-112:4 (same); Ex. 19 (Bell) 194:12-195:4 (same); Ex. 17 (Curwood) 137:7-13 (describing Cantor's CMBS business); *id*. 182:2-183:14 (explaining why Cantor's CMBS business was riskier than Berkeley Point); Ex. 24 (Moran) 131:2-10 (describing the business of Walker & Dunlop); Ex. 19 (Bell) 172:18-173:13 (describing potential synergies of the Transaction); Ex. 17 (Curwood) 142:22-145:12 (same).

Lutnick and Cantor frustrated with the outcome. That is not the behavior of a Special Committee that was "beholden" to Lutnick—just the opposite.

CONCLUSION

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

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