Court of Chancery of Delaware.

In re Nine Systems Corporation Shareholders Litigation

Consol. C.A. No. 3940-VCN | Submitted: April 1, 2014 | Decided: September 4, 2014

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MEMORANDUM OPINION

NOBLE, Vice Chancellor

I. INTRODUCTION

***1** The board decisions and stockholder actions at the heart of this lawsuit present one of the long-standing puzzles of Delaware corporate law: for a conflicted transaction reviewed by this Court under the entire fairness standard, "[t]o what else are shareholders entitled beyond a fair price?"[1] The entire fairness standard of review has long mandated a dual inquiry into "fair dealing and fair price"[2] that this Court should weigh as appropriate to reach a "unitary" conclusion on the entire fairness of the transaction at issue.[3] Delaware courts have contemplated this issue before.[4] What unites the resulting range of explications of this area of Delaware law is the principle that the entire fairness standard of review is principally *contextual*. That is, there is no bright-line rule on what is entirely fair.

Here, the Court concludes that a price that, based on the only reliable valuation methodologies, was more than fair does not ameliorate a process that was beyond unfair. At least doctrinally, stockholders may be entitled to more than merely a fair price, but the difficulty arises in quantifying the value of that additional entitlement. A more challenging question thus arises: what damages may stockholder plaintiffs receive where the transaction at issue was approved and implemented at a fair price? This memorandum opinion contemplates one practicable—and contextual—answer to that question.

This action centers on the 2002 recapitalization (the "Recapitalization") of a two-year-old start-up company in the streaming media industry: Streaming Media Corporation, later known as Nine Systems Corporation ("SMC," "Nine Systems," or the "Company"). In the Recapitalization, several Defendants increased their equity, and correspondingly diluted the Plaintiffs' equity, in the Company. Around four years later, in November 2006, the Company sold itself to Akamai Technologies, Inc. ("Akamai") for approximately $175 million. The Plaintiffs, contending that the Recapitalization was a dilutive, conflicted transaction that was not entirely fair, seek over $130 million in damages, plus interest, from the Defendants.

The five members of the Company's board of directors (the "Board") were each appointed, formally or otherwise, to reflect the interests of different stockholders: (i) Art Williams ("Williams") and then Troy Snyder ("Snyder"), each as the Company's Chief Executive Officer ("CEO"), presumably represented management; (ii) Dort A. Cameron, III ("Dort Cameron") represented Wren Holdings, LLC ("Wren"); (iii) Howard Katz ("Katz") represented Javva Partners, LLC ("Javva"); (iv) Christopher Shipman ("Shipman") represented Catalyst Investors, L.P. ("Catalyst");

and (v) Abrahim Biderman ("Biderman") represented a group of minority stockholders introduced to the Company through Biderman's investment firm, Lipper & Co. ("Lipper").

***2** By the beginning of 2002, Wren, Javva, and Catalyst owned approximately 54% of the Company's stock and held over 90% of its senior debt. The Plaintiffs owned approximately 26% of the Company's stock. Through the Recapitalization, Wren and Javva invested additional money in exchange for convertible preferred stock. In dispute is whether Catalyst received an option, formal or otherwise, to participate in the capital raise on the same terms as Wren and Javva. The new capital was to enable the Company to make two acquisitions: (a) a division of eMedia ("e-Media"); and (b) the streaming media group of NaviSite ("NaviSite SMG"). The Plaintiffs were not aware of the Recapitalization until after it was implemented.

The Board did not obtain any independent valuation of the Company, eMedia, or NaviSite SMG during the Recapitalization. Rather, the person most responsible for determining the relative values of the Company and the acquisitions, as well as the accompanying conversion rates for the convertible preferred stock, was Andrew T. Dwyer ("Dwyer"), who owned just under half of Wren. Dwyer's valuation, which he came to on his own during several weeks in December 2001 and January 2002, was admittedly "back of the envelope": a series of handwritten guesstimates scratched out on a single piece of paper. Several of the terms then changed, in favor of the Defendants who participated, from when the Board initially approved the Recapitalization in January 2002 to when it issued the convertible preferred stock in August 2002. Also in August, a majority of the Company's common stockholders—Wren, Javva, and Catalyst—approved certain necessary changes to the Company's charter. Despite a general notice sent to stockholders about the Recapitalization, specific details about its key terms—most importantly, who was receiving the convertible preferred stock and on what terms—were not disclosed to the Company's other stockholders, including the Plaintiffs.

For the better part of the four years after the Recapitalization, the Company had sporadic, if any, communications with most of its stockholders. SMC became Nine Systems and moved its headquarters across the country. Some stockholders may have been notified of certain of these or similar developments, but never more than once a year. There were no annual meetings or director elections. The Company's strongest outreach effort yielded a February 2006 informational meeting that had "[l]ess than a handful" of attendees.[5]

By mid–2006, the Company was attracting the interest of larger competitors in the streaming media industry. In June, the Company repurchased 44,000 shares of stock from one of its earliest investors, Thomas Murphy, for $1.00 per share. Later, in August, what started out as a $25 million capital raise soon evolved into a bidding war. Akamai eventually acquired the Company in November 2006 in a $175 million merger (the "Akamai Merger"), in which each stockholder of the Company received consideration worth approximately $13.00 per share.

Almost all investors made a return on their initial investment in the Company because of the Akamai Merger. Some stockholders, however, made more of a return than others. When several of the Company's minority stockholders learned details about the potential conflicts of interest in the Recapitalization (presumably through the Akamai Merger proxy materials), those former stockholders filed suit and challenged the Recapitalization's fairness. More stockholders would later bring additional claims, and this litigation has existed (in one form or another) for around six years.

This case was tried over eleven days and involved approximately one thousand exhibits. The Plaintiffs' claims presented at trial were:

***3** • Breach of fiduciary duty and unjust enrichment against Wren, Javva, and Catalyst as a purported control group that arranged the Recapitalization on unfair terms;

• Breach of fiduciary duty against Dort Cameron, Katz, Shipman, and Snyder for (i) approving the unfair Recapitalization, and (ii) failing to disclose purportedly material information about the Recapitalization to the Company's stockholders;

• Aiding and abetting against Dwyer, Wren, Javva, and Catalyst for their conduct in the Recapitalization;

• Unjust enrichment against Cameron Family Partnership, L.P. ("CFP") for holding, at the time of the Akamai

Merger, some of the convertible preferred stock that Wren had received in the Recapitalization; and

- Fraud against Dort Cameron, Katz, Shipman, and Snyder for their conduct in the Company's repurchase of stock from Thomas Murphy.[6]

The Defendants contend that the Plaintiffs' challenge to the Recapitalization must fail for lack of standing. Alternatively, the Defendants argue that the Recapitalization was entirely fair, and they also raise other defenses. Assuming that the Recapitalization was subject to entire fairness review, the parties presented expert testimony on the Company's value before, during, and after the Recapitalization.

This post-trial memorandum opinion represents the Court's findings of fact and conclusions of law. For the following reasons, the Court concludes that: (i) the Plaintiffs have standing to challenge the Recapitalization through a direct expropriation claim because (a) Wren, Javva, and Catalyst together represented a control group that, through their collective majority ownership of the Company, effected the Recapitalization to the exclusion and dilution of the Plaintiffs, or (b) alternatively, a majority of the directors who approved the Recapitalization were conflicted due to their fiduciary relationships with the entities that received the opportunity, not shared with the Company's other stockholders, to invest in the dilutive, convertible preferred stock; (ii) the Recapitalization, although it was approved and implemented at a fair price, was not entirely fair because of the Defendants' grossly unfair dealing; and (iii) Dwyer and (to the extent they were not a control group) Wren, Javva, and Catalyst are liable for aiding and abetting these breaches of fiduciary duty. But, given the only reliable valuation evidence, the Court concludes that the Defendants who breached their fiduciary duties or who aided and abetted those breaches are not liable for monetary damages. That said, the Plaintiffs are granted leave to petition the Court for an award of attorneys' fees and costs.

Separately, the Court also concludes that the Defendants are entitled to judgment in their favor on the Plaintiffs' other claims, including Thomas Murphy's fraud claim.

II. THE PARTIES

A. *The Plaintiffs*

Two former stockholders of the Company (the "Dubroff Plaintiffs") filed a putative class action lawsuit against the Defendants in August 2008. In 2009, the Court dismissed the Dubroff Plaintiffs' claims other than their disclosure claim.[7] The Court then denied class certification in August 2010.[8]

***4** Forty-three former stockholders (the "Fuchs Plaintiffs") then filed individual claims against the Defendants in November 2010. The Court dismissed the Fuchs Plaintiffs' unjust enrichment claims against Dort Cameron, Katz, Shipman, Snyder, and Dwyer, and it granted in part the Fuchs Plaintiffs' motion for permissive intervention and consolidation in 2011.[9] The Fuchs Plaintiffs are composed of three identifiable groups of former stockholders: (i) individuals who initially invested in the Company by purchasing membership interests in Streaming Media Investment Group, LLC ("SMIG"), an investment vehicle formed by Lipper for "administrative convenience"[10] that dissolved and transferred its stock in the Company to its former members in 2002 (the "SMIG Plaintiffs");[11] (ii) the "Preferred A Plaintiffs" on whose claims the Court granted summary judgment in the Defendants' favor in 2013;[12] and (iii) four stockholders who invested directly in the Company.[13]

Finally, six additional stockholders (the "Kim Plaintiffs") filed claims against the Defendants in October 2012. The claims of two of the Kim Plaintiffs were dismissed in 2013.[14] The remaining Kim Plaintiffs (the "Founding Stockholders") are: (i) Rick Murphy, the Company's founder and first CEO; (ii) Thomas Murphy, Rick Murphy's father and the first investor in the Company; (iii) Rounseville Schaum ("Schaum"), the Company's first Chief Financial Officer ("CFO"); and (iv) Newport Capital Partners, Inc., the entity through which Schaum invested in the Company.

The remaining Fuchs Plaintiffs and the Founding Stockholders are the "Plaintiffs" for purposes of this memorandum opinion.

B. ***The Defendants***
The Defendants are: (i) three stockholders of the Company (Wren, Javva, and Catalyst); (ii) those stockholders' representatives on the Board during the Recapitalization in 2002 (Dort Cameron, Katz, and Shipman); (iii) the Company's CEO and a director appointed in May 2002 (Snyder);[15] and (iv) an individual (Dwyer) and an entity (CFP) affiliated with Wren.

Wren, Javva, and Catalyst were stockholders of the Company by October 2000, and they had representatives on the Board by September 2001. Dort Cameron owned approximately 50% of Wren and was its managing member.[16] Dwyer owned the other approximately 50%.[17] Katz was the managing member and principal of Javva.[18] Shipman was a partner of Catalyst, and he served as Catalyst's representative on the Board until May 2006, when an associate who worked with him on the SMC/Nine Systems investment, non-party Tyler Newton ("Newton"), took over that position.[19] These and the other Board members generally did not receive compensation for their service as directors, likely due to the Company's continually struggling financial condition. For perhaps a similar reason, the Company did not purchase directors and officers liability insurance.

Before their common investment in the Company and representation on the Board, none of Wren, Javva, or Catalyst had any material relationship with one another. The only connection among any of these entities or their representatives was that Newton was a college classmate and friend of Dort Cameron's son, Seth Cameron.[20]

C. ***Key Non-parties***
***5** Biderman was the fifth member of the Board during the Recapitalization and until the Akamai Merger. He was an executive vice president at Lipper, a New York-based investment firm. Two of his junior colleagues at Lipper, Emily Grad ("Grad") and Patti Koo ("Koo"), worked with him on the SMC/Nine Systems investment. Lipper presented most of the Fuchs Plaintiffs with the opportunity to invest in the Company.

Biderman's religious practices feature somewhat prominently in the story of the Board's consideration and approval of the Recapitalization. Biderman is an observant Orthodox Jew, and, therefore, he is unable to transact any business on the Sabbath from sundown Friday to sundown Saturday. Often, he would have to leave Lipper's offices early in the afternoon on Fridays, especially in the winter months, to attend services. He made his "not negotiable" religious constraints known to the other directors "[f]rom the beginning" of his membership on the Board in June 2001.[21]

III. BACKGROUND

A. ***The Founding of the Company***
In 1999, in the midst of the dot-com boom in the United States, Rick Murphy, Thomas Murphy, and Schaum founded the Company. They anticipated that it would be able to capitalize on the growth of a nascent technology: broadband streaming.[22] Thomas Murphy was the first investor. Rick Murphy was the first CEO, and Schaum was the first CFO. Wren, Javva, and Catalyst would all come to be stockholders of the Company by October 2000, and debtholders the following year.

B. ***The Early Days of the Streaming Media Industry***
The increasing speed and growing availability of broadband Internet access in the early 2000s was expected to revolutionize how consumers would interact with online content. Streaming media was thought to be one of the primary means to that end. Catalyst expected it to become "a 'killer app' that helps drive growth in broadband penetration."[23] It also had the potential to be financially lucrative: at the time, Bear Sterns estimated that the market for broadband streaming media would grow from $300 million in revenue in 2000 to approximately $5.7 billion in 2005.[24]

The Company appeared to be well-positioned to take advantage of industry's anticipated growth through its

broadband-focused network architecture.[25] Catalyst thought the Company owned a "high-quality, low-cost network" that provided a "distinct cost advantage over its competitors."[26] However, despite the enthusiasm of many individuals initially involved with the technology, there was a not-sominor problem: the Company was suffering disruptive cash flow problems that threatened its continued existence.

C. ***The Capital Structure "Restart"***

In April 2001, Shipman sent a letter to Biderman at Lipper stating that Catalyst and the Company's other significant investors were contemplating a $4.6 million round of equity financing. In Shipman's words, this was "essentially a 'restart' of the Company's capital structure."[27] Javva's Katz testified that the repeated references to "we" in this letter referred to Shipman, Dort Cameron, and himself.[28] The letter noted that "we" did not believe that it was appropriate for Biderman to join the Board, despite his receiving a "firm commitment" to become a director only several months earlier.[29]

***6** The letter sought to have Biderman encourage various holders of the Company's bridge debt, who had invested by way of Lipper, to convert into equity. Shipman suggested that, absent conversion, "we" might pursue "pari passu or secured debt in front of or alongside the bridge debt."[30] However, Shipman also noted, "We would absolutely welcome new funds from Lipper and its affiliates on the same terms and conditions which we are buying in at."[31]

After some discussions, many of the Lipper-affiliated investors would convert their debt into common stock.

D. ***The Catalyst Memo***

Several days later, on April 27, 2001, Shipman, Newton, and Catalyst's controller authored a thirteen-page Investment Memorandum (the "Catalyst Memo") to Catalyst's Investment Committee outlining the prospects for the firm's continued investment in the Company.[32] The equity investment proposal shared with Biderman shifted to a possible debt investment. The authors sought approval to invest an additional $1 million during a three-to-four month "trial period" in which Wren, Javva, and Catalyst would implement an "austerity program ... to cut costs and monitor revenue traction."[33]

Part of the planned revamp of the Company was to replace management. Specifically, Catalyst intended to replace Murphy as CEO and Schaum as CFO. The Catalyst Memo further provided that:

> The Board of Directors (namely Catalyst) will control the purse strings of the Company, and will make bi-weekly funding decisions that minimize cash outflows. All money advanced will be in the form of senior secured debt with attached warrants (double dip) at a decreased valuation ($10 million), a 2x liquidation preference, and other terms that effectively give Catalyst (and to a lesser extent, [Wren] and Javva) control over the Company.[34]

In their description of the anticipated rights that Catalyst would receive for this additional investment, the authors again noted that "Catalyst will effectively control all major decisions made by the Company."[35]

Various persons at the Company—including Rick Murphy and Schaum—were not shown the Catalyst Memo.[36] Neither did Biderman see it.[37]

E. ***The Company's Business Plan in the Midst of Management Changes***

In late 2000, the Company engaged Daniels & Associates, L.P. ("Daniels"), a financial advisor, to raise additional capital.[38] Their business relationship appears to have had extended periods without much activity. Daniels eventually compiled an investment memorandum to solicit $5 to $8 million in senior secured debt. An early version of the memorandum was presented to the Board at a meeting in June 2001.[39] A December 2001 draft of the memorandum (the "Daniels Memo") included several years of revenue projections for the Company: $889,528 for 2001; $11,175, 725 for 2002; and $31,149, 000 for 2003.[40] These projections were based primarily on assumptions about expanding the Company's sales department.[41]

***7** Daniels was generally unsuccessful in raising additional capital for the Company.[42] Instead, the Company raised several million dollars from existing investors.[43]

As had been contemplated in the Catalyst Memo, top management at the Company was soon replaced. Rick Murphy was asked to resign, and Williams took over as CEO and as a director in mid-to-late 2001.[44] Also, around this time, Schaum left the Company, and Lorain Granberg ("Granberg") became the Company's CFO.[45]

On his way out of the Company, Rick Murphy sought to salvage his position (or at least good standing) by proposing that the Company look into minor acquisitions to increase its cash flows.[46] Potential targets included e-Media, which was one the Company's small competitors, and NaviSite SMG, which provided a streaming media software platform known as Stream OS. Rick Murphy continued to perform diligence on those acquisitions even after he left the Company.[47] He shared most of this information with Dwyer, Williams, and several others, but Biderman (who became a director in June 2001) was generally not informed.[48]

After he took over as CEO, Williams' business plan for the Company was, in part, to expand its customer base and revenues through small acquisitions.[49] He continued the process that Murphy had already begun with e-Media and NaviSite SMG.[50] Both potential acquisitions had stronger revenues and cash flows than the Company.

F. *The Major Events of December 2001*

1. *Stock Ownership of the Company*

By December 2001, as a result of their initial and subsequent investments, Wren, Javva, and Catalyst together owned 54% of the Company's stock.[51] Those three stockholders, which also held over 90% of the Company's senior debt,[52] each had a designee on the Board; Wren's Dort Cameron, Javva's Katz, and Catalyst's Shipman.[53] Wren's Dwyer, although not a director himself, often attended Board meetings and would regularly lead the Board's deliberations. For comparison, the Plaintiffs collectively held approximately 26%. Biderman was thought to be the Lipper-affiliated Plaintiffs' representative on the Board.

2. *The December 21, 2001 Board Meeting*

Near the end of 2001, the Company was facing what CFO Granberg described as "panic": it was quickly running out of money.[54] On several prior occasions, the Company had needed interim funding to meet payroll.[55] The situation came to a head this time in December.

On December 20, Williams scheduled a Board meeting for Friday, December 21 at 2:00 p.m. This meeting would be to discuss the possible acquisitions of e-Media and NaviSite SMG as a way to boost the Company's revenues to positive, or at least to breakeven. Although Williams would schedule Board meetings, the trial record supports the inference that several directors and Dwyer (but not Biderman[56]) would have been consulted about their availability on December 21. Part of the hurry in scheduling the meeting was a concern that any acquisition needed to close quickly; e-Media was thought to have been in poor financial condition, similar to the Company's own predicament.[57]

***8** However, December 21 also happened to be the winter solstice, the shortest day of sunlight of the year. Biderman, because of his religious obligations, was unable to attend a Board meeting at that time of day on a Friday in winter.[58] The Board was generally aware of these restrictions on his availability,[59] but they rejected his request to reschedule this meeting.[60]

3. *Dwyer Starts to Plan the Recapitalization*

Around Christmas, Williams contacted Dwyer and asked him to "figure out how [the Company] could raise money" in order to "stay alive."[61] Dwyer, generally working on his own, then began to sketch out what would become the Recapitalization. The Recapitalization would include two primary steps: (a) a conversion of certain secured debt to a

new class of preferred stock; and (b) a class of convertible preferred stock to be issued in exchange for new capital that would finance the proposed acquisitions.

4. ***Biderman's Objection to the Proposal***

Biderman only learned about what happened at the December 21 Board meeting through a phone call with Dwyer the following Monday.[62] There are no minutes for this meeting in the record.

From what he was told, the meeting was to discuss the terms of the Company's proposed acquisitions.[63] On December 28, Biderman submitted a harshly worded objection to the proposal through which he expressed his strong dissatisfaction with what he thought was the unfair dilution of the Company's existing stockholders by up to 70%. His letter stated, in part:

> I would expect that the Board, in the exercise of its fiduciary duty to *all* of the Company's shareholders, will give this extraordinary corporate event the proper attention, consideration and due diligence that it deserves. Such an acquisition should, at a minimum, be reviewed and considered by the Company's Board of Directors as a whole. Moreover, all directors should be kept well-informed on a timely basis of all relevant facts concerning the acquisition and the effect of the acquisition on the Company and all of its shareholders. As a result, I would expect that the Company and the directors who are involved in the due diligence of this acquisition will forward all relevant information to all directors on a timely basis.
>
> Moreover, as a director and shareholder of the Company, I find the possible dilution of existing shareholders' ownership interest in the Company as a result of the potential acquisition to be of great concern. In the event that the proposed acquisition were to proceed, the directors must carefully value the Company to ensure that the valuation is fair to *all* shareholders. This is especially important given that certain shareholders, who are represented on the Company's Board of Directors, may stand to benefit as a result of the transaction.
> I look forward to continue working together for the best interests of Streaming Media Corporation.[64]

This letter reflected the growing tension between Dort Cameron, Katz, Shipman, and Dwyer, on the one hand, and Biderman, on the other, over what would become the Recapitalization.

There was no response to Biderman's letter.[65]

G. ***The Recapitalization Becomes Concrete in January 2002***

1. ***January 7: Dwyer Proposes Initial Terms***

***9** The Board held its first meeting of 2002 on January 7 to discuss the latest developments in the Recapitalization. Biderman attended this meeting, along with Lipper's Grad and Koo. Wren's Dwyer and Catalyst's Newton also attended.[66]

At the meeting, Dwyer outlined the economic terms of his proposal. By this time, the general terms of the acquisitions had started to take shape, but the specifics were still being negotiated. The e-Media acquisition, which was primarily for customer contract assets, was expected to cost $1 million in cash and a convertible promissory note of up to $3.6 million. The NaviSite SMG acquisition, which was largely for its successful Stream OS business, was expected to cost $1.3 million in cash up front and another $1.3 million in twelve months.[67]

Dwyer presented to the Board his valuation of the Company: $4 million.[68] He had performed this calculation on his own, documented by "handwritten scribbles."[69] The Board did not review the calculations that supported this valuation because Dwyer did not share the methods he used to arrive at that figure with the directors.[70] Thus, no member of the Board was able to testify as to his understanding of how Dwyer came to value the Company at $4 million.[71]

Dwyer's plan provided that the new investors who facilitated the e-Media and NaviSite SMG acquisitions would own approximately 40% of the combined entity, with current stockholders owning 30% and other constituents

(including management and NaviSite SMG's parent) owning the remaining 30%.[72] The post-acquisitions enterprise value of the Company was thought to be its $4 million value plus the money used to fund the acquisitions.[73] No one at the January 7 Board meeting presented any alternative to Dwyer's proposal.

***10** Four of five directors—Dort Cameron, Katz, Shipman, and Williams—voted in favor of the Recapitalization. Consistent with his position in the December 2001 letter, Biderman abstained from this vote.[74] At trial, he explained his decision to abstain as twofold: first, he felt he did not have a chance to review the terms of the Recapitalization; and, second, he felt it was unfairly dilutive to current stockholders.

Despite their contrary trial testimony,[75] various Defendants likely held two informal meetings within days of the January 7 Board meeting.[76] Biderman was not invited to participate.[77] During these conversations, the Defendants discussed the terms of the e-Media and NaviSite SMG acquisitions in advance of a Board meeting to be held on January 10.

2. *January 10: Wren and Javva Agree to Invest*

The full Board, Dwyer, Newton, Grad, and Koo attended this second January Board meeting. According to the subsequently revised minutes,[78] Williams made clear that the Company "was no longer a viable stand-alone entity."[79] There was a choice for the Board to make, as "the alternative to securing funding and proceeding with the transactions was a complete liquidation of the business."[80] The Company did not have sufficient capital on hand to pay for either acquisition. The immediate funding necessary was $2.5 million: $1 million for the cash component of the e-Media acquisition; $1.3 million for the NaviSite SMG acquisition; and $200,000 for "integration and transaction costs."[81] Several Defendants believed that the Company would fail without these acquisitions.[82]

The required majority of the Company's senior debt holders—that is, Wren, Javva, and Catalyst, who together held over 90%—gave their consents to the acquisitions, which would be funded by this new capital raise. The new investors were to receive a series of convertible preferred stock that would represent 38% of the Company's fully diluted equity.[83]

***11** According to Granberg's contemporaneous minutes, Williams initiated a discussion among the Board and the other individuals present about how to fund the $2.5 million needed for the acquisitions. Responses were mixed:

> Javva agreed to fund $0.5 mm immediately and [Wren] committed to $2.0 mm. CEO Art Williams agreed to consider some contribution TBD. Catalyst deferred, saying the deal makes sense, but the timing is a problem and they had not done due diligence. Lipper also deferred, for reasons similar to those of Catalyst.[84]

Williams believed that Wren, Javva, and Catalyst each "made independent decisions for themselves."[85]

Based on the trial evidence, it is apparent that Dwyer and Wren suffered from the sunk cost fallacy: Wren was willing to participate in the financing, even if it "never intended to get as deep as [it] did," because it had the "most to lose" if the Company failed.[86] So too did Katz and Javva think the Recapitalization was an "all-in risk" without which the Company—and Javva's past investments—would be "gone."[87] Shipman and Catalyst, on the other hand, were aware of what it meant to throw "good money after bad."[88] That is not to say, however, that Catalyst would not receive any material benefit in the Recapitalization.

The revised meeting minutes also reflect that management's "pro forma valuation of SMC post closing of the proposed acquisitions [was] $23.0 million (assumed free-cash of $2.3 million; multiple of 10x)."[89] The record does not reflect any objection by the Board to this rough estimation of the Company's value after the acquisitions.

The Board, with Biderman now dissenting for the same reasons he had abstained three days earlier,[90] approved the borrowing of $2.5 million from Wren and Javva to fund the e-Media and NaviSite SMG acquisitions.[91]

Once more, outside of a formal Board meeting, some combination of Dort Cameron, Katz, Shipman, and Dwyer (and probably Williams) continued to hammer out the details of the preferred stock issue and acquisitions.[92] Any meetings or phone calls they held were without Biderman.[93]

3. ***Catalyst Receives a "Right to Invest"***
It is undisputed that while Wren and Javva participated in the Recapitalization, the Plaintiffs did not. What remained in dispute, until the Court could weigh the evidence presented at trial, was whether Catalyst received anything from the Recapitalization.

Internal Catalyst documents provide the most credible evidence revealing how Shipman and Newton viewed the Recapitalization. In a January 18, 2002, memorandum to Catalyst's Investment Committee, Newton and Shipman noted that they did "not feel that sufficient due diligence has been performed on the acquisitions ... to make [them] comfortable with investing in this round."[94] But, as Shipman and Newton wrote, Catalyst had "the right to invest in this round (at this valuation) for the next 90 days."[95] In a separate document, Catalyst again noted that, although it had not invested, it still had "the right to invest in the current financing round on identical terms for 90 days from closing."[96]

***12** Shipman acknowledged that, as a general matter, he would not have written something in a memorandum to Catalyst's Investment Committee if it were not true.[97] He testified at trial that there was no legal option, but he seemed to recognize that the right to invest may have been a shared understanding about Catalyst's opportunity to invest later:

> We had good relations with Javva and Wren and the Company, right, and so ... it was probably our belief that ... if we want to put more money in, we can put more money in. Let's take ninety days to figure this out....
>
> I think it [*i.e.,* the "right to invest"] was a shorthanded way of saying that if we want to put more money in, we can. Let's take a little time to look at the industry, look at these two new deals. But it wasn't ... a legal right to do it because we didn't have that.
> They needed our approval, and based on the relationships that we had, and based on repeated meetings where the company is saying 'we need more money, we need more money,' we just believed that if we wanted to put more money in, we could.[98]

Separately, Dwyer also recognized that it was "possible" that Catalyst had a ninety-day option to invest.[99] Other than the two internal Catalyst documents, there is no evidence in the record of an option agreement. The Court concludes that it is more likely than not that Wren and Javva (acting through Dort Cameron or Dwyer and Katz, respectively) informally extended to Catalyst (by way of Shipman), before the Board approved the Recapitalization, an invitation to participate in this $2.5 million financing on the same terms for ninety days after the closing of the e-Media and NaviSite SMG acquisitions.[100]

4. ***January 17: Biderman Acquiesces to Dwyer's Revised Terms***
During the next Board meeting on January 17, Dwyer described the current iteration of the Recapitalization. The NaviSite SMG price changed from $1.3 million at closing and $1.3 million in twelve months to $2.1 million at closing. Based on the $2.5 million in financing approved at the January 10 meeting, there was an $800,000 shortfall for the NaviSite SMG acquisition. The Board proposed to fund this gap with a senior note.[101] This particular shortfall would later disappear when the terms of the NaviSite SMG acquisition changed.[102]

The Board also discussed a slightly revised capitalization table for the Company after the acquisitions. Due in part to Biderman's criticism at the last meeting, Dwyer proposed to fund the acquisitions by creating two new series of preferred stock—Preferred A and Preferred B—on slightly less dilutive terms.[103] Under this modified proposal, current stockholders would be "reduced to a final stakeholding in the Corporation after the proposed recapitalization of approximately 7% (versus 3% in [the January 10] proposal)"; the Company's senior debt would be exchanged for Preferred A stock that would own approximately 20% of the Company; and the "new money" would receive Preferred B that would represent the rest of the Company's equity.[104]

***13** In the midst of this discussion, Williams and the Company's management presented their pro forma revenue projections for 2002. The total pro forma projections for 2002 revenue for all three units (the Company, e-Media,

and NaviSite SMG) was $15,935,074. Broken down by unit, management projected: (i) Company revenue of $7,025,560; (ii) e-Media revenue of $4,165,076; and (iii) NaviSite SMG revenue of $4,744,438.[105] The record does not contain any document in which the Board expressed its disagreement with these projections,[106] but the Board did not expressly adopt those projections at the meeting.[107]

It is likely that Catalyst's Newton was involved in creating the spreadsheets in which the Company's prior projections were presented—but not, as the Plaintiffs, contend, the underlying pro forma revenue projections for 2002. The sole evidence offered by the Plaintiffs on this point was a May 2001 email in which Newton outlined to Granberg how to manipulate the data and formulas in the spreadsheets.[108] This evidence does not establish that Catalyst (or any of the other Defendants) was involved in projecting the Company's 2002 revenue for the January 17 Board meeting.

During the Board's deliberation of this proposed capital structure, Biderman again objected to the dilution. He did not explicitly object to the $4 million valuation. Having been overruled on his objections earlier in January, Biderman now seemed to accept that the other members of the Board, because they represented a majority, would ultimately approve the Recapitalization regardless of his objections.[109] Hence, Biderman tried to make the best out of the situation. He agreed to vote in favor of the Recapitalization on two conditions: first, that he remained a director through 2004 unless there was a change in control; and second, that in the event a subsequent capital raise (other than an initial public offering) did not receive unanimous board approval, "then the shareholder[s] whose Board designee dissented to the issuance would be able to redeem [their] Preferred A in cash at 1.5 times its face amount."[110] The other directors acquiesced in Biderman's conditions, and the Board unanimously voted in favor of the Recapitalization at the January 17 meeting.

The e-Media acquisition closed later on January 17.[111] The Company paid $1 million in cash plus a $3.6 million note convertible into approximately 15.8% of the Company, which percentage could be adjusted were the acquisition not to meet certain revenue targets.[112]

H. *The Company Continues to Need Money During the Recapitalization*

1. *The NaviSite SMG Acquisition*

The NaviSite SMG closing was delayed multiple times from January to March, partially due to changes in the amount of money that the Company needed for the acquisition. In late February, the Company needed $2.6 million to complete the acquisition as it was then proposed. The Company already had commitments for $1.3 million, but the rest was still unfunded.

***14** On February 25, 2002, two directors (Shipman and Williams), and representatives of Wren (Dwyer), Javva, and Lipper (Grad and Koo, at Biderman's request[113]) met to discuss how to fund the additional $1.3 million that was needed due to weaker-than-expected revenues from the e-Media acquisition. This was not a Board meeting because there was no quorum. Based on some rough numbers that Dwyer had drawn up, the participants at the meeting expected that the new $1.3 million would equate to approximately 15% of the Company after the NaviSite SMG acquisition closed.[114] These new terms were not discussed with Biderman prior to this meeting.[115] Wren committed to fund $800,000 if the remaining $500,000 could be raised, and Javva committed to fund an incremental $100,000.[116] Wren and Javva would later invest approximately $700,000 and $100,000, respectively, as equity.[117] Thus, overall, Wren and Javva together invested approximately $3.3 million in the Company, for which they were to receive convertible preferred stock.

2. *A Warning from Lipper's Grad about Communications with Stockholders*

The next Board meeting was on March 6, during which the directors continued to discuss the terms of the NaviSite SMG acquisition. All directors except Biderman attended; Grad and Koo were there in his stead.[118]

At this meeting, Grad warned the Board that it needed to update the Company's other stockholders about the Recapitalization and the accompanying changes to the capital structure. Based on Grad's contemporaneous notes,

the directors in attendance agreed, and management discussed whether to hold a stockholder meeting to approve the new stock issuances.[119] This issue was generally not discussed again, and no annual meeting was ever held.

It is difficult to discern whether Biderman's absence from Board meetings around this time was due to his lingering dissatisfaction with the Recapitalization, to serious financial and regulatory problems at Lipper, or to some combination of these and other explanations. The Court concludes it is more likely than not that Biderman's absence was chiefly because of the problems at Lipper.[120] Several Defendants, including Snyder and Dwyer, were aware of the limitations on Biderman's time due to this stressful situation.[121]

The NaviSite SMG acquisition finally closed around March 25, 2002.[122] There did not seem to be much time pressure to close the acquisition, at least not that Snyder, who was a part of the NaviSite SMG team at the time, could recall.[123] After the acquisition, Snyder joined the Company.

3. ***Wren and Javva Loan Money to the Company as Williams is Forced Out***

***15** Biderman testified that when he contacted Dwyer in March 2002 to find out what was happening at the Company, he learned that a Board meeting was scheduled for around April 3. That date fell during Passover, which meant that Biderman would have been unable to attend. Biderman claims that his attempts to reschedule the meeting were rejected by Dwyer.[124] The record, however, does not include any minutes (formal or otherwise) reflecting an April 3 meeting. Separately, during the Passover holiday, the Company's counsel sent a draft term sheet for a potential series of Preferred B–3 stock and a 1:10 reverse stock split to both Dwyer at Wren and a representative of Javva. Dwyer shared the information with Catalyst, but no one shared it with Biderman.[125]

The Board held its next meeting on April 11. During a call among several directors and their associates in advance of the meeting, Dwyer proposed that Williams be replaced as the Company's CEO.[126] Those on the phone call agreed.[127]

Biderman did not attend this April 11 Board meeting; instead, Grad again attended. The minutes reflect that Williams resigned as a director and as CEO, most likely at Wren's request.[128] Due to persistent revenue problems—now in part because the e-Media acquisition was not performing as projected—the Company faced a $1 million cash shortfall. No one on the Board was willing to invest in additional equity, but Wren and Javva each agreed to loan $400,000 to the Company. The remaining $200,000 shortfall went unfunded.[129]

I. ***Other Significant Events from April through July 2002***

1. ***SMIG Dissolves***

SMIG, the Lipper-formed investment vehicle by which the SMIG Plaintiffs invested in the Company, dissolved on April 22, 2002.[130] Biderman sent letters to the former members of SMIG informing them that they would now be direct stockholders of the Company.[131] The Company issued certificates to the SMIG Plaintiffs on May 30, 2002.[132]

2. ***Snyder is Elected CEO and Appointed to the Board***

After Snyder joined the Company as part of the NaviSite SMG acquisition, he quickly proved to be a "very capable" manager. In particular, the Board thought he would be able to lead the Company's next stage of growth, primarily through the new Stream OS product it acquired with NaviSite SMG.[133] Around the time that SMIG dissolved, the Board unanimously elected Snyder to be the Company's CEO; it also appointed him to the Board.[134] When Snyder joined the Board, the terms of the Recapitalization were not yet final.[135] Specifically, the percentages of the Company's equity to be allocated to the two new classes of preferred stock were still undefined.

3. ***Wren and Javva Receive Convertible Promissory Notes***

One of Snyder's first significant acts as CEO was, in May 2002, to execute convertible promissory notes to Wren

and Javva for the $3.3 million they provided to the Company to fund the e-Media and NaviSite SMG acquisitions. Interest on the notes would accrue at 10% and any accrued interest would also be convertible.[136] It does not appear that the Board expressly approved the latter term. Sometime later, and apparently also without Board authorization, the interest rates were retroactively increased to 12%.[137]

***16** Wren's promissory note specified that it could receive no more than 34.65% of the Company's total outstanding equity, but it would end up receiving 39.9%. Javva's note specified no more than 9.10%, but it received 11.2%.[138] Javva also received (and later converted) an additional $50,000 convertible note that the Board does not appear to have ratified.[139]

4. ***The Holders of Secured Debt Consent to Convert to Preferred A Stock***

As an initial condition to the financing by Wren and Javva, the Company needed to persuade 100% of the holders of its senior debt to exchange their notes into equity.[140] But, the promissory notes that Wren and Javva received required only 85% of the senior debt to convert for the promissory notes to become convertible.[141] Because Wren, Javva, and Catalyst together held over that percentage, the consents of the holders of the remaining senior debt were not contractually required for Wren and Javva to convert their notes into common stock. Thus, the holders of the senior debt appear to have had veto power over the debt-to-Preferred-A-stock exchange, but not necessarily for the convertible-note-to-stock conversion.

Although he was otherwise burdened with the financial and regulatory problems at Lipper, Biderman took charge of obtaining the consent of various individuals that, through Lipper, invested in the Company's debt.[142] To that effect, he sent a letter to at least one debtholder soliciting his consent to convert to Preferred A stock.[143] Accompanying this letter were various informational documents about the Company, but Biderman did not draft them.[144] The Company obtained all the consents it needed to exchange the senior notes for Preferred A stock.[145] The converting senior note holders were to receive Preferred A stock that reflected a pro rata allocation of the debt and warrants they held.

5. ***Catalyst's Right to Invest***

It is unclear precisely when Catalyst's 90–day option to invest in the $3.3 million round of financing was to expire. Catalyst never took advantage of the opportunity. That is not evidence, however, that the right to invest did not exist.

J. ***Final Approval and Implementation of the Recapitalization***

The Company implemented the final steps of the Recapitalization during August 2002. The Company's charter needed to be amended to adjust the number of authorized shares and to effect a 1:20 reverse stock split.[146] On August 1, pursuant to 8 *Del. C.* § 141(f), the Board executed a unanimous written consent authorizing the necessary amendments to the Company's charter. That same day, pursuant to 8 *Del. C.* § 228(a), a majority of the Company's stockholders—Wren, Javva, and Catalyst, which collectively held 54%—executed written consents approving the charter amendments.[147] Only the Defendants were solicited for their consent.[148]

***17** Next, on August 9, 2002, the Board acted by unanimous written consent to issue Preferred A stock, representing 23% of the Company's total equity, to the holders of the Company's senior secured debt in exchange for their notes.[149] The Defendants received approximately 92% of the Preferred A stock.[150] The Preferred A stock did not include the 1.5x liquidation preference that the Board had agreed to on January 17 as a condition for Biderman to approve the Recapitalization.[151]

Then, on August 12, the Board once more acted by unanimous written consent to issue Preferred B–1 stock, which represented approximately 51% of the Company's total equity, to Wren and Javva in proportion to the $3.3 million that they invested in the Company to acquire e-Media and NaviSite SMG.[152] The previously undefined conversion ratio was set at 172.41 shares of common stock per share of Preferred B–1 stock.[153]

The percentage of the Company's post-acquisitions equity represented by the Preferred B–1 stock included most of

the roughly 15% of the equity that had been reserved as consideration in the e-Media acquisition.[154] Instead of receiving 15% of the Company, e-Media's parent received Preferred B–2 stock representing 2.6% of the Company.[155] This adjustment was due to lower-than-expected 2002 revenue for e-Media.[156] Neither Biderman nor any of the Plaintiffs had been notified of the transfer of the equity reserved for the e-Media acquisition to Wren and Javva.[157]

All told, after the final adjustments to the Recapitalization during 2002, Wren, Javva, and Catalyst's fully diluted stock ownership of the Company increased from approximately 54% in January to approximately 80% by September: Wren held 54%, Javva held 17%, and Catalyst held 9%.[158] In contrast, the Plaintiffs' fully diluted ownership decreased from approximately 26% to approximately 2%. Many of the Plaintiffs testified that, had they been contacted by the Defendants, they were ready, willing, and able to provide additional capital to the Company by participating in the Recapitalization.[159] Dwyer testified that they did not contact the Company's other stockholders because they were not "accredited investors," but he later recognized that many of the Plaintiffs had previously signed stock purchase agreements in which they represented that they were accredited investors.[160]

K. ***Snyder Receives Options in the Company***

Soon after the Recapitalization, the Board awarded to Snyder 530,000 stock options at a post-reverse stock split strike price of $0.50.[161] The Board unanimously approved the option grant to Snyder and the underlying employee stock option plan for the Company, and Wren, Javva, and Catalyst approved the latter by written consent.[162] Dwyer claimed that the $0.50 strike price for the options granted to Snyder and other employees[163] was intended to create the right incentives for the Company to grow and thereby make a return on investment for the holders of Preferred B–1 stock—Wren and Javva.[164]

***18** Snyder's award represented slightly more than 4.5% of the Company's equity. He would sign his options agreement on his own behalf and for the Company.[165]

L. ***The Company Notifies Stockholders about Some Terms of the Recapitalization***

The Company sent a document entitled SMC Update (the "Fall 2002 Update") to its stockholders at some point in the fall of 2002.[166] Snyder and Dwyer were primarily responsible for drafting the document, but they likely would have also relied on the advice of counsel.[167] In the Fall 2002 Update, the Company announced that it intended, at some indeterminate time in the future, to "re-launch with a change of corporate name to Nine Systems Corporation." The Fall 2002 Update also described the Recapitalization in general terms—the conversion of subordinated debt into "several new series of convertible preferred stock" collectively representing 8,989,786 shares of common stock; the acquisitions of e-Media and NaviSite SMG; and the 1:20 reverse stock split—but it failed to disclose who participated in the Recapitalization or on what terms.[168]

M. ***The Company's Dormant Years of 2003–2005***

1. ***Communications with Stockholders***

The Board did not volunteer much information about the Company to its stockholders from the Fall 2002 Update until the beginning of 2006. That is not to say, however, that there were no material changes at the Company. The Company moved its headquarters from New Jersey to California and changed its name from SMC to Nine Systems, but no notice was sent to stockholders on either occasion. There were also no annual stockholder meetings in 2003, 2004, or 2005.[169]

The record does contain one letter on Nine Systems letterhead apparently sent by Snyder to certain stockholders of the Company.[170] But, that letter does not discuss the terms of the Recapitalization in any meaningful way, and Snyder could not recall preparing or authoring it.[171] Neither did many of the Plaintiffs recall receiving it.[172]

One particular scene epitomized the Defendants' conduct during this period. In January 2005, an employee and

option holder (whose options had, unbeknownst to him, allegedly been cancelled) requested to see the Company's current capitalization table. Snyder flatly denied that request. As he sought Dwyer's input on how to handle the situation, Snyder explained, "[The employee] was very interested in seeing the cap table which I have denied him as I am sure he would not be happy."[173] Based on the weight of the trial evidence and testimony, the Defendants on the Board sought to avoid full and fair communications with the Company's stockholders.

This overall failure to communicate was, in part, due to the Board's mistaken belief that each director representative was responsible for his affiliated investors. In other words, they thought that the responsibility to inform the Lipper-affiliated stockholders (*i.e.,* most of the Plaintiffs) fell exclusively to the Lipper designee on the Board: Biderman.[174] This mistaken understanding of a director's fiduciary duties did not change even in 2002 when the Board knew that Biderman was generally prohibited from communicating with any investors associated with Lipper.[175] Moreover, any communications that Biderman could have had would have been compromised by the Board's failing to share information with him.

2. ***Financial Performance***

***19** The financial problems that the Board thought it had solved with the Recapitalization still plagued the Company's growth. For example, in 2004, Snyder asked senior management to defer their paychecks for the Company to make payroll.[176] Each of Wren, Javva, and Dwyer (in his individual capacity) would make loans to the Company during this period.[177] Given time, however, Snyder was implementing the turnaround that the Board hoped he would. By reducing costs and expenses, including through staff reductions, the Company was operating at a break-even level in late 2004 or 2005.[178] The Company would post its first annual profit for the fiscal year ended June 30, 2006.[179]

N. ***The February 2006 Letter to Stockholders***

Unexpectedly, the Company sent a letter to its stockholders in February 2006 (the "2006 Letter"). The 2006 Letter, which acknowledged "sporadic shareholder confusion related to their shareholdings after the reverse stock split three years ago," enclosed audited financials for 2004 and 2005 and invited stockholders to an "informational shareholders meeting" in New York on February 28.[180] Snyder recalled that "[l]ess than a handful" of stockholders would attend.[181] The 2006 Letter also noted that the Company planned "to send each shareholder a letter with their shareholdings shortly after the information meeting."[182] Consistent with its pattern of conduct, the Company never sent any follow-up letters to stockholders.[183]

O. ***The Company Repurchases Stock from Thomas Murphy***

Thomas Murphy contacted the Company around May 2006, seeking to sell back some of his stock. He had conversations with several of the Defendants, including Snyder and Dwyer. The Court discusses these conversations and the surrounding circumstances when analyzing the merits of Thomas Murphy's fraud claim. For now, it suffices to note that, on June 2, 2006, Thomas Murphy executed a Stock Repurchase Agreement by which the Company repurchased 44,000 of his shares for $1.00 per share.[184]

P. ***The Akamai Merger***

The 2006 Letter was part of a process undertaken by the Defendants to prepare for a possible investment or sale.[185] Dwyer and Newton (who had assumed Shipman's role as Catalyst's representative on the Board in 2006) thought the Company might be worth at least $60 million.[186] Others in the industry also thought the Company had value. Akamai, for one, approached Snyder to express an interest in a strategic investment, which Dwyer interpreted to mean that Akamai was interested in buying the Company.[187] Snyder and Dwyer were the two principal negotiators as the Board evaluated the Company' options.[188] An example of their communications is Snyder's "M & A FYI" email of May 2006 in which he informed Dwyer of his preliminary dialogues with Akamai, VitalStream, and Limelight.[189] The Court discusses this email when evaluating Thomas Murphy's claim for fraud.

In August 2006, the Company engaged a financial advisor, Merriman Curham Ford & Co. (“Merriman”), primarily to help raise $25 million in new equity.[190] Merriman’s secondary responsibility was to identify potential acquirers for all or part of the Company.[191] Alongside Merriman, Snyder went on a road show and received very favorable responses.[192] Based on this feedback, a decision was made to abandon the equity raise in favor of selling the Company.[193] Merriman’s first meeting with Akamai about a potential acquisition of the Company was held on August 30; meetings with two other possible acquirers took place the following week.[194] After negotiations between the Company and its suitors, Akamai emerged as the highest bidder.

***20** The Board—excluding Biderman, who had not been invited to the meeting—authorized the Company to enter into a letter of intent with Akamai on September 29, 2006.[195] The letter of intent contemplated a stock merger for approximately $13.00 per share, which valued the Company at approximately $175 million.[196]

The Board met on November 15, 2006, to discuss the specific terms of the Akamai Merger. Biderman was invited and attended, but he refused to approve the Akamai Merger on the grounds that the early investors in the Company “would not be receiving a comparable return on their investment as stockholders who had invested later”[197]—namely, Wren and Javva, by virtue of the Preferred B–1 stock they received in the Recapitalization. The Board, with Biderman dissenting, approved the Akamai Merger at this meeting.[198]

Two days later, on Friday, November 17, the Board held a 5:00 p.m. meeting to discuss and approve minor changes to the Akamai Merger.[199] Biderman was not aware of this meeting,[200] and Snyder did not know whether Biderman had been invited.[201] The Court concludes that, more than knowingly excluding Biderman as it had done in December 2001, the Board now intentionally scheduled this meeting late on a Friday in the fall so that Biderman could not attend. Dywer thought that the Biderman “had already made his dissent,” and the Board “just wanted to get the deal done.”[202] With Biderman absent, the other members of the Board unanimously approved the minor revisions to the Akamai Merger.[203]

The Company delivered proxy materials to its stockholders near the end of November 2006. Those materials informed stockholders—for the first time—that the only investors who had received Preferred B–1 stock in the Recapitalization were Wren and Javva.[204] After receiving this information, a number of stockholders complained that the Recapitalization had unfairly diluted their equity.[205] One Plaintiff testified that he “felt that [he] was had.”[206]

More than 94% of the Company’s stockholders voted in favor of the Akamai Merger. This percentage, however, is unsurprising given the Defendants’ collective, fully diluted ownership of approximately 90% of the Company. Wren alone held approximately 52%, Javva held approximately 16%, and Catalyst approximately 9%.[207]

The Akamai Merger closed on December 13, 2006. The Defendants received approximately $150 million of the $175 million in consideration.[208] Those who had invested in the Preferred B–1 stock received almost a 2,000% return.[209] Altogether, the Plaintiffs received approximately $3 million in the Akamai Merger. Although many Plaintiffs profited from their initial investments in the Company, some did not: one lost nearly 43% of his investment.[210]

IV. CONTENTIONS

The Plaintiffs assert purportedly direct breach of fiduciary duty, aiding and abetting, and unjust enrichment claims against the Defendants. Their claims are for expropriation—namely that, through the Recapitalization, the Defendants unfairly expropriated the economic and voting rights of the Company’s stockholders who did not participate in it. The Plaintiffs articulate two different theories of liability: (i) that Wren, Javva, and Catalyst constituted a control group, and (ii) that Dort Cameron, Katz, Shipman, and Snyder were conflicted when they approved and implemented the Recapitalization because of the unique benefits they (or the entities they represented) received. In each case, the Plaintiffs contend that the Defendants failed to demonstrate the entire fairness of the Recapitalization, especially because they submit that the Company was worth $30.89 million at the time—which is considerably higher than the $4 million valuation that Dwyer attributed to the Company. The Plaintiffs also assert

that Dwyer, Wren, Javva, and Catalyst aided and abetted the breaches of fiduciary duty by Dort Cameron, Katz, Shipman, and Snyder. Finally, their claim for unjust enrichment against Wren, Javva, and Catalyst is under a similar theory as their claim for breach of fiduciary duty.

***21** The Defendants assert various defenses to the Plaintiffs' challenge to the Recapitalization. Foremost among these is that the Plaintiffs lack standing after the Akamai Merger because they have not demonstrated that Wren, Javva, and Catalyst constituted a control group. They do not accept that, under Delaware law, the Plaintiffs would have standing to bring their claim if a majority of the Board was conflicted when it approved the Recapitalization. But, assuming standing is theoretically available to bring a direct expropriation claim against Dort Cameron, Katz, Shipman, and Snyder, they contend that the Plaintiffs failed to carry their burden to establish that a majority of the Board was conflicted. Even were the Plaintiffs to establish standing, the Defendants insist that the Recapitalization was entirely fair, if for no other reason than because the Company's equity had no value when the Board approved the transaction. The Defendants also assert other standing and laches defenses to claims of certain Plaintiffs. As to the aiding and abetting and unjust enrichment claims, the Defendants primarily contend that they are entitled to judgment in their favor because the Plaintiffs failed to establish an underlying breach of fiduciary duty.

Separate from the Recapitalization, Thomas Murphy alleges that several of the Defendants defrauded him when the Company repurchased 44,000 of his shares in June 2006 without disclosing its merger negotiations with Akamai and other potential acquirers. The Defendants contend that Thomas Murphy failed to carry his burden of proof because they were under no duty to disclose those preliminary discussions. They also assert other defenses to this fraud claim.

V. THE CLAIMS RELATED TO THE RECAPITALIZATION

A. *Standing to Challenge the Recapitalization Directly*

1. *The Standing of the Plaintiffs*

Before turning to the merits of the Plaintiffs' challenge to the Recapitalization, the Court addresses a potentially dispositive issue: standing. The parties recognize that, due to the non-fraudulent Akamai Merger, the only claims that the Plaintiffs may still have standing to assert are direct claims. The Defendants contend that the Plaintiffs lack standing because Wren, Javva, and Catalyst did not constitute a control group that expropriated the minority stockholders' economic and voting rights in the Recapitalization.[211] According to the Plaintiffs, they have standing to assert their expropriation claim directly not only because there was a control group, but also because a majority of the Board was inherently conflicted in approving the Recapitalization.[212] The Defendants reject the Plaintiffs' interpretation of Delaware law and argue that standing may exist only if there is a controlling stockholder (or a control group). But, even if Delaware law permits stockholders to assert an expropriation claim directly against a majority-conflicted board, the Defendants contend that a majority of the Board here was not conflicted.[213]

"The party invoking the jurisdiction of [this Court] bears the burden of establishing the elements of standing."[214] In stockholder litigation, the issue of standing most often arises in the context of the continuous ownership rule. Rooted in statute[215] and reflected in Court of Chancery Rule 23.1, the continuous ownership rule provides that "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit."[216] This Court has "closely" adhered to this "bedrock tenet of Delaware law" for decades.[217]

***22** When the Company completed the Akamai Merger in 2006, the continuous ownership rule foreclosed continued pursuit of any derivative claims against the Defendants. Thus, if the claims asserted by the Plaintiffs here are exclusively derivative in nature, then the Plaintiffs would lack standing to assert them, and the Defendants would be entitled to judgment in their favor. The burden is on the Plaintiffs to establish that they have standing by demonstrating that the Defendants' allegedly improper conduct may be challenged directly.

The Delaware Supreme Court defined how to distinguish between direct and derivative claims in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[218] Under *Tooley,* the Court's inquiry involves answering two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the

benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[219] Harm to the corporation or to the stockholders pro rata with their stock ownership would typically give rise to a derivative claim.[220] In contrast, harm unique to the stockholders—the classic example of which is the board's failing to disclose all material information when seeking stockholder action—would give rise to a direct claim.[221] At times, divining a direct claim from a derivative claim is not a straightforward exercise, as certain wrongful conduct appears to harm stockholders derivatively and directly.[222] "Courts have long recognized that the same set of facts can give rise both to a direct claim and a derivative claim."[223] Most relevant here, in *Gentile v. Rossette (Gentile 11),*[224] the Delaware Supreme Court again acknowledged that the *Tooley* test is not necessarily a binary choice: "[t]here is ... at least one transactional paradigm—a species of corporate overpayment claim—that Delaware case law recognizes as being both derivative and direct in character."[225]

The *Gentile* case featured allegations that a controlling stockholder who owned convertible promissory notes caused the corporation to permit him to convert the notes at a conversion rate lower than that specified in the relevant contracts. Through the debt conversion, the controlling stockholder increased his equity ownership from approximately to 61% to 93.5%. The corporation then merged with a third party, and only after the merger did the plaintiffs (who were stockholders before the merger) learn the terms of the debt conversion.

***23** Because the plaintiffs were minority stockholders before and after the debt conversion, the trial court concluded that their breach of fiduciary duty claim was solely derivative in nature under *Tooley* such that they lost standing to pursue the claim under the continuous ownership rule.[226] The Supreme Court, however, reversed and concluded that the plaintiffs' claim for "expropriation" against the corporation's controlling stockholder could be asserted derivatively *and* directly:

> A breach of fiduciary duty claim having this dual character arises where: (1) a stockholder having majority or effective control causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders. Because the means used to achieve that result is an overpayment (or "over-issuance") of shares to the controlling stockholder, the corporation is harmed and has a claim to compel the restoration of the value of the overpayment. That claim, by definition, is derivative.
>
> But, the public (or minority) stockholders also have a separate, and direct, claim arising out of that same transaction. Because the shares representing the "overpayment" embody both economic value and voting power, the end result of this type of transaction is an improper transfer—or expropriation—of economic value and voting power from the public shareholders to the majority or controlling stockholder. For that reason, the harm resulting from the overpayment is not confined to an equal dilution of the economic value and voting power of each of the corporation's outstanding shares. A separate harm also results: an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest. As a consequence, the public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited.[227]

The Recapitalization here was a stock issuance that, primarily through the Preferred B–1 stock that Wren and Javva received, proportionately diluted the Plaintiffs' stock holdings in the Company.[228] That the Recapitalization did not increase Wren and Javva's ownership of the Company "to the same extent" that it diluted Plaintiffs' equity (since investors other than the Defendants would receive Preferred A stock) does not change the Court's conclusion that the Recapitalization may have given rise to direct and derivative harm. Whether the Plaintiffs have standing to challenge this expropriation directly is a separate question.

(a) *Whether Wren, Javva, and Catalyst Constituted a Control Group*

Under *Gentile II,* the Plaintiffs may establish direct standing by proving that Wren, Javva, and Catalyst constituted a control group—the functional equivalent of a controlling stockholder—during the Recapitalization.[229]

***24** A controlling stockholder under Delaware law is one that "owns a majority interest in or exercises control over the business affairs of the corporation."[230] Because a controlling stockholder has the power, by definition, to act

selfishly to the detriment of the corporation's minority stockholders, it is said to owe fiduciary duties to those stockholders in certain situations,[231] including when it "stands on both sides of [a] transaction" with the corporation.[232]

"A group of stockholders, none of whom individually qualifies as a controlling stockholder, may collectively be considered a control group that is analogous, for standard of review purposes, to a controlling stockholder."[233] "[A] control group is accorded controlling shareholder status, and, therefore, its members owe fiduciary duties to their fellow shareholders."[234] Proving a control group is not impossible, but it is rarely a successful endeavor[235] because it is a fact-intensive inquiry that requires evidence of more than mere "parallel interests."[236] A plaintiff must prove that the group of stockholders was "connected in some legally significant way—e.g., by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal."[237] The standard does not necessarily require control "over the day-to-day operations" of a corporation; "actual control with regard to the particular transaction that is being challenged" may suffice.[238]

The Plaintiffs assert that Wren, Javva, and Catalyst constituted a control group that used their collective ownership of a majority of the Company's stock to cause the Board to implement the Recapitalization by which they received additional equity at an unfair price. They draw on circumstantial evidence of a plan to take control of the Company and to exclude Biderman from the process, all of which, in their estimation, supports the conclusion that Wren, Javva, and Catalyst were bound in a legally significant way to effect the Recapitalization.[239] In particular, the Plaintiffs emphasize Shipman's use of the word "control" in the Catalyst Memo, and they submit that Catalyst's 90–day option to invest is compelling evidence of a control group because that option, granted by Wren and Javva, was not shared with other stockholders or disclosed to Biderman.[240] The Defendants deny that any 90–day option was granted to Catalyst. They argue that, absent the option, the proffered evidence fails to demonstrate anything more than parallel interests among Wren, Javva, and Catalyst, let alone a legally significant relationship to control the Company.[241]

***25** Aside from a college friendship between Wren's Seth Cameron and Catalyst's Newton, there is no evidence of a historical relationship among Wren, Javva, and Catalyst. The weight of the evidence demonstrates that they each independently came to invest in the Company. Once they became investors, these three stockholders had parallel interests in maximizing the value of the Company.

These interests shifted to become more than parallel, however, by mid–2001. The Catalyst Memo is persuasive evidence that Wren, Javva, and Catalyst sought to "implement an austerity program at the Company to cut costs and monitor revenue traction."[242] In the words of the Catalyst Memo, "control [ling] the purse strings of the Company" and investing in senior secured debt on favorable terms would "effectively give Catalyst (and to a lesser extent, [Wren] and Javva) control over the Company."[243] At this time, these three stockholders held over 50% of the Company's stock. They executed that general plan and thereby obtained over 90% of the Company's senior secured debt. Although this evidence alone does not necessarily demonstrate that Wren, Javva, and Catalyst subsequently constituted a control group during the Recapitalization,[244] it does demonstrate their willingness to work together toward a common goal and to control the Company's business affairs.

The initial structure of the Recapitalization was not a product of any control group. Wren's Dwyer—not anyone at Javva or Catalyst—came up with the structure and the accompanying $4 million valuation. But, once Dwyer proposed the Recapitalization at the January 7 Board meeting, the interests of Wren, Javva, and Catalyst became further aligned—to the exclusion of the interests of the Company's other stockholders—during several phone calls among their director representatives in which the Recapitalization's terms continued to evolve. The trial record is replete with evidence that Dort Cameron, Katz, and Shipman knowingly excluded Biderman from these informal phone calls among directors from December 2001 until August 2002. Personal disdain or even animosity of other directors toward Biderman does not, however, show that Wren, Javva, and Catalyst were united in interest during the Recapitalization.

The Court's conclusion that Wren, Javva, and Catalyst constituted a control group during the Recapitalization is ultimately supported by the facts and circumstances surrounding Catalyst's 90–day "right to invest." The Court previously concluded that, before the Board approved the Recapitalization on January 17, 2002, Catalyst received an informal right to invest in what would become the Preferred B–1 stock. Under the facts and circumstances here, the right to invest demonstrates that Wren, Javva, and Catalyst were a control group. First, this right to invest was not

disclosed to the entire Board (namely, Biderman). Second, given that Catalyst received the right to invest in advance of the January 17 meeting, Wren and Javva must have together decided to provide it to Catalyst during one of the informal telephone meetings among their representatives, again without Biderman. Third, a right to invest was provided only to Catalyst, whose consent would be necessary to approve certain charter amendments by stockholder written consent instead of at a special meeting. Thus, the weight of the evidence supports the inference that, in exchange for agreeing to support the Recapitalization through Shipman's votes on the Board and Catalyst's stockholder written consent, Catalyst received the 90–day right to invest in the Recapitalization. Particularly in light of Catalyst's earlier comments in the Catalyst Memo, this conduct here demonstrates an agreement, arrangement, and legally significant relationship among Wren, Javva, and Catalyst—who together owned a majority of the Company's stock—to accomplish the Recapitalization. Catalyst's initial resistance toward investing immediately, its failure to document the right to invest, and its eventual decision not to invest do not undermine the Court's conclusion that, when the Board approved the Recapitalization on January 17, 2002, Catalyst, along with Wren and Javva, constituted a control group.

***26** Nor does the ostensible offer for Biderman to have the Lipper-affiliated investors contribute in the Recapitalization alter the weight of the evidence. With Wren and Javva having already agreed to fund $2.5 million on January 10, 2002, and Catalyst soon thereafter receiving the right to invest, those three stockholders were united in interest in excluding other investors to maximize their potential return from the Recapitalization. Granberg's contemporaneous notes from the January 10 Board meeting show that the Board offered Biderman the opportunity to ask the Lipper-affiliated investors to participate, but "Lipper ... deferred" because of concerns about timing and lack of due diligence.[245] This supposed offer was not genuine because Biderman had already twice complained—first, in his December 2001 letter rebuking the conduct of the Board, and then, at the January 7 Board meeting—that he did not have enough time to review the Recapitalization's terms. Biderman thus did not feel confident recommending the Recapitalization transaction to the Lipper-affiliated Plaintiffs, and the other directors did not contact those individuals.

All of this evidence undermines any contention by Wren, Javva, and Catalyst that they did not constitute a control group because Biderman was invited to participate and declined to do so. Rather, drawing on Biderman's characterization of other Board meetings, the Recapitalization was a *fait accompli*.[246]

In sum, the Plaintiffs have proven, based on the evidence presented at trial, that it is more likely than not that Wren, Javva, and Catalyst constituted a control group during the Recapitalization. Thus, Wren, Javva, and Catalyst owed fiduciary duties to the Company's other stockholders. The Plaintiffs therefore have direct standing under *Gentile II* to challenge the conduct of Wren, Javva, and Catalyst in the Recapitalization.

(b) *Alternatively, Whether a Majority of the Board which Approved the Recapitalization was Conflicted*

Because of the considerable attention devoted by the parties to this issue in their post-trial briefing and at post-trial oral argument, the Court also considers whether the Plaintiffs have direct standing to challenge the Recapitalization under *Gentile II* under the theory that a majority of the directors who approved the Recapitalization suffered impermissible conflicts.

The facts of *Gentile II* involved an undisputed controlling stockholder, which framed the Supreme Court's discussion of the "transactional paradigm" that could support direct and derivative expropriation claims. Early understandings of *Gentile II* assumed that direct standing was only available in circumstances in which there was a controlling stockholder[247] or, by implication, a functionally equivalent control group.[248] Support for this interpretation can be found in the same case upon which *Gentile II* relied for the proposition that expropriation gives rise to a direct claim: *In re Tri–Star Pictures, Inc., Litigation,*[249] where stockholder plaintiffs alleged that a controlling stockholder stood on both sides of a dilutive, assets-for-stock transaction.[250]

***27** By its own terms, however, *Gentile II* expressly recognized that it only addressed what was "*at least one* transactional paradigm" that had the dual nature of causing direct and derivative harm and permitting direct and derivative recovery.[251] Broader language in *Gentile II* (or in *Tri–Star*) about situations not involving a controlling

stockholder would arguably have been dictum.[252]

Thus, *Gentile II* 's holding does not necessarily warrant the interpretation that, by affording dispositive weight to the Supreme Court's discussion of the facts before it, forecloses direct standing for an expropriation claim absent a controlling stockholder. In other words, that a controlling stockholder's conduct may be challenged through an expropriation claim that is both direct and derivative under Gentile II does not mean that an expropriation claim that is both direct and derivative may only be asserted against a controlling stockholder.

This Court revisited this doctrinal question in *Carsanaro v. Bloodhound Technologies, Inc.*[253] There, a former stockholder alleged that a majority of the board of directors was conflicted when setting and approving the terms of several preferred stock issuances because an overwhelming percentage of the preferred stock was issued to the directors personally or to the venture capital firms that had nominated the directors to the board. The plaintiffs challenged those stock issuances after the corporation merged with a third party, implicating the continuous ownership rule.

The court in *Carsanaro* concluded that the plaintiffs' breach of fiduciary duty claims were, in the language of *Gentile II,* for improper expropriation. The court then concluded, at the motion to dismiss stage, that the plaintiffs had standing to assert these expropriation claims on two independent grounds: (i) the venture capital funds and their director representatives constituted a control group; and (ii) "the board that effectuated the transaction [*i.e.,* the preferred stock issuances] lacked a disinterested and independent majority" because a majority of the directors who approved the stock issuances each "acted as a fiduciary for his affiliated fund [that received stock], creating divided loyalties giving rise to a conflict of interest."[254]

In support of the latter conclusion (which was actually reached first), the court presented an illustrative hypothetical in which the directors issue to themselves stock at a price that is below current market value. The court concluded that, under the "core insight" of *Gentile II,* stockholders in that hypothetical could bring a direct breach of fiduciary duty claim against the directors after a subsequent merger: "[a]lthough there was no controlling stockholder pre-merger, the directors could be said to have expropriated value from the common stockholders in the manner contemplated by *Gentile*."[255] This conduct would support a direct claim because the economic and voting rights of the corporation's stockholders would be harmed in proportion to the board's expropriation of those rights on unfair terms.[256]

***28** Under the doctrinal justifications that implicitly support *Carsanaro,* it makes little sense to hold a controlling stockholder to account to the minority for improper expropriation after a merger but to deny standing for stockholders to challenge a similar expropriation by a board of directors after a merger. After al l, Delaware law endows the board–not a controller–with the exclusive authority to manage and direct the corporation's business affairs,[257] the foremost example of which is the power to issue stock.[258] Why, then, should Delaware law hold a controlling stockholder to a higher standard than the board of directors?[259] After careful reflection, the Court has struggled to articulate a satisfactory answer.

The *Carsanaro* decision is a more expansive interpretation of *Gentile II* than other decisions of this Court.[260] It is not, however, an unprecedented approach. This Court concluded in *Avacus Partners, L.P. v. Brian,*[261] under the then-prevailing "special injury" test,[262] that a stockholder stated a direct claim for dilution through allegations that the board of directors improperly issued "stock [to] friendly hands to protect against a threatened takeover."[263] Although there were allegations of entrenchment in *Avacus Partners,* there were no allegations of a controlling stockholder. The analysis of *Avacus Partners*—that a stockholder can assert an expropriation claim directly against a majority-conflicted board—remains persuasive today, particularly since both *Tri–Star* and *Gentile II* favorably cite that case for the proposition that improper stock dilution gives rise to a direct claim.[264]

***29** *Carsanaro* may also, perhaps, exceed what the Delaware Supreme Court intends in this area of Delaware law. But, the Supreme Court has not yet had the occasion to rule explicitly on this interesting question of corporate law. Until it does, the logic and reasoning of *Carsanaro* (and of its predecessor, *Avacus Partners*) are compelling. Although reasonable minds may disagree, the Court agrees with those conclusions of Delaware law. Importantly, *Carsanaro* is consistent with, and does not swallow the whole of, the settled *Tooley* test because the circumstances that would support a dual expropriation claim, as recognized in *Gentile II*, remain narrow: "[t]he expropriation principle operates only when defendant fiduciaries (i) had the ability to use the levers of corporate control to benefit

themselves and (ii) took advantage of the opportunity."[265]

Thus, as an alternative ground, the Plaintiffs may also establish standing by proving that a majority of the Board was conflicted—here, meaning interested or not independent[266]—when it approved and implemented the Recapitalization.

It is by no means *per se* improper for a director of a Delaware corporation to also be a fiduciary for another beneficiary. Directors frequently serve on the board of more than one company;[267] some, especially with start-up companies, may have been appointed by a venture capital firm with whom they are in a fiduciary relationship.[268] A director with a competing fiduciary relationship may face "an inherent conflict of interest" if, when considering the merits of a particular business decision, "the interests of the beneficiaries diverge."[269] Drawing on the teachings of the Delaware Supreme Court's decision in *Weinberger v. UOP, Inc.,* this Court has described this issue as the "dual-fiduciary problem."[270]

Directors of Delaware corporations owe fiduciary duties of care and loyalty to the corporation and its stockholders.[271] "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."[272] Thus, to discharge his or her fiduciary duties—especially the duty of loyalty—a director must put the interests of the stockholders above self-interest and, by extension, the interests of the other beneficiaries to whom the director may also owe fiduciary duties. Put simply, "[t]here is no 'safe harbor' for such divided loyalties in Delaware."[273]

***30** To prove that a director confronted the dual fiduciary problem, a plaintiff must establish: (i) that the interests of the second beneficiary diverged from those of the common stockholders; and (ii) that the director "faced a conflict of interest because of [his or her] competing duties."[274] A director who approves a stock issuance not offered to all stockholders may, if he or she is in a fiduciary relationship with a recipient of the new stock, faces an inherent conflict of interest.[275]

The Plaintiffs insist that, as fiduciaries of stockholders who benefited from the Recapitalization to the detriment of the Company's other stockholders—Wren and Javva's receiving the Preferred B–1 stock and Catalyst's receiving the 90–day right to invest—Dort Cameron, Katz, and Shipman were conflicted when deciding whether to approve the Recapitalization.[276] They further argue that Williams (and then Snyder) was interested because he intended to invest in the Recapitalization (and because Snyder received stock options after its completion), or at least because both Williams and Snyder were, each as the Company's CEO, beholden to the interested Board majority.[277] The Defendants again contend that Catalyst did not receive any 90–day option and thus Shipman was not conflicted because he declined to participate. As to Williams and Snyder, the Defendants maintain that the weight of the evidence belies the Plaintiffs' assertion that those two directors were interested in the Recapitalization.[278]

The Court analyzes potential conflicts of interests on a director-by-director basis.[279] By a clear preponderance of the evidence, the Plaintiffs established that Dort Cameron, Katz, and Shipman were in a fiduciary relationship with their respective entities. Dort Cameron was Wren's managing member; Katz was Javva's managing member and principal; and Shipman was one of Catalyst's partners. Each of these three members of the Board would have faced a potential conflict of interest in any transaction between the Company and the entity to which he owed fiduciary duties.

It is undisputed that Dort Cameron and Katz faced an actual conflict of interest when they approved the Recapitalization because Wren and Javva invested and ultimately received Preferred B–1 stock in return. The interests of Wren and Javva diverged from the interests of the Company's other stockholders: Wren and Javva sought to maximize the value of their investment, while the stockholders who did not participate in the Recapitalization—including the Plaintiffs—would seek to act in the best interests of the Company.

***31** Conversely, there is no dispute that Biderman was not in a fiduciary relationship, separate from his position as a director, with any investor who participated in the Recapitalization. The Plaintiffs thus must establish that one of the remaining directors—Williams (and then Snyder) or Shipman–also faced an actual conflict.

Neither Williams nor Snyder stood on both sides of the Recapitalization because neither invested in January 2002 or

any time thereafter. Williams appears to have, at first, committed to invest $200,000 in the Company in exchange for Preferred B–1 stock, but he never did so. He may have been asked to resign before he could invest, or perhaps he did not find the investment that attractive. The parties dispute the possible reasons in their briefs, but neither cites any evidence in support of their position.[280] The Plaintiffs did not put on evidence of this issue at trial, and thus they have failed to prove that this initial commitment, assuming there was one, rendered Williams conflicted. Williams had resigned by April, and Snyder was not a member of the Board until May. The stock options that Snyder received were approved by the Board separate from the Recapitalization; there is no evidence of a quid pro quo with Snyder and any of the Defendants.

Additionally, without deciding whether being "beholden"[281] to those who are issued stock is sufficient to render a director conflicted for purposes of asserting a direct expropriation claim, the Plaintiffs failed to demonstrate that either Williams or Snyder was beholden to Wren or Javva (or to Catalyst, for that matter). The Plaintiffs have not shown, for example, that either was appointed as a director with the understanding that he would approve the Recapitalization. Moreover, that the Board requested Williams' resignation as CEO and as a director in April 2002—in the midst of implementing and setting the final terms of the Recapitalization—undermines, rather than supports, any finding that Williams' business discretion was "sterilized."[282] Finally, the Board's appointing Snyder as CEO and electing him as a director, without further evidence, is insufficient to demonstrate that Snyder lacked independence during the Recapitalization process.[283]

This leaves Catalyst's Shipman. Given the two references to the "right to invest" in Catalyst's internal documents and Shipman's testimony that he would not have written anything in those documents that was not accurate, the Court found that, before the Board approved of the Recapitalization, Catalyst (and only Catalyst) was provided with an informal right to invest in what would become the Preferred B–1 stock. This right to invest, even if it was not legally enforceable (as the Defendants contend), was a tangible benefit that Catalyst would receive so long as Shipman voted in favor of the Recapitalization. In a way, the opportunity to see how the Company performed before investing additional money may have been a more valuable benefit than the convertible notes that the actual investors received—for while Wren and Javva had money on the table, Catalyst was able to wait and see if it was a good bet. Although not as readily apparent as with Dort Cameron and Katz, Shipman also faced the dual fiduciary problem. He faced an actual conflict of interest between his duties to the Company's stockholders and his duties to Catalyst, which was on the other side of the Recapitalization because it received something—the "right to invest" in the Preferred B–1 stock issuance—that was not shared with the Company's other stockholders.[284]

***32** As an alternative holding, the Plaintiffs have demonstrated that, of the members of the Board who approved the Recapitalization, a majority owed fiduciary duties to entities that received benefits from the Recapitalization (preferred stock or the right to invest in preferred stock) that were not shared with the Company's other stockholders. Thus, the Plaintiffs have direct standing to challenge the Board's conduct in the Recapitalization.

2. *The Standing of the SMIG Plaintiffs*

"As a general matter, when the terms of a transaction are established—not when the transaction is carried out—is the proper time for assessing whether a breach of fiduciary duty occurred."[285] The SMIG Plaintiffs were owed fiduciary duties by the Board by at least May 30, 2002, the date when they individually received stock in the Company. What remains in dispute is whether the SMIG Plaintiffs have standing to challenge the Recapitalization as approved by the Board in January 2002.

The SMIG Plaintiffs claim that they have standing on two, independent grounds: (i) because the Defendants changed material terms of the Recapitalization after May 2002; and (ii) because they received their stock by "operation of law" through the dissolution of SMIG.[286] The Defendants, consistent with their position that there was no breach of fiduciary duty, contend that the SMIG Plaintiffs were not harmed by any actions after May 2002. They also insist that the "operation of law" doctrine invoked by the SMIG Plaintiffs applies in derivative litigation, not for a purportedly direct claim asserted here.[287]

"[I]n order to bring any type of derivative action to correct alleged acts of corporate mismanagement it is necessary that the plaintiff either be a stockholder at the time of the transaction complained of, or that his stock thereafter devolve upon him by operation of law."[288] Because, when SMIG dissolved, the SMIG Plaintiffs received stock in the

Company without any action on their part,[289] they received their stock in the Company by operation of law.[290]

Under the facts of this case, the Court concludes that the "operation of law" exception to the continuous ownership rule applies with equal force to the SMIG Plaintiffs' ability to assert their expropriation claims directly. Because they received their stock in the Company from SMIG by operation of law, the SMIG Plaintiffs have direct standing to challenge the Recapitalization as approved by the Board in January 2002.[291]

3. ***The Standing of Morris and Bernard Fuchs***

***33** The Defendants assert that Morris and Bernard Fuchs (the "Fuchs Brothers") do not have standing to challenge the Recapitalization because they were not diluted. Rather, each was "mistakenly" issued additional shares in 2001 "well in excess of the amount by which they claim to have been diluted," rendering their expropriation claims moot. The Company's mistake in 2001, according to the Defendants, was issuing stock that was thought to have been required by the Fuchs Brothers' contractual anti-dilution rights, which the Defendants now assert that the Fuchs Brothers never had.[292] The factual dispute is whether the Fuchs Brothers acquired their stock in the Company through stock purchase agreements with most favored nation ("MFN") rights. If they had MFN rights, the Fuchs Brothers would have received anti-dilution protection when Catalyst,[293] Wren, and Javva subsequently received anti-dilution rights.[294] The Fuchs Brothers insist that they signed stock purchase agreements with MFN rights, even if they have not produced those documents such that their claims are not moot.[295]

The Court concludes, based on the weight of the evidence at trial, that it is more likely than not that the Fuchs Brothers signed stock purchase agreements that provided for MFN rights by which they received anti-dilution protection. The Fuchs Brothers testified to that effect.[296] More than one witness who had no interest in this issue testified that the Fuchs Brothers could not have acquired stock without signing a stock purchase agreement,[297] and the other stockholders who invested contemporaneously with the Fuchs Brothers all signed stock purchase agreements with MFN rights.[298] This evidence is credible.[299] The Defendants also treated the Fuchs Brothers as if they had anti-dilution protection, which they only could have acquired through MFN rights. It is difficult to reconcile the Defendants' litigation-minded characterization of this being a "mistake" given the magnitude of the Company's error—the Defendants contend that Morris and Bernard Fuchs were "overcompensated in the Akamai Merger by a factor of eight and eighteen, respectively."[300] The Court thus concludes that the additional shares that the Fuchs Brothers received in 2001 pursuant to their anti-dilution rights (acquired by operation of their MFN rights) do not compromise their standing to challenge the distinct, dilutive harm they purportedly suffered in the Recapitalization.[301]

B. ***The Standard of Review***

The Plaintiffs have standing to challenge the Recapitalization directly because Wren, Javva, and Catalyst constituted a control group that owned more than 50% of the Company. Alternatively, they have direct standing because a majority of the Board—Dort Cameron, Katz, and Shipman—was conflicted when approving and implementing the Recapitalization.

Absent certain procedural protections not implicated here,[302] a minority stockholder's challenge to a transaction in which a controlling stockholder stands on both sides implicates the entire fairness standard of review.[303] Most relevant here, Delaware courts have employed the entire fairness standard of review where a corporation with a controlling stockholder implements a recapitalization that benefits the controller to the detriment of other stockholders.[304] "A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness."[305] The members of the control group stood on both sides of the Recapitalization because each received a benefit not shared with the Company's other stockholders.[306] Accordingly, Wren, Javva, and Catalyst must demonstrate the entire fairness of the Recapitalization.

***34** The Court's default standard of review for the decisions of directors is that of business judgment. A plaintiff may rebut the deferential business judgment standard by, in addition to other ways not relevant here, demonstrating that at least half the board faced an inappropriate conflict of interest.[307] To do so, a plaintiff need not name every directive as a defendant.[308]

By proving that a majority of the directors who approved a stock issuance faced an inherent conflict as dual fiduciaries with conflicting beneficiaries, a stockholder plaintiff would implicate the entire fairness standard of review.[309] Each of Dort Cameron, Katz, and Shipman was inherently conflicted due to the competing fiduciary duties he owed to the Company and his respective firm. The Defendants who were members of the Board during the Recapitalization—Dort Cameron, Katz, Shipman, and Snyder[310]—thus must establish its entire fairness.

C. ***The Entire Fairness of the Recapitalization***

Entire fairness is the "most onerous" standard of review in Delaware corporate jurisprudence.[311] This standard has two well-known components—"fair dealing and fair price,"[312] which at times are referred to as "procedural fairness and substantive fairness"[313]—from which the Court must reach a unitary conclusion on the entire fairness of the business decision or transaction at issue.[314] The burden to establish the entire fairness of the Recapitalization is on the Defendants (other than Dwyer and CFP). Based on the close relationships of these Defendants (and their joint presentation at trial), the Court evaluates the breach of fiduciary duty claims against the control group (Wren, Javva, and Catalyst) and the Board (Dort Cameron, Katz, Shipman, and Snyder) together.

1. ***Fair Dealing***

Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[315] The Defendants conceded that "[their] process was not perfect," but they submit that, given the "exigent circumstances" of the Company's immediate need for cash, the process was fair. Their position on fair dealing centers primarily on Biderman's role in the Recapitalization: the negotiation, structure, and Board approval of the Recapitalization was a fair process because Biderman approved it without complaining to any stockholder that he was being marginalized.[316] The Plaintiffs, meanwhile, argue that little in the Defendants' process was fair. Specifically, they contend that the exclusion of Biderman, the Board's reliance on Dwyer's unsubstantiated $4 million valuation, the 90–day option granted exclusively to Catalyst, and the Board's concealment of the Recapitalization's material terms from the Company's other stockholders all evidence grossly unfair dealing.[317]

***35** The Court considers these and other relevant factors of fair dealing together in the context of five issues: (i) Biderman's role in the Recapitalization; (ii) the process by which the Board valued the Company at $4 million; (iii) Catalyst's right to invest; (iv) the terms of the Preferred B–1 stock; and (v) the Board's disclosure of the Recapitalization to stockholders.

(a) ***Biderman's Role in the Board's Evaluation, Negotiation, and Approval of the Recapitalization***

The general initiation of the Recapitalization was fair. The Company was running out of money, its business plan had proven unsuccessful, and management concluded that the Company either needed to grow quickly and become cash flow positive or liquidate. But, the specific sequence of events undertaken by the Defendants to implement the Recapitalization was not fair.

There was a sense of urgency in late December 2001 that, from the very beginning, compromised the Board's ability to evaluate fully and fairly the terms of the Recapitalization. In particular, that urgency—which, after the repeated delays in closing the NaviSite SMG acquisition, would prove unwarranted—led to the exclusion of Biderman from the first important Board meeting outlining what would become the Recapitalization. He was knowingly excluded from at least one Board meeting, unaware of informal calls among directors and Dwyer between subsequent meetings, and not provided with important materials on the same timeline as the other directors. In this context, the Defendants cannot rely on Biderman's eventual approval of the Recapitalization as evidence of fair dealing because his contribution was marginalized from the start.[318]

Biderman was independent, but there was no effort to condition the Recapitalization on his approval or that of

disinterested stockholders. Instead, the directors who owed fiduciary duties to the entities which would benefit from the Recapitalization controlled the process. Biderman's December 2001 Letter was a strong rebuke to the Board, but it prompted largely cosmetic changes, not substantive ones.

Biderman attended the key Board meetings in January, but his objections were generally trivialized. At one point, likely in light of Biderman's objections, Dwyer did revise the Recapitalization to reduce the dilution to the Plaintiffs and the Company's other stockholders, but the reduction was insignificant—and it did not cure the other procedural defects of the process by which the Board would evaluate, negotiate, and approve the Recapitalization. Moreover, one of the conditions to which the Board agreed for Biderman to approve the Recapitalization—the 1.5x liquidation preference for the Preferred A stock—was never implemented by the Board. On the key terms that mattered, including the valuation of the Company and the percentage of equity in the post-acquisitions Company to be given to the new money, Biderman had no effective bargaining power to challenge Dwyer or the other members of the Board.[319]

***36** The Defendants argue that because an independent Biderman approved the Recapitalization, and because he did not inform any of the Plaintiffs that he was being marginalized in an unfair process, the interests of the Plaintiffs were fairly considered in the Recapitalization. This argument, however, is unpersuasive because it is premised on a seriously flawed understanding of the nature of fiduciary duties under Delaware law. Directors owe fiduciary duties to *all* stockholders, not just a particular subset of stockholders.[320] Biderman was not the only director who owed fiduciary duties to the Plaintiffs; rather, Dort Cameron, Katz, and Shipman owed the same fiduciary duties to the Plaintiffs as they owed (as directors) to Wren, Javva, and Catalyst. Thus, responsibility for acting in the best interest of the Plaintiffs as stockholders fell to the entire Board, not Biderman alone. "A director's failure to understand the nature of his duties can be evidence of unfairness."[321] The Board's utter failure to understand this fiduciary relationship is further evidence of an unfair process.

(b) *The Board's Valuation Process*

Dwyer alone calculated the $4 million valuation. No director appears to have had any material input into that valuation, and Dwyer did not share his valuation methodology with the Board. No independent valuation was solicited.

The Defendants come close to arguing that because $4 million was (they thought) more than the Company was actually worth, the valuation process was fair. This argument is unavailing because the Defendants did not establish that the directors adequately understood how Dwyer—who was conflicted because of his material relationship with Wren—came to the $4 million valuation.

There are many steps the Board could have taken that would demonstrate that the process by which it came to the $4 million valuation was fair. Although hiring an independent financial advisor is not prescribed by Delaware law,[322] the presence of an advisor could demonstrate that the Board was reasonably informed about the Company's value. It is possible to conclude that the Board did not think it had the time or money to hire a financial advisor,[323] but that conclusion is undermined by the Company's roughly contemporaneous decision during summer 2002—while the terms of the Recapitalization continued to change—to hire three agencies to work for "months" on a possible name change.[324] Unable to rely on an independent financial advisor, the directors themselves needed to be adequately informed about what substantiated the $4 million valuation. Based on the weight of the evidence, they were not adequately informed.

(c) *Only Catalyst Receives a Right to Invest*

***37** Only Catalyst received a 90–day option to invest in the Recapitalization. This right to invest was not disclosed to the full Board (namely, Biderman), nor was it disclosed at any time to the Company's other stockholders. The option was key to Shipman and Catalyst's decision to approve the Recapitalization. Their approval meant that a

majority of the Company's stockholders would be in favor of the Recapitalization, and the Defendants thereby did not need to hold a stockholder vote on the necessary charter amendments. Thus, by favoring their own interests over those of the Company's other stockholders, the Defendants unfairly prescribed a process that rendered the Recapitalization a *fait accompli*.

(d) *The Board's Communications with Stockholders about the Recapitalization*[325]

The Board's justifications for not inviting the Plaintiffs to participate in the Recapitalization—the urgent need to complete the acquisitions—ring hollow in light of the informal "right to invest" provided to Catalyst. But, the failure to allow the Plaintiffs to participate is not necessarily evidence of unfair dealing. Neither is the failure to disclose the terms of the Recapitalization in real-time evidence of unfair dealing because Delaware law did not require disclosure of the Board's approval of the Recapitalization in January 2002. Each of these decisions "simply deprives the defendants of otherwise helpful affirmative evidence of fairness."[326]

That said, when Wren, Javva, and Catalyst submitted stockholder consents to approve the necessary amendments to the Company's charter in August 2002, the Company's other stockholders were entitled, by statute, to "[p]rompt notice of the taking of the corporate action."[327] The Board sought to provide that notice in the Fall 2002 Update, but that document was materially misleading. "[W]hen directors communicate publicly or directly with shareholders about corporate matters the *sine qua non* of directors' fiduciary duty to shareholders is honesty."[328] Without rigidly defining the scope of information that must be disclosed under 8 *Del. C.* § 228(e),[329] the Court concludes that a general principle of disclosure under Delaware law applies: "once [the directors] traveled down the road of partial disclosure ..., they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[330]

Under the circumstances here, in which Wren, Javva, and Catalyst gave their written consent to approve the charter amendments necessary for the Recapitalization that had been approved by their fiduciaries on the Board and after which the Plaintiffs and other stockholders would be substantially diluted, the Court concludes that the failure also to disclose in the Fall 2002 Update who participated in the Recapitalization and on what terms was materially misleading and inconsistent with the Board's fiduciary duties. The failure to disclose this material information is powerful evidence of unfair dealing.

(e) *The Changing Terms of the Preferred B–1 Stock*

***38** Finally, two additional terms of the Recapitalization inexplicably changed between the Board's approval in January 2002 and the issuance of Preferred B–1 stock in August 2002. First, the interest rates on the promissory notes increased from 10% to 12%. Second, the accrued interest became convertible. As a result of these changes—neither of which was approved by the Board—Wren received Preferred B–1 stock representing 39.9% of the Company's fully diluted equity (despite its promissory note providing for no more than 34.65%) and Javva received Preferred B–1 stock representing 11.2% (despite its promissory note limit of 9.10%). The disregard of the Board's resolutions approving the terms of the Recapitalization in January 2002 and the specific terms of the promissory notes—which further benefited Wren and Javva to the detriment of the Company's other stockholders—compounds the evidence leading to a conclusion of unfair dealing.

2. *Fair Price*

Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[331] The directors must establish that the valuation of the Company for purposes of the Recapitalization fell within the proverbial "range of fairness":[332] one "that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."[333]

The Defendants assert that Dwyer's $4 million valuation was a fair price because the Company's equity had no value at the time of the Recapitalization. The Plaintiffs contend that the Company's $30.89 million value at that time rendered the $4 million valuation fundamentally unfair. Unsurprisingly, to support their widely divergent valuations, the parties make several opposing assumptions, including whether the entity to value is the Company or the Company plus the eMedia and NaviSite SMG acquisitions; whether management's one year of projections presented when the Board approved the Recapitalization at the January 17, 2002, meeting are sufficiently reliable to support a credible discounted cash flow analysis; and the resulting assumptions in their expert valuation methodologies.

The parties each submitted expert reports and elicited a full day of expert testimony on valuation issues concerning the Recapitalization. The Plaintiffs presented James Reilly ("Reilly"), an investment banker with more than thirty years of experience. The Defendants proffered Jerry Hausman ("Hausman"), a chaired professor of economics at the Massachusetts Institute of Technology, where he has taught for approximately thirty-five years.

The Court considers three components of the fair price analysis—(i) the credibility of contemporaneous statements in the record about the Company's value in January 2002; (ii) the proper entity to be valued; and (iii) the reliability of management's January 2002 pro forma projections—before turning to the expert testimony and reaching a conclusion on fair price.

(a) ***The Contemporaneous Statements about Value are Not Credible***

The Plaintiffs contend that Reilly's opinions on the Company's value after the acquisitions are consistent with, and thus supported by, evidence of the Company's value from the time when the Board approved the Recapitalization.[334] This evidence includes:

- The Company raised capital in November 2001 based on an $18.1 million valuation using bullish projections;[335]
- Williams, in an email, estimated that the Company's assets were "conservatively worth $10 million";[336]
- Board minutes for the January 10, 2002, meeting note management's "pro forma valuation of [the Company] post-closing of the proposed acquisitions of $23.0 million (assumed free-cash of $2.3 million; multiple of 10x)";[337]

***39** • The conversion ratio for the $3.6 million note that the Company paid to acquire e-Media implied that the Company's post-acquisitions value was approximately $22.8 million;[338] and
- The conversion ratio discussed at the January 17, 2002, Board meeting for the senior secured debt implied that the Company's post-acquisitions value was approximately $25.2 million.[339]

The Defendants reject that any of this evidence offers a reliable, contemporaneous value of the Company that might undermine Hausman's contrary opinions on the Company's value before the Recapitalization.[340]

The Court agrees with the Defendants. First, for reasons that the Court discusses when evaluating Reilly's expert testimony, the November 2001 value is not credible because it is based on unreliable projections. Second, no valuation methodology underlies Williams's statement about the Company's assets; it was an unsubstantiated opinion in a brief email. Third, the pro forma valuation is also based on unreliable projections. Finally, the fourth and fifth valuations based on the conversion ratios in the e-Media note and for the senior secured debt reflect relative, not nominal, values. The Court credits Hausman's testimony that, without knowing the actual value of those notes (rather than their face value), a reliable value for the Company cannot be calculated.[341] Thus, because none of these statements is credible, it does not bolster Reilly's consistent valuations. Similarly, that Hausman largely ignored this contemporaneous evidence does not undercut his contrary expert testimony.

(b) ***The Entity to be Valued is the Standalone Company***

Before the Recapitalization, the Plaintiffs were stockholders of the Company. The Plaintiffs nonetheless contend that the entity to be valued in the fair price inquiry here is the Company plus the acquisitions because those transactions were not speculative but rather contemplated by the Recapitalization.[342] The Defendants, on the other hand, contend that the Company's value before the Recapitalization should not be artificially inflated by the acquisitions that could only be completed after the Recapitalization was approved.[343]

In two, combined entire fairness-appraisal proceedings, this Court described some of the contexts in which it may be appropriate to include, in a fair price analysis, the expected value from a company's "specific expansion plans or changes in strategy"[344] that are "not the product of speculation."[345] In *ONTI, Inc. v. Integra Bank,* the Court determined that, where the trial record did not support the finding that a non-speculative transaction would not occur but for a cash-out merger of minority stockholders, it was appropriate to include the value of the later transaction when determining the fair value of the stock in the cash-out merger.[346] Similarly, in *Delaware Open MRI Radiology Associates, P.A. v. Kessler,* the Court concluded that the company's non-speculative expansion plans for three additional facilities, even though one would not be established until sometime after a squeeze-out merger, should be included in assessing fair value as of the time of the merger. The *Kessler* Court analogized the additional facilities as corporate opportunities, concluding that each was "(1) in the line of the corporation's business and ... of practical advantage to it; (2) within the corporation's financial[ ] ability to capture; and (3) one in which the corporation has an interest or a reasonable expectancy."[347]

***40** Here, although it was not speculative that the Company would acquire e-Media and NaviSite SMG (it may, however, have been speculative as to what value those acquisitions would yield), they do not fall within the bounds of either *ONTI* or *Kessler*. The trial record supports the Court's conclusion here, unlike in *ONTI,* that the Company, on its own, did not have the capital needed to fund either of the e-Media or NaviSite SMG acquisitions, let alone both of them. Reilly conceded that they could not have occurred without additional capital.[348] In other words, unlike in *Kessler,* neither proposed acquisition was within the Company's financial ability to capture. The Recapitalization was what would provide the necessary cash; the "new money," not the "old money," financed those acquisitions.

Even if the Recapitalization was to be accretive to the Plaintiffs by improving the Company's capital structure through converting the senior secured debt into convertible preferred stock, that higher value (and those capital structure changes) only occurred *after* the additional investments by Wren and Javva. Under these circumstances, the fair price of the Company before the Recapitalization would have been precisely that—the fair price of the Company. Accordingly, the Court concludes that the Defendants must prove that the $4 million price attributed to the Company by Dwyer for purposes of the Recapitalization was a fair price.

(c) *The January 2002 Pro Forma Projections are Not Reliable*

The parties and their respective experts dispute the reliability of the January 2002 pro forma projections presented at the January 17 Board meeting when the Board approved the Recapitalization. Much of the Court's eventual conclusion on fair price turns on this issue. Based on their review of the relevant case law, the Defendants offer a six-factor list that the Court should consider in determining whether the Company's projections are reliable.[349] In their opinion, the projections are not reliable because, among other reasons, they were overly optimistic, contrary to the Company's two-year operating history, and not adopted by the Board when it approved the Recapitalization.[350] The Plaintiffs reject this attempt to synthesize the relevant case law. Instead, the Plaintiffs insist the projections are reliable because, also among other reasons, they were based on reasonable assumptions at the Company, conservative in comparison to the recent performance of the streaming media industry, and presented to the Board at its January 17 meeting and thereby partially formed the basis for the Board's approval of the Recapitalization.[351]

The most persuasive expert valuations tend to be those derived from contemporaneous management valuations—typically, revenue or cash flow projections—because management usually has the strongest incentives to predict the company's financial future accurately and reliably.[352] A CEO who continuously misses projections may miss his or her job well before retirement. But, Delaware law has long recognized that "methods of valuation, including a discounted cash flow analysis, are only as good as the inputs to the model."[353]

***41** In a recent appraisal action, *Huff Fund Investment Partnership v. CKx, Inc.,*[354] this Court noted that management projections created in the "ordinary course of business" are generally deemed reliable for valuation purposes. The Court also identified several circumstances that may warrant disregarding management projections, such as "where the company's use of such projections was unprecedented, where the projections were created in anticipation of litigation, or where the projections were created for the purpose of obtaining benefits outside the company's ordinary course of business."[355] Contrary to the Plaintiffs' contention, *Huff Fund* did not seek to present an exhaustive list of those occasions. Indeed, even in appraisals, Delaware courts have found projections to be too unreliable to support a credible discounted cash flow analysis where they are grossly inconsistent with the corporation's recent performance.[356] And, of course, projections tend to be speculative, and thus unreliable, if those who prepare them do so with the perspective that "because the industry was so new and volatile[,] ... reliable projections were impossible."[357]

For the Court to credit the Defendants' expert valuations, which ignore the January 2002 projections as unreliable, the Defendants bear the burden of establishing that the Company's projections are sufficiently unreliable to warrant no weight in a fair price analysis. Through Hausman's persuasive testimony, the Defendants successfully demonstrated that management's projections were wholly unreliable and thus insufficient to support the discounted cash flow analysis performed by Reilly.

The Company's management presented only one set of projections to the Board at the January 17 meeting—the January 2002 pro forma projections. Neither Granberg's contemporaneous minutes nor the revised minutes reflect that the Board adopted those projections. Because the Daniels Memo projections were not presented to the Board at this meeting and, moreover, because they were significantly revised in the 2002 pro forma projections, the Daniels Memo projections did not reflect management's best estimate of the Company's future growth.[358] There is also no evidence that management used the Daniels Memo projections to run the Company.[359] For these reasons, the Daniels Memo projections are given no weight in the Court's fair price analysis.[360] Nonetheless, several sets of the Company's projections from 2001, including those from the Daniels Memo, are the framework through which the Court evaluates the Defendants' position on the reliability of the 2002 pro forma projections.

***42** One particular exhibit in Hausman's opening report conclusively demonstrates that the Company's management was unable to produce reliable projections. The following table[361] compares various management projections for 2001 revenue with the Company's actual revenue:

As the table demonstrates, the Company's management–even after Williams took over as CEO for Rick Murphy in mid–2001—grossly overestimated the Company's revenues, even two to three months away. The further out the projected revenue, the greater the overestimation; management was often not even in the same ballpark. For example, in September 2001, management projected that December 2001 revenue would be $241,500. Actual revenue was $71,673, meaning that management was off by more than a factor of three.
It is in this context that the Plaintiffs, through Reilly, defend against Hausman's and the Defendants' charge that the January 2002 projections are unreliable. That the January 2002 projections were arguably consistent with the recent performance of comparable companies[362] does not change the Court's conclusion. The Court cannot accept that the same people who missed projections three-months out in September 2001 by a factor of three (where there was no intervening change to the Company's business) would have been able to produce reliable projections in January 2002 for an entire year.[363] Thus, the Defendants have established that the January 2002 pro forma projections are unreliable and not credible, and the Court does not rely on any expert valuation methodology based on them.[364]

(d) *The Expert Valuations*

The expert opinions differed on two foundational issues: (i) the proper entity to value in January 2002 when the Board approved the Recapitalization; and (ii) the reliability of the management projections presented at the January 17 Board meeting. Reilly argued that the appropriate entity to value was the Company plus the e-Media and NaviSite SMG acquisitions; he did not value the Company on a standalone basis.[365] He employed four different valuation methodologies—three of which were based on the management projections—and arrived at ten different

valuations, ranging from $13.96 million to $61.99 million.[366] Based on a weighted average, Reilly concluded that the equity value of the combined entity was $30.89 million. Hausman, in contrast, maintained that the proper entity to value in January 2002 was the Company on its own, without the to-be-acquired e-Media or NaviSite SMG. Based on his opinion that the single year of unreliable projections was inadequate to support a discounted cash flow analysis, Hausman presented a comparable companies analysis that yielded a range of implied equity values for the Company of negative $5.3 million to negative $4 million.

***43** For the reasons discussed earlier, the Court agrees with Hausman that the proper entity to value is the Company and the management projections are unreliable. With these initial conditions, the Court now considers whether Hausman has demonstrated, in light of Reilly's objections, that the $4 million valuation of the Company for the Recapitalization was a fair price.

Expert testimony on valuations can be supported "by any techniques or methods which are generally considered acceptable in the financial community."[367] Valuations based on the trading multiples or transaction multiples of comparable companies are generally recognized as valid methodologies under Delaware law.[368] An expert valuation tends to be more credible when it is based on a "blend of techniques"[369] that "serve to cross-check one another's results."[370] No expert's valuation methodology is perfect or, perhaps more accurately, beyond criticism from another expert. Some defects may be more damaging than others, however. "Expert valuations that disregard contemporaneous management projections are sometimes completely discounted."[371] But, here, for the reasons set forth earlier, it is the projections—not the expert valuations that disregard them—that must be completely discounted.

Without reliable projections, there can be no reliable discounted cash flow analysis or the derivative "venture approach" analysis offered by Reilly.[372] Additionally, Reilly did not value the Company in January 2002 separate from the e-Media and NaviSite SMG acquisitions. Nonetheless, to test the merits of Hausman's analysis, the Court considers the multiples offered by Reilly as appropriate.

***44** The Court agrees with Hausman's conclusion that, because the Company did not have any earnings or positive cash flow in January 2002, the best method to value the Company without using projections is based on last twelve months ("LTM") revenue multiples for comparable companies.[373] Hausman presented two multiples-based approaches to determine the Company's implied enterprise value from which the Company's debt could be subtracted to determine its implied equity value. First, he used the e-Media and NaviSite SMG acquisitions to generate an average private transaction multiple of 0.7625x LTM revenue.[374] Second, he used data on five comparable public companies to derive an average trading multiple of 2.80x (from a range of—1.01x to 4.85x) for LTM revenues.[375] Hausman persuasively argued that his 2.80x trading multiple should be discounted at least 20% to 2.24x based on the discount commonly applied to private company valuations. In support of his position, he presented academic research reflecting that a 20–40% discount is typically applied in situations like this because, in his opinion, "private firms typically have less sophisticated accounting systems and weaker internal controls (and thus lower quality earnings), and ... private firms typically are smaller and less diversified, leading to greater variability in sales and cash flows."[376]

In Reilly's opinion, neither e-Media nor NaviSite SMG was an appropriate comparable transaction, and he did not use them in any way in his valuation. Instead, he used a data set of five public companies (two of which, Akamai and RealNetworks Inc., were also in Hausman's set) to derive an average LTM revenue trading multiple of 3.7x (from a range of 1.3x to 7.2x).[377] He also produced a public transactions multiple of 2.05x, but, in his overall weighted average, he did not assign any weight to that valuation because of what he considered weaknesses in the data.[378] Reilly did not include a private company discount for his trading multiple. He did acknowledge that the private company discount is well known to investors, but he suggested that it should not apply here primarily because the Defendants were familiar with the Company and would have significant control over it.[379]

Although they are not perfect, Hausman's comparable companies are appropriate for his valuations. "The burden of proof on the question whether the comparables are truly comparable lies with the party making that assertion [.]"[380] "Where the valuation exercise rests upon data derived from companies comparable to the company being valued, it stands to reason that the more 'comparable' the company, the more reliable will be the resulting valuation information."[381] The Court concludes that the companies in the streaming media and related industries employed by Hausman to derive his private transactions and trading multiples are sufficiently comparable to generate a

reasonable range of fair values for the Company. In particular, several of the public companies were the same as those used by Reilly. Nonetheless, even if certain of the companies used by Hausman were not as comparable as others, the Court will also consider the multiples (and the underlying comparable companies) offered by Reilly in his valuation.

The Court also accepts the private company discount submitted by Hausman. In the appraisal context, it is thought to be impermissible under Delaware law to discount the value of a private company solely because its stock is not publicly traded.[382] Here, however, the Court finds that the theoretical justifications for a private company discount cited by Hausman—chief among them being lower quality and more variable earnings—should apply to the Company. The Court thus concludes that a conservative 20% discount, at the low end of the range, is appropriate to apply to Hausman's trading multiple. Nonetheless, to represent a conservative benchmark that is most friendly to the Plaintiffs, the Court also considers Reilly's unadjusted LTM trading multiple.

***45** In January 2002, the Company's LTM revenue was approximately $876,755.[383] The face value (exclusive of the 4x liquidation preference) of the principal and interest on its outstanding debt totaled $4,997,600.[384] Because he valued the Company plus the acquisitions, Reilly also assumed that the combined entity had no debt—that is, that the senior secured debt should be treated as Preferred A stock. But, just as the proper entity to value before the Recapitalization is the standalone Company, so too is the proper capital structure to use that of the Company before the Recapitalization. Although this debt was to be converted into Preferred A, it was still the Company's debt before the Recapitalization. Accordingly, this debt should be subtracted from the range of enterprise values to yield a range of equity values.[385]

Applying the experts' multiples yields a range of implied enterprise values for the Company. Subtracting the Company's debt from the range of implied enterprise values yields a range of implied equity values. The following table reflects these valuations:

Implied Valuations with LTM Revenue of $876,775 and Debt of $4,997,600

			*Hausman*Reilly	
Multiple	Private Transactions: 0.7625x	Discounted Trading: 2.24x	Public Transactions: 2.05x	No Discount Trading: 3.7x
Implied Enterprise Value	$668,526	$1,963,931	$1,797,348	$3,243,994
Minus Debt	($4,997,600)	($4,997,600)	($4,997,600)	($4,997,600)
Implied Equity Value	($4,329,074)	($3,033,669)	($3,200,252)	($1,753,606)

The range of implied equity values of the Company is negative $4.33 million to negative $1.75 million. Not only are these numbers less than the $4 million valuation attributed to the Company by Dwyer, but they reflect that the Company's equity had no value. Because the Defendants established that the Reilly's other valuation methodologies are based on the unreliable projections, the only credible valuations available are reflected in the table.[386] No reliable valuation offered by Reilly, based on these assumptions about the Company's revenue and debt, implied an equity value above $0. The Court need not consider the proper weighted average for this range of values because any average would still be negative. The Court thus credits Hausman's expert testimony and concludes that the equity value of the Company in January 2002 before the Recapitalization was $0.

***46** Concluding that the Company's equity had no value before the Recapitalization compels the Court also to conclude, as this Court recently did in *In re Trados Inc. Shareholder Litigation,* that the Recapitalization was approved by the majority-conflicted Board at a fair price. Regardless of how much the Plaintiffs may have been diluted in the Recapitalization, because their common stock had no value that could have been diluted, the Plaintiffs necessarily "received the substantial equivalent in value of what they had before."[387] Although certain terms of the

Recapitalization changed between January 2002 and August 2002, Reilly did not value the Company (or the Company plus the acquisitions) after January. The Plaintiffs also did not contest the post-January value of Company for purposes of the Recapitalization in their post-trial briefing, which means that the Plaintiffs waived this issue.[388] Nonetheless, if the Court did consider the relevant evidence, the Court would credit Hausman's testimony that, despite the changes to the terms of the Recapitalization, the Company's equity still had no value in May and August 2002.[389]

3. ***The Court's Unitary Conclusion on Entire Fairness***

The Defendants (other than Dwyer and CFP) must establish "to the court's satisfaction" that the Recapitalization was entirely fair.[390] "A strong record of fair dealing can influence the fair price inquiry, reinforcing the unitary nature of the entire fairness test. The converse is equally true: process can infect price."[391] "Merely showing that the ... price was in the range of fairness, however, does not necessarily satisfy the entire fairness burden when fiduciaries stand on both sides of a transaction and manipulate the ... process."[392]

The parties devote considerable attention in their post-trial briefs[393] to the import of this Court's recent post-trial, entire fairness decision in *Trados*. After concluding that a third-party merger in which the common stockholders received no consideration was nonetheless approved at a fair price because the corporation's common stock had no value before the merger, the *Trados* court concluded that the majority-conflicted board's approval of the merger was entirely fair primarily because "the common stockholders received in the Merger the substantial equivalent in value of what they had before."[394] Contrary to the Defendants' contentions, the Court does not interpret *Trados* for the broad proposition that a finding of fair price, where a company's common stock had no value, forecloses a conclusion that the transaction was not entirely fair.[395] Rather, the *Trados* conclusion reinforces the defining principle of entire fairness—that a court's conclusion is *contextual*.

***47** Approximately twenty years ago, in *Cinerama, Inc. v. Technicolor, Inc.,* this Court recognized that normative and policy-based considerations are, consciously or not, inherent in a unitary conclusion on entire fairness:

> This judgment concerning "fairness" will inevitably constitute a judicial judgment that in some respects is reflective of subjective reactions to the facts of a case. "Fairness" simply is not a term with an objective referent or clear single meaning. This does not mean its meaning is endlessly elastic and that it therefore constitutes no standard, but that it is a standard which in one set of circumstances or another reasonable minds might apply differently.[396]

Here, the Court is reluctant to conclude that the Recapitalization, even if it was conducted at a fair price, was an entirely fair transaction because of the grossly inadequate process employed by the Defendants. What particularly drives the Court's conclusion is that the fair price inquiry presented at trial was severely hampered by the unfairness of the process by which the Board came to the $4 million valuation, including, but not limited to, the combination of the lack of reliable projections, the Board's ignorance of Dwyer's valuation methodology, and the decision not to have any input from Biderman as an independent director or an independent financial advisor.

If the oft-repeated holding of the Delaware Supreme Court's decision in *Weinberger* regarding the entire fairness standard—that the analysis is *not bifurcated* but is to be a *unitary conclusion*[397]—has any purchase, then, even if the fair price component "may be the preponderant consideration" for most non-fraudulent decisions or transactions,[398] it must hold true that a grossly unfair process can render an otherwise fair price, even when a company's common stock has no value, not entirely fair. It is not unprecedented for this Court to conclude that a price near the low end of a range of fairness, coupled with an unfair process, was not entirely fair.[399]

After a careful and reflective weighing of the procedural and substantive fairness of the Recapitalization, the Court concludes that the Defendants (other than Dwyer and CFP) have not carried their burden of proof. Those Defendants breached their fiduciary duties because the Recapitalization was not entirely fair.

D. ***The Plaintiffs' Aiding and Abetting Claim against the Other Defendants***

Alongside their breach of fiduciary duty claim against Dort Cameron, Katz, Shipman, and Snyder, the Plaintiffs

claim that Dwyer, Wren, Javva, and Catalyst aided and abetted these breaches of fiduciary duty. They focus their attention in particular on Dwyer's conduct during the Recapitalization, especially his contributions to the misleading Fall 2002 Update.[400] In opposition, the Defendants argue that, because there was no breach of fiduciary duty (since, they contend, the Recapitalization was entirely fair and the Fall 2002 Update was not materially misleading), there is no aiding and abetting liability.[401]

***48** Under Delaware law, to recover on a claim for aiding and abetting another's breach of fiduciary duty, a plaintiff must prove four elements: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by the non-fiduciary defendants, and (iv) damages proximately caused by the breach."[402] For reasons similar to the Court's alternative conclusion that the Plaintiffs have standing under *Gentile II* to sue Dort Cameron, Katz, Shipman, and Snyder directly, the Court also concludes that the Plaintiffs have standing to bring this aiding and abetting claim directly against Dwyer, Wren, Javva, and Catalyst. But, because the Court previously concluded that Wren, Javva, and Catalyst breached their fiduciary duties as a control group, their liability for aiding and abetting is limited to the extent that they did not constitute a control group. In other words, the Plaintiffs are limited to one recovery—breach of fiduciary duty or aiding and abetting—as against Wren, Javva, and Catalyst.

The Plaintiffs easily satisfy the first two elements of an aiding and abetting claim. It cannot be disputed that the members of the Board owed fiduciary duties to the Company's stockholders, including all of the Plaintiffs.[403] Additionally, as the Court explained earlier, the director Defendants breached their fiduciary duties by approving the Recapitalization, which was not entirely fair.

The Plaintiffs have also proven that Dwyer, Wren, Javva, and Catalyst knowingly participated in that breach. First, Dwyer was instrumental, more so than any of the Company's directors, in defining the terms of the Recapitalization and valuing the Company. He was in charge of the valuation despite his conflict of interest stemming from his material relationship with Wren—a similar conflict faced by Dort Cameron. Despite attending all of the relevant meetings, Dwyer did not adequately explain the $4 million valuation when the Board approved the Recapitalization or before Wren invested. Due to this and similar conduct, Dwyer knowingly "participate[d] in the breach by misleading the board [and] creating the informational vacuum."[404]

The weight of the trial evidence supports the additional conclusion that Dwyer knowingly and actively participated in the conversations in the Board meeting during which management suggested that the Company should inform other stockholders about the changes to its capital structure. Dwyer was complicit in the Board's decision to ignore that suggestion. And, furthermore, Dwyer was involved in drafting the Fall 2002 Update, which he intended only to provide a "businessman's overview" of the Recapitalization.[405] It was in Dwyer's interest, as a member of Wren, to not disclose that Wren was a substantial participant in the Recapitalization.[406] In sum, Dwyer's conduct during and outside the Board meetings was his knowing participation in the unfair Recapitalization.

Second, Wren, Javva, and Catalyst all knowingly facilitated the Recapitalization by providing their consents to convert the senior secured debt into Preferred A stock and adopt the reverse stock split. Additionally, Wren and Javva invested money in exchange for Preferred B–1 stock. All three stockholders received something of value in the Recapitalization: Wren and Javva received the convertible promissory notes (and ultimately the Preferred B–1 stock), and Catalyst received the right to invest on similar terms for a designated period. Furthermore, under a general principle of Delaware agency law, their participation was knowing because they, as principals, are imputed with the knowledge of their agents (and fiduciaries) on the Board: Dort Cameron (for Wren), Katz (for Javva), and Shipman (for Catalyst).[407]

***49** Finally, the Plaintiffs demonstrated causal damages by the knowing participation of Dwyer, Wren, Javva, and Catalyst. There would have been no Recapitalization without a plan and valuation (by Dwyer); Board approval by their fiduciaries and stockholder consents to the charter amendments and to exchange the secured debt into Preferred A (by Wren, Javva, and Catalyst); and money to invest (by Wren and Javva). Each of these Defendants was a proximate cause of the Plaintiffs' damages.[408]

Therefore, the Plaintiffs have demonstrated, by a preponderance of the evidence, that Dwyer and (were they not liable for their own breaches of fiduciary duty) Wren, Javva, and Catalyst are liable for aiding and abetting Dort Cameron, Katz, Shipman, and Snyder's breaches of fiduciary duty.

E. ***The Plaintiffs' Unjust Enrichment Claim***
The Plaintiffs allege that Wren, Javva, Catalyst, and CFP were unjustly enriched in the Recapitalization. The Plaintiffs assume these Defendants may be held liable for unjustly enriching themselves in the Recapitalization even if the Court concludes that the Plaintiffs lack standing to sue Wren, Javva, and Catalyst directly.[409] These Defendants, for their part, marshaled many of the same defenses they advanced in opposition to the underlying fiduciary duty claim. They submit, for example, that a finding that Wren, Javva, and Catalyst did not breach their fiduciary duties should foreclose recovery on the Plaintiffs' duplicative unjust enrichment claim.[410] For purposes of this analysis, the Court assumes, without deciding, that the Plaintiffs have standing to assert this claim directly against the relevant Defendants.

The Delaware Supreme Court has defined unjust enrichment as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[411] Under Delaware law, recovery on a claim for unjust enrichment requires proof of five elements: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[412]

1. ***The Claim against Wren, Javva, and Catalyst***
The Plaintiffs' claim for unjust enrichment against Wren, Javva, and Catalyst mirrors their claims for breach of fiduciary duty and aiding and abetting. The theories of liability are the same. Thus, "[t]he elements of proof are the same, and so are the possible recoveries."[413] As the Court noted previously in this litigation, the Plaintiffs are entitled to receive only "one recovery" as between these duplicative claims.[414] The Plaintiffs conceded this point in their pre-trial briefing.[415] Because the Court concluded that Wren, Javva, and Catalyst are liable for breach of fiduciary duty (and, alternatively, for aiding and abetting), the Court need not address this unjust enrichment claim against them "which would, if resolved in the [Plaintiffs'] favor, lead to the same recovery."[416]

2. ***The Claim against CFP (Cameron Family Partnership)***
***50** The only claim asserted against CFP is one for unjust enrichment for which the Plaintiffs failed to carry their burden of proof. Because CFP did not receive any Preferred B–1 stock in the Recapitalization,[417] it was not unjustly enriched. Rather, CFP only acquired Preferred B–1 stock from Wren in a separate, unrelated transfer in October 2006. The Plaintiffs have not demonstrated, through a veil-piercing theory or otherwise, that CFP should be held to account for Wren's receipt of the Preferred B–1 stock in the Recapitalization.

CFP is therefore entitled to judgment in its favor on this claim.

F. ***Damages for the Breach of Fiduciary Duty and Aiding and Abetting Claims***
The Defendants (other than CFP) are liable for breach of fiduciary duty or aiding and abetting. Where a board decision is found not entirely fair, the Court engages in a director-by-director analysis to determine the nature of the breach of fiduciary duty: loyalty or care.[418] Directors whose unfair conduct implicates solely the duty of care may be exculpated from liability for monetary damages if the corporation's certificate of incorporation includes an exculpatory provision pursuant to 8 *Del. C.* § 102(b)(7).[419] That statute does not exculpate those who aided and abetted a breach of fiduciary duty, even if the underlying breach is of solely the duty of care.[420] Nor would it apply to Wren, Javva, or Catalyst as a control group. The Company's charter included a Section 102(b)(7) provision.[421]

"Self-dealing fiduciaries are liable because they breached their duty of loyalty if the transaction was unfair, regardless of whether they acted in subjective good faith."[422] Dort Cameron, Katz, and Shipman were interested in the unfair Recapitalization that provided unique benefits to the entities to which they owed conflicting fiduciary duties (Preferred B–1 stock for Wren and Javva and the right to invest for Catalyst); each of these three directors

engaged in self-dealing and thus breached his duty of loyalty. Snyder, in contrast, did not receive any benefit in the Recapitalization. His conduct in the unfair Recapitalization was generally limited to drafting the materially misleading Fall 2002 Update and permitting certain terms of the convertible promissory notes to change without Board approval. There is no evidence that Snyder "knowingly disseminate[d]" the misleading information[423] or that he failed to act in good faith.[424] Thus, by operation of the Company's Section 102(b)(7) provision, Snyder is exculpated from monetary liability. The other liable Defendants, however, are not.

***51** "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly."[425] This Court has "very broad" power to "fashion[ ] equitable and monetary relief under the entire fairness standard as may be appropriate."[426] Indeed, this discretion is greater "when fashioning an award of damages in an action for a breach of the duty of loyalty than it would [be] when assessing fair value in an appraisal action."[427]

The Plaintiffs proffered several damages theories, including disgorgement in the amount of $118.6 million to $133.2 million and rescissory damages in the amount of $48.9 million to $58.9 million. Delaware courts have found those damage theories to be appropriate in certain situations,[428] but those precedents do not necessarily guide the Court's discretion here. The most compelling theory offered is that the Plaintiffs should be awarded damages in the amount of consideration they would have received in the Akamai Merger had they participated in the Recapitalization pro rata; those damages, by the Plaintiffs' calculations, would be approximately $17.8 million, plus interest. Yet, what strongly undermines this theory, among other issues, is that the Defendants were under no duty to allow the Plaintiffs to participate. Moreover, the $4 million value attributed to the Company in the Recapitalization was a fair price. And, furthermore, calculating damages for a lost opportunity to invest is too speculative based on the facts and circumstances here.

As the Plaintiffs' theories demonstrate, it is difficult to assess damages for the unfair Recapitalization in January 2002, when the fair price of the Company's equity was zero, without reference to (and a fair bit of bias from) the $175 million Akamai Merger in November 2006. It is likewise difficult to conclude that disloyal conduct when the Company's equity was worth nothing should now be remedied by an award of damages in the tens (or hundreds) of millions of dollars, especially where the trial record strongly suggests that it was Snyder's management of NaviSite SMG's Stream OS business—not the Company's legacy business—that drove the Company's growth after the Recapitalization. In other words, but for the Recapitalization, there is little evidence to suggest that the Company would have been worth any amount approaching what the Plaintiffs seek in damages. For these and related reasons, because the unfair Recapitalization was nonetheless effected at a fair price in which the Plaintiffs' stock had no value, the Court concludes, in its discretion, that it would be inappropriate to award disgorgement, rescissionary, or other monetary damages to the Plaintiffs "because of the speculative nature of the offered proof."[429]

***52** That is not to say, however, that the Plaintiffs are wholly without a remedy. Based in part on its inherent equitable power to shift attorneys' fees[430] and its statutory authority to shift costs,[431] this Court has exercised its discretion and concluded that, even where a transaction was conducted at a fair price, a finding that the transaction was not entirely fair may justify shifting certain of the plaintiffs' attorneys' fees and costs to the defendants who breached their fiduciary duties.[432] This case may also qualify for similar treatment, but the parties did not fairly present this issue in post-trial briefing. The Plaintiffs may petition the Court for an award of attorneys' fees and costs if they so choose.

G. *Laches*

In their post-trial briefing, the Defendants assert laches as an affirmative defense to the remaining Kim Plaintiffs' challenge to the Recapitalization.[433] For the Court to bar recovery on a claim as untimely under laches, a defendant must establish three elements: "first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, prejudice to the defendant."[434]

> Although both laches and statutes of limitation operate to time-bar suits, the limitations of actions applicable in a court of law are not controlling in equity. A court of equity moves upon considerations of conscience, good faith, and reasonable diligence. Thus, although a statute of limitations defense is premised solely on the passage of time, the lapse of time between the challenged conduct and the filing of a suit to prevent or correct the wrong is not, in itself, determinative of laches. Instead, the l aches inquiry is principally whether it is

inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties.[435]

The Defendants contend that the Kim Plaintiffs unreasonably delayed in bringing their claims. They submit that this delay materially prejudiced their defense of this action by requiring additional briefing and depositions (and incurring additional legal costs) after completion of discovery on the claims asserted by the Fuchs Plaintiffs.[436] Conversely, the Kim Plaintiffs argue that their claims should not be barred by laches because, with the benefit of tolling during the pendency of several putative class actions in Delaware and elsewhere, they filed their complaint within the analogous limitations period. In any event, they suggest that the Defendants failed to demonstrate sufficient prejudice to warrant applying laches.[437]

***53** The Delaware Supreme Court recently endorsed the use of intra-jurisdictional tolling for class action lawsuits and adopted cross-jurisdictional class action tolling. "Until class action certification is denied, the individual claims remain tolled."[438] Class action tolling reflects public policy in favor of avoiding the "wasteful and duplicative litigation" of "placeholder" lawsuits that proposed class members may have to file without this doctrine.[439]

Assuming, without deciding, that the Defendants-friendly suspension tolling doctrine applies to class action tolling in this Court—which would require the Kim Plaintiffs to assert their claims "within the amount of time left in the limitation period on the day tolling took place"[440]–then the Kim Plaintiffs' claims are within the analogous limitations period. After the Kim Plaintiffs were on inquiry notice of their claims when the Company mailed proxy materials for the Akamai Merger to them in November 2006, the analogous limitations period would have been tolled during the pendency of three putative class actions for which the Kim Plaintiffs were within the class definition: (i) from February 1, 2007, to September 21, 2007, for a class action in California dismissed on *forum non conveniens* grounds;[441] (ii) from October 19, 2007, to April 7, 2008, for a class action in New York that was discontinued in favor of litigation in this Court;[442] and (iii) from August 1, 2008, to August 20, 2010, when the Court denied class certification in *Dubroff II*.[443] The Kim Plaintiffs filed suit on October 22, 2012.

The sum of the periods of time when there was no class action tolling is 1,004 days, which is within the analogous limitations period of 1,095 days (3 years) for breach of fiduciary duty claims.[444] That is, the Kim Plaintiffs filed their claims with three months remaining in the analogous period. The potential prejudicial impacts identified by the Defendants—chief among them being increased litigation costs—do not warrant barring the Kim Plaintiffs' claims under laches when the Defendants were otherwise on full notice of practically identical claims asserted by the Fuchs Plaintiffs. The Kim Plaintiffs' challenge to the Defendants conduct in the Recapitalization is thus not barred by laches.

VI. THOMAS MURPHY'S FRAUD CLAIM

Thomas Murphy asserts that several Defendants—primarily Snyder, Dwyer, and Dort Cameron—defrauded him when the Company repurchased 44,000 shares of his stock in June 2006. Specifically, he claims that these individuals fraudulently induced him to sell back his stock at $1.00 per share, which they stated was fair, without disclosing ongoing merger discussions between the Company and Akamai. He seeks the difference between the $1.00 per share he received and the $13.00 per share of consideration received by stockholders in the Akamai Merger, or approximately $560,000.

A. *Relevant Background*

***54** By early 2006, the Board had begun the process of getting ready "[t]o someday sell the business."[445] Competitors in the industry, including VitalStream, Limelight, and Akamai, were tacitly expressing their interest in the Company, and Snyder generally updated the Board about this activity.[446] For example, Snyder had received an email from the CEO of VitalStream in May. On May 27, Snyder changed the email's title from "VS/Nine" to "M & A FYI," forwarded it to Dwyer, and included his thoughts on preliminary conversations with other potential acquirers. According to the email, someone at Limelight "wants to start a process with [the Company] in about 2 weeks," and Snyder planned to schedule an overdue meeting with Akamai at some point "over the next 30 days to

keep them interested."[447]

Around this time, Dwyer, Newton (who would shortly replace Shipman on the Board), Snyder, and others expressed their opinions, with varying degrees of confidence, that Nine System's financial performance was exceeding their expectations.[448] Dwyer informally valued the Company's preferred stock at $57.5 million,[449] and Newton thought the Company was worth $60 to 90 million.[450] Snyder, in particular, expected the Company to have "a bang up quarter and year versus budget."[451] He made this specific comment, which the Plaintiffs emphasized heavily at trial, while trying to increase his compensation as CEO during negotiations with Dwyer.

Less than a week after the "M & A FYI" email, Thomas Murphy contacted the Company seeking to resell a substantial portion of his stock. He wanted the money because he was under financial pressure in light of his and his wife's health problems.[452] It is likely that he spoke with Dort Cameron, Snyder, Dwyer, and the Company's CFO, John Walpuck ("Walpuck"), although some of those individuals could not recall whether they talked or what may have been said.[453] Thomas Murphy asked about the Company's financial outlook, and someone in that group—most likely Snyder—said that things were "going okay."[454] At another point, Thomas Murphy also mentioned to Snyder that he saw that the Company had received some favorable publicity: a magazine or newspaper article had featured it alongside Akamai and well-known competitors in the streaming media industry.[455] This comment went largely ignored.[456]

One of the Defendants with whom Thomas Murphy spoke likely proposed a $1.00 per share price, and someone at the Company drafted a stock repurchase agreement to reflect the transaction.[457] No one at the Company obtained an independent valuation of these shares.[458] Contrary to his pre- and post-trial contentions, Thomas Murphy did not prove by a preponderance of the evidence that any of the Defendants represented or otherwise assured him that $1.00 per share was a "fair" price. Rather, it is more likely than not that Thomas Murphy independently assumed, based on his expectation of how the Company should treat its first investor in a time of need, that the Defendants would only offer him a price that was fair.[459]

***55** On June 2, 2006, Thomas Murphy and the Company executed a Stock Repurchase Agreement by which the Company repurchased 44,000 of his shares.[460] Thomas Murphy did not negotiate any provision of the document.[461] The Stock Repurchase Agreement included a purported anti-reliance provision, which provided:

> Section 2.5 *Representations.* Shareholder acknowledges that no promises, representations or warranties whatsoever, express or implied, not contained herein concerning the Company and the subject matter hereof, have been made by the Company to induce Shareholder to execute this Agreement. Shareholder further acknowledges and warrants that he has not entered into this Agreement or the transactions contemplated thereby in reliance on any promise, representation or warranty not contained herein, or under duress or coercion, whether economic or otherwise.[462]

After the stock repurchase, Thomas Murphy held 1,000 shares of the Company.

When he received the proxy materials for the Akamai Merger in November 2006, Thomas Murphy was upset. He felt he had been had because the shares he sold for $1.00 each in June were, less than six months later, now valued at $13.00 per share. Despite thinking that he might have had grounds to bring a lawsuit, however, Thomas Murphy did not seek legal advice because he felt he could not afford an attorney at the time.[463]

He eventually filed his claim against the Defendants in this Court in 2012 as one of the Kim Plaintiffs.

B. *The Parties' Contentions*

Thomas Murphy contends that he has established that the Defendants fraudulently induced him to sell back his stock, if not by representing that $1.00 per share was a fair price, then by failing to disclose the contemporaneous merger discussions with Akamai and other parties.[464] The Defendants, for their part, assert that Thomas Murphy failed to carry his burden to establish fraud against any of them[465] under the standard articulated by this Court in *Latesco, L.P. v. Wayport, Inc. (Wayport I)*[466] and *In re Wayport, Inc. Litigation (Wayport II)*.[467] Alternatively, they contend that he failed to establish justifiable reliance or damages, and, moreover, that his claims should be barred

under the anti-reliance provisions of the Stock Repurchase Agreement or under laches as untimely.[468] As to these alternative arguments, Thomas Murphy maintains that, given the lack of negotiation and unequal bargaining power, any anti-reliance provision should not be enforced—assuming it even applies to omissions, which he argues it does not.[469] Further, he asserts tolling to support his position that his claim is timely, and he posits that the additional consideration he would have received for his 44,000 shares in the Akamai Merger—the calculation of damages followed in *Wayport II*—is sufficient to establish damages here.[470]

C. ***Analysis***

***56** To recover on a claim of fraud under Delaware law,[471] Thomas Murphy must prove:

> (i) a misrepresentation, which can take the form of a statement, omission, or active concealment of the truth; (ii) the defendant's knowledge that the representation was false; (iii) intent to induce the plaintiff to act or refrain from acting; (iv) justified reliance on the misrepresentation; and (v) damage as a result of such reliance.[472]

Based on the evidence presented at trial, Thomas Murphy failed to establish a fraudulent statement or active concealment by any of the Defendants. No one represented to him that $1.00 per share was a fair price. Consequently, he must establish a fraudulent omission.

For the Defendants to be held liable for fraud for failing to disclose the conversations between Snyder and the Company's competitors about a potential acquisition, they must have been subject to a duty to disclose that information. "[M]ere silence about facts material to another party is not fraud unless the party who remains silent has a duty to disclose those facts."[473] "Generally, a duty to disclose arises when there is a fiduciary or other similar relationship of trust between the parties or where the custom or course of dealing between the parties merits disclosure."[474] This Court's decisions in the *Wayport* case are instructive in analyzing whether Thomas Murphy has carried his burden to establish that the Company's repurchasing of his stock required Snyder or any of the other Defendants to disclose additional information to him.

The *Wayport* case involved allegations by a stockholder that the corporation, the board of directors, an officer of the company, and two major stockholders were liable for breach of fiduciary duty, fraudulent misrepresentation, and other claims for their failure to disclose certain information to the plaintiff when he sold his stock in the corporation to the defendant stockholders. The defendants allegedly failed to disclose material information about the corporation's ongoing negotiations to sell various assets to a third party, which was information that purportedly would have increased the consideration that the plaintiff would have sought when selling his stock. In *Wayport I,* the Court dismissed the claims against the directors under Rule 12(b)(6) in part "[b]ecause there is no allegation of board action that implicates the duty of loyalty, and none of the directors ultimately purchased any stock in the second sales transactions, no claim for breach of the duty of loyalty can be maintained against them."[475] However, the Court sustained the claims against the other defendants, concluding that it was reasonably conceivable that they may "have been subject to a duty to speak which made silence about the material inside information they possessed impermissible."[476]

***57** In its post-trial decision in *Wayport II,* the Court found that none of the remaining defendants was liable for failing to disclose information to the plaintiff when buying his shares.[477] In doing so, the Court concluded that Delaware law follows the "special facts" doctrine in determining what information a fiduciary must disclose before directly buying stock from, or selling stock to, a stockholder.[478] Most relevant here, a fiduciary generally assumes a duty to speak in those circumstances if the fiduciary has "knowledge of a substantial transaction, such as an offer for the whole company."[479] Under *Wayport II,* a fiduciary's failure to disclose a special fact can also establish the false misrepresentation element of a fraud claim.[480]

The threshold for a "special fact" is higher than that for information to be deemed material.[481] Information about a possible merger or similar transaction generally becomes material when there is an "agree[ment] on the price and structure of the transaction."[482] The Court in *Wayport II* concluded that the only material omission did not rise to the level of a special fact.[483]

The facts here are a slight variation on those of *Wayport*. Here, the Company repurchased stock from a stockholder.

Under Delaware law, a corporation does not owe fiduciary duties to its stockholders; the board of directors and the officers do.[484] Thus, the Company cannot be liable to Thomas Murphy for breach of fiduciary duty (or for fraud) for want of a fiduciary relationship that could give rise to a duty to speak.

Nonetheless, as the *Wayport II* court suggested, the Defendants who acted as agents of the Company in facilitating the stock repurchase, even if they did not purchase the stock, could still have liability because they were responsible for the Company's statements and omissions to Thomas Murphy. That is, Snyder and the other members of the Board, as fiduciaries to Thomas Murphy, could be liable for fraud if they failed to disclose a special fact to hi m. Dwyer, as a non-fiduciary, could also be liable for fraud under an aiding and abetting theory.

***58** It is plain from the documentary evidence that, despite Snyder's attempts at trial to discount the import of his "M & A FYI" email, the Board was in the early stages of considering whether to sell the Company. But, Thomas Murphy did not establish that Snyder and Dwyer's conversations with competitors in May or June 2002 were anything more than preliminary. There are no contemporaneous term sheets, letters of intent, or draft agreements in the record. Any conversations with potential acquirers at that time could hardly be called negotiations. If anything, Snyder's email reveals that any serious meetings were still weeks or even months away—they did not occur in earnest until August. The Board's internal and generalized discussion of a potential transaction and their accompanying valuations of the Company would not qualify as material information. Accordingly, as the Court noted in *Wayport II,* neither does this information qualify as a special fact.[485]

Because there was no special fact, there was no duty to speak.[486] Thus, failing to disclose that information to Thomas Murphy was neither a breach of fiduciary duty nor a fraudulent omission by Snyder, Dort Cameron, or anyone else on the Board. Since no director is liable for failing to disclose that information, neither Dwyer nor the other Defendants are liable under an aiding and abetting theory.[487] The Defendants are therefore entitled to judgment in their favor on Thomas Murphy's fraud claim.[488]

VII. CONCLUSION

For the foregoing reasons, the Court concludes that Wren, Javva, Catalyst, Dort Cameron, Katz, Shipman, and Snyder breached their fiduciary duties, and Dwyer (and, to the extent they were not a control group, Wren, Javva, and Catalyst) aided and abetted those breaches, in the unfair Recapitalization. The Defendants are entitled to judgment in their favor on the Plaintiffs' other claims, including Thomas Murphy's fraud claim.

The Plaintiffs are not entitled to any monetary damages. The Plaintiffs are nonetheless granted leave to submit a petition for attorneys' fees and costs.

Counsel are requested to confer and to submit an implementing form of order.

Footnotes

1 Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Stockholders,* 152 U. Pa. L.Rev. 785, 798 n.41 (2003) ("The court's reasoning [in *Weinberger v. UOP, Inc.,* 457 A.2d 701 (Del.1983)] is unclear. Suppose the price is entirely fair, but the process is faulty. To what else are shareholders entitled beyond a fair price?").

2 *Weinberger,* 457 A.2d at 711.

3 *See Kahn v. Tremont Corp.,* 694 A.2d 422, 432 (Del.1997).

4 *See, e.g., Reis v. Hazelett Strip–Casting Corp.,* 28 A.3d 442, 467 (Del. Ch.2011) (citing *HMG/Courtland Props., Inc. v. Gray,* 749 A.2d 94, 116 (Del. Ch.1999)) ("Depending on the facts and the nature of the loyalty breach, the answer can be a 'fairer' price.").

5 Trial Tr. ("Tr.") 971 (Snyder).

[6] Pretrial Stipulation and Order ("Pretrial Stip.") ¶ 29.

[7] *See Dubroff v. Wren Hldgs., LLC,* 2009 WL 1478697 (Del. Ch. May 22, 2009) ("*Dubroff I*").

[8] *See Dubroff v. Wren Hldgs., LLC,* 2010 WL 3294219 (Del. Ch. Aug. 20, 2010) ("*Dubroff II*").

[9] *See Dubroff v. Wren Hldgs., LLC,* 2011 WL 5137175 (Del. Ch. Oct. 28, 2011) ("*Dubroff III*").

[10] Tr. 1062 (Biderman).

[11] The SMIG Plaintiffs are: J. Paul Amaden, James P. Amaden, David Horowitz, Howard Horowitz, Steven Horowitz, Carrie Keating, John Keating, Gregory Loprete, Michael Loprete, Caroline Reckler, Gillian Reckler, Jon Reckler, Stephanie Reckler, Shlomo Schon, Edward Strafaci, Linda Strafaci, Joanne Visovsky, and Michael Visovsky.

[12] *See In re Nine Sys. Corp. S'holders Litig.,* 2013 WL 771897 (Del. Ch. Feb. 28, 2013) ("*Nine Sys. Corp. I*").

[13] These four stockholders are: Morris Fuchs, Bernard Fuchs, The Greenberg Family Fund d/b/a ASR Ventures LLC, and The Golden Family Fund, LLC.

[14] *See In reNine Sys. Corp. S'holders Litig.,* 2013 WL 4013306 (Del. Ch. July 31, 2013) ("*Nine Sys. Corp. II*").

[15] Joint Exhibit ("JX") 219.

[16] Pretrial Stip. ¶ 10.

[17] JX 684 ¶¶ 44–45.

[18] Pretrial Stip. ¶ 8.

[19] Pretrial Stip. ¶ 9.

[20] JX 609 (Newton Dep.) at 29–30.

[21] JX 645 (Biderman Dep.) at 713–14; JX 1045–0002.

[22] JX 684 ¶¶ 35–37.

[23] JX 113–0007.

[24] *Id.*

[25] Tr. 28 (Mountanos), 92 (Hampe).

[26] JX 113–0001.

[27] JX 111.

[28] Tr. 2026–27 (Katz).

[29] *Id.* 1096 (Biderman).

[30] JX 111.

[31] *Id.*

[32] JX 113.

[33] *Id.* at 0002.

[34] *Id.*

[35] *Id.* at 0004.

[36] Tr. 320–21 (R. Murphy), 1554–55 (Schaum).

[37] *Id.* 1100–06 (Biderman).

[38] JX 85.

[39] JX 1045–0044–79.

[40] JX 154–0005. The Defendants object to the Daniels Memo and the included projections on the grounds of authenticity and hearsay. Defs.' Post–Trial Answering Br. ("Defs.' Answering Br.") 24 n.26. The Plaintiffs contend that Bob Hampe ("Hampe"), the Company's Senior Vice President for Operations at the time, authenticated the Daniels Memo and the projections. Pls.' Post–Trial Opening Br. ("Pls.' Opening Br.") 109 n.59 (citing Tr. 110–16 (Hampe)). The Court concludes that this document is admissible to the extent it is relied upon in this memorandum opinion.

[41] Tr. 137 (Hampe).

[42] *Id.* 425 (R. Murphy).

[43] JX 232–0003.

[44] JX 147, 618 (Williams D ep.) at 16–17.

[45] Tr. 344–45 (R. Murphy), 1554–55 (Schaum); JX 615 (Granberg Dep.) at 24.

[46] Tr. 347–50, 354, 372 (R. Murphy), 663–65 (Snyder).

[47] JX 157

[48] Tr. 1115–17 (Biderman), 1694–95 (Shipman), 2233 (Dwyer).

[49] JX 618 (Williams Dep.) at 72–79.

[50] JX 697 (R. Murphy Dep.) at 530, 546–50, 558.

[51] JX 1000 at ¶ 5.

[52] JX 0181–0006.

[53] JX 1000 at ¶ 40.

[54] JX 615 (Granberg Dep.) at 60.

[55] JX 111.

[56] JX 159.

[57] JX 185–0001, 632 (Grad Dep.) at 237–38.
The Court notes that, although the Company was struggling through a financial crisis, this was not an unexpected emergency. Had the Defendants adequately discharged their fiduciary duties leading up to December 2001, they would have been aware of this issue well in advance of December 20.

[58] Tr. 1118–21 (Biderman), 790–91, 799–80(Koo), 1476–78 (Grad).

[59] *Id.* 1701–02 (Shipman), 2237 (Dwyer).

[60] *Id.* 1118 (Biderman).

[61] *Id.* 2514 (Dwyer).

[62] *Id.* 1123–24 (Biderman); JX 645 (Biderman Dep.) at 718–19, 731–32.

[63] JX 159.

[64] *Id.*

[65] Tr. 1131 (Biderman), 1699 (Shipman).

[66] JX 166.

[67] *Id.* at 0004.

[68] Ironically, Dwyer thought that $4 million was such a high value for the Company that using it "would avoid this litigation." Tr. 2521 (Dwyer).

[69] Tr. 2029–30 (Katz), 2242, 2521, 2611–12 (Dwyer), 2677 (D.Cameron).

[70] *Id.* 2242, 2521, 2611–12 (Dwyer).

[71] Dwyer valued the Company by comparing the revenue and acquisition prices for eMedia and NaviSite SMG and by adding an acquirer premium. *See id.* 2525 (Dwyer) ("I wanted to have a price that was greater than either of the acquisitions, because we were the acquiring company. And I thought SMC, as an acquiring company, should get some sort of premium for being the acquirer."); *id.* 2527 (Dwyer) ("So I came up with a number of $4 million, for two reasons: One, it was higher than either of the other companies, even though Streaming Media Corporation was much lower; and, two, that when you did that $4 million, even though SMC debt was impaired, which it clearly was, you had capital leases, negative working capital, and $5.7 million. There was going to be some substantial part of this enterprise that would go to SMC. And then the proposal was that the SMC secured creditors make a deal with the common shareholders where they get part of the SMC part of the transaction. And that way, the common shareholders, who started off initially behind a whole bunch of debt in a tiny little company, would own something in a much, much bigger company that had some opportunity to be worth something some day.").

The Court does not doubt that Dwyer believed this valuation was appropriate at the time. Whether he is correct, there may be room to doubt. Whether the process by which he valued the Company could have been better, however, there is no doubt.

[72] JX 167.

[73] JX 166–0004.

[74] *Id.* at 0002.

[75] Tr. 1977–80 (Newton), 2121 (Katz), 2504 (Dwyer).

[76] JX 169.

[77] Tr. 1134, 1140–42 (Biderman).

[78] Throughout late 2002 and early 2003, Dort Cameron's son, Seth Cameron, was tasked with "revising" the Board minutes. JX 327. He likely did so with the assistance of the Company's counsel. Tr. 1020–22 (S. Cameron). Before this time, Seth Cameron was not actively involved with Wren's investment in the Company, and he offered conflicting testimony regarding whether he had sat in on telephonic Board meetings in his father's office. *Compare id.* 1013–14 (S.Cameron), *with* JX 607 (S. Cameron Dep.) at 25. With his instructions from the Board, Seth Cameron revised what he described as the "very thorough," contemporaneous minutes taken by Granberg. Tr. 1012, 1021 (S.Cameron). Embellishments were made, new statements were added, and certain comments were

deleted, but Seth Cameron was adamant at trial that he would not have added anything that he did not know to be a truthful statement. *Id.* 1015–16, 1018–25, 1028 (S.Cameron). These revised minutes—ultimately designed to "make sure that everyone on the board was on the same page in terms of what had happened," *id.* 1013 (S.Cameron)—were ratified at a Board meeting on April 23, 2003. JX 334. Biderman did not receive the revised minutes or attend that meeting. Tr. 1219–20 (Biderman).

Without delving into the similarities and differences of the Board-ratified minutes and Granberg's contemporaneous minutes, the Court notes that this post-hoc revision decreases the former's reliability. The Court draws on the different sets of documents as appropriate.

[79] JX 170–0002.

[80] *Id.*

[81] *Id.* at 0001.

[82] JX 1710 (Shipman), 2117 (Katz), 2531 (Dwyer).

[83] JX 170–0002.

[84] JX 170–0004.

[85] JX 618 (Williams Dep.) at 174–75.

[86] Tr. 2513, 2530 (Dwyer).

[87] *Id.* 2117, 2136 (Katz).

[88] *Id.* 1720, 1847–48 (Shipman) ("So I thought God bless people who were willing to fund this, because it keeps my investment alive, and you never know what will happen.").

[89] JX 170–0002.

[90] Tr. 1146–47 (Biderman).

[91] JX 170.

[92] JX 174, 175; Tr. 1983 (Newton).

[93] Tr. 1149–50 (Biderman).

[94] JX 181.

[95] *Id.* ("While we will be diluted substantially if we do not exercise our 90–day option to invest, the alternative is shutting the company down.").

[96] JX 161–0013.

[97] Tr. 1742–43, 1746 (Shipman).

[98] *Id.* 1752–54 (Shipman).

[99] *Id.* 2271–72 (Dwyer).

[100] This invitation to invest was never shared with any of the Company's minority investors that, by virtue of their most favored nation rights, most likely had preemptive rights. Tr. 1168–70 (Biderman). The Court discusses these rights in the context of the Defendants' challenge to the standing of Plaintiffs Morris and Bernard Fuchs.

[101] JX 178.

[102] JX 185–0003.

[103] Tr. 2264–65 (Dwyer).

[104] JX 178–0002.

[105] *Id.* at 0005.

[106] Tr. 1680–81 (Shipman), 2283 (Dwyer) ("I don't think we wrote anything that said we disagreed with the projections.").

[107] JX 178.

[108] JX 1044.

[109] Tr. 1163–64 (Biderman) ("They just wanted to rubber-stamp what they had already discussed ... and they wanted, ideally, for me to go along so it looked like it was unanimous.").

[110] JX 178–0002.

[111] JX 185–0001.

[112] JX 260.

[113] JX 645 (Biderman Dep.) at 890–91.

[114] JX 188.

[115] Tr. 2286–87 (Dwyer).

[116] JX 188.

[117] JX 741–0003–04.

[118] JX 741.

[119] *Id.* at 0003–04.

[120] In January 2002, the Securities and Exchange Commission ("SEC") opened an investigation into alleged financial fraud regarding the value of certain Lipper-managed funds. The allegations of impropriety at Lipper centered around the conduct of Edward Strafaci, a Plaintiff in this action, who would eventually serve seven years in prison. Tr. 1153–54 (Biderman).

As a Lipper executive, Biderman became overwhelmed with the SEC investigation, which became public when it was reported in major newspapers in February 2002. JX 628 (Biderman Dep.) at 91–96, 105–106; JX 645 (Biderman Dep.) at 889. He gave "perfunctory" attention to matters unrelated to Lipper, including his position on the Board. Tr. 1380–81 (Biderman). Additionally, Lipper's counsel instructed Biderman not to communicate with any Lipper investors, which meant that he never told any of the Lipper-affiliated Plaintiffs, including persons with whom he had been friends or colleagues for years, that he was being excluded from Board meetings or that the ongoing Recapitalization was unfair. *Id.* 1216–17, 1292, 1298–1302, 1414 (Biderman). Grad denied that Biderman ever asked her to inform the Company's Lipper-affiliated investors about these issues. Tr. 1485–86 (Grad).

[121] Tr. 679–81 (Snyder), 2259–60, 2299, 2373 (Dwyer).

[122] JX 185–0005.

[123] Tr. 666–68, 676, 686 (Snyder).

[124] *Id.* 1191 (Biderman).

[125] JX 201; Tr. 1195 (Biderman), 2375 (Dwyer).

[126] Tr. 2309, 2377 (Dwyer).

[127] JX 202; Tr. 1984 (Newton).

[128] JX 185–0005, 206–0001.

[129] JX 206–0002.

[130] JX 208.

[131] JX 209, 210, 211, 212, 213.

[132] JX 223, 227. The Defendants contend that, due to a misreading of certain documents, the Company wound up issuing more stock to Plaintiffs Morris Fuchs and Bernard Fuchs than they were entitled based on their investments. Defs.' Answering Br. 97–99. Other than noting the apparent error, the Defendants do not contend that the stock issued to the Fuchs brothers is invalid.

[133] Tr. 2547–48 (Dwyer).

[134] JX 219; Tr. 694 (Snyder).

[135] Tr. 696, 712–13 (Snyder), 2386–87 (Dwyer).

[136] JX 216, 217.

[137] JX 743; Tr. 703–04 (Snyder).

[138] JX 216, 217, 309; Tr. 707–09 (Snyder), 2070–71 (Katz).

[139] JX. 249–0002, 334–0003; Tr. 2073–76 (Katz).

[140] JX 185–0005.

[141] JX 216, 217; Tr. 2069 (Katz).

[142] JX 185; JX 645 (Biderman Dep.) at 946–49.

[143] JX 232.

[144] Tr. 1212–13 (Biderman).

[145] *See, e.g.,* JX 250–0014.

[146] The 1:10 reverse stock split that had been contemplated earlier in the year became a 1:20 reverse stock split. JX 201; Tr. 2389, 2629 (Dwyer). According to the Plaintiffs, this change was intentional and led to further dilution. They contend that the 1:20 reverse stock split, which increased the per-share price of the Preferred B–1 stock to $0.58 per share, was barely above the anti-dilution rights held by many Plaintiffs for equity issuances below $0.50 per share. JX 45, 50, 57, 124, 131–0016, 135; Tr. 2392 (Dwyer). The other directors did not ask Biderman for his input on the appropriate reverse stock split. Tr. 1216 (Biderman).

[147] JX 255.

[148] *See, e.g.,* Tr. 469–71 (M.Fuchs), 1558–59 (Schaum), 1910 (Horowitz).

[149] JX 262.

[150] JX 309.

[151] JX 178.

[152] JX 729; Tr. 2391–92 (Dwyer).

[153] JX 309.

[154] *See, e.g.,* JX 194, 260, 309; Tr. 2389, 2613 (Dwyer).

[155] JX 309.

[156] JX 260.

[157] Tr. 2618 (Dwyer).

[158] *See, e.g.,* JX 309.

[159] *See, e.g.,* Tr. 464–66 (M. Fuchs), 507–08 (B. Fuchs), 626–27 (Visovsky), 1438 (Reckler), 1627 (Schaum), 1906–07 (Horowitz), 2185–86 (Minster).

[160] *Id.* 2403–04 (Dwyer), 1540 (Schaum).

[161] JX 314, 315, 320.

[162] JX 314.

[163] JX 316.

[164] Tr. 2557–59 (Dwyer).

[165] JX 315.

[166] JX 774.

[167] Tr. 747–48 (Snyder), 2413, 2560–62 (Dwyer); JX 643 (Tallan Dep.) at 149–51, 154.

[168] JX 774.

[169] JX 695 at Resp. 25.

[170] JX 2137A.

[171] Tr. 967–68, 987–88 (Snyder).

[172] *See, e.g.,* Tr. 1910 (Horowitz).

[173] JX 361.

[174] Tr. 1636–37 (Shipman), 2142, 2154 (Katz), 2709 (D.Cameron).
Biderman was not immune from this view, as evidenced by his January demand for a 1.5x liquidation preference for the Preferred A stockholder "whose Board designee dissented" to a subsequent capital raise. JX 178.

[175] Tr. 679–81 (Snyder), 1150–57 (Biderman).

[176] *Id.* 944 (Snyder).

[177] *Id.* 2564 (Dwyer).

[178] *Id.* 940–44 (Snyder).

[179] JX 509–0006–07.

[180] JX 419.

[181] Tr. 971 (Snyder).

[182] JX 419.

[183] Tr. 770–71 (Snyder).

[184] JX 450.

[185] Tr. 2422 (Dwyer).

[186] *Id.* 1984–85 (Newton), 2426–27 (Dwyer).

[187] *Id.* 2435–36 (Dwyer).

[188] *Id.* 856 (Snyder), 1777 (Shipman), 2448–49 (Dwyer).

[189] JX 443; Tr. 836–44 (Snyder).

[190] JX 457.

[191] JX 2142.

[192] Tr. 953–54, 981–84 (Snyder).

[193] *Id.* 959, 963, 983 (Snyder); JX 484–0004.

[194] JX 484–0004.

[195] JX 464; Tr. 2453 (Dwyer).

[196] JX 465.

[197] JX 497.

[198] *Id.*

[199] JX 501.

[200] Tr. 1238 (Biderman).

[201] *Id.* 865 (Snyder).

[202] *Id.* 2461–62 (Dwyer).

[203] JX 501.

[204] JX 510.

[205] *See, e.g.,* JX 520; Tr. 2465 (Dwyer).

[206] Tr. 474 (M.Fuchs).

[207] JX 703.

[208] JX 540.

[209] *Id.*

[210] JX 57, 540.

[211] Defs.' Answering Br. 57–63.

[212] Pls.' Post–Trial Reply Br. ("Pls.' Reply Br.") 18–23; Pls.' Opening Br. 44–58.

[213] Defs.' Answering Br. 51–57.

[214] *Dover Historical Soc'y v. City of Dover Planning Comm'n,* 838 A.2d 1103, 1109 (Del.2003).

[215] 8 *Del. C.* § 327 ("In any derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law.").

[216] *Lewis v. Anderson,* 477 A.2d 1040, 1049 (Del.1984); *but see Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.,* 75 A.3d 888, 894 (Del.2013) (citing *Lewis,* 477 A.2d at 1046 n.10) (reaffirming "two exceptions to the loss-of-standing rule": (i) "where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring or maintain a derivative action"; and (ii) "where the merger is essentially a reorganization that does not affect the plaintiff's relative ownership in the post-merger enterprise").

[217] *See In re New Valley Corp. Deriv. Litig.,* 2004 WL 1700530, at *3 (Del. Ch. June 28, 2004).

[218] 845 A.2d 1031 (Del.2004).

[219] *Id.* at 1033.

[220] *See Feldman v. Cutaia,* 951 A.2d 727, 733 (Del.2008).

[221] *See In re J.P. Morgan Chase & Co. S'holder Litig.,* 906 A.2d 766, 772 (Del.2006).

[222] *See In re Ebix, Inc. S'holder Litig.,* 2014 WL 3696655, at *15–16 (Del. Ch. July 24, 2014) (discussing this tension in the context of a claim challenging the board's allegedly defensive-minded conduct that purportedly had unreasonable anti-takeover effects).

[223] *Grimes v. Donald,* 673 A.2d 1207, 1212 (Del.1996).

[224] 906 A.2d 91 (Del.2006).

[225] *Id.* at 99.

[226] *See Gentile v. Rossette,* 2005 WL 2810683, at *4–5 (Del. Ch. Oct. 20, 2005) ("*Gentile I* "), *rev'd, Gentile II,* 906 A.2d at 91.

[227] *Gentile II,* 906 A.2d at 99–100.

[228] *See Carsanaro v. Bloodhound Techs., Inc.,* 65 A.3d 618, 655 (Del. Ch.2013) ("A dilutive stock issuance can have the requisite dual character [articulated in *Gentile II*].").

[229] *See Gentile II,* 906 A.2d at 99–100.

[230] *Ivanhoe P'rs v. Newmont Min. Corp.,* 535 A.2d 1334, 1344 (Del.1987).

[231] *See Citron v. Fairchild Camera & Instrument Corp.,* 569 A.2d 53, 70 (Del.1989).

[232] *See Tremont Corp.,* 694 A.2d at 428.

[233] *Frank v. Elgamal,* 2014 WL 957550, at * 18 (Del. Ch. Mar. 10, 2014).

[234] *Dubroff I,* 2009 W L 1478697, at *3.

[235] The Defendants submit that only once has a Delaware court found, after a trial, that a plaintiff successfully proved the existence of a control group. *See eBay Domestic Hldgs., Inc. v. Newmark,* 16 A.3d 1, 26 (Del. Ch.2010) (citing *Dubroff I,* 2009 WL 1478697, at *3) ("Even though neither Jim nor Craig individually owns a majority of craigslist's shares, the law treats them as craigslist's controlling stockholders because they form a control group, bound together by the Jim–Craig Voting Agreement, with the power to elect the majority of the craigslist board.").

[236] *Williamson v. Cox Commc'ns, Inc.,* 2006 WL 1586375, at *6 (Del. Ch. June 5, 2006).

[237] *Dubroff I,* 2009 W L 1478697, at *3 (citing *In re PNB Hldg. Co. S'holders Litig.,* 2006 WL 2403999, at *9–10 (Del. Ch. Aug. 18, 2006); *Emerson Radio Corp. v. Int'l Jensen Inc.,* 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996)); *see also Zimmerman v. Crothall,* 62 A.3d 676, 700 (Del. Ch.2013) (finding after trial that two stockholders that owned 65% of the company and that designated two of the board's five directors were not a control group because, in part, "[t]here [was] no showing that they acted as one unit or that one exerted control over the other").

[238] *See Williamson,* 2006 WL 1586375, at *4.

[239] Pls.' Opening Br. 47–58.

[240] Pls.' Reply Br. 22–23.

[241] Defs.' Answering Br. 57–63.

[242] JX 113–0002.

[243] *Id.*

[244] *See, e.g., Frank,* 2014 WL 957550, at *18 (acknowledging implicitly that different stages of a transaction may lead to different conclusions on whether there is a control group).

[245] JX 170–0004.

[246] Tr. 1146, 1148, 1375 (Biderman).

[247] *See, e.g., Gatz v. Ponsoldt,* 925 A.2d 1265, 1280–81 (Del.2007) ("In this case, ... the fiduciary exercises its stock control to expropriate, for its benefit, economic value and voting power from the public shareholders.... Here, the ultimate transferee is a third party, with the controlling stockholder being an intermediary that transfers the benefits of its expropriation to the ultimate beneficiary in exchange for cash or other equivalent value."); *Feldman v. Cutaia,* 956 A.2d 644, 657 (Del. Ch.2007) ("*Gentile* and *Gatz* are predicated on the idea that transactions of this type result in an improper transfer of both economic value and voting power from the minority to the controlling stockholder. Thus, it is clear from those decisions that the Delaware Supreme Court intended to confine the scope of its rulings to only those situations where a controlling stockholder exists. Indeed, any other interpretation would swallow the general rule that equity dilution claims are solely derivative, and would cast great doubt on the continuing vitality of the *Tooley* framework."), *aff'd,* 951 A.2d 727 (Del.2008).

[248] *See, e.g., Dubroff I,* 2009 WL 1478697, at *3 (articulating some of the ways in which a group of stockholders may be deemed a control group).

[249] 634 A.2d 319 (Del.1993).

[250] *Id.* at 329, 332–33.

[251] *See Gentile II,* 906 A.2d at 99 (emphasis added).

[252] *See generally In re MFW S'holders Litig.,* 67 A.3d 496, 521 (Del. Ch.2013) ("Our Supreme Court follows the traditional definition of 'dictum,' describing it as judicial statements on issues that 'would have no effect on the outcome of [the] case.' In Delaware, such dictum is 'without precedential effect.' Thus, broad judicial statements, when taken out of context, do not constitute binding holdings.") (internal citations omitted), *aff'd sub nom., Kahn v. M & F Worldwide Corp.,* 88 A.3d 635 (Del.2014).

[253] 65 A.3d 618 (Del. Ch.2013).

[254] *Id.* at 639, 658.

[255] *Id.* at 658.

[256] *Id.* at 655–56.

[257] *See* § *Del. C.* § 141(a); *see also, e.g., Aronson v. Lewis,* 473 A.2d 805, 811 (Del.1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.").

[258] *See, e.g.,* § *Del. C.* §§ 151–53, 157, 161, 166; *see also Grimes v. Alteon, Inc.,* 804 A.2d 256, 261 (Del.2002) ("Taken together, these provisions confirm the board's exclusive authority to issue stock and regulate a corporation's capital structure.").

[259] On more than one occasion, this Court has emphasized how even controlling stockholders must accede to the decisions of the corporate body bestowed with exclusive management authority—the board of directors:

> The reality is that controlling stockholders have no inalienable right to usurp the authority of boards of directors that they elect. That the majority of a company's voting power is concentrated in one stockholder does not mean that that stockholder must be given a veto over board decisions when such a veto would not also be afforded to dispersed stockholders who collectively own a majority of the votes. Like other stockholders, a controlling stockholder must live with the informed (*i.e.,* sufficiently careful) and good faith (*i.e.,* loyal) business decisions of the directors unless the DGCL requires a vote. That is a central premise of our law, which vests most managerial power over the corporation in the board, and not in the stockholders.

Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 387 (Del. Ch.2004); *see also In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 415 (Del. Ch. May 25, 2010) ("[D]irector primacy remains the centerpiece of Delaware law, even when a controlling stockholder is Present[.]").

[260] *See, e.g., Di Rienzo v. Lichtenstein,* 2013 WL 5503034, at *25 (Del. Ch. Sept. 30, 2013) ("As stated, a direct claim under *Tri–Star* and *Gentile* is against a majority or controlling shareholder only."), *appeal refused,* 80 A.3d 959 (Del.2013); *Feldman,* 956 A.2d at 657.

[261] 1990 WL 161909, 16 Del. J. Corp. L. 1425 (Del. Ch. Oct. 24, 1990).

[262] *See Lipton v. News Int'l, Plc,* 514 A.2d 1075, 1078 (Del.1986), *abrogated in part by Tooley,* 845 A.2d at 1038–39.

[263] *Avacus P'rs, L.P.,* 16 Del. J. Corp. L. at 1432, 1439 ("Shareholders do have a right to vote their shares, however, so a claim that the board improperly acted to entrench itself by issuing stock that impacts the shareholders' voting power may state either an individual or a derivative claim. Assuming the stock is issued for an adequate consideration, the claim will be only individual. If the stock is issued for inadequate consideration, the corporation itself will be directly injured as well and both individual and derivative wrongs might be alleged.").

[264] *See Gentile II,* 906 A.2d at 99 n.18; *In re Tri–Star Pictures, Inc.,* 634 A.2d at 330.

[265] *Carsanaro,* 65 A.3d at 658–59.

[266] Because it was not raised by the parties, the Court does not decide whether a showing that a majority of the Board was not acting in good faith or was not adequately informed–the other ways in which a plaintiff may rebut the business judgment standard of review, *see Aronson,* 473 A.2d at 812—would be sufficient for standing to bring a direct expropriation claim under *Gentile II.*

[267] *See, e.g., Krasner v. Moffett,* 826 A.2d 277, 283 (Del.2003) (concluding, at the pleadings stage, that three directors were not independent when considering a transaction because they also served as directors of the counterparty in the transaction at issue); *Weinberger,* 457 A.2d at 710 (concluding in a post-trial appeal that the directors who served on the boards of a corporation and its

controlling stockholder were not independent when considering the merits of a transaction between the two).

[268] *See, e.g., In re Trados Inc. S'holder Litig.,* 73 A.3d 17, 51–54 (Del. Ch.2013) (concluding after trial that three directors appointed by venture capital funds to the board were in a fiduciary relationship with their respective funds); *Carsanaro,* 65 A.3d at 638 (inferring at the motion to dismiss stage that three directors were in a fiduciary relationship with the affiliated funds that appointed them to the board).

[269] *In re Trados Inc.,* 73 A.2d at 47.

[270] *Id* at 46–47; *Carsanaro,* 65 A.3d at 638.

[271] *See MiIls Acq.Co. v. MacmiIlan, Inc.,* 559 A.2d 1261, 1280 (Del.1989).

[272] *Cede & Co. v. TechnicoIor, Inc.,* 634 A.2d 345, 361 (Del.1993); *see also Guth v. Loft, Inc.,* 5 A.2d 503, 510 (Del.1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.... The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.").

[273] *Weinberger,* 457 A.2d at 710; *see also McMullin v. Beran,* 765 A.2d 910, 923 (Del.2000) ("There is no dilution of that [duty of loyalty] in a parent subsidiary context for the individuals who acted in a dual capacity as officers or designees of [the controlling stockholder] and as directors of [the corporation].").

[274] *In re Trados Inc.,* 73 A.3d at 52–54 (concluding that three directors faced actual conflicts of interest because the beneficiaries of their fiduciary duties had conflicting interests: the corporation's stockholders were owed duties to maximize the value of the corporation for their benefit, while the venture capital firms wanted to exit the investment by selling the company in the near-term without regard to long-term value maximization).

[275] *See Carsanaro,* 65 A.3d at 638 ("Because of their dual status as fiduciaries for the Company and for the entities purchasing the Series D Preferred, [three directors] were not independent with respect to the Series D Financing.").

Because no member of the Board received stock individually, the Court does not address whether a majority of directors who approve stock issuances to themselves may also face a fundamental conflict that, absent relevant procedural protections, may give rise to a direct expropriation claim under *Gentile II*.

[276] Pls.' Opening Br. 44–47.

[277] Pls.' Reply Br. 18–22.

[278] Defs.' Answering Br. 54–56.

[279] *See McMullin,* 765 A.2d at 923.

[280] Pls.' Reply Br. 20; Defs.' Answering Br. 27.

[281] *Aronson,* 473 A.2d at 815.

[282] *Rales v. Blasband,* 634 A.2d 927, 936 (Del.1993).

[283] *See, e.g., In re Tyson Foods, Inc. Consol. S'holder Litig.,* 919 A.2d 563, 588 (Del. Ch.2007) ("[I]t is well-settled that a director's appointment at the behest of a controlling shareholder does not suffice to establish a lack of independence.").

[284] Based on this conclusion, the Court need not address the Plaintiffs' alternate theory that Shipman was conflicted because Catalyst would receive Preferred A stock in the Recapitalization. Tr. of Post–Trial Oral Arg. 21.

[285] *Nine Sys. Corp. I,* 2013 WL 771897, at *7 (citing *7547 P'rs v. Beck,* 682 A.2d 160, 162–63 (Del.1996)).

[286] Pls.' Reply. Br. 51–53; Pls.' Opening Br. 105–07.

[287] Defs.' Answering Br. 95–96.

[288] *Brown v. Automated Marketing Sys., Inc.,* 1982 WL 8782, at *1, 7 Del. J. Corp. L. 466, 468 (Del Ch. Mar. 22, 1982) (citing 8 *Del. C.* § 327).

[289] *See, e.g.,* JX 209, 210, 211, 212, 213.

[290] *Parfi Hldg. AB v. Mirror Image Internet, Inc.,* 954 A.2d 911, 937 (Del. Ch.2008) (quoting WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5981 (2013)) ("A transfer of shares by operation of law means that the shareholder acquires the shares without any act or cooperation on his or her part.").

[291] Alternatively, the Court concludes that the SMIG Plaintiffs have standing to challenge the Recapitalization because, after they became direct stockholders in the Company, material terms in the Recapitalization changed before it was finally implemented in August 2002.

[292] Defs.' Answering Br. 97–99.

[293] JX 78.

[294] JX 81; Tr. 304 (R. Murphy).

[295] Pls.' Opening Br. 107–09.

[296] Tr. 455–58 (M. Fuchs), 504–05 (B. Fuchs).

[297] *See, e.g., id.* 288 (R. Murphy), 786–87, 809–10(Koo), 1542–43 (Schaum).

[298] JX 45, 50, 57.

[299] *Cf. Krenowsky v. Haining,* 1988 WL 90825, at *4 (Del. Ch. Aug. 30, 1988) ("I find no credible evidence of an agreement calling for Haining to transfer her assets to Hull in exchange for a deed to the Harmony Road property. No corroborating documentary evidence of such an agreement, or testimony of any disinterested witness, was presented."), *aff'd sub nom., Hull v. Krenowsky,* 567 A.2d 421 (Del.1989).

[300] Defs.' Answering Br. 97.

[301] *See Kalisman v. Friedman,* 2013 WL 1668205, at *7 (Del. Ch. Apr. 17, 2013) (citing *In re Celera Corp. S'holder Litig.,* 59 A.3d 418, 429 (Del.2012)) ("To establish standing, a plaintiff must demonstrate that (i) he suffered an injury in fact, (ii) there is a causal connection between the injury and the conduct complained of, and (iii) the injury will likely be redressed by a favorable decision.").

[302] *See generally M & F Worldwide Corp.,* 88 A.3d at 645.

[303] *See, e.g., Tremont Corp.* 694 A.2d at 428.

[304] *See, e.g., Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, Inc.,* 803 A.2d 428 (Del.2002) (TABLE) (applying, at the preliminary injunction stage, the entire fairness standard of review to a recapitalization where the corporation's voting stock (of which two funds controlled 50%) was to be treated differently than the nonvoting stock).

[305] *Kahn v. Lynch Commc'n Sys., Inc.,* 638 A.2d 1110, 1115 (Del.1994).

[306] *OTK Assocs., LLC v. Friedman,* 85 A.3d 696, 724 (Del. Ch.2014) ("If a challenged transaction would confer a unique benefit on a party exercising *de facto* control, then entire fairness is the standard of review.").

[307] *See generally Orman v. Cullman,* 794 A.2d 5, 22 (Del. Ch.2002).

[308] *See Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.,* 2014 WL 1813340, at *15 (Del. Ch. May 7, 2014) ("[I]t is not impermissible for a stockholder to assert a breach of fiduciary duty claim against less than half of the directors who approved a particular decision[.]").

[309] *See, e.g., Paramount Commc'ns Inc. v. QVC Network Inc.,* 637 A.2d 34, 42 n.9 (Del.1994) ("Where actual self-interest is present

and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders.").

[310] Although Snyder was not a director when the Board initially approved the Recapitalization in January 2002, he was a director when the Board finally implemented the Recapitalization in August 2002. Not only did material terms change while Snyder was a director, but he also was directly involved in the process by which the Board sought to disclose the Recapitalization to the Company's stockholders. Thus, Snyder is a proper defendant as to this breach of fiduciary duty claim.

[311] *See Reis,* 28 A.3d at 459.

[312] *Weinberger,* 457 A.2d at 711.

[313] *ONTI, Inc. v. Integra Bank,* 751 A.2d 904, 930 (Del. Ch.1999).

[314] *See Tremont Corp.,* 694 A.2d at 432.

[315] *Weinberger,* 457 A.2d at 711.

[316] Defs.' Answering Br. 85–88.

[317] Pls.' Reply Br. 6–13, 23–25; Pls.' Opening Br. 60–65.

[318] *See, e.g., In re S. Peru Copper Corp. S'holder Deriv. Litig.,* 52 A.3d 761, 798 (Del. Ch.2011) ("[F]rom inception, the Special Committee fell victim to a controlled mindset and allowed [the controlling stockholder] to dictate the terms and structure of the Merger."), *aff'd sub. nom., Ams. Mining Corp. v. Theriault,* 51 A.3d 1213 (Del.2012).

[319] *Gentile v. Rossette,* 2010 WL 2171613, at *8 (Del. Ch. May 28, 2010) ("*Gentile III* ") ("Rossette set the conversion rate with limited or no pushback from Bachelor, who was in no position to bargain effectively on behalf of the minority stockholders.").

The Court focuses on Biderman here because three of the other directors (Dort Cameron, Katz, and Shipman) would all get something out of the Recapitalization for their respective entities, and the fourth director (Williams and then Snyder) was more concerned about completing the Recapitalization to fund his business plan (and thereby maintain his position as CEO) than he was about the merits of what was being proposed.

[320] *See, e.g., In re Trados Inc.,* 73 A.3d at 38 ("The duty to act for the ultimate benefit of stockholders does not require that directors fulfill the wishes of a particular subset of the stockholder base."); *In re MONY Gp., Inc. S'holder Litig.,* 853 A.2d 661, 676 (Del. Ch.2004) ("The board owes its fiduciary duties to the corporation and its stockholders, not merely to a set of stockholders as of a certain record date.").

[321] *In re Trados Inc.,* 73 A.3d at 62 (citing *In re Trans World Airlines, Inc. S'holders Litig.,* 1988 WL 111271, 14 Del. J. Corp. L. 870, 881 (Del. Ch. Oct. 21, 1988)).

[322] *See, e.g., Chesapeake Corp. v. Shore,* 771 A.2d 293, 331 (Del. Ch.2000) ("There is no legal requirement that a board consult outside advisors, so long as the board has adequate information to make an informed judgment."); *cf. Houseman v. Sager man,* 2014 WL 1600724, at *7 (Del. Ch. Apr. 16, 2014) (concluding, in the *Revlon* context, that a board's alleged failure to obtain a fairness opinion before agreeing to a merger was not an allegation that supported an inference of a lack of good faith (under the knowing and conscious dereliction of duty theory) because the plaintiffs also alleged that the board actively evaluated whether to obtain a fairness opinion before concluding it would have been prohibitively expensive).

[323] *See Zimmerman v. Crothall,* 2012 WL 707238, at *9 (Del. Ch. Mar. 5, 2012, revised, Mar. 27, 2012) ("The Board was under no obligation to hire financial advisors, and the Company's limited cash position likely would have made it reluctant to incur such an expense.").

[324] Tr. 720–21 (Snyder); JX 259.

[325] Because the Plaintiffs have not demonstrated that the Fall 2002 Update harmed them separate from the overall Recapitalization, the Court considers their contentions about the Board's inadequate disclosures in the context of the entire fairness analysis.

[326] *In re Trados Inc.,* 73 A.3d at 65.

[327] 8 *Del. C.* § 228(e).

[328] *Malone v. Brincat,* 722 A.2d 5, 10 (Del.1998).

[329] "[T]he precise parameters of the disclosure required by § 228(e) have not yet been delineated[.]" *Dubroff III,* 2011 WL 5137175, at *9; *cf. Di Loreto v. Tiber Hldg. Corp.,* 1999 WL 1261450 (Del. Ch. June 29, 1999) (considering the consequences of the failure to provide "prompt notice" of the action taken by stockholder written consent); *cf. also Unanue v. Unanue,* 2004 WL 2521292, at *8 (Del. Ch. Nov. 3, 2004, revised, Nov. 9, 2004) (contemplating the standard of disclosure when directors solicit stockholder written consents under 8 *Del. C.* § 228).

[330] *Arnold v. Soc'y for Sav. Bancorp, Inc.,* 650 A.2d 1270, 1280 (Del.1994); *see also Zirn v. VLI Corp.,* 681 A.2d 1050, 1056 (Del.1996) ("In addition to the traditional duty to disclose all facts material to the proffered transaction, directors are under a fiduciary obligation to avoid misleading partial disclosures.").

[331] *Weinberger,* 457 A.2d at 711.

[332] *Reis,* 28 A.3d at 466–67.

[333] *Cinerama, Inc. v. Technicolor, Inc.,* 663 A.2d 1134, 1143 (Del. Ch.1994) ("*Cinerama I* "), *aff'd,* 663 A.2d 1156 (Del.1995) ("*Cinerama II* ").

[334] Pls.' Opening Br. 66–69.

[335] JX 1020.

[336] JX 160.

[337] JX 170–0002.

[338] JX 667 ("Reilly Report") ¶ 93.

[339] *Id.*

[340] Defs.' Answering Br. 67–71.

[341] Tr. 2875–79 (Hausman).

[342] Pls.' Reply Br. 25-27; Pls.' Opening Br. 75-80.

[343] Defs.' Answering Br. 75-77.

[344] *Del. Open MRI Radiology Assocs., P.A. v. Kessler,* 2006 WL 4764042, at *14 n.51 (Del. Ch. Apr. 26, 2006) (citing *Cede & Co. v. Technicolor, Inc.,* 684 A.2d 289, 298–300 (Del.1996)).

[345] *ONTI, Inc. v. Integra Bank,* 751 A.2d 904, 910 (Del. Ch.1999) (same).

[346] *Id.* at 909–11.

[347] *Kessler,* 2006 WL 4764042, at *16 (citing *Guth,* 5 A.2d at 511).

[348] Tr. 3173 (Reilly).

[349] Those factors are "(i) whether the projection was created outside the ordinary course of business; (ii) whether the projection was relied upon by management in operating the company; (iii) whether the projection is overly optimistic; (iv) the persons who formulated the projection; (v) the length of the company's operating history; and (vi) whether the projection was formally approved by the board." Defs.' Answering Br. 78–79.

[350] *Id.* at 77–84.

[351] Pls.' Reply Br. 27–34; Pls.' Opening Br. 69–75.

[352] *See, e.g., Gentile III,* 2010 WL 2171613, at *11 ("[C]ourts frequently pay particular attention to management's assessment of an enterprise's value, especially shortly before the start of the chain of events leading to the transaction at issue."); *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *5 (Del. Ch. May 20, 2004) ("Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's operations."); *Gilbert v. MPM Enters., Inc.,* 709 A.2d 663, 669 (Del. Ch.1997) ("[M]anagement was in the best position to forecast MPM's future before the merger[.]"), *aff'd,* 731 A.2d 790 (Del.1999).

[353] *Neal v. Ala. By–Products Corp.,* 1990 WL 109243, at *9 (Del. Ch. Aug. 1, 1990), *aff'd,* 588 A.2d 255 (Del.1991).

[354] 2013 WL 5878807 (Del. Ch. Nov. 1, 2013).

[355] *Id.* at *9.

[356] *See, e.g., Kahn v. Household Acq. Corp.,* 591 A.2d 166, 175 (Del.1991) (recognizing, in an appraisal proceeding, that a discounted cash flow analysis that was based on management projections where the airline company had recently experienced an "erratic pattern of past operating revenues and earnings attributable to [a] prolonged pilot strike" was "not particularly meaningful"); *accord Cooper v. Pabst Brewing Co.,* 1993 WL 208763, at *4 (Del. Ch. June 8, 1993) (concluding, in an appraisal proceeding, that an expert's discounted cash flow analysis was not reliable because it "assumed that the volume of sales would increase by 1.5% per year when, despite [the company's recent] acquisitions, its volume of sales had declined every year between 1977 and 1981 and had declined further during the first nine months of 1982").

[357] *Doft & Co.,* 2004 WL 1152338, at *5.

[358] *See In re Emerging Commc'ns, Inc. S'holders Litig.,* 2004 WL 1305745, at *14 (Del. Ch. May 3, 2004) ("This Court has consistently expressed a preference for the most recently prepared management projections available as of the merger date.").

[359] *See Henke v. Trilithic Inc.,* 2005 WL 2899677, at *5 (Del. Ch. Oct. 28, 2005) ("There is neither evidence that management used these projections to run the Company nor evidence concerning their creation.").

[360] Reilly's reliance on the earlier Daniels Memo projections to derive projections for 2003 (by discounting the 2003 projections in the Daniels Memo by a similar percentage that management had revised the 2002 projections in the Daniels Memo into the January 2002 pro forma projections) is, assuming Delaware law recognizes this methodology, also given no weight. *See Cede & Co. v. JRC Acq. Corp.,* 2004 WL 286963, at *2 (Del. Ch. Feb. 10, 2004) ("[T]his Court ... holds a healthy skepticism for post-merger adjustments to management projections or the creation of new projections entirely.").

[361] JX 668 ("Hausman Report") Ex. 5.

2001 Revenue: Projections v. Actual

Month	*Jan. 2001 Projections*	*Mar. 2001 Projections*	*June 2001 Projections*	*Daniels Memo*	*Actual*
January	180,001	--	--	--	42,797
February	250,000	--	--	--	66,534
March	386,437	62,211	--	--	68,079
April	544,936	79,703	--	--	83,955
May	732,313	98,020	--	--	95,867
June	808,655	128,986	128,105	--	78,235
July	912,103	167,536	153,885	--	78,351
August	1,063,032	209,432	204,885	--	70,130
September	1,274,326	270,088	297,135	98,575	74,218
October	1,547,858	354,244	358,510	130,300	77,166
November	1,896,714	450,618	414,010	176,838	69,750
December	2,328,526	549,330	469,510	241,500	71,673

[362] Pls.' Opening Br. 73.

[363] The Court's conclusion is not necessarily a reflection on the competence of management who created the January 2002 pro forma projections, because it is just (if not more) likely that the cause of the unreliability is the inherent difficulty in valuing a start-up company in a nascent industry. That said, the Court also notes that the management responsible for these projections was replaced within six months.

[364] To avoid any potential confusion, the Court's conclusion here is not a departure from the general preference of Delaware courts for fair price analyses to feature multiple (and preferably consistent) valuation methodologies that are derived from contemporaneous management projections. This case just happens to be the exception to that general rule on both accounts.

[365] Tr. 3173, 3183 (Reilly).

[366] Tr. 3171–72 (Reilly).

[367] *Weinberger,* 457 A.2d at 713.

[368] *See, e.g., Global GT LP v. Golden Telecom, Inc.,* 993 A.2d 497, 509 (Del. Ch.2010), *aff'd,* 11 A.3d 214 (Del.2010).

[369] *In re Hanover Direct, Inc. S'holders Litig.,* 2010 WL 3959399, at *2 (Del. Ch. Sept. 24, 2010).

[370] *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.,* 2011 WL 863007, at *20 (Del. Ch. Mar. 9, 2011), *aff'd,* 35 A.3d 419 (Del.2011) (TABLE).

[371] *JRC Acq. Corp.,* 2004 WL 286963, at *2.

[372] With the venture approach, Reilly valued the Company based on a combination of discounted cash flow analysis and his trading and transaction multiples. Reilly Report ¶ 47. In effect, he calculated the 2003 revenue projections for the Company (by discounting the 2003 projections in the Daniels Memo by 30%) plus e-Media and NaviSite SMG (both by assuming, conservatively, 0% growth from the pro forma 2002 revenue projections presented to the Board on January 17, 2002), slipped the resulting $30.7 million revenue projection one year to 2004, multiplied that 2004 revenue projection by his comparable trading and public transaction multiples (2.2x as the median, 3.2x as the mean, and 3.7x as Akamai's trading multiple) to calculate an expected exit value, and then discounted that range by a 50–70% rate, as suggested by academic research based on a venture capitalist's expected return on investing in a startup company. *Id.* ¶¶ 55–66. "This provides a value range of $13.96mm at a 70% discount and $33.67mm at a 50% discount, with a mid-point average of $23.82mm." *Id.* ¶ 64. In his weighted average valuation of $30.89 million, Reilly placed the most weight (50%) on his venture approach.

The Court agrees with Hausman that, because Reilly's venture approach "is based on *ad hoc* adjustments to the DCF methodology, ... [it] is no more reliable than his DCF methodology." JX 683 (Hausman Rebuttal Report) ¶ 18.

[373] Hausman Report ¶ 22.

[374] e–Media's 2001 revenues were $4.6 million. In January 2002, the Company paid, based on Hausman's conservative estimate, $4.6 million for e-Media ($1 million in cash plus a $3.6 million note, assumed to trade at face value). Thus, the e-Media transaction multiple was 1.0x. *Id.* ¶ 25. NaviSite SMG's 2001 revenues were approximately $4 million, and the Company ultimately paid $2.1 million in cash for it in March 2002. Thus, the NaviSite SMG transaction multiple in Hausman's estimate was 0.525x. The average of these two private transaction multiples is 0.7625x. *Id.* ¶ 27.

[375] *Id.* ¶ 28.

[376] *Id.* ¶¶ 28–29; *see also* Stanley Block, *The Liquidity Discount in Valuing Privately Owned Companies,* 17 J. Applied Fin. 33, 33–40 (2007).

[377] Reilly Report ¶ 67.

[378] *Id.* ¶ 78.

[379] JX 682 (Reilly Rebuttal Report) ¶¶ 34–35.

[380] *ONTI, Inc.,* 751 A.2d at 916.

[381] *Le Beau v. M.G. Bancorporation, Inc.,* 1998 WL 44993, at *8 (Del. Ch. Jan. 29, 1998), *aff'd in part and remanded,* 737 A.2d 513

(Del.1999).

[382] *See Borruso v. Commc'ns Telesystems Int'l,* 753 A.2d 451, 460 (Del. Ch.1999) (citing *Cavalier Oil Corp. v. Harnett,* 564 A.2d 1137, 1145 (Del.1989) ("The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a 'going concern.' ")).

[383] Hausman Report, Ex. 5. Hausman derived this figure from various trial exhibits. Reilly used a slightly higher $889,528 figure for 2001 revenue based on the numbers in the Daniels Memo. Reilly Rebuttal Report ¶ 10, n.2. Because the approximately $13,000 difference is not material to either expert's testimony, the Court need not resolve this issue.

[384] Hausman Report, Ex. 9.

[385] The experts disagreed whether the Company's approximately $1–1.5 million in leases were operating leases (which are not subtracted from enterprise value) or capitalized leases (which are subtracted from enterprise value). Hausman Report ¶ 31; Reilly Rebuttal Report ¶¶ 12–16. The evidence is inconclusive. For present purposes, and to adopt a conservative approach friendly to the Plaintiffs, the Court revises Hausman's valuations as if the leases were operating leases.

[386] Briefly, the Court revisits its earlier conclusion on the proper entity to value. What Reilly's inclusion of e-Media and NaviSite SMG does is grossly inflate the value of the Company post-acquisitions. To illustrate, as of January 2002, e-Media's LTM revenue was $4.6 million and NaviSite SMG's was $4 million. Applying Reilly's 3.7x trading multiple would yield values of $17 million for e-Media and $14.8 million for NaviSite SMG. These implied values cannot be squared with the arm's-length purchase prices paid by the Company. It is possible to infer from the trial record that e-Media and NaviSite SMG may have been sold at a discount because the sellers wanted to get out of those lines of business quickly, but it is unreasonable to conclude that there was a discount of approximately 70%. It is inapposite for the Plaintiffs to assert that their common stock in the Company as of the Recapitalization included not only the value of the purchase prices of e-Media and NaviSite SMG, but also the multiples-based valuation.

[387] *In re Trados Inc.,* 73 A.3d at 76; *see also Sterling v. Mayflower Hotel Corp.,* 93 A.2d 107, 114 (Del.1952) ("[T]he test of fairness which we think the correct one [is] ... that upon a merger the minority stockholder shall receive the substantial equivalent in value of what he had before."); *In re Hanover Direct, Inc.,* 2010 WL 3959399, at *3 (Del. Ch. Sept. 24, 2010) ("[O]n the basis of evidence presented at trial and in respondent's expert report, I conclude that the company was in fact 'under water' at the time of the merger. Accordingly, a merger price above $0.00 (in this case, $0.25 per share) was entirely fair.").

[388] *See generally Emerald P'rs v. Berlin,* 726 A.2d 1215, 1224 (Del.1999) ("Issues not briefed are deemed waived."); *see also In re IBP, Inc. S'holders Litig.,* 789 A.2d 14, 62 (Del. Ch.2001) (concluding that a party waived an argument by failing to include that argument in its otherwise "voluminous" post-trial opening brief).

[389] Hausman testified there were no market synergies from the e-Media or NaviSite SMG acquisitions in either May or August 2002. Thus, the value that those acquisitions added to the Company was no greater than the purchase price: $1.6 million each. Hausman Report ¶ 8. After combining the $3.2 million paid to acquire e-Media and NaviSite SMG to the Company's January 2002 enterprise value to derive a range of implied enterprise values for May and August, Hausman subtracted the additional debt obligations incurred by the Company to fund those acquisitions—including the $3.3 million in convertible promissory notes held by Wren and Javva and a $600,000 note held by e-Media's parent—to yield a range of implied enterprise values. That range, just as it had been in January 2002, was negative. Tr. 2792–95 (Hausman).

[390] *See Cinerama II,* 663 A.2d at 1163.

[391] *Reis,* 28 A.3d at 467 (citing *Tremont Corp.,* 694 A.2d at 432); *see also Tremont Corp.,* 694 A.2d at 432 ("[H]ere, the process is so intertwined with price that under *Weinberger* 's unitary standard a finding that the price negotiated by the Special Committee might have been fair does not save the result."); *Gentile III,* 2010 WL 2171613, at *9 ("From a tainted process, one should not be surprised if a tainted price emerges.").

[392] *William Penn P'ship v. Saliba,* 13 A.3d 749, 758 (Del.2011).

[393] Pls.' Reply Br. 34–37; Defs.' Answering Br. 64–67.

[394] *In re Trados Inc.,* 73 A.3d at 78.

[395] Even if *Trados* may be said to support a framework in which a finding of fair price strongly supports a finding of entire fairness, the facts here—where the Company's stockholders would, after the Recapitalization—remain stockholders in the Company as a going concern—are sufficiently distinguishable from the third-party merger in *Trados*.

[396] *Cinerama I,* 663 A.2d at 1140.

[397] *See, e.g., William Penn P'ship,* 13 A.3d at 756–57; *Tremont Corp.,* 694 A.2d at 432; *Cinerama II,* 663 A.2d at 1163; *Lynch,* 638 A.2d at 1115; *Rosenblatt v. Getty Oil Co.,* 493 A.2d 929, 937 (Del.1985); *Weinberger,* 457 A.2d at 711.

[398] *See Weinberger,* 457 A.2d at 711.

[399] *See HMG/Courtland Props.,* 749 A.2d 94 at 118 ("Taken together, these factors lead me to conclude that the defendants have not demonstrated that they paid a fair price in the sense inherent in the entire fairness standard. Therefore, Gray and Fieber have failed to establish to my satisfaction that the Transactions were the product of both fair dealing and fair price.") (internal citations and quotations omitted).

[400] Pls.' Opening Br. 80, 82; Opening Pretrial Br. for the Fuchs and Kim Pls. ("Pls.' Pretrial Opening Br.") 40–41.

[401] Defs.' Answering Br. 63 n.56; Defs.' Opening Pretrial Br. 40–41, 47 n.125.

[402] *In re Rural Metro Corp. S'holders Litig.,* 88 A.3d 54, 80 (Del. Ch.2014) (citing *Malpiede v. Townson,* 780 A.2d 1075, 1096 (Del.2001)).

[403] *See Mills Acq. Co.,* 559 A.2d at 1280.

[404] *In re Rural Metro Corp.,* 88 A.3d at 97.

[405] Tr. 2560 (Dwyer).

[406] *See Houseman,* 2014 WL 1478511, at *9 (concluding that the plaintiffs' allegations did not support a reasonable inference of knowing participation by the corporation's financial advisor because, among other deficiencies, there was no allegation that the advisor "actively concealed information to which it knew the Board lacked access, or promoted the failure of a required disclosure by the Board").

[407] *See In re Am. Int'l Gp., Inc., Consol. Deriv. Litig.,* 965 A.2d 763, 806 (Del. Ch.2009) ("[T]he knowledge of an agent is normally imputed to the agent's principal."), *aff'd sub nom., Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP,* 11 A.3d 228 (Del.2011) (TABLE).

[408] *See In re Rural Metro Corp.,* 88 A.3d at 107 ("RBC's actions resulted in stockholders voting on the merger based on a proxy statement that contained materially false disclosures and omissions about RBC's valuation analyses and conflicts. Stockholders were denied the information necessary to make an informed decision whether to seek appraisal. Causation is satisfied.").

[409] Pls.' Reply Br. 39–41; Pls.' Opening Br. 58–59.

[410] Defs.' Answering Br. 88–90.

[411] *Fleer Corp. v. Topps Chewing Gum, Inc.,* 539 A.2d 1060, 1062 (Del.1988) (citation omitted).

[412] *Addy v. Piedmonte*, 2009 WL 707641, at *22 (Del. Ch. Mar. 18, 2009).

[413] *See Frank,* 2014 WL 957550, at *32.

[414] *See Dubroff III,* 2011 WL 5137175, at *11; *see also Frank v. Elgamal,* 2012 WL 1096090, at *11 (Del. Ch. Mar. 30, 2012) (noting that as between a breach of fiduciary duty claim and a duplicative unjust enrichment claim, "[a] plaintiff will only receive, at most, one recovery"); *McPadden v. Sidhu,* 964 A.2d 1262, 1276 (Del. Ch.2008) ("If plaintiff has pleaded and then prevails in demonstrating that the same conduct results in both liability for breach of Dubreville's fiduciary duties and disgorgement via unjust enrichment, plaintiff then will have to elect his remedies.").

[415] Pls.' Pretrial Opening Br. 44 n.16 ("Plaintiffs concede that, insofar as they prevail on both claims [*i.e.,* (i) breach of fiduciary duty or aiding and abetting, and (ii) unjust enrichment], they are entitled to only one recovery.")

[416] *QC Commc'ns v. Quartarone,* 2014 WL 3974525, at *13 (Del. Ch. Aug. 15, 2014) (declining to address the merits of alleged unjust enrichment after concluding, on cross-motions for summary judgment on a stipulated record, that the defendant breached his

fiduciary duties where the theories of liability for the two claims were the same).

In any event, it would appear difficult for the Plaintiffs to establish an impoverishment where the Board approved the Recapitalization at a fair price because the Plaintiffs' stock had no value.

[417] JX 729–0013.

[418] *See In re Emerging Commc'ns, Inc.,* 2004 WL 1305745, at *38 (Del. Ch. May 3, 2004).

[419] *See Emerald P'rs v. Berlin,* 787 A.2d 85, 98 (Del.2001) ("The director defendants can avoid personal liability for paying monetary damages only if they have established that their failure to withstand an entire fairness analysis is exclusively attributable to a violation of the duty of care.").

[420] *See In re Rural Metro Corp.,* 88 A.3d at 85–89.

[421] JX 2000. That provision provides:

> A director of this corporation shall have no personal liability to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that this provision shall not eliminate the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit.

[422] *In re Primedia, Inc. S'holders Litig.,* 67 A.3d 455, 489 (Del. Ch.2013).

[423] *See Malone,* 722 A.2d at 9 ("[D]irectors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty, and may be held accountable in a manner appropriate to the circumstances.").

[424] *See In re Walt Disney Co. Deriv. Litig.,* 706 A.2d 27, 67 (Del.2006).

[425] *Thorpe v. CERBCO, Inc.,* 676 A.2d 436, 445 (Del.1996).

[426] *Int'l Telecharge, Inc. v. Bomarko, Inc.,* 766 A.2d 437, 440 (Del.2000).

[427] *Id.* at 441.

[428] *See id.* at 440 (citing *Weinberger,* 457 A.2d at 714); *Gesoff v. IIC Indus., Inc.,* 902 A.2d 1130, 1154 (Del. Ch.2006) ("[T]he court can, and has in the past, awarded damages designed to eliminate the possibility of profit flowing to defendants from the breach of the fiduciary relationship.").

[429] *Weinberger v. UOP, Inc.,* 1985 WL 11546, 10 Del. J. Corp. L. 945, 955 (Del. Ch. Jan. 30, 1985), *aff'd,* 497 A.2d 792 (Del.1985) (TABLE); *see also Oliver v. Boston Univ.,* 2006 WL 1064169, at *25 (Del. Ch. Apr. 14, 2006) ("[A]lthough the BU Defendants did breach their duty of loyalty and were unable to demonstrate the entire fairness of the Series B and C transactions, for purposes of assessing the fiduciaries' treatment of these claims in the context of negotiating the Accord Agreement, the Court does not find it appropriate to assign anything but nominal damages to these breaches.").

[430] *See Gatz Props., LLC v. Auriga Capital Corp.,* 59 A.3d 1206, 1222 (Del.2012) ("The Court of Chancery, under its equitable powers, has latitude to shift attorneys' fees[.]").

[431] *See* 10 *Del. C.* § 5106 ("The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity.").

[432] *See Saliba v. William Penn P'ship,* 2010 WL 1641139, at *1 (Del. Ch. Apr. 12, 2010) ("Because defendants conducted the sale in a clearly conflicted manner that resulted in a breach of fiduciary duty, I find and conclude that it would be unfair and inequitable to require plaintiffs to shoulder the costs incurred in demonstrating the unfairness of this sales process. For that reason, I award plaintiffs all of their attorneys' fees and the portion of costs that they have paid in connection with the court-appointed expert witnesses. Those who violated their fiduciary obligations and were the cause of this litigation are the parties who properly should bear the fees and costs made necessary solely by reason of their faithless conduct."), *aff'd,* 13 A.3d 749 (Del.2011).

[433] The Court separately considers the Defendants' laches defense to Thomas Murphy's fraud claim when analyzing the merits of that claim.

[434] *Homestore, Inc. v. Tafeen,* 888 A.2d 204, 210 (Del.2005).

[435] *Reid v. Spazio,* 970 A.2d 176, 183 (Del.2009).

[436] Defs.' Answering Br. 93-95.

[437] Pls.' Reply Br. 49-51; Pls.' Opening Br. 99-102.

[438] *See Dow Chem. Corp. v. Blanco,* 67 A.3d 392, 393, 395 (Del.2013).

[439] *See id.* at 395.

[440] *See Nine Sys. Corp. II,* 2013 WL 4013306, at *6 (quoting Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland,* 60 Notre Dame L.Rev. 686, 689 (1985)).

[441] JX 556 ¶¶ 43–44; JX 564.

[442] JX 565 ¶¶ 44–45; JX 567.

[443] JX 571; *see Nine Sys. Corp. II,* 2013 WL 4013306, at *5 ("Since the [Kim] Plaintiffs were not senior officers, directors or control persons of any Defendants at the time of the filing of the Class Action Complaint, they were part of the Proposed Class.").

[444] 10 *Del. C.* § 8106.

[445] Tr. 773–76 (Snyder), 2422 (Dwyer).

[446] *Id.* 833–36 (Snyder).

[447] JX 443; Tr. 837–44 (Snyder).

[448] JX. 433, 437, 440, 1006.

[449] Tr. 2426–27 (Dwyer).

[450] JX 440; Tr. 1984–85 (Newton).

[451] JX 445.

[452] Tr. 536, 581–82 (T. Murphy).

[453] Tr. 537–41, 570–71 (T. Murphy), 2443–44 (Dwyer), 2728–29 (D.Cameron); JX 695 (Walpuck Dep.) at 385.

[454] Tr. 539–40, 549 (T. Murphy).

[455] *Id.* 541–44, 575–77 (T. Murphy). The Plaintiffs were unable to produce the exact article, but they did identify one that Thomas Murphy thought was similar. JX 444; Tr. 543–44 (T. Murphy).

[456] Tr. 541–42, 573–77 (T. Murphy).

[457] JX 447.

[458] Tr. 854 (Snyder), 2448 (Dwyer).

[459] Tr. 556, 581 (T. Murphy) ("I felt at that time that under my circumstances that I deserved a fair and honest square deal."); *see also* JX 696 (T. Murphy Dep.) at 167 ("Q. ... In what way were you assured that the price was fair? A. I can't say that there was an assurance other than the fact that that was the price mentioned and it seemed like there was no means of negotiating that.").

[460] JX 450.

[461] Tr. 553 (T. Murphy).

[462] JX 450.

[463] Tr. 601, 603, 612 (T. Murphy).

[464] Pls.' Reply Br. 45–46; Pls.' Opening Br. 90–94.

[465] In the Pretrial Stipulation and Order, Thomas Murphy asserts this claim against Dort Cameron, Katz, Shipman, Snyder, and Dwyer. Pretrial Stip. ¶ 29(f). At trial, Thomas Murphy conceded that he never spoke with Shipman or Katz. Tr. 572 (T. Murphy). Neither Thomas Murphy nor Dwyer was sure if they spoke. *Id.* 570–72 (T. Murphy), 2443 (Dwyer). In post-trial briefing, Thomas Murphy primarily pursued this claim against Snyder, Dwyer, and (to a lesser extent) Dort Cameron. Pls.' Reply Br. 46 n.57. The Defendants, in their post-trial briefing, responded with language suggesting that all of the Defendants were defending against this claim. The Court's conclusions on the liability for Dort Cameron, Snyder, and Dwyer apply equally to the other Defendants.

[466] 2009 WL 2246793 (Del. Ch. July 24, 2009).

[467] 76 A.3d 296 (Del. Ch.2013).

[468] Defs.' Answering Br. 99–105.

[469] Pls.' Reply. Br. 46–47; Pls.' Opening Br. 94–98.

[470] Pls.' Reply Br. 47–49; Pls.' Opening Br. 102–05.

[471] The parties assumed, without briefing the choice-of-law issue, that Delaware law governs this fraud claim. No party suggested that Delaware's standard is different from those of other jurisdictions whose laws may apply. Largely for this reason, the Court assumes, without deciding, that Delaware law applies. *See Vichi v. Koninklijke Philips Elecs., N.V.,* 85 A.3d 725, 778 (Del. Ch.2014) ("Because I have concluded that no material conflict exists between Delaware and Italian law as they relate to this case, I need not address the second prong of Delaware's choice of law analysis, and I apply Delaware law.").

[472] *Great–W. Investors LP v. Thomas H. Lee P'rs, L.P.,* 2011 WL 284992, at *12 (Del. Ch. Jan. 14, 2011).

[473] *Corporate Prop. Assocs. 14 Inc. v. CHR Hldg. Corp.,* 2008 WL 963048, at *6 (Del. Ch. Apr. 10, 2008).

[474] *MetCap Sec. LLC v. Pearl Senior Care, Inc.,* 2007 WL 1498989, at *5 (Del. Ch. May 16, 2007)

[475] *Wayport I,* 2009 W L 2246793, at *8.

[476] *Id.* at *9.

[477] *Wayport II,* 76 A.3d at 320. The Court did, however, find one of the defendants liable for fraud because, after making a particular representation, it "assumed a duty to update its statement to the extent that subsequent events rendered its representation materially misleading." *Id.* at 324.

[478] *See id.* at 315, 320 (tracing the history of the "special facts" doctrine in Delaware law and noting that, "[a]bsent further guidance from the high court, the 'special facts' doctrine remains the standard in this context"); *see also Lank v. Steiner,* 224 A.2d 242, 244 (Del.1966) (citing *Kors v. Carey,* 158 A.2d 136 (Del. Ch.1960)) ("[T]he special circumstance rule applies only when a director is possessed of special knowledge of future plans or secret resources and deliberately misleads a stockholder who is ignorant of them.").

[479] *Wayport II,* 76 A.3d at 320 (citing persuasive case law from outside Delaware in support of this definition).

[480] *See id.* at 323.

[481] *See id.* at 321.

[482] *Bershad v. Curtiss–Wright Corp.,* 535 A.2d 840, 847 (Del.1987); *cf. Rosenblatt v. Getty Oil Co.,* 493 A.2d 929, 944 (Del.1985) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

[483] *Wayport II,* 76 A.3d at 321–22.

[484] *See, e.g., In re Orchard Enters., Inc. S'holder Litig.,* 88 A.3d 1, 30 (Del. Ch.2014) (citing *Wayport II,* 76 A.3d at 322–23); *Chen v. Howard–Anderson,* 87 A.3d 648, 693 (Del. Ch.2014) (same).

[485] *See Wayport II,* 76 A.3d at 321.

[486] *See id.* at 323.

[487] *Cf. Malpiede,* 780 A.2d at 1096.

[488] Based on this conclusion, the Court need not determine whether Thomas Murphy has proven the other elements of his fraud claim. The Court also need not resolve the Defendants' laches defense or the effects of the purported anti-reliance provisions of the Stock Repurchase Agreement.