



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: JOHN Q. HAMMONS HOTELS)
INC., SHAREHOLDER LITIGATION) CONSOLIDATED
C.A. No. 758-CC

**DEFENDANT JOHN Q. HAMMONS'S APPLICATION FOR
CERTIFICATION OF AN INTERLOCUTORY APPEAL AND
MOTION TO STAY PROCEEDINGS PENDING INTERLOCUTORY APPEAL**

Pursuant to Supreme Court Rules 32 and 42 and Chancery Court Rule 72(b), Defendant John Q. Hammons ("Hammons") hereby applies to the Court for an order certifying an interlocutory appeal of the Court's Order on Summary Judgment Motions dated October 16, 2009 (the "Order"), implementing the Court's Memorandum Opinion dated October 2, 2009 (the "Memorandum Opinion"), and also for a stay of proceedings in this Court pending resolution of the interlocutory appeal.

PRELIMINARY STATEMENT

Defendant John Q. Hammons ("Hammons") was the controlling stockholder of John Q. Hammons Hotels, Inc. ("JQH"). An independent third-party buyer sought to acquire JQH and, accordingly, negotiated with Hammons regarding terms on which he would be willing to sell his controlling position. The board of directors of JQH established a special committee to negotiate with third-party buyers on behalf of the JQH minority stockholders. Over the course of negotiations, the special committee achieved a \$24-per-share offer for the JQH Class A common stockholders (up from an initial offer of \$13 per share). Hammons received the exact same consideration for his Class A holdings as all other Class A holders. Hammons also held all of JQH's Class B supervoting stock. Regarding his Class B stock, Hammons negotiated independently with the potential third-party buyers—he was not involved in the special committee's negotiations, nor was it involved in his. The deal Hammons ultimately reached was similar to the deal initially proposed.

Although plaintiffs conceded that the JQH special committee was disinterested and independent, although the Court found that Hammons was not “on both sides” of the transaction, and although the Court held that *Kahn v. Lynch*¹ did not apply to this transaction, the Court held that entire fairness applied *ab initio* to the transaction. The Court’s holding is in direct conflict with the Court of Chancery’s decision in *In re CompuCom*² (not even cited in the Memorandum Opinion), which held that such a transaction merits the presumptions of the business judgment rule.

There is no authority for the proposition that a controlling shareholder who is not “on both sides” of the transaction and who plays no role in negotiating for the minority can be subjected to entire fairness *ab initio*, particularly where the special committee was admittedly disinterested and independent. Under *CompuCom*, Hammons should have been presumptively entitled to the protection of the business judgment rule. Because of the conflict between the Memorandum Opinion and the Chancery Court’s opinion in *CompuCom*, this Court should certify the Order for interlocutory appeal to the Supreme Court of the State of Delaware.

STATEMENT OF FACTS

A. Hammons and JQH

Defendant JQH was a Delaware corporation headquartered in Missouri and engaged in the business of owning and managing hotels. Memorandum Opinion (“Op.”) at 3. Defendant JQH Acquisition, LLC (“Acquisition”) and its wholly-owned subsidiary, JQH Merger Corporation, were formed by Jonathan Eilian to facilitate the JQH acquisition. Op. at 5.

Before the merger, JQH’s ownership was held through two classes of stock: Class A common and Class B common. Op. at 4. The Class A stock (publicly traded) was entitled to one

¹ *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).

² *In re CompuCom Sys., Inc. S’holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005).

vote per share; the Class B stock (not publicly traded) was entitled to 50 votes per share. Op. at 4. Hammons and his affiliates owned approximately 5% of the Class A stock and all of the Class B stock. Op. at 4. Hammons therefore controlled approximately 76% of the total vote in JQH. Op. at 4.

B. The Special Committee Is Formed

In early 2004, Hammons told the JQH Board that he was beginning to discuss selling JQH (or his interest in JQH) with certain third parties. Op. at 8. On October 15, 2004, Barceló Crestline Corporation informed the JQH Board that it had entered into an agreement with Hammons and was offering \$13 per share to acquire all of JQH's Class A stock. Op. at 8.

Hammons's initial agreement with Barceló reflected his tax objectives. It was essential to Hammons that any sale transaction be structured to avoid the large tax liability that would otherwise result from any transaction deemed to be a "disposition event" to Hammons. Op. at 8. Therefore, Hammons had to retain some minimal ownership interest in the surviving entity and had to continue to have capital at risk. Op. at 8. Because he was giving up control in the merger, Hammons negotiated certain other terms to protect his interests. Among other agreements, Hammons's original deal with Barceló included a line of credit of up to \$250 million to allow Hammons to continue developing hotels. Op. at 9.

Soon after the Barceló transaction was announced, the JQH Board formed a special committee of independent and disinterested directors to evaluate and negotiate proposed transactions on behalf of the unaffiliated shareholders and to make a recommendation to the Board. Op. at 9, 11. Plaintiffs conceded that the Special Committee was disinterested and independent. Op. at 22. The Special Committee retained Katten Muchin Rosenman LLP as its legal advisor and Lehman Brothers as its financial advisor. Op. at 10.

C. Barceló And Eilian Make Competing Offers

On December 5, 2004, Eilian submitted a proposal to the Special Committee under which his group would acquire Hammons's interests in JQH and make a tender offer to the unaffiliated shareholders at a price to be determined. Op. at 11. Lehman Brothers advised the Special Committee that, based on its preliminary evaluation, Barceló's original \$13-per-share offer was inadequate, from a financial point of view, for the minority shareholders. Op. at 12. The Special Committee unanimously recommended to the Board that it reject Barceló's revised agreement with Hammons. Op. at 12.

Thereafter, Barceló and Eilian's group submitted revised, competing proposals. Op. at 12–13. Barceló submitted a revised proposal in which it increased its offer for the unaffiliated stockholders to \$21 per share, insisting that the transaction be subject to approval by a simple majority of shares, including those owned by Hammons—Barceló was only willing to pay \$20 if a separate majority-of-the-minority vote was sought. Op. at 12. Eilian proposed a transaction including a tender offer for the Class A shares at \$20.50. Op. at 12–13. Barceló then agreed to increase its offer to \$21 per share and condition any merger on a majority vote of the unaffiliated stockholders. Op. at 13. Lehman advised the Special Committee that the \$21-per-share offer was fair to the minority stockholders of JQH from a financial perspective and that the allocation of consideration between the minority stockholders and Hammons was reasonable. Op. at 13.

Hammons indicated that he was no longer interested in a transaction with Eilian. Op. at 13. The Board granted Barceló exclusivity until January 31, 2005, but Barceló and Hammons failed to reach agreement by that date. Op. at 13–14.

D. Eilian's New Offer

On January 31, 2005, the Special Committee received an offer from Eilian's group pursuant to which Acquisition would take JQH private and acquire all outstanding Class A stock

for \$24 per share. Op. at 14. Eilian's offer was not contingent on third-party financing, and certain Class A shareholders unaffiliated with Hammons (approximately 23% of the Class A holders) had entered into agreements with Eilian in which they agreed to support Eilian's offer. Op. at 14. Soon thereafter, Hammons informed the Board that he was interested in negotiating a transaction with Eilian's group. Op. at 14.

Over the next few months, the terms of a potential transaction were negotiated. Op. at 15. The Special Committee negotiated with Eilian on behalf of the minority shareholders. Hammons negotiated with Eilian and did not participate in the negotiations between Eilian and the Special Committee. Op. at 27. Hammons reached several agreements with Eilian on behalf of his interests and requested the Special Committee's approval of those agreements. Op. at 15.

On June 14, 2005, the Special Committee met with Lehman and its counsel. Op. at 15. Lehman provided a fairness opinion that the \$24-per-share price for the JQH minority stockholders was fair from a financial point of view. Op. at 15. Calculating the value of Hammons's consideration to be between \$11.95 and \$14.74 per share, Lehman also advised the Special Committee of its opinion that the allocation of the consideration between Hammons and the minority shareholders was reasonable. Op. at 15-16. The Special Committee approved the agreements between Hammons and Acquisition and the Merger Agreement. Op. at 16.

At a Board meeting immediately following the Special Committee's meeting, Hammons informed the Board that he supported the proposed transactions and recused himself from the meeting. Op. at 16. After presentations from the Special Committee's advisors, the remaining members of the Board voted to approve the Merger Agreement and the agreements between Hammons and Eilian. Op. at 16.

E. The Merger Agreement

The Merger Agreement provided that each share of Class A common stock would be converted into the right to receive \$24 per share in cash upon consummation of the Merger. Op. at 16. The Merger was contingent on approval by a majority of the unaffiliated Class A stockholders, unless that requirement was waived by the Special Committee. Op. at 16. That requirement was never waived by the Special Committee. Op. at 30.

In addition to the Merger Agreement, Hammons and Acquisition entered into a number of other agreements designed to provide Hammons the ability to continue developing hotels without triggering tax liability. Op. at 17. Hammons's Class B shares were eventually converted into a preferred interest in the surviving limited partnership, in which he was allocated a 2% interest in the cash-flow distributions and preferred equity. Op. at 17. An Eilian company became general partner of the surviving limited partnership and received a 98% ownership interest. Op. at 17.

Hammons was also provided with other rights and obligations. Among those were a \$25 million short-term line of credit and a \$275 million long-term line of credit. Op. at 18. Hammons also received, in exchange for certain assets and liabilities, a particular hotel near Branson, Missouri (an arrangement that had also been part of the original Barceló proposal); a right of first refusal to acquire hotels sold post-Merger; and an indemnification agreement for tax liability arising from the surviving limited partnership's sale of hotels during Hammons's lifetime. Op. at 9, 18.

At a special meeting of stockholders on September 15, 2005, over 72% of the issued and outstanding shares of Class A stock voted to approve the Merger—that is, a majority of JQH's minority stockholders voted to approve the Merger. Op. at 19, 30. The Merger closed the next day. Op. at 19.

F. The Litigation

This action was filed in October 2004, and the now-operative complaint was filed in October 2006. Op. at 21. After discovery was taken, defendants other than Hammons filed their motion for summary judgment in October 2008. Op. at 21. In February 2009, after further discovery, Hammons filed his motion for summary judgment. Op. at 21. In April 2009, plaintiffs filed their cross-motion for partial summary judgment, leaving only the issue of fair price for trial. Op. at 21–22. The Court granted defendants’ motions in part and otherwise denied all parties’ motions, applying entire fairness to the transaction *ab initio* and creating a two-part procedure under which business judgment could have been (but was not) the applicable standard of review. The Court therefore held that entire fairness was the appropriate standard of review. Op. at 32; Order.

ARGUMENT

I. STANDARD OF REVIEW.

Supreme Court Rule 42(b) authorizes the Court to certify an order for interlocutory appeal if the order (i) determines a substantial issue; (ii) establishes a legal right; and (iii) meets one or more of the additional criteria set forth in the Rule. Supr. Ct. R. 42(b). The Order does all three.

As discussed below, the Court’s ruling conflicts directly with another opinion of the Court of Chancery, *In re CompuCom Systems, Inc. Stockholders Litigation*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005). The two opinions set forth diametrically opposed standards of review for the same situation: a third-party purchase of a corporation with a controlling stockholder in theoretical competition with the minority stockholders for merger consideration. *CompuCom*—which was not cited at all in the Court’s Memorandum Opinion—holds that business judgment is the default standard and that entire fairness only applies if the presumptions of the business

judgment rule are rebutted. The Memorandum Opinion and the Order, on the other hand, hold that entire fairness applies *ab initio* and that business judgment only applies if certain procedural mechanisms are put into place.

Given the significance of the standard of review applied, the implications of the Court's ruling are significant not just in this case, but for future cases as well, and should be addressed promptly by the Delaware Supreme Court. Furthermore, interlocutory appeals are favored where, as here, they can "advanc[e] the termination of litigation and sav[e] time below if a threshold question can be resolved." Supr. Ct. R. 42 cmt.; *see also, e.g., Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1193 n.1 (Del. 1992) (granting defendants' motion for an order certifying an interlocutory appeal and holding that interlocutory appeals "can serve a beneficial purpose in the administration of justice by advancing the termination of litigation and saving time in the trial courts if an important threshold question can be resolved, and the resolution of the question will save substantial time and expense").

II. THE COURT SHOULD GRANT HAMMONS'S APPLICATION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL.

A. The Court's Denial Of Hammons's Motion For Summary Judgment Determined A Substantial Issue.

The question regarding which standard of review applies in a case is very important—indeed, often outcome determinative. *See, e.g., AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) ("Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of [the] litigation."); *see also Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1988) (same). Here, that important question is applied to a controlling-stockholder transaction. Other controlling-stockholder transactions have given rise to a number of significant

Delaware cases, *see, e.g., Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787 (Del. Ch. June 19, 2001), and the Order decides an issue of similarly significant import.

The Court's Memorandum Opinion and its Order hold that entire fairness should apply *ab initio* to transactions such as the third-party sale here. Had the Court instead followed the Court of Chancery's opinion in *CompuCom*, the presumptions of the business rule would have applied, and Hammons would have been entitled to summary judgment. The Order therefore determined a substantial issue. *Cf. Lyondell Chem. Co. v. Ryan*, 2008 WL 4294938, at *1 (Del. Sept. 15, 2008) (ORDER) (concluding that an application for interlocutory review of a denial of summary judgment "meets the requirements of Supreme Court Rule 42(b) and should be accepted").

B. The Other Requirements Of Supreme Court Rule 42(b) Are Met.

Supreme Court Rule 42(b) requires that the order sought to be reviewed "meets 1 or more of the . . . criteria" in Rule 42(b). The Order meets two of those criteria: Rule 42(b)(i) and Rule 42(b)(v). The Order conflicts with another decision of the Court of Chancery (*CompuCom*) and, had the Order followed *CompuCom*, the litigation as to Hammons would have been terminated.

1. The Court's Order Conflicts With Another Decision Of The Court Of Chancery.

The Order conflicts with another decision of the Court of Chancery on the question of which standard of review should apply. Therefore, "[t]he decisions of the trial courts are conflicting upon the question of law." Supr. Ct. R. 41(b)(ii); *see also id.* 42(b)(i) (allowing interlocutory review for an order that meets "[a]ny of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41"). The Court of Chancery's decision in *In re CompuCom Systems, Inc. Stockholders Litigation*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005),

held that the proper standard of review for a transaction such as this is business judgment. The Court’s Memorandum Opinion—which did not cite *CompuCom* even though it was raised in both of Hammons’s briefs on the motions for summary judgment—held instead that the proper standard of review was entire fairness (which may only be escaped by the use of certain procedural protections).

The direct conflict between two decisions of the Court of Chancery authorizes an interlocutory appeal. The similarities—and single striking difference—between *CompuCom* and the Court’s Memorandum Opinion are set forth in the table below:

Memorandum Opinion	<i>CompuCom</i>, 2005 WL 2481325
Sale to a third party at behest of controlling stockholder Hammons (Op. at 1)	Sale to a third party at behest of controlling stockholder Safeguard Scientifics, Inc. (<i>Id.</i> at *2)
Allegations that terms of the merger improperly favored Hammons at the expense of the minority stockholders (Op. at 1)	Allegations that terms of the merger improperly favored Safeguard at the expense of the minority stockholders (<i>Id.</i> at *1)
Hammons owned portion of Class A common and all of super-voting Class B common (Op. at 4)	Safeguard owned portion of common and all of super-voting preferred (<i>Id.</i> at *1)
Plaintiffs concede that special committee was independent and disinterested (though argue it was coerced by Hammons) (Op. at 22)	Plaintiffs argue that members of special committee were not independent of Safeguard (<i>Id.</i> at *4)
Plaintiffs challenge the merger price (Op. at 22)	Plaintiffs challenge the merger price (<i>Id.</i> at *3)
Hammons negotiated a deal with Eilian and stayed out of the special committee’s negotiations (Op. at 15, 27)	Safeguard rejected an offer that would have given it less consideration per share than other holders of common stock (<i>Id.</i> at *2)
All Class A common holders received \$24 per share (Op. at 16)	All common stockholders received \$4.60 in cash (<i>Id.</i> at *2)
Hammons, the only Class B common holder, received certain benefits from Eilian through various side agreements (Op. at 17–18)	Safeguard, the only preferred holder, received a lump sum payment of \$15 million, plus accrued and unpaid dividends (<i>Id.</i> at *2)
The Court applied entire fairness <i>ab initio</i>³ (Op. at 29–32)	The Court applied presumptions of business judgment rule (<i>Id.</i> at *5)

³ Plaintiffs may argue that the Court did not apply entire fairness *ab initio*, but instead applied entire fairness because defendants failed to meet the procedural requirements set forth in the Memorandum Opinion. But that would be incorrect—the Court did not find or state that the presumptions of the business judgment rule had been rebutted. Instead, the Court held that

The Court held that defendants would have been entitled to business judgment if the transaction had been recommended by an independent and disinterested special committee <i>and</i> the merger had been approved by stockholders in a non-waivable vote of the majority of all minority stockholders (Op. at 29)	The Court held that plaintiffs could have rebutted (but did not rebut) the presumptions of the business judgment rule (<i>Id</i> at *6–8)
The Court denied Hammons’s motion for summary judgment on this issue (Op. at 34)	The Court dismissed plaintiffs’ claims (<i>Id</i> at *11)

Furthermore, *CompuCom* was correctly decided, and the Court should have followed that case. As the Court held, Hammons was not “on both sides” of the transaction. Op. at 30. Therefore, as the Court also held, the *Lynch* line of cases did not apply to this transaction. Op. at 29. Business judgment should have been the standard, as applied in *CompuCom* and as discussed in *McMullin v. Beran*, 765 A.2d 910, 916–17 (Del. 2000). Plaintiffs did not rebut the business judgment rule—either as to Hammons, regarding whom plaintiffs can make no showing of any breach of his duties of care or loyalty, *see, e.g., CompuCom*, 2005 WL 2481325, at *6 (“Generally speaking, a controlling shareholder has the right to sell his control share without regard to the interests of any minority shareholder, so long as the transaction is undertaken in good faith.”), or as to the members of the Special Committee, who had no personal interest in this transaction at all, *see* Op. at 22 (noting that plaintiffs had conceded the independence and disinterestedness of the Special Committee).

The Court’s holding that entire fairness applied *ab initio* was apparently based on the notion that Hammons was “in a sense ‘competing’ for portions of the consideration Eilian was

“business judgment would be the applicable standard of review *if* [defendants complied with the procedural requirements].” Op. at 29 (emphasis added). Therefore, entire fairness was the default standard, and business judgment *only* would have applied *if* defendants could have met the procedural requirements. In other words, entire fairness applied *ab initio*, and not business judgment.

willing to pay to acquire JQH.”⁴ Op. at 30. But the Court recognized that “Hammons negotiated with Eilian and *did not participate in the negotiations between Eilian and the special committee.*” Op. at 27 (emphasis added). That is, Hammons did not “make the offer to the minority stockholders or agree to a merger with JQH. Rather, an unaffiliated third-party negotiated separately with Hammons and the special committee.” Op. at 27 n.30. Hammons therefore is forced to undergo the scrutiny of entire fairness based on a theoretical “competition” that he was not actively engaged in and that existed, if at all, only in the minds of Eilian, the plaintiffs, and the Court.

Under *CompuCom* and *McMullin*, as well as other Delaware cases, far more is required to rebut the presumptions of the business judgment rule. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (applying the presumptions of the business judgment rule in a sale of a company to a third party when the controlling stockholder remained such after the merger); *In re Budget Rent A Car Corp. S’holders Litig.*, 1991 WL 36472, at *5 (Del. Ch. Mar. 15, 1991) (applying business judgment to a sale of a company to a third party when the controlling stockholder received stock in the entity acquiring the company). As in *CompuCom*, *Orman*, and *Budget*, Hammons was not “on both sides” of the transaction. Op. at 30. This was an arm’s-length transaction with an unrelated third party that had no prior relationship to Hammons or any of the directors.⁵ Hammons negotiated the sale of his majority interest and played no role in the

⁴ The notion that entire fairness applies because “Hammons, as a result of his controlling position, could effectively veto any transaction” (Op. at 30) logically would apply entire fairness to any transaction with any company that had a controlling stockholder—a result at odds with much of Delaware law. Hammons’s right to veto any transaction is one that has been long recognized by the Delaware courts. *See, e.g., Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (“Clearly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority.”).

⁵ *Cf. CompuCom*, 2005 WL 2481325, at *10 (“In other words, the plaintiff does not adequately allege that the merger was anything other than an arms-length transaction with an

Special Committee's negotiations for the minority stockholders. *Op.* at 27. The presumptions of the business judgment rule should have applied, and the plaintiffs were unable to rebut those presumptions.

Even though the transaction in *Orman* involved key elements of the concerns that animated *Lynch* ("a party that controls, and will continue to control, the corporation"), the Court applied the business judgment rule:

Here, however, although the Cullman Group was the controlling shareholder of the target company both before and after the merger, the Cullman Group did not stand on both sides of the challenged merger. Instead it was approached by, and began initial negotiations with, an unaffiliated third party, Swedish Match. A Special Committee of independent directors then completed those negotiations. Therefore, the burden remains on *Orman* to allege other facts sufficient to overcome the business judgment presumption.

Orman, 794 A.2d at 22. Business judgment should similarly apply here, where Hammons was also not "on both sides" of the merger, and where the Special Committee handled the negotiations on behalf of the minority stockholders. *See Op.* at 27, 30.

In *Budget*, the controlling stockholder received cash for its shares and exchanged some of that cash for the common stock of the entity acquiring the company. The Court looked to the restrictions on the common stock that the controlling shareholder received (and to a limited management agreement its parent negotiated) and determined that the controlling shareholder was obtaining no benefit from the merger. *Budget*, 1991 WL 36472 at *4. The Court therefore held that the merger was not an interested transaction and that the directors were protected by the business judgment rule. *Id.* at *5. Hammons was not "on both sides" of the JQH Merger, and business judgment should have applied to this transaction.

unaffiliated third party pursuant to the goal of maximizing shareholder value by attaining the best possible price.").

Furthermore, the mere “competition” for consideration should not lead to entire fairness *ab initio*.⁶ See, e.g., *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986). Entire fairness applied in *Jedwab*, but not simply because the controlling shareholder accorded himself different consideration. Cf. *id.* at 594–95. In *Jedwab*, the third-party buyer announced up front the total price it would pay for the company and had no input into how that amount would be divided between the classes of stock. *Id.* at 590. The controlling shareholder apportioned the total price among the other stockholders and himself. *Id.* He received less cash per share than the other common stockholders, but took other non-cash property that they did not receive. Because the total merger price had been pre-determined, any special consideration the controlling shareholder accorded himself necessarily created a corresponding reduction to the minority’s consideration. Under these circumstances, the Court held that the transaction called for entire fairness review. *Id.* at 595 (noting that the controlling shareholder “directed the apportionment of merger consideration in a way that treated himself differently from other holders of common stock”). The JQH transaction, however, involved no such zero-sum game.

⁶ Plus, this theoretical “competition” will exist in any situation in which a controlling stockholder receives or requests a control premium, even though the notion of a control premium has been recognized as valid by the Court of Chancery. See, e.g., *Mendel v. Carroll*, 651 A.2d 297, 305 (Del. Ch. 1994) (noting that the “law has acknowledged . . . the legitimacy of the acceptance by controlling shareholders of a control premium”).

In many ways, this transaction is akin to that in which disinterested directors apportion transactional consideration to different classes of stockholders—a transaction that would also receive the presumptions of the business judgment rule. See, e.g., *In re Gen. Motors Class H S’holders Litig.*, 734 A.2d 611, 618 (Del. Ch. 1999) (“An allegation that properly motivated directors, for no improper personal reason, advantaged one class of stockholders over the other in apportioning transactional consideration does not state a claim for breach of the duty of loyalty.”); *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999) (noting that “[d]irectors must often resolve conflicts among classes of stock” and holding that plaintiffs’ “allegations fail to rebut the business judgment standard of review”), *aff’d*, 746 A.2d 277 (Del. 2000); *In re Staples, Inc. S’holders Litig.*, 792 A.2d 934, 950 (Del. Ch. 2001) (“Delaware case law has recognized that there will be circumstances when corporate directors must balance the competing interests of two classes of their company’s stock. When this sort of inevitable balancing by corporate fiduciaries occurs, the entire fairness standard is not automatically invoked.”).

Hammons did not direct the apportionment of the merger consideration. Negotiations with Eilian proceeded on two separate paths (Op. at 27), and Eilian never announced a limit on the total amount he was willing to pay. Hammons's principal requests—the credit line, the hotel sale, and the tax-advantaged status—were part of the original proposed transaction with Barceló back when Barceló was offering \$13 per share to the minority in September 2004. Op. at 8–9.

There is also no parallel between the transaction here and that in *In re PNB Holding Co. Shareholders Litigation*, 2006 WL 2403999, at *1 (Del. Ch. Aug. 18, 2006), where Vice Chancellor Strine noted that director shareholders created a zero-sum game by entering into a merger intended to reduce the total number of shareholders. Because the directors would remain shareholders in the new corporation, they had an incentive to pay as little as possible to the departing shareholders. *Id.* Hammons, however, played no role whatsoever in establishing the price to be paid the minority. *See* Op. at 27. Because the negotiations were controlled by an independent, disinterested Special Committee, Hammons's only role was that of seller.

Incorrect as a policy matter as well, the Order would decrease returns to all stockholders. First, the Court's holding is likely to provide controlling stockholders an incentive to cut private deals regarding the control block (for a premium) and leave the minority stockholders to fend for themselves in corporations with a new controller. Eilian's first proposed transaction, for example, took this form. Op. at 11. Transactions that would be more remunerative to the minority—like the all-shares transaction involved here—will likely decrease significantly in light of the Court's Order because controllers will have a disincentive to include the minority in their deals. Second, the requirement (Op. at 29) that a majority of all minority stockholders approve mergers such as the one at issue here will likely have the effect of decreasing prices paid to minority stockholders. *See, e.g.*, Op. at 12 (discussing the fact that Barceló initially offered a

lower price if the merger were to be conditioned on a majority-of-the-minority vote). Third, the Court's holding will deprive controlling stockholders of control premiums, to which Delaware law has long held them entitled. *See, e.g., Cheff v. Mathes*, 199 A.2d 548, 555 (Del. 1964) (“[A] substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a ‘control premium’ . . . [I]t is elementary that a holder of a substantial number of shares would expect to receive the control premium as part of his selling price . . .”). That is, any attempt by a controlling stockholder to receive anything but the same per-share consideration—even though the controller’s shares may have supervoting or other special rights—will force the application of entire fairness *ab initio* unless the transaction complies with both of the requirements set forth in the Memorandum Opinion.⁷

2. Appellate Review Of The Court’s Order May Terminate The Litigation Or Otherwise Serve Considerations Of Justice.

Appellate review of the Court’s Order “may terminate the litigation or may otherwise serve considerations of justice.” Supr. Ct. R. 42(b)(v). Had this Court applied the standard of review set forth in *CompuCom*, plaintiffs would not have been able to rebut the business judgment rule, and this case would have been dismissed as to Hammons.

Furthermore, Chancery Court Rule 56(h) should have governed the Court’s resolution of these issues. The parties filed cross-motions for summary judgment on the issues raised in the Memorandum Opinion and the Order, but the Court did not even cite Rule 56(h). Since no party presented argument that there was an issue of fact material to the disposition of that party’s

⁷ The requirement that even a third-party sale transaction must be approved by a majority of all minority stockholders voting on the transaction is ironic, since the notion of a control premium is based partly on a controller’s ability to deliver control of a corporation to a buyer. Under the Court’s new requirements, a controller cannot in fact deliver control of the corporation to a third-party buyer without triggering entire fairness; that power is reserved to a majority of the minority stockholders voting on the transaction.

motion for summary judgment,⁸ the Court should have “deem[ed] the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.” Ct. Ch. R. 56(h). Therefore, some of the Court’s statements regarding the need for further factual development ran afoul of Rule 56(h).

First, the Court stated that it was unable to “resolve th[e] factual dispute” regarding the pre-Merger price of JQH shares. Op. at 35. The Court further stated that plaintiffs could prevail at trial “if they were able to establish that the price of the minority shares was depressed as a result of Hammons’s improper self-dealing conduct.” Op. at 35. The Court’s statement demonstrates that plaintiffs had not yet made such a showing. Therefore, under Rule 56(h), the issue should have been resolved “on the merits based on the record submitted with the motions,” and the issue should have been resolved in Hammons’s favor. Plaintiffs cannot be held to complain, since they failed to support their contentions with any factual or expert evidence. Furthermore, the Court’s discussion of the “coercion” point raises a fatal flaw in the Court’s ruling: The Court’s result purportedly “addresses the concern that majority stockholders may have an incentive to depress the price of minority shares through improper self-dealing so they could then *buy out the minority at a low price.*” Op. at 36 (emphasis added). While that may be a proper concern in a case governed by *Lynch*, it is inapposite here, where Hammons did not “buy out the minority” and where an independent third party was the acquirer. Indeed, any

⁸ See, e.g., Plaintiffs’ Brief in Support of Their Cross-Motion for Partial Summary Judgment and in Opposition to Defendants’ Motions for Summary Judgment at 2 (Trans. ID 24674118) (“Accordingly, Plaintiffs agree with Defendants that—with the exception of the issue of price—this matter is ripe for summary adjudication.”). Therefore, only one issue—the issue of price—should remain for any further factual development. All other issues should have been decided upon the papers filed. See also *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559, at *6 (Del. Ch. Oct. 14, 2009) (applying Rule 56(h) where “none of the parties ha[d] . . . argued that there is an unresolved question that would preclude summary judgment”).

depression in the JQH stock price allegedly caused by Hammons served only to decrease his return on his own Class A shares.

Second, the Court stated that there were “factual and legal disputes regarding the persuasive value of Lehman’s opinion on the issue of fair price.” Op. at 34. Plaintiffs left the issue of “fair price” open for trial,⁹ but they moved for summary judgment based on alleged flaws in Lehman’s allocation-of-consideration opinion. Thus, issues regarding Lehman’s allocation-of-consideration opinion should have been resolved on the merits pursuant to Rule 56(h).¹⁰ Plaintiffs submitted no expert evidence of a different valuation for Hammons’s agreements—just criticism. Plaintiffs therefore failed to support their arguments and therefore properly should have the merits resolved against them pursuant to Rule 56(h).

C. The Court’s Denial Of Hammons’s Motion For Summary Judgment Established A Legal Right.

The Court’s Order established a legal right. “An order may be thought to establish a legal right when it either creates or diminishes any party’s rights with respect to the underlying substantive issues.” Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04[b], at 14-8 (2009). As the Supreme Court recently decided, the Court’s decision to deny Hammons’s motion for summary judgment under an erroneous standard of review—thereby potentially subjecting him to potential personal liability and depriving him of any protection under JQH’s exculpatory charter provision—clearly diminished Hammons’s legal rights. *Lyondell Chem. Co. v. Ryan*, 2008 WL 4294938, at *1 (Del. Sept. 15, 2008) (concluding that an application for interlocutory review of a denial of

⁹ Regardless of whether \$24 per share is “fair” to the minority holders, plaintiffs make no showing that Hammons received the equivalent of more than \$24 per share for his Class B stock. Since Hammons’s consideration was less than the consideration paid to the minority, the “fairness” of the \$24 should be irrelevant to Hammons’s motion for summary judgment.

¹⁰ Furthermore, the directors were entitled to rely on Lehman’s opinion under 8 *Del. C.* § 141(e).

summary judgment “meets the requirements of Supreme Court Rule 42(b) and should be accepted”).

Moreover, the Delaware courts have acknowledged that “the ‘right’ to be free of the expense of a trial defense to a claim is a legal right that is determined by denial of a motion . . . for summary judgment.” *Price v. Wilmington Trust Co.*, 1996 WL 560177, at *2 (Del. Ch. Sept. 3, 1996) (granting application for certification of an interlocutory appeal); *see also Lyondell*, 2008 WL 4294938; *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 171 (Del. 1976) (granting application for certification of an interlocutory appeal and finding that a legal right was established because the Court “by his ruling obliged the appealing defendants to go to trial on the complaint”).

III. PROCEEDINGS IN THIS COURT SHOULD BE STAYED PENDING THE INTERLOCUTORY APPEAL.

Proceedings in this Court should be stayed pending the interlocutory appeal pursuant to Supreme Court Rule 32(a). Plaintiffs will not be harmed in any way, and a stay would promote judicial economy, particularly where appellate review may potentially terminate the litigation altogether. *See Lyondell*, 2008 WL 4294938 (granting stay upon acceptance of interlocutory appeal).

CONCLUSION

For the foregoing reasons, Defendant John Q. Hammons respectfully requests that the Court grant his application for certification of an interlocutory appeal and stay proceedings in this Court pending resolution of the interlocutory appeal.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of October 2009, true and correct copies of the foregoing document were served upon the following counsel of record by e-service.

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