IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

DEFENDANT JOHN Q. HAMMONS'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs admit that *Revlon*[1] does not apply to the Merger[2] and that the Special Committee was disinterested and independent. (Plaintiffs' brief at 2, 51). They argue, however, that entire fairness applies because Hammons was purportedly both seller and buyer. This premise is false. The truth is that Hammons owned no interest in the surviving company,[3] and retained only a small preferred interest in the surviving limited partnership. Though he deferred receipt of most of the consideration for his partnership interest until his death, Hammons had no controlling interest in the Company after the Merger. Plaintiffs' attempt to squeeze this case into a *Lynch*[4]-style interested transaction presents a classic square peg/round hole situation.

Plaintiffs' alternative theory also fails. The question from *Sinclair*[5] is not, as plaintiffs assert, simply whether Hammons received different consideration, but whether he caused the Company to accord him some benefit *to the detriment* of the minority. Plaintiffs' characterization of the negotiations as a "zero-sum game" is fallacious, because there was no pre-determined total price for the Company. Additionally, negotiations proceeded on a dual path, with Hammons negotiating for his interest and the Special Committee negotiating for the minority. Plaintiffs point to no evidence that Hammons appropriated any consideration intended for the minority. In fact, Hammons's consideration changed little from the proposed transaction with Barcelo in September 2004, while the Special Committee was able to negotiate an 85% increase in the consideration to be paid to the minority shareholders.

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[1] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).
[2] Capitalized terms not otherwise defined herein shall have the meanings attributed to them in Defendant John Q. Hammons's Memorandum in Support of Motion for Summary Judgment, filed February 20, 2009 (Transaction ID 23869571).
[3] The Merger Agreement provided that Hammons would own an eight percent interest in the Company immediately following the Merger. Following execution of the Related Transactions, however, Hammons did not retain that interest.
[4] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).
[5] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971).

Even if entire fairness were to apply, Plaintiffs cannot avoid bearing the burden of persuasion. The Merger was approved by a disinterested and independent Special Committee and was approved by a majority of the minority stockholders. There was no "innocent coercion," and Hammons played absolutely no role in the negotiations for the minority's consideration. Likewise, Plaintiffs' characterizations of the Special Committee as ineffective and the shareholder vote as illusory are baseless.

Plaintiffs have abandoned most of their disclosure claims. The remaining four rest on the same false premises as their arguments for entire fairness or are otherwise immaterial. All are irrelevant to Hammons, since Plaintiffs apparently concede that he is not subject to liability as a director.

The undisputed material facts show that Hammons negotiated with a third party as to his interests only. Hammons properly stayed away from the Special Committee, which negotiated substantial additional consideration for the minority. Hammons allowed the Merger to go to a shareholder vote that came out overwhelmingly in favor of the Merger. There is no evidence of any wrongful conduct by Hammons. There is no authority for the proposition that a controlling shareholder who sells his stock separately and plays no role in negotiating for the minority can be held liable for an allegedly inadequate price, particularly where the special committee was admittedly disinterested and independent. Hammons is therefore entitled to the protection of the business judgment rule, and summary judgment should be granted in his favor.

SUPPLEMENTAL STATEMENT OF UNDISPUTED MATERIAL FACTS

Before the Merger, Hammons owned two kinds of stock in the Company: Class A shares and Class B shares. Hammons was the sole owner of the Class B shares. The Company owned approximately 28% of John Q. Hammons Hotels, L.P. (the "LP"). Hammons owned the remaining portion of the LP as its sole limited partner.

After the Merger and Related Transactions, Hammons owned no interest in the surviving company. (Gilson Dep., Rohrbacher Aff. Ex. 45[6] at 138). The transactions were structured to avoid being deemed a disposition event for Hammons, which would have triggered federal income tax liability to him. (Hobert Dep., Rohrbacher Aff. Ex. 46 at 17, 20, 63). To do this, Hammons had to retain some ownership interest in the surviving limited partnership (the "surviving LP"). (*Id.* at 20). There is no bright-line rule on the percentage ownership that must be retained, but Ben Hobert, Hammons's tax counsel, was comfortable with two percent. (*Id.* at 25, 63). Hammons was thus allocated a two-percent interest in the cash flow distributions and preferred equity of the surviving LP, and Atrium GP, LLC, an Eilian company, became general partner of the surviving LP and received a 98% ownership interest. (Fourth Amended and Restated Partnership Agreement, at Exhibit A, Rohrbacher Aff. Ex. 47; Hobert Dep., Rohrbacher Aff. Ex. 46 at 22, 23).

Hammons also had to continue to have capital at risk. (Hobert Dep., Rohrbacher Aff. Ex. 46 at 20, 26). This was achieved by converting his preexisting limited partner interest in the LP into a capital account associated with his preferred interest in the surviving LP. (*Id.* at 26-28). The capital account was equal to a liquidation preference of $328 million. (Plaintiffs' Ex. 27 at 62; Plaintiffs' Ex. 79 at 22-23). For his percentage ownership in the general partner through his Class B shares in the Company, Hammons[7] was allocated a preferred interest[8] with a capital

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[6] Citations in the form "Rohrbacher Aff. Ex. __" refer to exhibits to the Affidavit of Blake Rohrbacher, Esq. in Support of John Q. Hammons's Reply in Support of his Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously herewith.

[7] Some of Hammons's interests were owned directly or indirectly through other entities, a fact that is not material here. Hammons and related entities are therefore referred to collectively as "Hammons" for simplicity.

account of $7 million. (Plaintiffs' Ex. 27 at 63; Plaintiffs' Ex. 79 at 23; Plaintiffs' Ex. 80). Hammons's capital account thereby totaled a liquidation preference of $335 million. (Fourth Amended and Restated Partnership Agreement, at Exhibit A, Rohrbacher Aff. Ex. 47). The partnership agreement provided for events in which the capital account could be distributed during Hammons's lifetime, but it was anticipated that distribution of the capital account was to occur at Hammons's death so that his trust would receive the step-up in basis. (Gilson Dep., Rohrbacher Aff. Ex. 45 at 115-16).

Because he was giving up control in the Merger, Hammons negotiated certain other terms to protect his interests. For example, he secured a right of first refusal and an indemnification agreement for any tax liability from the LP's sale of any of its hotels during Hammons's lifetime. (Hobert Dep., Rohrbacher Aff. Ex. 46 at 16-17, 73, Plaintiffs' Ex. 79 at 33). The partnership agreement also contains certain restrictions on partnership distributions and the issuance of any indebtedness or partnership interests to protect Hammons's interest. (Plaintiffs' Ex. 79 at 30, 33).

Hammons obtained a management services agreement to ensure that the quality of the hotels was maintained to his standards. (Gilson Dep., Rohrbacher Aff. Ex. 45 at 99). The agreement was for actual operating costs and expenses incurred and included a $200,000 annual salary to Hammons plus benefits. (Plaintiffs' Ex. 64 at 72).

Hammons also received a $25 million short-term line of credit and a $275 million line of credit so he could continue to develop hotels.

At a Special Committee meeting in March 2005, Special Committee counsel Jeffrey Patt of Katten Muchin told the Special Committee that iStar had retained Katten Muchin to represent

[8] This preferred interest is part of the two-percent interest Hammons received in the surviving LP. (*See* Fourth Amended and Restated Partnership Agreement, at Exhibit A, Rohrbacher Aff. Ex. 47, setting out ownership percentage of total partnership units.)

it in drafting and negotiating Hammons's line of credit that iStar would be financing. Patt explained that iStar was a regular client of Katten Muchin, and the team of lawyers representing iStar would be completely separate from, and would be prohibited from discussing the transaction with, the team of lawyers representing the Special Committee. The Special Committee discussed the matter and unanimously approved that representation and agreed that it would not compromise Katten Muchin's independence. (March 28, 2005, Minutes of Special Committee, Beck Aff. Ex. 27[9] at 2).

At the same meeting, the Special Committee rejected a draft provision that gave Eilian the right to waive the majority of the minority vote. (*Id.*).

In 2005, Eilian had some discussion with a Lehman group different from the one advising the Special Committee to obtain a quote for refinancing Company debt, although Eilian ultimately retained Goldman. (Eilian Dep., Rohrbacher Aff. Ex. 48 at 202-08). The Special Committee members did not recall this contact. (Sullivan Dep., Rohrbacher Aff. Ex. 49 at 155; Moore Dep., Rohrbacher Aff. Ex. 50 at 119-20; Dempsey Dep., Rohrbacher Aff. Ex. 51 at 158-59).

Of the 5,253,262 minority shares eligible to vote, 3,821,005 -- or nearly 73% -- voted in favor of the Merger. (September 15, 2005, Minutes of Special Meeting of Stockholders, Beck Aff. Ex. 39).

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[9] Citations in the form "Beck Aff. Ex. __" refer to exhibits to the Affidavit of Thomas A. Beck (Transaction ID 23869571).

ARGUMENT

I. *LYNCH* DOES NOT APPLY BECAUSE HAMMONS GAVE UP HIS CONTROLLING INTEREST AND OTHERWISE PLAYED NO ROLE IN NEGOTIATING THE MINORITY CONSIDERATION.

Plaintiffs focus on the consideration Hammons received for his limited partnership interest in the LP and his Class B stock in the Company -- interests that none of the Class A minority shareholders owned -- and argue that, since the Merger was not a "sale" for tax purposes, Hammons was on both sides of the transaction. But none of these facts trigger the fairness doctrine. *Lynch* instructs that an entire-fairness-style interested transaction is one in which the controlling shareholder proposes the merger and continues to control the company after closing. *Lynch*, 638 A.2d at 1116. That is not the case here.

Hammons effectively transferred his equity along with control to Eilian. Payment of the bulk of Hammons's consideration was deferred essentially until his death to avoid income tax liability. Although Hammons continued to have that capital at risk and its amount was not insignificant, the undisputed fact is that Hammons retained only a small percentage interest in the surviving LP. Tellingly, Plaintiffs never mention that his surviving interest in the LP was just two percent.

The hotel management agreement was nothing more than a service contract.[10] It gave Hammons oversight of the hotel operations so that he could preserve the quality of the hotels he had developed.

Plaintiffs harp on other elements of the Related Transactions as well, but none of the Related Transactions gave Hammons the power to direct the day-to-day operations of the Company itself. A line of credit does not give the borrower an ownership interest in, or control

[10] The value of that agreement cannot even be deemed material to Hammons, as it was at cost. While not an insignificant number in absolute terms, his salary under the agreement was but a small part of the consideration he negotiated for his interests. (*See* Plaintiffs' Ex. 64 at 72).

of, the lender. A reciprocal right of first refusal does not equal company control. A reciprocal development restriction is not an ownership interest. Even the provisions in the partnership agreement designed to protect Hammons's liquidation preference do not equal the power to manage the Company. The undisputed material fact is that Hammons gave up his controlling interest in the Company. Indeed, as tax counsel Hobert explained, the tax indemnity afforded Hammons was negotiated precisely because Hammons gave up control:

> Q. And why did it become necessary for him to obtain an indemnity, where he had not previously had one?
>
> A: Previously he had input into whether a hotel was sold, and now with the partnership, there was a potential of more sales of hotels.
>
> Q. Because he was giving up control?
>
> A. That's right.

(Hobert Dep., Rohrbacher Aff. Ex. 46 at 73).

Under Delaware law, Hammons was not on both sides of the transaction, and entire fairness does not apply.

Plaintiffs' citation of *In re Tele-Communications* is wholly inapposite. There, two board members negotiated the sale of the company and obtained a premium for the directors' class of stock over the consideration paid to the minority. A majority of the board approved the sale. *In re Tele-Communications* thus involved a typical entire-fairness situation in which a majority of the board was interested in the transaction. *See In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *8 (Del. Ch. Dec. 21, 2005) (noting also that the special committee was not fully disinterested). Further, only one of the directors (Malone) was a controlling stockholder -- it was therefore only he who was entitled to a control premium. *See id*. at *14 ("[P]laintiffs have cast into doubt the need to pay a TCOMB premium to all TCOMB holders, if only Malone was entitled to a control premium as a control shareholder."). Here, on the other hand, Hammons was entitled to a control premium and he did not participate in the negotiations for the minority shares. The admittedly disinterested Special Committee successfully negotiated consideration for the minority shareholders that was greater on a per-share basis than that received by Hammons.[11]

Plaintiffs' reliance on *LNR* is also misplaced. The *LNR* Court noted the rule applicable here: "There is authority for the proposition that the mere fact that a [controlling shareholder] has or may be acquiring some interest in the buyer does not automatically trigger entire fairness review." *In re LNR Prop. Corp. S'holders Litig.*, 896 A.2d 169, 177 (Del. Ch. 2005). In *LNR*, however, the Court could not -- on a motion to dismiss -- rule out the possibility that entire fairness would apply because the controlling stockholder negotiated the transaction, including the allocation of a 20.4% stake in the resulting company for himself.[12] *Id.* at 178. Nevertheless, the Court noted that business judgment could apply if the defendants were to show "at the summary judgment stage that [controlling stockholder] Miller . . . negotiated this transaction as a seller, not a buyer, and that the board and the Special Committee were entitled to repose

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[11] The evidence shows that Hammons received less on a per-share basis than the Class A shareholders. Plaintiffs' criticisms of Lehman's analysis are meritless. Their discussion of Lehman internal emails proves nothing. As Lehman analyst Gaddy Cohen explained, it was an iterative process as they gathered and analyzed information. (Cohen Dep., Rohrbacher Aff. Ex. 52 at 173, 179). Moreover, the parties' objectives, as well as any subjective value the parties may have assigned to the elements of the transaction, are irrelevant. Likewise, there is no authority that requires a financial advisor to take into account any tax savings to a controlling shareholder. Lehman correctly analyzed Hammons's consideration at market value. But even if plaintiffs could show that Hammons received more than the Class A shareholders on a relative basis, Delaware law recognizes that a controlling shareholder like Hammons is entitled to a control premium. *Mendel v. Carroll*, 651 A.2d 297, 305 (Del. Ch. 1994) ("The law has acknowledged . . . the legitimacy of the acceptance by controlling shareholders of a control premium.").

[12] Likewise, in *Ryan v. Tad's Enterprises, Inc.,* 709 A.2d 682 (Del. Ch. May 24, 1996), and *In re Dairy Mart Convenience Stores, Inc*., 1999 WL 350473 (Del. Ch. 1999), other cases on which Plaintiffs rely, the court applied the entire fairness standard because, unlike here, the controlling shareholder negotiated the transaction for the company and for the minority.

confidence in his unconflicted motivation to obtain the maximum price for all LNR stockholders." *Id.* Hammons has made such a showing. He negotiated his transaction as a seller, given that he sold everything he was able to without triggering tax implications, and he allowed the Special Committee to independently obtain the maximum price for the minority shareholders.

Orman, *Budget*, and *CompuCom* show that the business judgment rule applies here. *See Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (applying the presumptions of the business judgment rule in a sale of a company to a third party when the controlling stockholder remained such after the merger); *In re Budget Rent A Car Corp. S'holders Litig.*, 1991 WL 36472, at *5 (Del. Ch. Mar. 15, 1991) (applying business judgment to a sale of a company to a third party when the controlling stockholder received stock in the entity acquiring the company); *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005) (applying the business judgment rule to a sale of a company to a third party at a majority stockholder's behest).

Even though the transaction in *Orman* involved key elements of the concerns that animated *Lynch* ("a party that controls, and will continue to control, the corporation"), the Court found that, as here, the controlling stockholder did not stand on both sides of the transaction:

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

Orman, 794 A.2d at 22.

In *Budget*, the controlling stockholder received cash for its shares and exchanged some of that cash for the common stock of the entity acquiring the company. That case belies plaintiffs' position that business judgment applies only when the controlling shareholder receives cash consideration (though plaintiffs do seem to cite it for that proposition -- *see* Plaintiffs' brief at 54). The Court looked to the restrictions on the common stock that the controlling shareholder received (and to a limited management agreement its parent negotiated) and determined that the controlling shareholder was obtaining no benefit from the merger. *Budget*, 1991 WL 36472 at *4. The Court therefore held that the merger was not an interested transaction and that the directors were protected by the business judgment rule. *Id.* at *5. Notably, the Court also rejected the plaintiff's characterization of the transaction "as a management led cash out of the minority public stockholders."[13] *Id.* at *1.

As in the above cases, Hammons was not on both sides of the transaction. This was not a "squeeze-out" merger, as Plaintiffs assert. It was an arm's-length transaction with an unrelated third party that had no prior relationship to any of the directors. Hammons negotiated the sale of his majority interest and played no role in the Special Committee's negotiations for the minority. While the receipt of much of his consideration was deferred to avoid tax liability, that does not negate the fact that he gave up control of the Company. Plaintiffs cannot escape application of the business judgment rule in this case.

II. THE BENEFIT/DETRIMENT REQUIREMENT OF *SINCLAIR* AND *JEDWAB*[14] IS NOT SATISFIED HERE.

Plaintiffs' alternative argument for entire fairness rests on the false premise that any benefit Hammons received equaled a detriment to the minority. The Delaware Supreme Court, in *Sinclair*, held that the self-dealing that would lead to the application of entire fairness "occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such

[13] *Budget* also appeared in a passage in a book that the Supreme Court in *Lynch* described as discussing "parent-subsidiary transactions other than cash-out mergers." *Lynch*, 638 A.2d at 1117 n.5; 1 Dennis J. Block et al., *The Business Judgment Rule* 188 (4th ed. 1993).
[14] *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986).

a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).[15] Hammons did not receive any benefit that caused a detriment to the minority shareholders.

Furthermore, Plaintiffs' analysis of *Jedwab* is oversimplified and misleading in this regard. Entire fairness did not apply in *Jedwab* because the controlling shareholder accorded himself different consideration, as plaintiffs suggest (*see* Plaintiffs' brief at 50). The key fact was that the third-party buyer announced up front the total price it would pay for the company, and had no input into how that amount would be divided between the classes of stock. *Jedwab*, 509 A.2d at 590. The controlling shareholder apportioned the total price among the other stockholders and himself. *Id.* He received less cash per share than the other common stockholders, but took other non-cash property that they did not receive. Because the total merger price had been pre-determined, any special consideration the controlling shareholder accorded himself necessarily created a corresponding reduction to the minority's consideration. Under these circumstances, the Court held that the transaction called for entire fairness review. *Id.* at 595 (noting that controlling shareholder "directed the apportionment of merger consideration in a way that treated himself differently from other holders of common stock").

This case, however, involved no such zero-sum game. Hammons did not direct the apportionment of the merger consideration. Negotiations with Eilian proceeded on two separate paths, and Eilian never announced a limit on the total amount he was willing to pay. Hammons's principal requests -- the credit line, the Chateau, and the tax-advantaged status -- were part of the proposed transaction with Barcelo when Barcelo was offering $13/share to the minority in

[15] Plaintiffs cite to *Sinclair* for the benefit/detriment rule, but do not otherwise analyze it.

September 2004. Barcelo proposed a five percent profits interest in the new company for Hammons with a $300 million capital account. With Eilian, the capital account was $335 million, but Hammons's interest in the surviving LP was reduced to two percent. Hammons's long-term line of credit increased 10% from $250 million to $275 million with Eilian. (*See* Minutes of Special Committee of October 18, 2004 at JQH018411-12, discussing Barcelo terms, Beck Aff. Ex. 3). In contrast, due to the Special Committee's efforts, the minority ultimately received an 85% increase over Barcelo's $13 per-share offer. Hammons's "benefits," therefore, caused no detriment to the minority.

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

Although Plaintiffs may not be required to quantify the detriment to the minority at this stage, they must offer some evidence that Hammons received a benefit at the expense of the minority. Plaintiffs have produced no such evidence. The fact that the transactions were complex, or that they were structured to allow Hammons to develop hotels, avoid taxes, or achieve any other objective is immaterial. The benefit/detriment rule of *Sinclair* and its call for entire fairness simply have no application here.

III. EVEN IF ENTIRE FAIRNESS WERE TO APPLY, THE BURDEN OF PERSUASION SHIFTS TO PLAINTIFFS.

Plaintiffs' arguments that the Special Committee and shareholders were coerced, the shareholder vote was illusory, and the Special Committee was ineffective are baseless. Therefore, even if entire fairness were to apply, the burden of persuasion shifts to Plaintiffs.

A. There Was No Coercion, Innocent or Otherwise.

Plaintiffs suggest that the minority stockholders faced coercion in this transaction akin to that in *Lynch*. (Plaintiffs' brief at 45-46, 57-62). But this transaction posed no such risk of coercion because Hammons was not on both sides of the transaction.[16]

Plaintiffs make much of the status of the minority stockholders before the transaction (Plaintiffs' brief at 58-59) and suggest that the stockholders "had no effective choice but to accept the challenged transaction" (Plaintiffs' brief at 59). But the status of the minority stockholders before the transaction was no different than that of any minority stockholder in any corporation, *i.e.*, they lacked control. Any "undervaluing" of the shares posited by Plaintiffs (Plaintiffs' brief at 58, 62) merely represents the lack of control premium attributable to a minority position in the Company.

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[16] Furthermore, to the extent that plaintiffs suggest that the minority stockholders faced coercion because their disapproval of the transaction could have risked retaliation from Hammons (Plaintiffs' brief at 45), plaintiffs try to have it both ways. The merger was subject to a waivable majority-of-the-minority condition. Thus, by plaintiffs' logic, the minority stockholders would have risked no retaliation -- and therefore would have suffered no coercion -- had the Special Committee waived the condition and allowed Hammons to dictate the Merger's approval. First, plaintiffs argue that the condition was "illusory" (Plaintiffs' brief at 65-66), so it comes with ill grace for them to also contend that the illusory condition was sufficiently potent to cause coercion. Second, it makes little policy sense to argue that minority stockholders require greater protection *because* they are given greater voting power to protect themselves. A ruling that a majority-of-the-minority condition will force the application of entire fairness when business judgment would otherwise have applied would certainly be inconsistent with prevailing Delaware law and policy.

To the extent that the Company was leveraged or Hammons clashed with the Board, those facts were publicly known before the Merger came about. As Plaintiffs point out, the Company was leveraged when it first went public. And one of Plaintiffs' own authorities concerning prior disagreements between Hammons and the Board is hearsay from a book published in 2002, three years before the Merger. But whatever may be said about Hammons or his prior dealings with the Board, none of that constitutes coercion. To the extent that the minority viewed the Merger as superior to continuing with the status quo -- even if the status quo included a CEO they did not like -- there is no authority that such a choice equals coercion.

Plaintiffs' suggestion that the Merger involved coercion similar to that in *Pure Resources*[17] and other majority freeze-out transactions makes no sense. The coercion in *Pure Resources* was the fear of a declining minority position. *See* 808 A.2d at 442 ("That stockholder could be one of the few who holds out, leaving herself in an even more thinly traded stock with little hope of liquidity and subject to a § 253 merger at a lower price or at the same price but at a later (and, given the time value of money, a less valuable) time."). That is, if a minority stockholder rejects a mostly successful tender offer, that minority stockholder will be part of a much smaller minority (and subject to the future possibility of being cashed-out in a short-form merger). That could not have happened here -- Hammons was selling his stake in the Company as well. The minority stockholders faced no "worse fate" of the kind Plaintiffs describe. (*See* Plaintiffs' brief at 61).

Plaintiffs have not and cannot produce any evidence that Hammons did anything coercive with respect to the Special Committee or the minority shareholders' approval of the Merger.

[17] *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).

Indeed, Hammons purposely stayed out of the negotiations for the minority's consideration, leaving it to the disinterested and independent Special Committee.

B. The Special Committee Performed Effectively.

Plaintiffs' contention that the Special Committee was ineffective is belied by their admission that *Revlon* does not apply. Given that Hammons controlled a majority of the Company, the Special Committee had no duty to market the Company. Similarly, the Special Committee was necessarily subject to Hammons's right to reject any transaction that involved selling his interests.[18] *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interests" and "a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority holder, merely because the sale would profit the minority"); *Freedman v. Restaurant Assoc. Indus., Inc.*, 1990 WL 135923, at *6 (Del. Ch. Sept. 21, 1990) ("[A] shareholder, even a majority shareholder, has discretion as to when to sell his stock and to whom . . . ."). The Special Committee properly recognized these tenets in negotiating the best available transaction at a price that was fair to the Class A shareholders. Indeed, the Special Committee went through multiple rounds of negotiations over the Class A share price, obtaining increases from $13 to $20, $20.50, $21, and ultimately to $24.

C. The Vote Was Not Illusory.

The minority shareholder vote could be waived only by the Special Committee. The Special Committee specifically rejected a draft provision of the Merger Agreement that would have given Eilian such authority. (March 28, 2005, Minutes of Special Committee, Beck Aff.

[18] Plaintiffs complain that Hammons had a "preference for keeping the Board uninformed" about his negotiations with third parties. (*See* Plaintiffs' brief at 20). But even if that were true, it is immaterial. Hammons had no obligation to involve the Board in negotiations for the sale of his interests.

Ex. 27, at 2). Likewise, Hammons had no authority to prevent the minority vote -- which overwhelmingly favored the Merger. Under these facts, there is no authority, and indeed it would make no sense, to deem the vote illusory. Moreover, Delaware courts have upheld provisions, like the one here, that require the vote of a majority of the minority voters who actually vote. *See, e.g.*, *Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 493 (Del. Ch. 1990); *Bershad v. Curtiss-Wright Corp.*, 1983 WL 10916 (Del. Ch. Mar. 21, 1983), *aff'd*, 535 A.2d 840, 846 (Del. 1987). And in any event, a majority -- nearly 73% -- of the total number of minority shares eligible to vote approved the Merger. (September 15, 2005, Minutes of Special Meeting of Stockholders, Beck Aff. Ex. 39).

IV. THERE WERE NO MATERIAL NONDISCLOSURES.

Plaintiffs have withdrawn most of their disclosure claims. Hammons cannot be liable for any of the remaining alleged nondisclosures because plaintiffs appear to concede that he has no liability in his capacity as a director. (Plaintffs' brief at 51). He cannot be liable as a shareholder either, because he took no part in the disclosure process. The Company, through the other Board members, handled the proxy statement.

Regardless, Plaintiffs' four alleged nondisclosures are without merit. First, Plaintiffs' claim that the Proxy failed to disclose the Special Committee's "subservient, deferential approach" (Plaintiffs' brief at 67) rests on the same false premises discussed in Section III.B. above, and need not be repeated here. Second, the Defendants had no obligation to disclose the valuation of the third-party buyer that rested on a hypothetical scenario in which the Company remained public and was transformed into some new entity under his management. Third, the purported conflicts with Katten Muchin and Lehman were not material and therefore did not need to be disclosed. A separate team of lawyers from Katten Muchin was to represent iStar and was prohibited from discussing the transaction with the team representing the Special Committee. The Special Committee discussed the matter and waived the conflict. (March 28, 2005 Minutes of Special Committee, Beck Aff. Ex. 27, at 2). Fourth, as for Lehman, it was likewise a group different from the one advising the Special Committee that had contact with Eilian about debt refinancing, and Lehman did not get the business. Further, there is no evidence that Lehman's opinion was affected by the purported pitch. The contact occurred after Lehman had opined to the Special Committee in December 2004 that the then-high bid of $21 per share was fair to the minority shareholders. Lehman's presentation as to value in June 2005 remained essentially the same, except that the minority stood to receive $3 more per share. Moreover, the Special Committee members do not even recall that Eilian spoke to someone at Lehman about getting a quote for financing.

CONCLUSION

In selling his interests, Hammons wanted to avoid a taxable event -- which was his right as a controlling stockholder -- and to be free to develop hotels. To reach those two objectives, he was willing to take consideration valued at roughly 60% of that paid to the minority stockholders on a relative basis. Whatever subjective value the tax avoidance and Hammons's other objectives may have had to Hammons is immaterial. Hammons ceded his control to an unrelated third party and stayed out of the disinterested and independent Special Committee's negotiations with that third party on behalf of the minority. Under these facts, the business judgment rule applies instead of the more stringent entire fairness standard.

For the foregoing reasons, Defendant John Q. Hammons respectfully requests that the Court deny Plaintiffs' motion for partial summary judgment and enter summary judgment in his favor.

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