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Neutralizing the "800-[P]ound [G]orilla": Chancery Court Denies Motions to Dismiss Breach of Fiduciary Duty Claims against Controlling Stockholder Engaged in Conflicted Transaction and Special Committee Members

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DELAWARE CORPORATE LAW BULLETIN

Neutralizing the "800-[P]ound [G]orilla": Chancery Court Denies Motions To Dismiss Breach of Fiduciary Duty Claims Against Controlling Stockholder Engaged in Conflicted Transaction and Special Committee Members

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Chancery Court reiterates that the standard of review for breach of fiduciary duty claims in conflicted transactions will likely be entire fairness absent implementation of MFW Dual Protections.

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INTRODUCTION

The Delaware Court of Chancery ("*Chancery Court*") generally is suspicious of a transaction involving a corporation and its controlling stockholder "where the controller indisputably stands on both sides" (quoting *Viacom Litigation* here and throughout the piece unless otherwise noted). The controlling stockholder can prove to be a coercive force, manipulating the individuals charged with negotiating the transaction and, as a result, the ultimate transaction terms. Then-Vice Chancellor Leo E. Strine, Jr., colorfully described the controller "as the 800-pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support)." *In re Pure Res., S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002) (citing *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110 (Del. 1994)). Typically, the Chancery Court reviews breach of fiduciary duty claims arising from conflicted transactions under the entire fairness standard—"the highest standard of review in corporate law."

In *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), the Delaware Supreme Court provided controllers and independent directors with an escape hatch from entire fairness review for properly structured transactions. Under *MFW*, the coercive effect of the controller in conflicted transactions may be "neutralized" if the transaction is conditioned, from the outset, on (i) negotiation and approval by a fully constituted and authorized special committee of independent directors *and* (ii) approval by a vote of the fully informed and uncoerced majority of the minority stockholders ("*Dual*

Protections"). Successful implementation of the Dual Protections results in judicial review of breach of fiduciary duty claims under the highly deferential business judgment rule instead of entire fairness, usually resulting in pleading-stage dismissal. It is not surprising, therefore, that parties to conflicted transaction litigation spend much of their time debating the applicable standard of review.

Recently, the Chancery Court confronted another "800-pound gorilla" in *In re Viacom Inc. S'holders Litig.*, No. 2019-0948-JRS, 2020 Del. Ch. LEXIS 373 (Del. Ch. Dec. 29, 2020) ("*Viacom Litigation*"). Vice Chancellor Joseph R. Slights III characterized the *Viacom Litigation* as "one of the more visible, hotly contested instances of alleged controll[er] . . . self-dealing in recent memory." In the *Viacom Litigation*, minority stockholders sought damages from both the controller and nominally independent directors serving on a special board committee for negotiating and approving a conflicted transaction "out of loyalty" to the controller but "on terms detrimental" to the minority. Vice Chancellor Slights explained that, absent the Dual Protections, "a conflicted controller standing on both sides of a transaction cannot avoid entire fairness review of that transaction." Sidestepping the "ultimately academic" issue "whether the controller's 'mere presence' on both sides of a merger is enough to trigger entire fairness review," the Vice Chancellor denied the controller's motion to dismiss based on plaintiffs' adequately pleading "a reasonably conceivable basis to infer that the controller achieved a non-ratable benefit from the [m]erger to the detriment of [the] public stockholders." Further, while the Vice Chancellor noted that breach of fiduciary duty claims against independent directors will be evaluated separately from the claims against the controller, the controller's history of "retributive behavior" and dominance of corporate fiduciaries can create a "controlled mindset" that sufficiently taints the independence of directors so as to trigger entire fairness review and, ultimately, denial of the directors' motion to dismiss.

I. FACTUAL BACKGROUND

Mass media giants Viacom Inc. ("*Viacom*") and CBS Corporation ("*CBS*") shared a tangled corporate history before consummation of their 2019 merger ("*Merger*") that created ViacomCBS, Inc. ("*ViacomCBS*"). Pre-Merger, each company had a dual-class stock structure, with voting Class A Common Stock and non-voting Class B Common Stock. All classes of stock of both companies were publicly traded on the New York Stock Exchange. The companies also shared the same controlling stockholder, National Amusements, Inc. ("*NAI*"),

which owned approximately 80% of the voting stock of each company. NAI, in turn, was controlled by the Redstone family.

NAI was founded by the father of Sumner Redstone ("*Sumner*") as "a national movie theater operator." Sumner later transformed NAI into one of the largest media conglomerates in the United States through its control of, among other properties, Viacom and CBS. Before his death, Sumner held approximately 80% of NAI's voting power through a trust, while his daughter Shari Redstone ("*Shari*") held the other 20% through another trust.

Despite its voting control, at the time of the Merger, NAI "held only approximately 10.5% of the economic value of CBS and 9.9% of the economic value of Viacom." Sumner recognized that the "discrepancy between control and economic risk" created the possibility of significant governance issues at both companies. To address this concern, he "made clear his desire that the boards of Viacom and CBS select his successor because, in his view, his daughter . . . was not suitable for the job." By 2016, however, Sumner's failing health left Shari with the opportunity to mold the future of her father's media empire as she saw fit.

A. Viacom's Pre-2016 History

NAI acquired its controlling interest in Viacom in 1987. In turn, Viacom acquired CBS in 2005. At the end of 2005, Sumner split Viacom and CBS into two separate publicly traded entities, with NAI retaining a controlling stake in each.

After the split, Sumner assumed the role of Chairman for each of Viacom and CBS, while selecting Les Moonves ("*Moonves*") as CBS CEO and Phillipe Dauman ("*Dauman*") as Viacom CEO. Further, despite his misgivings, Sumner installed Shari as Non-Executive Vice Chair of the boards of directors of both Viacom ("*Viacom Board*") and CBS ("*CBS Board*").

In early 2016, health issues led Sumner to "abdicate[ ] the roles of Chairman of Viacom and CBS." Over Shari's objections, the Viacom Board appointed Dauman as Chairman. Not long after, Shari removed Dauman from the NAI board of directors and as trustee of her father's trust. She also successfully removed George Abrams ("*Abrams*"), a longtime friend of both Sumner and Dauman, as trustee of her father's trust. Shari then replaced the departed trustees with trustees of her choosing.

Rattled by these moves, on May 30, the Viacom Board notified NAI that removal of Viacom directors would run counter to Sumner's wishes for an independent board. Two weeks later, NAI issued a written consent in response "that purported to amend Viacom's bylaws to allow

stockholders to fill vacancies on the Viacom Board directly." NAI then exercised its new authority to unilaterally remove five directors (including Dauman and Abrams) from the 11-person Viacom Board and replace them with

- *Thomas J. May* ("*May*"), a neighbor of Shari who served with both Redstones on two nonprofit boards;
- *Judith A. McHale* ("*McHale*"), general counsel for MTV Networks, a Viacom subsidiary;
- *Ronald L. Nelson* ("*Nelson*"), CFO and a director of Paramount Pictures, another Viacom subsidiary; and
- *Nicole Seligman* ("*Seligman*"), a former executive at longtime NAI customer Sony. Seligman and Shari not only served on a nonprofit board together but also regularly accompanied each other to trade and social events. Multiple media outlets reported on the closeness of their relationship, describing them as "BFFs" and naming Seligman as Shari's "closest advisor."

B. Early Merger Attempts

With her consolidation of power complete at NAI and Viacom, Shari set her sights on recombining Viacom and CBS, in part due to "concern that CBS might agree to be acquired by a large technology company." In September 2016, NAI sent a letter to both Viacom and CBS requesting they "consider a combination." In the same missive, NAI warned it would not consider any combination requiring it to relinquish control of either company. The Viacom Board established a special committee to consider the transaction.

The CBS Board, by contrast, refused to discuss a merger unless NAI withdrew its condition that it maintain control. In response, NAI withdrew its request. At the same time, Shari made her displeasure known to the CBS Board, stating: "the failure to get the deal done had caused Viacom to suffer" and "the merger would get done even if I have to use a different process."

Next, Shari installed Robert M. Bakish ("*Bakish*") as Viacom's President, CEO, and newest board member. With Bakish at the helm, Viacom "substantially improved its financial performance."

In January 2018, NAI again advised Viacom and CBS that it "wanted their respective boards to re-engage in negotiations" for a combination. This time, both companies obliged and reconstituted their respective special board committees. Viacom's special committee was composed of Seligman, May, McHale, and Nelson (the "*Viacom Committee*"). As a practical matter, "Seligman spearheaded the

negotiations and drove all substantive discussions." For its part, NAI made its presence felt throughout the 2018 merger negotiations:

- *First*, the Viacom Committee named NAI as a beneficiary of its confidentiality agreement, giving NAI access to all due diligence materials.
- *Second*, after NAI made clear that it would not accept a majority-of-the-minority stockholder approval vote condition, the Viacom Committee made no effort to negotiate for such a condition.
- *Third*, the Viacom Committee rebuffed an interested third party that NAI was unwilling to consider.
- *Fourth*, NAI stipulated that the Merger consideration must be all stock.
- *Fifth*, NAI insisted that Bakish should "have a substantive position in the combined company."

Although the CBS Board refused to consider Bakish for any senior management position, the respective special committees negotiated the financial terms of a combination. After bridging a significant valuation gap, the special committees "eventually settled upon an exchange ratio of 0.6135" ("*2018 Exchange Ratio*"), implying a valuation of about $12.8 billion for Viacom. The Viacom Committee then advised CBS to negotiate "board composition matters" directly with NAI. Unhappy with this direction, the CBS special committee broke off negotiations and publicly announced "that the merger would not be in the best interest of CBS or its minority stockholders."

Fearing an NAI reprisal, CBS attempted to dilute NAI's voting control by issuing a special dividend of voting Class A Common Stock to all stockholders ("*Special Dividend*"). Immediately thereafter, CBS filed suit in Chancery Court seeking to temporarily restrain NAI from changing the CBS Board or interfering with the Special Dividend. NAI responded by executing written consents that required its approval for any amendments to CBS's bylaws and countersuing for a declaration voiding the Special Dividend.

The litigation was cut short "when issues surfaced regarding Moonves' fitness to remain as CBS's CEO." This led to a settlement in which CBS rescinded the Special Dividend, NAI withdrew its written consents, Moonves exited as CEO and a director, several other CBS directors vacated their seats, and Shari agreed to refrain from proposing a combination of Viacom and CBS for two years. All in all, the settlement provided NAI with an even greater measure of control over CBS.

C. The Merger

Notwithstanding her agreement to refrain from pursuing a Viacom/CBS combination for two years, by late 2018/early 2019, Shari pushed CBS's interim CEO to restart discussions. By March 2019, the CBS Board initiated internal discussions about the Merger and, in April, formed a special committee ("*CBS Committee*").

Shortly thereafter, CBS's interim CEO contacted Bakish to re-engage in discussions towards the Merger. The Viacom Committee, which had not disbanded, quickly got back to work. Viacom entered the Merger negotiations newly reinvigorated by its improved financial performance. CBS's financial performance, by contrast, had declined since the prior discussions.

The Viacom Committee, seeking to exploit its enhanced position by focusing on the exchange ratio before negotiating governance issues, proposed the 2018 Exchange Ratio as a floor for exchange ratio negotiations. However, Shari upended this strategy by insisting that Bakish serve as both director and CEO of the combined company. In response, CBS claimed the "prior ratio was 'irrelevant to the current negotiations' " because of the "differences in the proposed governance terms" and insisted on negotiating governance issues ahead of the exchange ratio.

Not surprisingly, the parties settled on a governance structure acceptable to Shari. Among other things, Shari emerged as Chair of a ViacomCBS board of directors consisting of "six former CBS directors, four former Viacom directors and three NAI designees." The subsequent negotiations over financial terms led to an exchange ratio of 0.59625, implying a valuation of about $11.9 billion for Viacom—almost a billion dollars less than what the Viacom stockholders would have received under the 2018 Exchange Ratio. Following stockholder approvals, the Merger was completed on December 4, 2019.

D. Litigation Ensues

Just before the Merger closing, various Viacom stockholders ("*Plaintiffs*") filed the first of several lawsuits challenging the Merger in Chancery Court. The complaint asserted two principal claims:

- *First*, according to Count I, NAI and Shari, as Viacom's controlling stockholders, breached their fiduciary duties to the public stockholders by "causing Viacom to consummate a demonstrably conflicted and unfair Merger."
- *Second*, according to Count II, the members of the Viacom Committee breached their fiduciary duties by "preferring Ms.

> Redstone's dream to combine Viacom and CBS and governance demands over the rights of nonaffiliated stockholders and subsequently approving an exchange ratio that deprived Viacom stockholders of fair value," a breach allegedly not exculpated by a Delaware General Corporation Law section 102(b)(7) provision in Viacom's charter shielding directors from personal liability for breach of their duty of care ("*Exculpatory Provision*").

The defendants moved to dismiss. Focusing on the applicable standard of review, Shari and NAI argued that entire fairness review was unwarranted because (i) "the controller's 'mere presence' on both sides" of the Merger was not "enough to trigger entire fairness review," and (ii) Shari and NAI did not receive "a non-ratable benefit from the Merger to the detriment of Viacom's public stockholders." For their part, the members of the Viacom Committee argued that Plaintiffs failed to rebut their independence or demonstrate that their positions as Viacom directors were "material." Siding with Plaintiffs on both counts, Vice Chancellor Slights denied the motions to dismiss.

II. VICE CHANCELLOR SLIGHTS' ANALYSIS

Vice Chancellor Slights began his analysis by noting that "the gating question that frequently dictates the pleadings stage disposition of breach of fiduciary duty claims" is the selection of the applicable judicial standard of review. If reviewed under the business judgment rule, the claim is unlikely to survive a motion to dismiss. On the other hand, if reviewed under the entire fairness standard, the claim is likely to proceed to discovery or even trial. The Vice Chancellor also noted that "entire fairness review for one [defendant] does not mean entire fairness review for all." As such, the Vice Chancellor analyzed the breach of fiduciary claims against Shari and NAI separately from the claims against the Viacom Committee members.

A. Breach of Fiduciary Duty by Controlling Stockholders (Count I)

1. "[C]onflicted [T]ransaction" Analysis

Controlling stockholders of Delaware corporations, who have the power to "extract[ ] differential benefits from the corporation at the expense of minority stockholders," owe a fiduciary duty of loyalty and good faith to the corporation and its other stockholders. *See In re EZCORP Inc.*, No. 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016), discussed in Robert S. Reder & Elizabeth F. Shore, *Chancery Court Applies* M&F *Framework to Transactions in Which Controlling*

Stockholders Allegedly Received "Unique Benefits," 72 VAND. L. REV. EN BANC 221 (2019). A controller's presence "in the midst of a corporate transaction," however, does not automatically trigger entire fairness review. Rather, the court must determine whether the controller engaged in a "conflicted transaction" in which "(1) 'the controller stands on both sides'; or (2) 'the controller competes with the common stockholders for consideration.' " A controller "competes with the common stockholders for consideration" in one of three scenarios:

- *First,* when the controller "receives greater monetary consideration for its shares than the minority stockholders."
- *Second,* when the controller "takes a different form of consideration than the minority stockholders."
- *Third,* when the controller "gets a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders." The Delaware courts have labelled such a "unique benefit" as a "non-ratable benefit."

2. "Mere Presence" Debate

NAI challenged whether a controller's "mere presence" on both sides of a transaction is enough to trigger entire fairness review. Citing a number of seminal Delaware decisions, counsel for each side argued with "equal fervency" the merits of its position. Vice Chancellor Slights declined to resolve the " 'mere presence' debate" because, in his view, Plaintiffs "have well pled the Merger was a 'conflicted transaction' beyond NAI's presence on both sides." However, the Vice Chancellor did intimate that "mere presence" may be enough to trigger entire fairness:

> [I]t is difficult to escape the clarity with which the Supreme Court stated the "presence on both sides" rule in *Emerald Partners*: "[the controller's] stance on both sides as a corporate fiduciary, ***alone***, is sufficient to require the demonstration of entire fairness." . . . [T]he rule, as stated there, leaves little, if any, room for nuance. And that rule appears to comport with the "mere presence" argument Plaintiffs advance here.

3. Perpetuation of Control as a "Non-Ratable Benefit"

Because NAI received the same consideration in the Merger for its Viacom shares as the public stockholders, selection of the standard of review turned on whether NAI competed with the other stockholders, to their detriment, by extracting a "non-ratable benefit." In its defense, NAI argued that non-ratable benefits occur only in two scenarios: (i) when "the controller eliminates something bad for it and good for the minority," or (ii) when "all parties suffer a sub-optimal price, but the controller still benefits because it receives cash to satisfy an

idiosyncratic liquidity problem." The Vice Chancellor, however, identified a third, and ultimately determinative, scenario where non-ratable benefits can flow to the controller.

In *Ira Tr. FBO Bobbie Ahmed v. Crane*, No. 12742-CB, 2017 Del. Ch. LEXIS 843 (Del. Ch. Dec. 11, 2017) ("*Crane*"), a controlling stockholder sought to implement a recapitalization because it "feared dilution of its voting control in future transactions." The *Crane* court held that the controller's perpetuation of control qualified as a non-ratable benefit justifying an entire fairness review. For a discussion of *Crane*, see Robert S. Reder & Elizabeth F. Shore, *Chancery Court Applies* M&F *Framework to Transactions in Which Controlling Stockholders Allegedly Received "Unique Benefits,"* 72 VAND. L. REV. EN BANC 221 (2019).

With reference to *Crane*, Vice Chancellor Slights found that Shari, "through NAI, used the Merger as a means to consolidate her control of Viacom and CBS at the expense of the Viacom minority stockholders." She "had long desired to combine the media companies her father had built in order to consolidate her control of both companies and solidify her status as a media mogul," a desire that "was fueled . . . amid concern that CBS might agree to be acquired by a large technology company." Moreover, her insistence that Bakish lead the combined company's management was considered a "significant concession" by the CBS Committee that resulted in an exchange ratio nearly one billion dollars less than the valuation agreed to the year before. Similar to *Crane*, these facts created "a reasonable inference" that Shari received a non-ratable benefit "at the expense of the minority stockholders," triggering an entire fairness review.

4. Entire Fairness Analysis

Finally, the Vice Chancellor concluded that Plaintiffs adequately pled that the Merger was not entirely fair. In so ruling, the Vice Chancellor catalogued the Viacom Committee's failures in negotiating a fair transaction:

- *First*, the Viacom Committee "did not consider alternative transactions."
- *Second*, the Viacom Committee "did not consider walking away" when the CBS Committee "telegraphed that it viewed agreeing to [Shari's] governance demands as a valuable 'concession.' "
- *Third*, the Viacom Committee did not advocate for "protections to neutralize the controller."

- *Fourth*, the Viacom Committee did not "exploit" Viacom's improved financial position relative to CBS's diminished position as leverage in the negotiations.
- *Fifth*, the Viacom Committee agreed to an exchange ratio that valued Viacom at nearly one billion dollars less than the parties had agreed upon "just one year before."
- *Sixth*, the Viacom Committee "relied upon flawed market projections, rather than its own management's internal projections, when valuing the transaction."

On this basis, the Vice Chancellor denied pleading-stage dismissal of Count I to Shari and NAI.

B. Breach of Fiduciary Duty by Committee Members (Count II)

According to Vice Chancellor Slights, Delaware courts abide by the presumption that independent directors are "motivated to do their duty with fidelity." Consistent with this presumption, Delaware courts have "refused to presume that an independent director is not entitled to the protection of the business judgment rule solely because [a] controlling stockholder may itself be subject to liability for breach of the duty of loyalty if [a] transaction was not entirely fair to the minority stockholders." And this is particularly true when directors charged with a breach of fiduciary duty are protected by an Exculpatory Provision, requiring plaintiffs to adequately allege breach of the duty of loyalty. Thus, the Vice Chancellor's findings with respect to Shari and NAI did not dictate the outcome of Plaintiffs' claims against the members of the Viacom Committee.

To survive the Viacom Committee members' motion to dismiss, and in light of the Exculpatory Provision, Plaintiffs were required to "allege 'facts supporting a rational inference that [each] director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith.' " Plaintiffs did not allege self-interest on the part of the Viacom Committee members but instead made three arguments attacking their independence and good faith:

- *First*, each had " 'thick' personal relationships" with Shari.
- *Second*, each was well aware of Shari's "demonstrated willingness" to oust directors and management who did not comply with her wishes.
- *Third*, the members collectively displayed a "controlled mindset" that resulted in their failure to operate independently of Shari in the Merger negotiations.

1. Personal Relationships

To demonstrate that a personal relationship in question is "thick" enough to overcome the presumption of director independence, Plaintiffs were required to plead more than natural collegiality stemming from being longtime neighbors (*May*), serving on the same nonprofit board (*May*), or former business connections in the same industry (*McHale* and *Nelson*). According to the Vice Chancellor, the personal relationships between each of these directors and Shari were too "thin" to "overcome the presumption" of independence.

In contrast, while Seligman had some of the same ties to Shari as the other Viacom Committee members, Plaintiffs pled additional facts (as noted above) revealing a "thicker" relationship. These facts, taken as a whole, demonstrated to the Vice Chancellor that the personal relationship between Seligman and Shari, "standing alone, present a reasonably conceivable case that . . . Seligman was not independent . . . with respect to the Merger."

2. History of Ousters

The Viacom Committee members argued that to overcome the presumption of independence, evidence of Shari's history of "retributive conduct" must be coupled with "allegations that the Viacom directorships were 'material' to each of these [directors]." Vice Chancellor Slights disagreed, reasoning that "a controller's actual threats and retributive behavior" against independent directors, at least at the pleading stage, have "important integrity-preserving consequences." As such, a controller's history of ousters can taint the actions of otherwise independent directors when the corporation engages in a conflicted transaction.

3. "Controlled Mindset"

Vice Chancellor Slights last turned to Plaintiffs' argument that Shari dominated the Viacom Committee, leading to a "controlled mindset" on the part of the Viacom Committee members. The "controlled mindset" inquiry is "highly fact specific" and, at the pleading stage, "the court 'does not take an unduly restrictive view of the avenues through which a controller obtains corporate influence.' " The Vice Chancellor found that Plaintiffs cleared "the 'low "reasonable conceivability" ' " bar required to plead that the Viacom Committee had a "controlled mindset," as evidenced by the following:

- *First*, the Viacom Committee members were handpicked by NAI after the removal of "disloyal" Viacom directors.

- *Second*, the Viacom Committee allowed NAI to dictate the course of the negotiations by accepting such limitations as not considering alternative transactions and not insisting upon negotiating the exchange ratio before the governance terms, which left Viacom unable to leverage its improved financial position.
- *Third*, based on NAI's behavior in the previous merger negotiations, the Viacom Committee did not ask NAI to condition the Merger on the approval of a majority of Viacom's minority stockholders.
- *Fourth*, the Viacom Committee did not "seek a collar on the deal price or other minority protections . . . even though NAI insisted that the Merger be structured as stock-for-stock and even though due diligence revealed that Viacom was significantly outperforming CBS."

These actions "reflect[ed] a desire to placate the controller, not to land the best transaction possible for all Viacom stockholders," which was sufficient to plead a "controlled mindset."

* * * * *

In sum, Vice Chancellor Slights found that Plaintiffs' allegations regarding (i) "personal relationships" between Shari and Viacom Committee members, (ii) "the circumstances of their appointments to the Viacom Board and the Viacom Committee," (iii) Shari's "past retributive behavior," and (iv) "their actions as special committee members that reasonably infer a controlled mindset," considered together, "sufficiently plead reasonably conceivable breaches of the duty of loyalty on the part of each Viacom Committee [member]." On this basis, the Vice Chancellor denied their motions to dismiss Count II.

CONCLUSION

In the *Viacom Litigation*, Vice Chancellor Slights reaffirmed the Chancery Court's willingness to step in to protect minority stockholders from conflicted transactions when the controlling stockholder elects not to adopt the Dual Protections. Clearly, the only way to guarantee business judgment rule review and pleading-stage dismissal of breach of fiduciary claims in conflicted transactions is the effective use of the Dual Protections.

With respect to controlling stockholders, the extraction of non-ratable benefits from a transaction, even when the controller nominally receives the same consideration as other stockholders, will implicate

entire fairness review. Further, non-ratable benefits may include such noneconomic or idiosyncratic benefits as the perpetuation of control over a corporation.

Finally, breach of fiduciary duty claims against independent directors arising from a conflicted transaction will be evaluated separately from those brought against the controller. Nevertheless, even where plaintiffs are required to plead a non-exculpated breach of fiduciary duty against directors protected by an Exculpatory Provision, such claims may be allowed to proceed beyond the pleading stage when a controller has a demonstrated history of "retributive behavior" and domination leading to a "controlled mindset" among otherwise independent fiduciaries, effectively tarring these directors with the same brush as the controller.