IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EMERALD PARTNERS, a New Jersey limited partnership,	)	
Plaintiff,	)	
v.	)	Civil Action No. 9700
RONALD P. BERLIN, DAVID L. FLORENCE, REX A. SEBASTIAN and THEODORE H. STRAUSS,	)	
Defendants.	)	

OPINION

Date Submitted: August 12,2002
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JACOBS, VICE CHANCELLOR

On February 7, 2001, this Court issued its post-trial Opinion granting judgment to the defendant-directors in this class action challenging a self-dealing merger between May Petroleum, Inc. ("May") and a group of corporations owned by May's controlling stockholder, Craig Hall.[1] This Court reached that result on two principal grounds: (1) one of the four director defendants (Ronald Berlin) played no legally significant role in negotiating or approving the challenged merger terms, and (2) the remaining director defendants were exculpated from liability by virtue of the exculpatory provision (Article Fifteenth) of May's certificate of incorporation.

On appeal from that judgment, the Delaware Supreme Court reversed, holding that this Court had erred by not deciding the entire fairness of the merger before considering the effect of the exculpatory charter provision. Accordingly, the Supreme Court vacated the judgment and remanded the case for this Court to determine the validity of the merger under the entire fairness standard of review.[2]

On remand, the parties engaged in a new round of post-trial briefing, based upon the same trial record. After oral argument, the case was resubmitted to this Court. This is the Court's post-trial decision on remand.

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[1] *Emerald Partners v. Berlin, 2001 WL 115340* (Del. Ch. Feb. 7, 2001) (hereinafter, "PTO, 2001 WL 1 I 15340, at * ").

[2] *Emerald Partners v. Berlin,* 787 A.2d 85 (Del. 2001) (hereinafter, *"Emerald IV').*

Under challenge in this lawsuit is an August 15, 1988 merger (the "merger") between May and Hall Real Estate Group ("HREG"), a group of thirteen corporations owned by Craig Hall ("Hall"), who was May's Chairman, Chief Executive Officer, and its controlling stockholder.[3] The plaintiff, Emerald Partners ("Emerald"), which was a shareholder of May, challenges the merger on behalf of a class consisting of May minority stockholders on the merger date.[4] At this stage, the sole defendants are four of May's five then-directors. The fifth director—Hall-was dismissed as a defendant by reason of his 1992 personal bankruptcy discharge.

Since its commencement in early 1988, this lawsuit has generated a multitude of judicial opinions, including four by the Delaware Supreme Court.[5]

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[3] At the time the merger was proposed, Hall owned 52.4% of May common stock. In January 1988, before the record date for the merger and before the May shareholders voted to approve it in March 1988, Hall reduced his stock interest to 25% by transferring a large block of his May shares to independent irrevocable trusts created for the benefit of his children.

[4] The class includes all May shareholders except the defendants, Hall, and their families and trusts.

[5] On March 18, 1988, this Court preliminarily enjoined the merger. *Emerald Partners v. Berlin,* 1988 WL 25269 (Del. Ch. Mar. 18, 1988) (Hartnett, V.C.). That injunction was reversed on appeal on August *15, 1988, Berlin v. Emerald Partners, 552* A.2d 482 (Del. 1989), and the merger was consummated that same day. Thereafter, this Court issued a series of opinions and orders: (1) denying defendants' motion to disqualify Emerald Partners as class representative but granting their motion to disqualify plaintiff's law firm in the derivative aspect of the suit, *Emerald Partners v. Berlin, 564* A.2d 670 (Del. Ch. 1989); (2) granting plaintiffs motion for class certification, *Emerald Partners v. Berlin,* 1991 WL 244230 (Del. Ch. Nov. 15, 1991) (Hartnett, V.C.); (3) granting defendants' motion to dismiss (derivative) Count I for failure to plead facts sufficient to excuse a Rule 23.1 demand, but holding that demand was excused as to (derivative) Count III, *Emerald Partners v. Berlin,* 1993 WL 545409 (Del. Ch. Dec. 23, 1993) (Hartnett, V.C.); (4) denying a discretionary award of interim attorneys' fees to plaintiff and indicating the likely extinguishment of the derivative corporate waste claims of Count *III, Emerald Partners v. Berlin,* 1994 WL 48993 (Del. Ch. Feb. 4, 1994) (Hartnett, V.C.); (5) granting plaintiffs motion to compel the defendants to produce handwritten notes without redactions, *Emerald Partners v. Berlin,* 1994 WL 125047 (Del. Ch. Mar. 30, 1994) (Hartnett, V.C.); and (6) granting summary judgment in favor of the corporate and individual defendants, *Emerald Partners v. Berlin,* 1995 WL 60088 1 (Del. Ch. Sept. 22, 1995) (Steele, V.C.), which was later reversed on appeal, *Emerald Partners v. Berlin,*

The claim ***sub judice*** is that the plaintiff class is entitled to a money damages award against the defendant-directors for approving a merger that was unfair to May's minority stockholders, in terms of both the price and the process by which the transaction was initiated, negotiated, and approved. The defendants respond that they have carried their burden of proving that the merger was entirely fair, but even if not, they are, nonetheless, not liable by reason of the exculpatory provision in May's charter. For the reasons next discussed, this Court concludes, after having reviewed the merger under the entire fairness standard, that the defendants remain entitled to judgment in their favor on all claims.

I. THE FACTS

A. Prefatory Comment

In its 2001 post-trial Opinion, this Court made numerous findings of fact, many of which were hotly contested. After the case was remanded, the parties agreed that the original trial record would constitute the record on remand, and that the parties would proceed by submitting new post-trial briefs, to be followed by oral argument.

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726 A.2d 1215 (Del. 1999); (7) granting judgment and awarding damages to defendants resulting from being wrongfully enjoined from consummating the merger *in* 1988, *Emerald Partners v. Berlin, 712* A.2d 1006 (Del. Ch. 1997) and *Emerald Partners v. Berlin,* 1998 WL 474195 (Del. Ch. Aug. 3, 1998) (Steele, V.C.), ***aff'd,*** *Emerald Partners v. Berlin, 726* A.2d 1215 (Del. 1999); and (8) this Court's post-trial Opinion and the Supreme Court's reversing Opinion *in Emerald IV (see* cases cited *supra* at notes 1 and 2).

Although the evidentiary record remained unchanged, Emerald, nonetheless, devoted much of its post-trial brief on remand to attacking, and attempting to rehtigate, almost every fact that was found adversely to it.” That tactic raises the threshold question of whether, in these circumstances, this Court either must-or should-revisit its earlier factual findings. The comment that follows addresses that issue.

Emerald’s effort to relitigate the facts rests essentially on two propositions. First, Emerald relies upon the Supreme Court’s direction that the “judgment of the Court of Chancery is vacated,” and that the case would be remanded for an “initial analysis” under the entire fairness standard.’ That language, Emerald argues, nullifies not only this Court’s final judgment, but also every finding of fact that supports the judgment, thereby wiping the entire slate clean and requiring this Court to start over. Second, and alternatively, Emerald suggests that it is entitled to relitigate the facts because of the very nature of entire fairness review.

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[6] It is noteworthy that Emerald’s post-trial brief on remand predicates its entire fairness arguments on the version of the facts Emerald contends the Court should find, as distinguished from the facts that the Court actually found. The inescapable inference is that Emerald (implicitly) was conceding that it could not prevail on the entire fairness issues unless the original factual findings were changed. At oral argument, the Court asked plaintiff’s counsel if that was Emerald’s position. Counsel denied making any such concession, arguing that the merger could be found unfair even if the original findings remained in place. Post-Trial Oral Argument Tr., 7/19/2002 , at 53-55. If that is true, one would have expected Emerald to have made, at the very least, alternative arguments predicated on the original findings, which it did not do. Accordingly, to the extent this Court adheres to its original findings, the analytical utility of Emerald’s brief is limited.

‘*Emerald IV*, 707 A.2d at 98.

Emerald's argument, as this Court understands it, runs as follows: the defendant-directors' burden of establishing the merger's entire fairness constrains not only the legal inferences this Court is allowed to draw from the facts, but also the factual inferences that the Court may draw from the evidence in deciding what the found facts should be. Just as entire fairness review requires the Court to resolve all doubts against the defendants when reaching its conclusions on contested issues of law, so too (Emerald suggests), the Court must also resolve all disputed inferences against the defendants when deciding contested issues of fact.

I cannot agree. Although the Supreme Court did vacate this Court's *judgment,* it did not address, let alone overturn, any of this Court's *factual findings*. Although vacating the judgment may have obviated the finality of those factual findings, and thus may permit their revisitation, this Court does not understand the Supreme Court's Opinion or Mandate to *obviate* those findings or require this Court to decide them anew.

Emerald's argument also misconceives and overstates the nature and effect of entire fairness review. Under that standard, the defendant-directors have the burden of persuasion, *i.e.,* must prove by a preponderance of the evidence all facts that comprise the legally mandated elements of an entire fairness analysis. But from that proposition it does not follow (as Emerald appears to argue) that on every disputed fact issue the Court must find against the defendants whenever (and

solely because) Emerald is able to establish some doubt, however slight, on that issue. If that were the law, then in all entire fairness cases, every fact issue would have to be resolved in the plaintiffs favor whenever the plaintiff is able to introduce *any* controverting evidence. The Court does not understand the entire fairness inquiry to reach that far or that deep. Entire fairness review is not a construct designed to shackle or constrain a trial court's fact-finding process in any respect, except to require that where the court finds that the evidence on a given fact issue is in equipoise, then on that issue the party having the burden must lose.

Accordingly, Emerald has shown no basis for its effort to relitigate the facts as originally found. This Court is free, if it so chooses, to adhere to the fact findings originally made in its 2001 post-trial Opinion, and to predicate its entire fairness analysis on those findings. Indeed, the Court considered taking that approach, but nonetheless has chosen—albeit without being required and for reasons unrelated to Emerald's position—to revisit its factual findings and to alter them where appropriate. One reason, rooted in an overabundance of caution, is that both sides agree that one of the Court's original findings, although not critical to the analysis, was incorrect, raising the possibility that other factual errors may have crept in as well. A second reason is that on this remand, the original fact findings, even if correct, are incomplete, because entire fairness review requires the Court to make additional findings that were not made the first time around.

With that explanatory preface, the Court turns to the facts, 'which are as found below.

B. The Parties

1. Emerald Partners

The plaintiff, Emerald Partners, is a New Jersey limited partnership managed by Paul Koether and his wife, Natalie Koether, Esquire. At the time of the merger, Emerald Partners owned at least 3 15,720 shares of May common stock.[8]

2. May And Its Directors

May was a Delaware corporation that was based in Dallas, Texas. Initially, May was engaged in oil and gas exploration, but later it became engaged in the business of acquiring oil and gas properties, companies and other types of investments. In 1972, May became a publicly held company. At the time of the August 15, 1988 merger, May had 14,655,660 issued and outstanding shares of common stock held by more than 2,000 shareholders. May's common shares were traded on the over-the-counter market and were reported on the NASDAQ National Market System.

[8] The record shows that Emerald Partners owned 3 15,270 May shares as of January 5, 1988 (DX 69), although Paul Koether represented that as of that date he and his clients owned 505,700 shares.

At all relevant times leading up to and including the merger, May had a five-member board of directors. The directors were Craig Hall ("Hall"), Ronald P. Berlin ("Berlin"), David L. Florence ("Florence"), Rex A. Sebastian ("Sebastian"), and Theodore H. Strauss ("Strauss"). Except for Hall, those directors are the defendants in this action. Berlin had been employed by HREG for over ten years and served as its President in 1987 and 1988. Florence, Sebastian, and Strauss, who represented a majority of May's board, were not affiliated with, and were financially independent of, Hall and his corporations. All three of these directors were successful businessmen of independent means, were many years older than Hall, and had no business, professional, financial or significant personal relationships with him.[9] Because of the significance of their roles in approving the merger, the background of each of the non-affiliated directors is briefly discussed.

Florence co-founded May with his (now deceased) business partner, John May, 32 years before the merger. Florence served on May's board from and after its initial public offering in 1972, until early 1994. At the time of the merger, Florence owned in his own name about 30,000 May shares. Florence was also a fiduciary for trusts that held shares of May common stock for the benefit of his own children, and also for the benefit of John May's widow and surviving daughter. Besides serving as a director of May, Florence served on the board of

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[9] Neither Florence nor Sebastian knew Hall before Hall first invested in May in 1985. Before Strauss joined May's board in 1986 he had been acquainted with Hall, but they were not personally or socially close friends.

First Republic Bank, one of the then-largest banks in Texas. He had also been the Chairman and sole owner of a private company, Dallas Communications Corporation. Florence had a broad range of investment experience, including investing in real estate in the Southwest.

Sebastian became a director of May in 1980, five years before Hall began investing in that company. Sebastian had retired from Dresser Industries after 19 years of service as a senior executive, with control over operations producing over $1 billion in annual revenue. At the time of the merger, Sebastian held 11,050 shares of May stock. Sebastian, like Florence, had considerable experience as a director, having served on the boards of two publicly traded companies and of Texas Commerce Bank in Dallas. As both a bank director and a personal investor, Sebastian was familiar with the needs and cycles of the real estate business.

Strauss became a May director in 1986, bringing to the board an extensive business background that spanned four decades, which included founding a substantial packaging business and a prominent Dallas bank. At the time of the trial, Strauss was a former Chairman of First City Bank in Dallas, was the current Chairman of Strauss Broadcasting, Inc., and was also a board member of several other corporations. At the time of the merger, Strauss's wife, Annette, was the Mayor of Dallas[10] and Strauss was an investment banker in the Dallas office of

[10] Annette Strauss is now deceased.

Bear Stearns-a nationally prominent firm later retained in connection with the merger. Strauss did not share in the profits of Bear Stearns, and, therefore, did not receive from Bear Steams any compensation or profit directly attributable to transactions involving May. On the date of the merger, Strauss owned 10,000 shares of May common stock.

C. May Before The Merger

Before 1986, May's activities'were substantially devoted to oil and gas exploration. To raise capital for its oil and gas investments, May sold interests in public partnerships. Beginning in 1983, May had difficulty raising capital in this manner because of its track record, and also because of generally depressed oil and gas prices and changes in the tax laws. Between 1983 and 1987, May lost about $80 million dollars in the oil and gas exploration business.

In 1985, Hall began investing in May with the goal of cashing out May's remaining stockholders. Hall abandoned that goal after he learned of substantial problems with May's two most significant oil wells, and, instead, he began investing additional capital in May. Eventually Hall obtained a controlling stock interest, and in January 1986, he became May's Chief Executive Officer.

By the end of 1985, Hall had invested nearly $24 million in May, which at that point was heavily in debt and perilously close to bankruptcy. From 1986 until the August 1988 merger, May's management searched for an investment strategy to extricate the company from its financial problems. Prompted by a significant

decrease in the price of crude oil and natural gas during 1986, as well as by pressure from its lenders, May changed its operational focus from oil and gas exploration, to optimizing the production and revenues from its existing oil and gas properties and reducing its debt and general administrative overhead. May's directors also formulated a different new strategy-acquiring oil and gas properties, companies, or other types of investments-but, unfortunately, the company was unable to locate attractive oil and gas acquisitions at reasonable prices. Accordingly, in 1987, May's board once again changed the company's focus-this time to exit the oil and gas business and seek to enter a different, more viable field of endeavor. That new business plan, unfortunately, turned out to be harder to implement than the board originally anticipated.

To implement that new strategy, during the summer of 1987, May sold substantially all of its oil and gas assets to a third party, Quinoco Petroleum Inc. ("Quinoco"), for $41.4 million, which included $3.2 million of obligations assumed by Quinoco. Bear Steams acted as the investment banker for May in that transaction.

After the sale to Quinoco, May was left with about $38 million in cash, plus potential tax advantages which took the form of $54 million of net operating losses ("NOLs") and $8 million in capital loss carry forwards. To use its NOLs, however, May needed substantial operating income against which the NOLs could be offset (tax-deducted). But, after the sale of its operating assets to Quinoco, May

no longer had operating income. Accordingly, May's board began exploring opportunities to develop a new operating income-producing business. The board engaged experts to search for, and evaluate, those opportunities.

While May was exploring potential opportunities, during the third quarter of 1987 it invested a substantial portion of the proceeds of the Quinoco sale in securities of publicly traded companies. In addition, May invested $8 million to purchase a 40% interest in a Texas limited partnership known as HSSM#7 Limited Partnership ("HSSM#7"). That partnership was formed as a vehicle to invest indirectly in investment funds controlled by Paul Bilzerian ("Bilzerian"), whom Hall then regarded as a successful investor. The remaining 60% of HSSM#7's equity was owned by Hall Capital Corporation, an entity, wholly owned by Hall, that also served as HSSM#7's general partner.

HSSM#7 was a limited partner (and, thus, a passive minority investor) in Suncoast Partners, Ltd. ("Suncoast"), a Florida limited partnership. Suncoast, in turn, was a limited partner in Bilzerian Partners L.P. I and Bilzerian L.P. Series A, two investment partnerships controlled by Bilzerian. Under the Suncoast partnership agreement, Bilzerian and the entities he controlled had no obligation to pursue any particular strategy or to provide any return to HSSM#7. Hall did, however, negotiate for HSSM#7 an annual "put" right that entitled HSSM#7, in March of each continuing partnership year, to require Bilzerian to purchase

HSSM#7's share of Suncoast at the market value of HSSM#7's capital account as of December 3 1 of the previous year.

By October 10, 1987, May had not yet identified a suitable operating business to acquire. That was problematic because, without an income-generating business, May could not use its NOLs. Thereafter, as a result of the October, 1987 stock market decline, May experienced unrealized losses in its investment portfolio that, by December 30, 1987, would eventually total about $12.5 million. It was at this point that Hall proposed a merger of May (which Hall then controlled) and HREG (which Hall then owned) at the October 30, 1987 meeting of May's board of directors.

D. The Hall Corporations (HREG)

HREG grew out of a real estate business that Hall had founded in 1968. The thirteen corporations comprising HREG were primarily real estate service companies that did not directly own real estate. During their twenty-year pre-merger history, those corporations were engaged in diversified real estate activities, principally organizing and managing various investment programs, as well as providing advisory services and other financial and investment services and products. The thirteen corporations invested in real estate subject to mortgage loans, through investment programs that typically were structured as limited partnerships. The general partner of those partnerships was either Hall or an entity that he controlled. As of December 30, 1987, the HREG partnerships were

invested in multi-family housing and commercial space. The partnerships managed approximately 275 rental and commercial developments that were located throughout the country, but were concentrated primarily in the Midwest, Southeast, and Southwest. Those partnerships provided HREG with diverse and significant sources of fee revenue at both the offering stage and during the life of the partnerships.[11]

By the end of 1985, the real estate market in the Southwest was swiftly collapsing. In the view of HREG's management, the cause was primarily excessive new construction, fueled in part by low interest rates and favorable tax benefits that depressed rental revenue and increased vacancies. To preserve the partnerships they had sponsored, HREG undertook a massive restructuring of its own debt. To that end, HREG successfully worked out over $1 billion of non-recourse partnership debt for various properties, essentially on a loan-by-loan basis. As restructured, that debt required the repayment of interest at rates between 8% and 10% for extended maturities, generally of ten year durations.[12] After the restructuring, as of December 30, 1987, HREG's outstanding debt consisted of

[11] In a sponsored limited partnership, HREG typically received reimbursement for the costs of the offering, acquisition fees as a percentage of the purchase price of the asset, management fees based on a percentage of revenue, financing and refinancing fees, disposition fees on disposition of a property, and partnership distributions.

[12] In addition, in 1986 and 1987, HREG raised more than $30 million from existing investors to help defer any losses generated by the affiliated partnerships.

$25 million owed to banks, about $27 million owed to Hall, and other debt totaling approximately $19 million.

Although the restructuring did not completely extricate HREG from the problems then existing in the real estate market, the restructuring did enable the 13 HREG companies to stabilize their (and the affiliated partnerships') financial health. It also enabled them to position themselves to take advantage of opportunities presented by the down-cycle, specifically, to implement HREG's business plan to acquire additional real estate properties at favorable prices.

E. The Merger Proposal

At the October 10, 1987 May board of directors meeting, Hall proposed that the board consider a merger of May and HREG. Hall told the board that the current real estate market had created a "unique market opportunity with respect to taking control of real estate assets by becoming [a] 'substitute' general partner for real estate syndicators in dire financial straits." Hall added, however, that although it would benefit May to enter into this segment of the real estate business, a merger would also create a conflict with HREG, which was better positioned to take advantage of such opportunities. HREG (Hall added) was planning a $50 million subordinated debenture offering to raise capital that would enable HREG to acquire distressed real estate assets. HREG's then-investment banker (Bear Steams), however, had advised Hall that "it [Bear Steams] would do the deal [the debenture offering], but is not sure that they can sell it because of the bond market.

Therefore, it might make sense to consider the merger of the Hall companies into May Petroleum."[13]

The reasons for the merger proposal were further detailed in Hall's February 16, 1988 letter to May stockholders, which accompanied the combined proxy statement and Notice of the stockholders meeting later called to consider the merger. Hall's letter pertinently stated:

> The proposal to merge arose out of complementary strengths and needs of the two organizations. Because of the current unfavorable conditions of oil and gas exploration relative to the significant inherent risks, May has been actively seeking to diversify its traditional business base of oil and gas activities. May has available capital, but has met difficulty in finding appropriate growth oriented business opportunities. [HREG] has been pursuing a growth strategy and have identified many opportunities in the current shake-out that has been occurring in the real estate markets. However, these opportunities require substantial liquidity for investment and. . . .as of September 30, 1987, approximately $74.5 million . . . or seventy two percent (72%) of [HREG's] assets are comprised of receivables from partnerships which are relatively illiquid. Of this net amount, approximately $53 million or seventy one percent (7 1%) of such net receivables are from 95 partnerships currently experiencing working capital deficits, defaulted loans, or bankruptcy . . . [and which] constitute seventy one percent (7 1%) of the 134 partnerships from which [HREG] has receivables. While HREG generally [is] profitable . . . the addition of May's capital, and access in the future to capital as a public company, will provide the needed liquidity to carry out the plans for growth opportunities
> . . . .[14]

[13] PX 24 at 3306.

In other words, HREG already had in place a fully-developed plan to expand its business base by acquiring additional income-producing assets, but it lacked sufficient capital to carry out that plan. May, on the other hand, had ample liquid assets (and NOL carry forwards), but had not identified a satisfactory business in which to invest those assets. Hall viewed a merger of these two enterprises as the solution to both companies' problems.

Because Hall controlled both enterprises, and because Berlin was Hall's employee, it was determined that the issue of whether May would pursue Hall's merger proposal would be decided by the three non-affiliated directors who constituted the majority of May's board-Sebastian, Florence, and Strauss. Those three directors initially determined that Hall's merger proposal merited exploration, but that more information about HREG was needed to enable them to reach a final decision.

Sebastian, Florence, and Strauss ultimately decided to negotiate, and, later, to approve and recommend, a merger with HREG. The negotiation and decision-making process leading to the Merger Agreement began on October 10, 1987, and was concluded on November 30, 1987, when the May board approved that Agreement and recommended its submission to May's stockholders. Because the

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[14] DX 108 (Hall 2/16/1988 Ltr. to May Stockholders) at 1. The debenture offering was subsequently abandoned. This statement of the reasons for the merger proposal is consistent with what Hall told May's board at the May 10, 1987 meeting, except that the proxy statement did not disclose the failed effort to raise $50 million for HREG in the subordinated debenture offering.

decision-making process leading up to the executed Merger Agreement forms an integral part of Emerald's entire fairness arguments, that process is next described.

F. The Process Leading To The Merger Agreement

1. The October 24, 1987 Mav Board Meeting

During the process leading up to the Merger Agreement, two major events took place, both at the October 24, 1987 meeting of May's board of directors. Those events were: (i) Hall's formal presentation of a written merger proposal, and (ii) the retention of legal and financial advisors to represent the three non-affiliated directors-Florence, Sebastian, and Strauss-who would be acting on behalf of May's minority stockholders.

At that board meeting, Hall submitted a written memorandum proposing a stock-for-stock merger. The proposal was that as consideration for contributing HREG, Hall would receive between $85 and $105 million of May common stock, valued at the market price on the day an agreement in principle was reached. Hall described himself as "open to any reasonable modifications to insure that this [would be] an equitable transaction to the outside shareholders . . . ." Hall further committed to:

> . . . abstain from voting, as will Ron Berlin, who is the President of [HREG]. Ron and I will absent ourselves from discussions as to outside counsel, investment bankers, and any other issues regarding the merger leaving the balance of the Board as a committee to act on this proposal. [15]

Despite Hall's recognition of the need for procedural safeguards for the negotiation of what clearly would be a conflict transaction, neither he nor Berlin scrupulously followed the procedures to which Hall had committed to adhere. Despite his representation, Hall and Berlin attended some board meetings where the proposed merger was discussed, and, on some occasions, Hall and Berlin also conferred with Bear Steams, the financial advisor retained to represent May. In this regard, the non-affiliated directors must also be faulted, for not insisting that Hall and Berlin absent themselves from their deliberations. Nor did the May board formally constitute those three directors as a "special committee" by board resolution.

No adverse consequence resulted from those procedural lapses, however. Although they were not formally constituted as a special committee, Florence, Sebastian, and Strauss constituted the majority of May's board. The credible evidence shows that at all times those three directors negotiated the merger terms in good faith, at arm's length, and in an adversarial manner, in reliance on the advice of

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[15] PX 5.

their financial and legal advisors. Moreover, although Hall and Berlin should not have been permitted to be present at meetings of these three directors, the credible evidence establishes that neither Hall nor Berlin influenced the non-affiliated directors' decisions in any significant way.

2. Preliminary Steps: The Retention Of Legal And Financial Advisors

When he submitted his merger proposal to the May board, Hall also provided a detailed analysis of that proposal, including pro forma financial statements and an overview of HREG's proposed post-merger business plan? The three majority directors considered these submitted materials, and they also retained two firms to serve as their legal and financial advisors, in evaluating the proposed transaction."

For their legal counsel, the non-affiliated directors selected the Dallas law firm of Shank, Irwin, Conant, Lipshy, and Caster-line ("Shank Irwin"). Having never previously represented Hall or his entities, Shank Irwin was undoubtedly independent, as was the Wilmington law firm of Prickett, Jones, Elliott, Kristol & Schnee ("Prickett Jones"), which the majority directors retained as their Delaware counsel?

[16] DX 27.

[17] Hall and Berlin were both present during that discussion about engaging legal and financial advisors.

[18] In the February 7, 2001 Opinion, this Court found that Shank Irwin and Prickett Jones were independent and represented only the majority, non-affiliated directors, who in turn were acting on behalf of May's minority stockholders. On remand, the plaintiff resurrected its challenge to the independence of the Shank Irwin and Prickett Jones firms, claiming that they were conflicted because they represented both the non-affiliated directors and Hall. That argument, unlike good wine, does not improve with age,

After considering several capable investment banking firms, the majority (or "non-affiliated") directors (with Strauss abstaining) selected Bear Stearns as the financial advisor best suited for this transaction, even though Bear Steams had previously performed work for HREG. Berlin also voted to retain Bear Steams, although Hall (like Strauss) abstained. Sebastian testified that the non-affiliated directors believed Bear Steams was the most suitable candidate because it had performed well as an advisor to May's directors in two other 1987 transactions. Moreover, Bear Steams had conducted due diligence on HREG for the then-contemplated debenture offering. Accordingly, the non-affiliated directors concluded that Bear Steams would be able to evaluate the proposed merger more expeditiously and thoroughly than the other investment banking firms they had considered.[19]

once again merits rejection. There is no credible evidence that either firm acted as counsel to Hall or to HREG in this transaction. Shank Irwin was chosen because its lead partners were well known to the non-affiliated directors, and Prickett Jones was chosen because Shank Irwin had recommended that firm. Ivan b-win, a Shank Irwin senior partner who was involved in representing the non-affiliated directors, had been an acquaintance of Florence for many years; and T. MacCullough Strother, the Shank Irwin attorney on the matter, was known to, and respected by, Sebastian, and had never previously met Hall.

[19] On this remand Emerald resurrects its argument (also previously rejected) that Bear Steams was conflicted and should not have been retained because it had represented the Hall interests in other transactions. But the non-affiliated directors were mindful of that issue and satisfied themselves that, despite its past involvement with Hall, Bear Stearns would have no conflict in connection with this particular representation because it would be "looking out for the May public shareholders." Tr. at 1114. In its earlier post-trial brief, Emerald argued that the Bear Stearns representation of the minority shareholders was inconsistent with the Bear Stearns engagement letter, which recited that that firm had been retained "to advise the Comuanv as to the appropriate exchange ratio . . . and for the purpose of rendering an opinion to the Company as to the fairness, from a financial point of view, of the Merger." PX 33 (emphasis added). The thrust of Emerald's argument was that because "the company" was controlled by Hall, Bear Steams's real client was Hall. In its earlier post-trial Opinion, this Court disagreed, finding no inconsistency because "Bear Stearns would be the financial advisor to (and their fee would be paid by) May, but in this particular transaction (i) the three non-affrhated directors would be acting on behalf of 'the company' and (ii) because Hall owned over 52% of the company's stock, *by process of elimination* Bear Steams's services and advice would necessarily be for the benefit of the

3. The Merger Negotiations

After Hall submitted to May's board his formal proposal to merge May and the Hall Corporations in exchange for "$85 to $105 million of value of [May] common stock" valued at its market price, Sebastian later met with Amy Youngquist and Julie Silcock of Bear Stearns. Youngquist and Silcock told Sebastian that Bear Stearns intended to appraise May by using an asset value approach, and that Bear Stearns would value **HREG** by using a going concern value

47% minority public shareholders." PTO, WL 115340, at *7, n.17 (italics added).

Emerald asserts that this Court's determination of whom Bear Stearns represented "'by process of elimination'" is "inconsistent with the allocation of the burden on this remand" (Emerald Post-Trial Br. at 9), and, moreover, that if a deductive process of elimination is needed to determine whom the key banker represented, "you've got problems with the process." Post-Trial Oral Argument Tr. 7/1 9/2002 , at 66. That argument, to be blunt, is just plain silly. It was the totality of the credible evidence, not deductive logic, that persuaded this Court that Bear Stearns represented the May minority. A fair reading of the 'by process of elimination" comment would have revealed that its intent was merely to show that Emerald's contrary "evidence" on that point was not inconsistent.

Emerald also advances the additional argument that Bear Stearns was not independent of, and indeed was loyal to, Hall because (i) Hall negotiated both Bear Stearns's fee and the valuation methodologies that Bear Stearns would employ, and (ii) Hall retained Bear Stearns to value the May stock that he contributed to his childrens' trusts in early 1988. Regarding the first point, it is the case that Hall and Jeannie Baggett, May's Executive Vice President, met with Gilbert Matthews, the lead Bear Stearns partner on this engagement, in Dallas on October 30, 1987, and discussed the fee that Bear Steams would receive to advise the non-affiliated directors on the proposed merger. The full board, which included the three non-affiliated directors, had expressly authorized May's officers to do that (PX 30). Matthews told Hall what the fee would be ($200,000) and rejected Hall's suggestion that the fee should be lower. Tr. at 867; Matthews Dep. 3/9/1 988, at 21. It is not the case, however, that Hall influenced the valuation methodology that Bear Steams would use; in fact, Bear Stearns rejected Hall's proposal that the exchange ratio should be based on market value.

As for Emerald's second point, the short answer is that its premise is incorrect. In his 1988 deposition, Hall testified that he had retained Bear Stearns to value the May stock he would be transferring to his childrens' trusts in the so-called "dropdown." At trial, however, Hall corrected his deposition on that point, testifying that although he attempted to retain Bear Stearns, that firm had declined the representation. Hall Dep., 3/8/1988, at 27-28; Tr. at 1088-92. Emerald argues that that recantation is not credible, but Matthews, whom the Court finds credible, similarly testified that he advised Bear Stearns's Amy Youngquist (who had conveyed Hall's request to Matthews) that Bear Stearns could not undertake that representation. Matthews Dep., 3/9/1988, at 133-34. Accordingly, the Court adheres to its original finding that Bear Steams, Shank h-win, and Prickett Jones, in their representation of the three non-affiliated directors, were independent of Hall and HREG.

approach. Sebastian concurred and then advised Hall that May would be valued on a net asset basis-not on the basis of market value as Hall had proposed.[20]

After the October 24 board meeting, Hall furnished the non-affiliated directors with a valuation analysis prepared by Donald Braun, HREG's Treasurer. Based upon comparisons of HREG to potentially comparable companies and upon his analyses of comparable transactions, Braun valued HREG at $105 million. At May's next board meeting held on November 7, 1987, Youngquist and Silcock discussed their assignment and their valuation approaches. Sebastian urged those Bear Steams representatives, in carrying out their task, to be critical of the assumptions used in the HREG's projected cash flows, particularly those relating to HREG's ability to increase rental rates and occupancies and to obtain additional managed properties.[21] Strother, the Shank Irwin partner who was lead counsel for the non-affiliated directors, also attended that meeting to discuss his concerns about the potential deal, and then met with his clients after the full board meeting.

Over the next 17 days, Bear Steams performed its financial analyses of both companies and arrived at an exchange ratio to recommend to the May board. At a meeting of the full board held on November 24, 1987, Youngquist and Silcock presented Bear Stearns's valuations of HREG and May, and its recommendations, based on extensive due diligence performed by Bear Steams, which included a

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[20] **Tr. at** 113-14.

[21] DX 38 at 3296; Tr. at 115-l 6. Those cautionary instructions were consistent with Sebastian's directions to Youngquist throughout the process. Tr. at 1116.

review and analysis of HREG's **prospects.**[22] Bear Steams recommended that the consideration that May would pay to Hall for HREG would consist of (i) 28.9 million shares of May common stock, and (ii) 35% of the disposition commissions that otherwise would have been earned by **HREG.**[23] Based on the prevailing market prices of May stock (then trading at $1.25 to $1.50 per share), the exchange ratio recommended by Bear Steams was worth approximately $36 million to $43 million in market value of May common stock-far less than Hall's proposal that he receive $85 to $105 million in market value. Bear Stearns arrived at its recommendation by valuing HREG conservatively at $65 million, and by valuing May on a net asset value basis at **from** $2.20 to $2.25 per share.

After a lengthy discussion, Bear Steams's representatives left the meeting. The three majority directors then informed Hall that 28.9 million shares was the maximum number of shares that May would issue in any proposed merger with HREG. They also told Hall that if the transaction got any worse on the "Hall side,"

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[22] DX **50, 51.**

[23] Bear Steams also recommended that May and Hall split certain asset disposition commissions — typically 5% of the sale **price**—that HREG expected to derive from future dispositions of real estate owned by the HREG limited partnerships. HREG was entitled to receive such commissions on property worth as much as $3 billion, and Hall viewed those fees as a substantial part of HREG's value. Bear Steams refused to give these future commissions any value in the exchange ratio, however, and instead recommended that May be allocated 65% of this potential income stream. The minutes of the November 24 meeting show that Hall disagreed with Bear Stearns's proposal to give no ($0) value to the future disposition fees. Hall also disagreed with its recommendation to split those fees on a **65%(May)-35%(Hall)** basis, and requested that the subject remain an "open issue" for further discussion with the non-affiliated directors. DX 53 at 3293-94.

Hall would have to "eat the loss."[24]

After the November 24, 1987 board meeting concluded, Sebastian and Strauss met separately with their counsel, Strother, to discuss additional counterproposals that they intended to advance and negotiate. After that meeting, Strother telephoned Hall and negotiated certain additional concessions, all of which favored May's minority stockholders.

Specifically, the non-affiliated directors: (1) rejected Hall's proposal to split future disposition fees evenly (SO%-50%) and adhered to the 65%-35% split that Bear Stearns had recommended; (2) required Hall to reduce from 14% to 10% the interest rate on the loans that were payable to him by HREG; (3) required Hall immediately to repay a loan he had obtained from May, and to apply certain personal income he had received from exercising syndication puts, to the repayment

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[24] Tr. at 14041; DX 54 at 2134. That this adversarial exchange took place at the November 24 meeting is undisputed, but, in an effort to blunt its legal significance, Emerald points out, as it did in its original post-trial brief, that Bear Stearns had furnished copies of its valuation analysis directly to Hall in advance of that meeting. Emerald argues that the disclosure of that valuation analysis to Hall constituted "nothing less than a knowing and intentional abdication of duty [by the defendants]" because disclosing the directors' " bottom line" would make it impossible for them to negotiate any lower price. Emerald Post-Trial Br. at 14-15. But, it is difficult to understand why it was sinister to show Hall the Bear Steams analysis, where the non-affiliated directors' negotiating position was that the merger exchange ratio would be based on Bear Steams's valuation. No prejudice to May's minority shareholders resulted from Hall being shown the Bear Steams report.

Emerald also points out that (i) Strother, the non-affiliated directors' counsel, never asked, or advised the defendants to ask, Hall or his advisers to leave the meeting during Bear Steams's presentation, and (ii) Strother briefed his clients on the status of the merger agreement with Hall and his lawyer remaining in the room. This Court found in its 2001 Opinion that those instances of "process" laxity did occur, and should not have. PTO, 2001 WL 115340, at *8, n.22. The credible evidence shows, however, that none of these process flaws compromised the non-affiliated directors' ability to negotiate the merger terms on an arms-length basis, or their ability to represent the interests of May's public shareholders with appropriate adversarial vigor. Indeed, one week later, the number of May shares that would be issued to Hall was reduced from 28.9 million to 27 million shares. Although Emerald continues to insist that the defendant directors never met with their financial advisor outside of Hall's presence (thus portraying them as mere figureheads controlled by Hall), that portrayal ignores the uncontroverted evidence that throughout the non-affiliated directors' process of considering the

of certain outstanding debts he owed to HREG; (4) rejected Hall's proposal that he be issued additional May shares when he received payment from prospective property dispositions (a proposal that would have added 'back-end" consideration to the exchange ratio); and (5) demanded that Hall reduce the amount of HREG's debt that was immediately payable to him, and that Hall spread that debt over an extended period, to ensure that the combined entity would have sufficient cash balances and reserves to carry out its business strategy. The three non-affiliated directors and their counsel successfully negotiated these and other favorable concessions.*'

Thereafter, Bear Steams's valuation committee met to consider Youngquist's and Silcock's recommended valuations of May and the Hall Corporations. If approved, those valuations would result in Hall receiving 28.9 million May shares in the merger. The valuation committee concluded, however, that both the May and HREG valuations were too high, and overruled that recommendation. Instead, the valuation committee appraised HREG at $59 million, and valued May at $2.18 per share. The ultimate result was to decrease the merger consideration that HREG would receive, from 28.9 million May shares to 27 million shares. Based on May's

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merger, Sebastian was continually in communication with Youngquist about Bear Steams's progress. Tr. at 1114-15. It also ignores the evidence that Sebastian, Florence, and Strauss often conferred informally.

[25] **Specifically, they negotiated a fair proration of merger expenses, rejected Hall's request for a break-up fee if the merger did not go through, and required Hall to guarantee personally the representations and warranties of HREG in the Merger Agreement. The non-affiliated directors also proposed that HREG be valued at less than $65 million-a proposal that Hall rejected.**

then-market price—$1.06 per share-27 million shares represented approximately $32 million in market value, in contrast to $85 to $105 million in market value that Hall was demanding.

The negotiations concluded-and the final transaction terms were struck-at the November 30, 1987 May board meeting. At that meeting, the three majority directors endorsed the Bear Stearns valuation committee's proposed adjustment, and insisted that Hall accept that reduced consideration. Hall agreed, but in exchange negotiated an "out" from the deal if the number of May shares to be issued fell below 27 million.[26] Bear Stearns's representatives assured the board that Bear Steams would review the transaction, both at the time the proxy statement was issued and at the time of the shareholder vote.

At the November 30 meeting, the directors also reviewed and discussed the Merger Agreement, which reflected the revised purchase price and the other terms

[26] Emerald does not dispute these facts, but strives to downplay their significance by pointing out that the non-affrhated directors never learned of Bear Steams's downward adjustment in the recommended purchase price until the November 30 directors' meeting, and even then, from Hall, not from their financial adviser, Bear Steams. Moreover (Emerald adds), to verify that information from Bear Stearns directly, those directors had to telephone that firm after Hall told them of the revised purchase price. Emerald criticizes Strother for failing to address this failure of process with Bear Stearns, and also for failing to request that Hall and Berlin, and Hall's counsel, leave the November 30 board meeting. In its earlier Opinion, this Court made no finding that those procedural lapses had occurred but observed that if they did occur, they should not have. PTO, 2001 WL 115340, at *9 and n.24. Emerald contends that because the merger is being reviewed for process (as well as price) fairness, it is entitled to a finding in this regard. The Court agrees, and expressly finds that those process lapses did occur, and reiterates that they should not have. As discussed elsewhere in this Opinion, however, the Court also fmds that those process flaws did not diminish the adversary quality of the defendants' negotiations with Hall or otherwise adversely affect the interests of May's minority stockholders. Indeed, Emerald concedes that it has no evidentiary basis to challenge the substantive fairness of the valuations leading to the agreed-upon merger exchange ratio as of the date the Merger Agreement was signed.

earlier **described.**[27] The directors approved the Merger Agreement. which, in its final form, required that HREG and Hall personally reaffirm all representations and warranties at the time of closing. The Merger Agreement also provided that if the merger did not close before September 30, 1988, either party could terminate the transaction. The merger was conditioned upon Bear Steams not withdrawing its fairness opinion. That fairness opinion was furnished to the board and was attached to the February **16, 1988** proxy statement issued to May shareholders in connection with the March 11, 1988 shareholders meeting called to consider the **merger.**[28] Shortly after the November 30, 1987 board meeting, May issued a press release publicly disclosing the execution of the Merger Agreement.

At this point in the narrative, the Court pauses to discuss two issues that Emerald has raised in connection with the Bear Stearns's February 1988 fairness opinion. The first issue concerns what degree of change in the relative values of May and HREG Bear Steams would deem sufficiently material to require it to reconsider its fairness opinion (the so-called "materiality collar" issue). The second issue concerns whether Bear Stearns intended to update its fairness opinion at the time the merger was consummated (the "updated fairness opinion" issue). Neither issue would have arisen if the merger had been consummated shortly after the

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[27] By that point the non-affiliated directors had previously reviewed and discussed drafts of the Merger Agreement with their counsel.

[28] Bear Stearns furnished the board its preliminary fairness opinion at the November 24 Board meeting, and issued its definitive fairness opinion on February 16, 1988. Matthews **Dep. 3/1 1/1** 999 at 172.

approving shareholder vote. That is what the parties had initially anticipated.[29] Those issues arise because (as later discussed) consummation of the merger was preliminarily enjoined during the period March through mid-August, 1988. That five month injunction created the possibility of intervening changes in the two companies' relative values.

As for the "materiality collar," the undisputed record shows that Bear Stearns reserved the right to reassess its fairness opinion if, before its effective date, a material change in the relative values of the two companies had occurred. In their November 24 report recommending their valuations of May and HREG to the Bear Steams valuation committee, Silcock and Youngquist proposed that the firm reassess its fairness opinion if, before the opinion became public, May's net asset value relative to the value of HREG had changed by more than 1 0%.[30] Similarly, at May's November 30 board meeting, Matthews told the board that Bear Steams would have to reassess its opinion if the relative values of the two companies changed by more than 10%.[31] Although the "materiality collar" was not a formal contractual condition of the Bear Steams engagement letter, it nonetheless

[29] As Matthews testified, Bear Steams's practice was that, unless the engagement letter provided differently, its engagement responsibilities in connection with rendering a fairness opinion normally would end at the time of the shareholder vote at the meeting held to consider the transaction at issue. See Matthews Dep. II, 3/1 1/1 994, at 168. Here, the engagement letter contained no contrary provision. Moreover, in this case, any continuation of Bear Steams's engagement would be subject to negotiating an additional acceptable fee. Id. at 169.

[30] PX 47 at 26.

[31] Matthews Dep. II, 3/1 1/1994, at 194. Matthews went on to explain that more than 5% change of relative values would probably require a second look. Id. at 195.

evidences Bear Steams's understanding, at that time, of what magnitude change in the companies' relative values would require that firm to revisit its fairness opinion.

That leads to the "updated fairness opinion" issue. Emerald contends that, between March and August 1988, HREG's value had materially declined in relation to the value of May, thereby triggering the need for an updated fairness opinion. It is undisputed that no updated fairness opinion was obtained. The factual issue is whether, during the summer of 1988, Bear Steams told May that an updated opinion was required. Emerald contends that Bear Steams did, in fact, communicate that position to the May board. The defendants disagree. The evidence on this point is controverted. Although in its earlier Opinion this Court rejected Emerald's argued-for version of those events,32 that issue will now be revisited.

The record shows that Jeanne Baggett, a senior officer of May, took handwritten notes of a conversation between herself and Youngquist on July 18, 1988." As explained in Baggett's deposition, those notes revealed that Youngquist told Baggett that she had spoken with Matthews, who told Youngquist that a new fairness opinion would be required, effective as of the merger consummation date. Baggett testified that she became irate that Bear Stearns was taking that position (and also because Bear Stearns intended to charge an additional $100,000). Baggett testified that she conveyed the substance of this conversation to Strother, and to the

[32] See PTO, 2001 WL 115340, at *14.
[33] PX 123.

members of the board." Youngquist had no recollection of that conversation. Both she and Matthews testified that it would not have been Bear Steams's practice to tell its clients that a new fairness opinion was **required.**[35]

The Court's difficulty is that it finds all three witnesses to be credible. Although Baggett testified by deposition, her recollection about the details of the conversation with Youngquist, in particular, her ire when told that a new opinion would be required, was quite vivid. No reason is suggested why Baggett would fabricate this story. On the other hand, the testimony of Matthews and Youngquist, that Bear Steams did not give that kind of advice to clients, is equally plausible. The only way to harmonize this conflicting testimony is to conclude that, even if Baggett misunderstood what Youngquist had told her, she (Baggett) nonetheless believed Bear Steams was taking the position that an updated fairness opinion would be required as of the merger consummation date. Baggett then passed on that information to the May board.'"

[34] Baggett Dep., 3/2/1 994, at 147-l 52. Some corroboration for **Baggett's** testimony can be found in the minutes of the November 30, 1987 board meeting, which recite that Bear Stearns "indicated that while they did not foresee the further adjustment to their opinion, nevertheless, their opinion and the facts and circumstances underlying same would be reviewed immediately prior to the consummation of the transaction and if an adjustment was in order it would have to be made." PX 49 at 3265. **When** shown the November 30 minutes, Matthews testified that that recital was inaccurate. Matthews Dep. II, 3/11/1994, at 172.

[35] Tr. at 1138-l 139; Matthews Dep. II, 3/1 1/1994, at 191-92, 179.

[36] That the testimony regarding the substance of Youngquist's advice was not consistent does not necessarily require the Court to find that any of those witnesses testified untruthfully. Baggett may have misunderstood what Youngquist had told her. It is equally plausible that (i) Youngquist, in fact, gave the advice (believing it was accurate) that Baggett attributed to her, but (ii) Youngquist was later told that her advice did not correctly portray Bear Steams's policy on this issue, and (iii) when called upon to testify about that subject six years later when her memory of that conversation would have been dim, she gave testimony reflecting the natural human tendency to recall the facts that she then understood were correct.

4. Post-Merger Agreement Events Leading Up To The May Shareholders Meeting

(a). *Events Relating To Article Fourteenth*

Following the announcement of the proposed merger, Hall took steps, with the approval of the non-affiliated directors, to avoid the effect of Article Fourteenth of May's certificate of incorporation. Article Fourteenth required that for May to be a party to certain business combinations, those transactions must be approved by a 66-2/3% super-majority vote at a meeting at which an 80% quorum was present. This supermajority requirement would apply to any merger between May and an acquiring entity owning over 30% of May stock. Because Hall owned or controlled approximately 52% of May's stock, the super-majority provisions of Article Fourteenth would apply to the merger. Article Fourteenth could be made inapplicable only by amending May's certificate of incorporation to eliminate Article Fourteenth,[37] or by Hall reducing his stock ownership below the 30% level.

Although the May board had earlier expressed its willingness to propose the first alternative (amending the certificate), ultimately it agreed to the second. That is, the board permitted Hall to transfer a portion of his May shares to an irrevocable

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In any event, the Court need not and does not make any finding based on this speculation, because any such finding would be immaterial. The only material fact which the Court does fmd, is that Baggett told the board that Bear Stearns had taken the position that an updated fairness opinion would be required at the time the merger was consummated, To the extent this Court's previous finding is inconsistent with the finding made here, the latter finding supersedes. See PTO, 2001 WL 115340, at * 14, and nn.35, 36.

[37] That alternative was proposed at the November 30, 1987 board meeting, but was never carried out, because it was later decided that Hall would reduce his stock ownership to below 30%.

trust for his children (the "drop down"), which had the effect of reducing Hall's stock ownership to below 30%. How and why that occurred is next discussed.

From the outset of the merger negotiations, Hall and the non-affiliated directors were concerned that a minority stockholder group's ability to use Article Fourteenth to veto the merger could pose a serious obstacle. That problem was flagged in Hall's October 14, 1987 memorandum to the May board, and it was a significant topic of discussion at the November 7 and November 24, 1987 board meetings. At the November 30, 1987 board meeting, the directors (including Sebastian and Strauss) adopted a resolution to put the elimination of Article Fourteenth to a vote of the May stockholders. Ultimately, no such resolution was presented to the shareholders, because Emerald's emergence caused the directors to take a different approach.[38]

Emerald, as earlier noted, is controlled by Paul Koether and his wife, Natalie Koether, Esquire. After the merger was announced, Paul Koether increased Emerald's (and his other clients') holdings in May. On December 10, 1987, Paul Koether met with Hall in Dallas, at Koether's request. Koether told Hall that he represented interests that owned 450,000 shares of May stock, and that he (Koether) and his wife made money by selling their stock positions back to the issuing

[38] In its earlier Opinion, the Court found that the directors had actually submitted to the shareholders, a proposal to amend May's certificate of incorporation to delete Article Fourteenth. *PTO*, 2001 WL 115340, at * 10. That finding was incorrect, as all parties agree. Although the board did vote to propose such a charter amendment, that proposal was never presented, because the "drop down" made a charter amendment unnecessary.

companies at a significant profit. Koether proposed that he and Hall become partners in these "greenmail" ventures. Hall rejected that proposal. Hall then asked Koether if he wanted to sell Emerald's May stock holdings back to May. Koether responded that Emerald would sell its stock to May for $1.80 per share before January 1, 1988, but thereafter the price would be $2.24 per share.[39] Hall rejected that proposal as well. Koether then informed Hall that unless Emerald's May shares were repurchased, he would acquire additional May shares, so that Emerald's holdings, combined with the Article Fourteenth supermajority provision, would enable Emerald either to block, or make it difficult for Hall to complete, the proposed merger.

Concerned over what they believed was a tangible, credible threat by Koether to derail the proposed merger, the May directors discussed ways to avoid the super-majority requirement. Hall considered donating a substantial portion of his stock to charity, but he and the other directors were told that such a charitable contribution could result in May losing its potentially valuable NOLs. Later, the directors were told that Hall could transfer a significant percentage of his May stock to an irrevocable trust (having independent trustees) for his children, and a smaller percentage of the stock to charity, without risking the loss of the NOLs.

[39] At that time May had a nominal market value of about $1 per share.

Hall decided to propose that latter course of action, and at the January 28, 1988 meeting of the May board, the directors approved Hall's proposal.[40] The following day, Hall transferred shares amounting to 27% of May's outstanding common stock to an independent irrevocable trust for the benefit of his children (the "Hall Trust"), whose trustees had independent power to vote or dispose of the shares owned by the trust. The net effect of this "drop down" transfer was to reduce Hall's personal ownership of May stock from 52% to 25% before the record date for the stockholders meeting called to vote on the proposed merger. Relying on an opinion of counsel, the May board concluded that as a result of the "drop down" transfer, the Article Fourteenth super-majority provision would not apply to the stockholder vote on the merger proposal. Consistent with that advice, the proxy statement disseminated to May's stockholders disclosed the "drop down" transfer and its legal consequence, namely, that approval of the proposed merger would require only a simple majority shareholder vote.

(b). *The Proxy Statement And The Shareholders ' Meeting*

Between the date the Merger Agreement was executed and the May shareholders' meeting, the non-affiliated directors remained actively involved in the merger process, including making preparations to approve the proxy statement

[40] The board reaffirmed and ratified that approval at a special meeting of May's directors held on February 13, 1988. PX 86.

being sent to May shareholders. At May's board meetings, the non-affiliated directors, in the course of performing due diligence, obtained updates on the status of HREG. On February 13, 1988, the board met and approved the proxy statement, drafts of which had been reviewed by counsel for the non-affiliated directors, by Bear Steams and its counsel, and by Arthur Andersen & Co. ("Arthur Andersen"), the long-time outside auditor for both May and HREG.[41]

The final proxy statement, which recommended that May shareholders approve the merger, was issued on February 16, 1988. The shareholders' meeting to vote on the merger was held on March 11, 1998. At the stockholders' meeting, May's shareholders voted to approve the Merger Agreement. Of the 14,655,660 shares entitled to vote as of the record date, 11,834,661 shares (or 80.7%) were represented at the meeting, and 9,934,172 shares (or 67.8%) were cast in favor of the Merger Agreement. Of the 10.5 million shares that were voted, 94.5% supported the merger. Even if the shares controlled by Hall and the Hall Trusts are excluded, the merger would still have been approved by nearly 80% of the voted shares.

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[41] The final proxy statement, which as issued contained 68 pages of text and 40 pages of financial disclosures, had been revised several times in response to comments by the SEC on earlier drafts. The proxy statement disclosed in detail the potential risks of the merger, the financial situation of HREG, and May's investment in HSSM #7. These disclosures are discussed in Part III of this Opinion.

(c). The Prosecution Of This Lawsuit

Shortly thereafter, Emerald filed this lawsuit to enjoin the merger. On March 18, 1988, this Court preliminarily enjoined its consummation, on the grounds that (1) the Article Fourteenth super-majority requirement applied, despite the "drop down" transfer of shares to the Hall Trust; and (2) those requirements were not satisfied at the May special stockholders meeting, because an 80% quorum was not present and the merger proposal did not receive the required super-majority vote.

Six months later, the Delaware Supreme Court reversed the preliminary injunction by an oral ruling announced on August 15, 1988, and, thereafter, by written Opinion issued on January 12, 1989. The Supreme Court ruled, *inter alia,* that, as a matter of law, the Article Fourteenth super-majority requirement did not apply to the merger; moreover, and in any event, the Article Fourteenth quorum and super-majority vote requirements had, in fact, been satisfied. The Supreme Court also rejected Emerald's argument (which Emerald again advances here) that the transfer of stock to the Hall Trust was an improper effort by corporate fiduciaries to abridge the minority stockholders' voting protections, and constituted a "wrongful subversion of corporate democracy."[42]

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[42] *Emerald Partners,* 552 A. 2d at 490,495. The Supreme Court ruled that there was ". . . no evidence in the record to suggest *any* agreement, or arrangement or understanding, between the co-trustees and Hall or the Hall corporations with respect to voting on the proposed merger, and there is no legal basis to assume that the co-trustees would act contrary to their fiduciary duties." *Id.* at 490 (emphasis in original, citation omitted). Presumably that is why, despite its emphasis on this subject in

(d). *Post-Injunction Events*

(i). Post-Injunction Monitoring Of HREG By May's Directors

Until its reversal on appeal on August 15, 1988, this Court's preliminary injunction remained in force for almost six months. During that interval, the businesses of both May and HREG were in a state of limbo. The non-affiliated directors nevertheless continued to monitor the operations and financial condition of HREG as part of their ongoing assessment of whether or not to proceed with the merger, assuming the injunction was vacated.

On March 26, 1988, the May board met to consider the company's options in light of the injunction. Hall proposed that May hire HREG personnel to integrate May into the real estate business. He also sought assurances that May would reimburse HREG for expenses and lost opportunities if May abandoned the merger. Thereafter, Hall and Berlin excused themselves, and the non-affiliated directors met separately to consider those matters. After deliberating for about four hours, those directors decided to authorize an appeal from the preliminary injunction, to defer any decision to hire HREG personnel, and to reject Hall's proposal that May pay HREG's costs if the merger was abandoned.

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the factual portion of its Brief, Emerald advances no contention that the directors' approval of the Hall "drop down" transfer, and their willingness to recommend that Article Fourteenth be eliminated without extracting from Hall any consideration for that approval, were independent acts of fiduciary wrongdoing. Instead, that conduct is proffered as evidence that the non-affiliated directors were primarily loyal to Hall, but not to May's minority stockholders, as to whose interests it is claimed the non-affiliated directors were indifferent.

From HREG's perspective, the injunction prohibiting the merger blocked a source of needed liquidity that would have enabled HREG to take advantage of growth opportunities that had become available as a result of the depressed real estate market.[43] Several times during the summer of 1988, Hall inquired of May's directors if May would loan HREG money to alleviate those ongoing liquidity problems.

In June 1988, Hall made a formal loan request to the non-affiliated directors. After extensive separate discussions about the business merits of the loan, and after receiving advice of counsel, the non-affiliated directors determined that the merger remained in the best interests of May and its public stockholders. They accordingly agreed, at May's July 23, 1988 board meeting, to make available to HREG a $5 million line of credit, of which a portion would fund working capital and another portion would fund acquisitions. Because of the risks involved, in particular the risk that the merger might never occur, the loan terms were highly protective of May and more stringent than the terms Hall had proposed. For example, the directors required that Hall personally guarantee the loan and that the loan be repayable on demand. Any advances on the extension of credit would be subject to separate approval by the non-affiliated directors, and would bear interest at the rate

[43] One such opportunity was to acquire a real estate firm known as the Freeman Companies during the spring of 1988. Although Hall offered the opportunity to May, the May board required more time and information to consider this significant potential acquisition, and as a result the deal was lost. Hall also presented to the board an opportunity to invest in a hotel property, but the board declined to involve May in financing this project.

of 2% above prime, increasing at 1% per quarter thereafter. The loan would be fully collateralized and would mature within two years. The non-affiliated directors satisfied themselves that Hall had sufficient assets to fund his guaranty should that become necessary?

(ii). Events Relating To May's Investment In HSSM#7

As earlier noted, Bear Steams valued May's investment in HSSM#7 at cost. That at-cost valuation was disclosed to May shareholders in the February 16, 1988 proxy statement. The plaintiff claims that the HSSM#7 investment was undervalued, and that between March and July 1988, HSSM#7's value had significantly increased. For this reason, among others, Emerald contends that the proxy statement was misleading and that the merger exchange ratio was unfair to May, because by the time the merger was consummated in August 1988, May's value had increased and HREG's value had decreased. Because the value of HSSM#7 is disputed and is the basis of one of Emerald's fairness claims,

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[44] DX 159; Tr. at 244-52. The evidence, therefore, does not support Emerald's contention that by approving the loan, the non-affiliated directors disloyally preferred Hall's interests over the interests of the minority stockholders. Emerald Post-Trial Br. at 20-21. Emerald also contends that Hall announced, at the July 23 board meeting, that HREG intended to abandon its acquisition plan which, because it was the primary rationale for the merger, should have prompted May's directors to reconsider the transaction. But the evidence does not support that contention either. The minutes of the July 23 meeting reflect that Hall indicated that under consideration was "whether to continue the business plan *vis-à-vis* acquisition of general partner companies in light of the current economy," that "the economies of scale are not at an optimum level at [HREG] at this time, and that a decision was needed . . . in the near future." DX 182 at 4881 (emphasis in original). *Considering* abandoning one part of a business plan is not the same as *actually* abandoning the plan altogether. Moreover, and in fact, HREG did not abandon its plan, as shown by the Hall Financial Group, Inc. Form 8-K dated August 15, 1988 ("Upon the consummation of the Merger, [HREG] will be operating in substantially the same manner under present management"). DX 194 at 3.

and because certain post-injunction events are claimed to have affected that value, those events are discussed at this point.

As earlier related, May was a limited partner in HSSM#7, which in turn was a limited partner in Suncoast. May's investment in HSSM#7 was illiquid, and May's sole right to exit that investment consisted of HSSM#7's annual contract right to "put" its investment in Suncoast to Bilzerian personally, for the market value of HSSM#7's capital account as of December 3 1 of the previous year. In deciding upon the recommended merger exchange ratio, Bear Steams concluded that it had no basis to value May's HSSM#7 investment at other than May's $8 million cost. That valuation, Emerald urges, was improperly low, because the entire investment had increased in value after Bilzerian's takeover of Singer Company, using Suncoast and other affiliated Bilzerian partnerships as the financial vehicles. Moreover, Emerald claims, an agreement had been struck whereby Bilzerian would buy out HSSM#7's interest for $60 to $80 million.

The evidence persuades the Court, which here finds, that no facts that were known at the time Bear Steams valued May's HSSM#7 investment, or even at the time the merger was consummated, that would have required a higher-than-cost valuation of the HSSM#7 investment. In January, 1988, Hall had shown to May's board a statement, by Bilzerian, that an investment banker had claimed HSSM#7 might attain a value as high as $110 million. Bear Steams and the May board regarded these claims as sheer speculation. No evidence of record shows otherwise,

or that Bear Steams erred in concluding that May's $8 million cost was the only reliable value of its investment at that time.

Moreover, and contrary to Emerald's claim, as of August 15, 1988, no agreement had been reached that Bilzerian would buy out HSSM#7's interest in Suncoast under the "put" right. Indeed, on August 12, 1988, only three days before the merger closed, Hall wrote Bilzerian a letter stating that he (Hall) "need[ed] to get into a negotiation" for a repurchase of HSSM#7.[45] Although Hall did make efforts to negotiate a repurchase agreement with Bilzerian during the summer of 1988, his efforts were unsuccessful. Although Hall pressed for, and later received, verbal assurances from Bilzerian that HSSM#7 would be bought out, those representations were never reduced to writing. That history, plus the fact that Bilzerian was the target of simultaneous SEC and grand jury investigations, gave the May directors ample basis to conclude that Bilzerian's assurances were worthless--a conclusion validated by later events.[46]

[45] Tr. at 918-19; DX 186 at 5555.

[46] Bilzerian failed to honor his "assurances" (PX 141 at 5619-20), and ultimately HSSM#7 was forced to exercise his contractual "put" option in March 1989, which Bilzerian also failed to honor. HSSM#7 then sued Bilzerian in Federal District Court in Dallas, Texas, where a jury found, on July 3 1, 1990, that Bilzerian had fraudulently induced HSSM#7 to make the Suncoast investment. DX 207 at 1-2. The Court found HSSM#7's interest in Suncoast had no ascertainable market value and granted rescission to HSSM#7, awarding it the return of its $20,400,000 investment, plus interest. DX 209 at 2-3. May's share of that judgment for rescission (which it has been unable to collect) would have been $8.16 million-the amount of May's investment in HSSM#7.

Emerald relies upon an affidavit, filed by Hall in the Dallas Federal action, as evidence that Hall was claiming that an agreement to buy out HSSM#7's interest had been reached (PX 14 1). The facts recited in that affidavit show, however, only a series of verbal assurances by Bilzerian, none of which were ever honored. Given the actual facts, of which May's board was aware, the directors were not required to accept at face value Hall's litigating position or his characterization of those facts, in determining the appropriate valuation of HSSM#7.

(iii). The Directors' Decision Not To Obtain A New Fairness Opinion

On February 16, 1988, Bear Steams issued its formal opinion that, from a financial point of view, the terms of the merger were fair to May's stockholders other than Hall, his family, and the Hall Trust. Bear Steams updated its opinion through March 11, 1988, the date of the shareholder vote. Bear Steams did not, however, update its fairness opinion through the August 15, 1988 closing date, nor did the May board ask Bear Steams to do so. After discussing with their counsel whether a new fairness opinion was either required or warranted, the non-affiliated directors concluded that it was not. They based that conclusion upon their assessment of the relative financial condition of the two companies at the time, and their judgment that the merger remained in the best interests of May and its public stockholders.

Emerald does not challenge Bear Steams's conclusion that the merger was financially fair to May's public stockholders as of the date the merger was approved by those stockholders. What Emerald does contend is that by the time the merger was consummated on August 15, 1988, May's value had increased and HREG's value had decreased, thus necessitating a new or updated fairness opinion.

Emerald contends that an updated opinion was required both contractually and as a matter of fiduciary duty. The defendants vigorously controvert that claim. Emerald claims that a critical term of the Bear Steams retention agreement was that

Bear Steams's fairness opinion would be updated "at closing." Although certain documents do so indicate, the evidence shows that all parties involved assumed that the "closing" would occur the same day as, or shortly after, the shareholder vote.[47] No one had in mind the scenario that actually occurred-a post-shareholder vote injunction that delayed the merger for over five months. Bear Stearns's position was that, in these circumstances, its engagement did not include updating its fairness opinion as of August 1988, because its engagement had ended after the March 1988 shareholder vote.[48]

Even though they were advised that, as a contractual matter, no updated fairness opinion was required, the May directors did, nonetheless, consider whether they should obtain a new fairness opinion from Bear Steams, given the months that had passed since the stockholder vote. At the board's July 23, 1988 meeting, counsel for the non-affiliated directors advised that, if they concluded that no material adverse change relating to the transaction had occurred, a new fairness

[47] Tr. at 718, see also Tr. at 134-35 and DX 50 at § VII (Bear Steams notes stating that updates would be performed in March).

[48] Matthews Dep., Vol. II at 178-79. Youngquist similarly testified that Bear Steams's practice was to update a fairness opinion to the time of the vote, and that is what Bear Steams would have communicated to the Board. Tr. at 1132.

opinion would not be required. Those directors determined that no material adverse change had occurred and that the merger, as negotiated, remained in the best interests of May's public stockholders.[49]

Emerald contends that the defendants had no factual basis to reach that conclusion. Indeed, Emerald argues, the facts then available demonstrate that the defendant directors knew that HREG was failing, that May's financial position was improving, and that the change in relative values of May and HREG had exceeded 1 0%—the Bear Steams materiality collar threshold that would trigger a reassessment of its fairness opinion. Because of their importance to the case, the facts relating to that contention, and to the board's determination that no material adverse change had occurred, are next discussed.

Emerald claims that between February and August 1988, May's value increased. Emerald bases that claim on (i) a $2 million increase in value in May's portfolio of public company investments between October 1987 and July 1988; and (ii) its position that HSSM#7's value had increased during that period. The

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[49] That advice was supported by the trial testimony of John H. Small, Esquire, whose firm had acted as Delaware counsel for the non-affiliated directors, and who had conferred with their Shank Irwin counterparts for several months. Tr. at 1490-91 ("It was my view that they did not have to [obtain an updated fairness opinion] if they did not feel in their business judgment [that] it was necessary to do so. If they felt [that] they had enough current information for them to make the business decision, it was not necessary as a matter of Delaware law . . . ."). Emerald attempts to minimize the import of that advice, by arguing that shortly before the July 23 board meeting the defendants met privately with Hall, and that Florence's notes of that private meeting show that a consensus was reached that no updated fairness opinion was required at that time, thereby suggesting that the decision made at the formal directors' meeting was merely window dressing. DX 183; Tr. at 1427-29. But, Emerald misreads Florence's notes, which state only that "<u>My</u> consensus" (as opposed to "everyone's" consensus) was that no updated opinion was required. DX 183 at 535 1 ¶ 1 (emphasis added).

evidence, however, does not show a significant *net* increase in May's value during that period. Although May's cash position did improve (in part because of the gain from the sale of certain of its portfolio investments), May's overall total net asset value declined slightly between November 1987 and August 1988.[50] Moreover, during that period no event occurred which increased the value of HSSM#7, or justified valuing that investment at higher than cost? Accordingly, the crux of Emerald's position is (and must be) that the critical change in the two companies' relative values consisted of a material decline in the value of HREG.

Viewed in the aggregate, the changes in HREG's financial circumstances between the date of Bear Steams's February 1988 fairness opinion and the August 15, 1988 merger date, were a "mixed bag"-some changes were adverse and others were favorable.

Some changes were unquestionably adverse. According to HREG's Form 8K dated October 18, 1988: (a) between December 31, 1987 and June 30, 1988, HREG's current liabilities increased by $5 million and its total liabilities increased by $1.8 million; (b) total revenues for the first six months of 1988 were $16.124 million, as contrasted with $19.397 million for the first six months of 1987; (c) total operating expenses had increased from $6.47 million for the first six

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[50] DX 219 at Table 1 (showing net asset value, calculated on a liquidation basis, declined from $32.26 million on November 23, 1987 to approximately $3 1 million on August 15, 1988).

[51] DX 219 at 7-10.

months of 1987 to $15.2 million for the first six months of 1988; (d) net income for the first six months of 1988 was $9 12,000, down from $12.97 million for the first six months of 1987; and (e) the number of limited partnerships in insolvency or bankruptcy had increased from thirteen as of December 3 1, 1987 to twenty-five as of June 30, 1988.[52]

These developments, while adverse,53 were tempered by other considerations that were known to the May directors. First, bankruptcy and insolvency were commonplace tools in real estate workouts that HREG had historically used to its advantage. Second, the success of the loan workouts enabled HREG's management to report to May in July 1988, that the number of foreclosures would

[52] DX 201 at 5, 6, 15. Emerald underscores, as an additional adverse development, the undisputed fact that HREG was substantially behind its 1988 acquisition goals. Bear Stearns had assumed a 25% growth in units under management, but during the first 7 months of 1988, the number of units under management had decreased by 12%. DX 180 at Schedule 4. In fairness, however, the 1988 acquisition goals were based on the assumption that May and HREG would already have merged, thereby affording HREG the liquidity needed to make those acquisitions. That assumption was negated by the preliminary injunction, which prevented the acquisitions whose financing was dependent upon the merger, for almost six months until the injunction was reversed on August 15, 1988. Indeed, at the May 19, 1998 May board meeting, the directors were told that, because of the injunction, the level of business for both HREG and May was at a standstill. PX 112. While that development clearly was adverse, once the injunction was overturned, there was no reason for the board to conclude that its duration would be long term or permanent.

Another adverse development emphasized by Emerald is that by July 23, 1988, approximately $24 million of loans guaranteed by HREG were in default. That argument is somewhat misleading, because it ignores the fact that HREG was only contingently liable, and that the loans in question were investor note loans that were highly collectible even if they fell into default. HREG's experience rate in collecting investor note receivables was over 90%. Tr. at 1567-68.

[53] Some developments that Emerald claims represented material adverse changes were not "changes" at all but, rather, were circumstances of which the May board and Bear Stearns were aware at the time of the shareholder vote, e.g., the fact that substantially all of HREG's operating revenue was derived from affiliated real estate limited partnerships; the fact that HREG needed and intended to expand their base of business; and the fact that a substantial portion of HREG's net receivables was owed by firms experiencing working capital deficits.

be substantially less during the second half of 1988 than it was during the first half. Third, the decline in revenue would be offset by a $2 million projected reduction in overhead expense for 1988.”

HREG also experienced favorable developments during this period. Management fees had increased from approximately $7.9 million for the first six months of 1987, to $8.5 1 million for the first six months of 1988. That was important, because it showed that the core of HREG’s business was improving. Indeed, as of June 25, 1988, year-to-date property management revenue at the partnership level was only marginally below the budgeted projection.”

During that same period, stockholders’ equity (book value) had increased from $108.3 million to $111 .1 million. The quality of HREG’s income-producing assets had also improved: the number of limited partnerships that were *not* experiencing working capital deficits had increased from 146 to 164, and the number of limited partnerships that were experiencing working capital deficits had declined from sixty-eight to fifty-five.[56]

In short, some developments after the February 1988 May stockholders meeting were adverse to HREG from a financial standpoint, but others were favorable. The relevant factual issue is what the May directors perceived to

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[54] DX 180 at 4887-88; DX 201 at 6.
[55] DX 180 at 4915.
[56] DX 201 at 15.

be the relative valuation picture at the time they were deciding whether or not to obtain an updated fairness opinion. The March-August 1988 developments, taken as a whole, do not compel Emerald's argued-for conclusion that the board *must* have perceived that HREG was "failing." Although HREG's financial picture had worsened in some respects, it had improved in others, and the record supports the non-affiliated directors' conclusion that the situation was not black and white but, rather, gray and murky. Based upon the facts available to them, those directors could have concluded that although HREG's transactional income was way down, what they viewed as HREG's core business (management fee income) had improved. Those directors could also have concluded that the transactional income decline, while significant, would not be long term, because it was caused by the injunction-created delay as well as the sporadic nature of that segment of HREG's business. Thus, and as this Court found in its earlier post-trial Opinion, the defendants could have decided the updated-fairness opinion issue, in perfectly good faith, either way.

Ultimately, the May directors decided that no material adverse change had occurred that warranted obtaining an updated fairness opinion. Regardless of whether or not that decision turned out to be correct or wise, the Court is satisfied, both from the documentary evidence and from the demeanor of the defendant directors during their trial testimony, that the board's decision was made on a

rational basis, was the result of a rational process, and was made in good faith and independently of Hall.

(e). *The Reversal Of The Injunction And Consummation Of The Merger*

As earlier noted, on August 15, 1988, the Supreme Court, by oral ruling, vacated the preliminary injunction. Later that same day, the May directors held a meeting at the Wilmington offices of Prickett Jones, and after deliberation and consultation with counsel, determined to consummate the merger that same day.

At that meeting the board specifically discussed the issue of whether a new fairness opinion was needed. John H. Small, Esquire, the board's lead Delaware counsel, advised the directors present [57] that the decision was for the board to make in the exercise of its business judgment. Small also advised the directors that if a court later found that the transaction had unfairly resulted in May issuing excessive shares to Hall, the remedy would be to cancel the excess shares, or for Hall to disgorge the excess portion of his May stock. Before giving that advice, Small had reviewed the minutes of the November 24 and November 30, 1987 meetings. He also had consulted with Shank Irwin, his co-counsel, throughout the summer of 1988. As a result, by the August 15, 1988 board meeting, Small was satisfied that, before giving this advice, he had been informed of all pertinent developments.

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[57] Strauss was not present at the August 15 meeting, but he supported the decision to go forward with the merger.

Based on that advice, and upon their judgment that no material adverse developments had occurred, the non-affiliated directors concluded that the merger remained in the best interests of May and its public stockholders. The non-affiliated directors voted to proceed with the merger, which was consummated that same day?

II. THE PARTIES' CONTENTIONS AND THE ISSUES PRESENTED

To put this litigation in perspective, the advice given by Mr. Small to his clients, the non-affiliated directors, was that if the merger were later invalidated, an adequate remedy would be either to cancel the "excessive" portion of the May shares Hall had received, or to require Hall to disgorge those shares and to transfer them back to May. As matters turned out, that remedy would become impossible to accomplish, because in Hall's post-merger personal bankruptcy proceeding, Emerald stipulated to a permanent injunction that barred the assertion of the claims of the shareholder class against Hall.[59] The result was that Hall--the only defendant who personally benefited from the merger—was dismissed as a defendant in this lawsuit, while the remaining May directors—who received no special benefit—continued to be subject to this lawsuit.

with the merger.

[58] DX 188.

[59] PX 158.

Emerald insists that this result is legally justified because the defendant directors, by approving the merger, breached their fiduciary duties to May's minority stockholders, and that those defendants should be held liable, even though they received no benefit from the transaction. Emerald's position is that, because the merger was an interested transaction between May and its majority stockholder, the defendants have the burden to demonstrate that the merger was entirely fair to May's public stockholders. That proposition is now the established law of the case, by virtue of the Supreme Court Opinion remanding the case to this Court." Emerald contends that the defendants have not carried that burden, because they have failed to establish that the merger was fair in terms of process and price. In support of that position, Emerald advances several arguments.

Emerald contends that the merger was the product of unfair dealing because, in negotiating, considering, and approving the transaction, the defendants did not engage in a vigorous, arm's-length bargaining process. More particularly, Emerald argues that: (1) the May board failed to appoint a special committee of independent directors to negotiate the merger; (2) the non-affiliated directors were not independent of Hall, they failed to act in the interest of the minority stockholders, and they acted to further the interests of Hall; (3) the merger was initiated, structured, and timed by Hall to benefit himself; (4) there were no meaningful negotiations over price; (5) the merger was not approved by a fully-

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[60] *Emerald IV*, 787 A.2d 85.

informed independent director vote; and (6) because the proxy statement was materially false and misleading, the merger also was not approved by a fully-informed shareholder vote.

Emerald also contends that the merger price was unfair. Relying upon the valuation and testimony of its trial expert, Emerald argues that HREG was overvalued by $17 million, or by about 29% of Bear Steams's $59 million valuation? According to Emerald, that overvaluation represented an overpayment to Hall of between 10 and 11 million May shares, which represented a $4,116,362 to $4,674,5 12 dilution of the value of the shares that the plaintiff shareholder class then owned.

The remedy to which the plaintiff claims entitlement as a consequence of the above-described wrongdoing, is an award of damages against the defendant directors of not less than $4,674,5 12, plus pre-judgment and post-judgment interest calculated from August 15, 1988 through the date of judgment.

The defendants vigorously resist these claims. They contend that the defendant directors carried their burden of demonstrating the fairness of the merger, both as to process and price. Alternatively, the defendants argue, even if the merger is found unfair, they should not be held liable for damages, because any

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[61] $59 million less $42 million = $17 million, which represents approximately 29% of $59 million ($17M ÷ $59M=28.8%).

unfairness was at most solely the product of a breach of their duty of care, since at all times they acted loyally (i.e., selflessly) and in the good faith belief that they were advancing May's interests. As a consequence, the defendants urge, they are exempted from liability under the exculpation provision of May's certificate of incorporation, which tracks Section 102(b)(7) of the Delaware General Corporation Law.[62] Finally, the defendants argue, Berlin is entitled to dismissal for the additional reason that he either abstained altogether from, or did not meaningfully participate in, the May board's deliberations and approval of the challenged transaction.

In its Opinion remanding the case to this Court, the Supreme Court explicitly outlined the nature and sequence of the analysis in which this Court must engage. The Supreme Court instructed:

> Upon remand, the Court of Chancery must analyze the factual circumstances, apply a disciplined balancing test to its findings on the issue of fair dealing and fair price, and articulate the basis upon which it decides the ultimate question of entire fairness. If the Court . . . determines that the transaction was entirely fair, the director defendants have no liability for monetary damages. The Court . . . should address the Section 102(b)(7) charter provision only if it makes a determination that the challenged transaction was not entirely fair. The director defendants' Section 102(b)(7) request for exculpation must then be examined in the context of the completed judicial analysis that resulted in a finding of unfairness. The director defendants can avoid personal liability for paying monetary damages only if they have established that their

[62] 8 *Del. C.* § 102(b)(7).

> failure to withstand an entire fairness analysis is exclusively attributable to a violation of the duty of care.[63]

The analysis that follows proceeds in accordance with that framework. Part III, *infra,* of this Opinion addresses the first issue, which is whether the merger was entirely fair both as to process and price. The Court finds (in Part III A) that although the process leading up to the merger was in some respects flawed, the defendants nonetheless, have established that the merger was the product of fair dealing. The Court next finds (in Part III B) that (i) the defects in the process did not adversely affect the merger exchange ratio ultimately negotiated by the parties, and that (ii) the defendants have established that the exchange ratio (the merger price) was fair. Finally, in Part III C, the Court concludes, after weighing all relevant factors and viewing them as a whole, that the merger has been established as entirely fair. On that basis, the Court finds the defendant directors not liable on Emerald's fairness claims.

In Part IV of this Opinion, the Court addresses the question of whether, even if it is assumed that the merger was not entirely fair, the defendants are nonetheless protected from liability under the exculpation provision of May's certificate of incorporation. Although the Supreme Court was careful to indicate that if the merger were found entirely fair no further analysis is needed, this Court proceeds to resolve that issue, for two reasons. The first is likelihood of an appeal given the

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[63] *Emerald IV,* 787 A.2d at 98.

lengthy history of appellate review in this case. The second is the desirability of avoiding (if possible) a further remand should this Court's entire fairness determination be overturned. In Part IV A, the Court determines, as it did in its first post-trial Opinion, that the defendants are exculpated from liability, because if the merger was unfair, the unfairness could only have been solely the product of a breach of the defendants' fiduciary duty of care, the defendants at all times having acted in good faith and selflessly (i.e., loyally). In Part IV B, the Court finds defendant Berlin not liable on the additional ground that he did not participate in any significant way in the board's decision-making process.

III. WAS THE MERGER ENTIRELY FAIR?

A determination of whether a transaction is entirely fair involves a two-pronged inquiry into the two aspects of fairness: fair dealing and fair price.” A fair dealing analysis addresses how the transaction was timed, initiated, structured, negotiated, disclosed, and approved. A fair price inquiry focuses on the economic and financial considerations of the transaction, including all relevant factors such as assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.[65] The test of fairness, however, is not one that is bifurcated between fair dealing and fair price. The

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[64] *Emerald IV*, 787 A.2d at 97; *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).
[65] *Weinberger*, 457 A.2d at 711.

fairness issue must be examined as a whole in all its aspects, keeping in mind that the entire fairness standard does not "lend itself to bright line precision or rigid doctrine.“”

In accordance with this well-settled analytical structure of entire fairness review, the Court next turns to the issues of fair dealing and fair price.

A. Fair Dealing

1. <u>The Negotiation Of The Merger</u>

Emerald contends that the negotiation of the merger was unfair, because the defendants who negotiated the merger were not a duly constituted negotiating committee, were not independent of Hall, did not engage in meaningful arm's-length negotiations, and, accordingly, did not act in the interests of May's minority stockholders.” The Court finds these claims to be without support in the record.

(a). The *Failure To Constitute A Formal Negotiating Committee*

Emerald cites as a process failure the fact that the May board of directors never formally constituted defendants Strauss, Sebastian and Florence as a special committee of independent directors to negotiate the proposed merger. That this did not occur is undisputed. In this case, however, that omission is of no practical or legal significance.“” Special negotiating committees are typically constituted

[66] *Id.; Nixon v. Blackwell, 626* A.2d **1366, 1381 (Del. 1993).**

[67] **Emerald Post-Trial Br. at 42-45.**

[68] *See Shingala v. Becor Western, Inc.,* **1988 WL 7390, at *5 (Del. Ch. Feb. 3, 1988) ("When the auction process got underway, all proposals were considered by the full board without**

because a majority of the board have a disabling conflict. That was not the case here. The three non-affiliated directors constituted the majority of May's board, and, for purposes of the merger proposal, they regarded themselves as a special negotiating committee whose role was to protect the interests of May's minority stockholders. The real issue, therefore, is whether those directors adequately discharged that role.

(b). *The Independence Of The Non-Affiliated Directors*

Emerald next contends that the three non-affiliated directors failed to act independently of Hall or to serve the interests of the May minority stockholders.[69] As support for that contention, Emerald urges that (i) those directors delegated to Bear Steams their duty to negotiate the merger actively and to set the exchange ratio, in circumstances where Bear Stearns's own independence was suspect; (ii) those directors communicated only three times with Bear Stearns, and Hall and/or Berlin participated in two of those encounters; and (iii) the directors acceded to Hall's request to propose the elimination of Article Fourteenth to the stockholders, without demanding any consideration in exchange, and even though Hall had earlier agreed not to press that issue.

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independent directors. As a result, I do not attach any significance to the fact that the special committee stopped fimctioning as such when outside proposals were submitted and evaluated.").

[69] Emerald Post-Trial Br. at 42-44.

This Court has specifically found as fact that, in carrying out this transactional engagement, Bear Stearns was independent, and acted independently, of Hall and his interests.[70] In its initial post-trial Opinion, the Court considered—and rejected-Emerald's claim that the non-affiliated directors had improperly delegated to Bear Stearns their statutory duty to negotiate and fix the merger exchange ratio. That claim was found to lack evidentiary support. It fares no better the second time around. The record establishes that the non-affiliated directors engaged Bear Steams to *recommend* an exchange ratio, reserving to themselves whether or not to accept that recommendation. The record also establishes that those directors-not Bear Steams-made all relevant decisions.

Nor does Emerald's argument that the non-affiliated directors met only three times with Bear Stearns establish unfair dealing or otherwise negate those directors' independence. There is no magic number of meetings that directors must have with their financial advisor to avoid a claim that their process was deficient. In this case, one of the non-affiliated director (Sebastian) was in continual communication with Bear Steams's Youngquist about her firm's progress. Sebastian often conferred informally with the other directors on this and other subjects." Of greater concern is that Hall and/or Berlin were present at some of those meetings. Where director conduct is reviewed under the entire fairness

[70] See *supra* pp. 23-25 and note 19.
[71] *See supra* p. 27, note 19.

standard, process laxity of this kind cannot be condoned, and (as this Court has found) it should not have been allowed to occur. Neither Hall nor Berlin should have been present at any of the non-affiliated directors' meetings or deliberations, or allowed to have any direct contact with their advisors." To the extent that did occur, however inadvertently, it must be regarded as some evidence of unfair dealing. But, in this case, that evidence does not overcome the preponderating force of the other credible evidence which persuades this Court that the non-affiliated directors were, in fact, independent—and acted independently-of Hall.

Emerald's third criticism-that the non-affiliated directors agreed (without insisting on any ***quidpro quo)*** to put to the May shareholders whether Article Fourteenth should be deleted from the May charter-is also cited as proof that those directors preferred Hall's interests over the interests of May's minority stockholders. In fact, the Article Fourteenth question was never put to the stockholders. Putting that aside, however, the difficulty with the argument is its focus on the directors' decision in isolation, divorced from the context in which it arose.

At the time the directors agreed to Hall's request, they had already negotiated and agreed to the terms of the merger. Those directors sincerely believed that the merger, as negotiated, was in the best interests of May and its shareholders, and at that time they (and Hall) were concerned that a minority

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[72] *See supra* **note 24, and note 26.**

stockholder group's ability to use Article Fourteenth to veto the merger could pose a serious obstacle. Given the strength of that belief, it strains credulity to argue that those directors' willingness to put the Article Fourteenth super-majority vote issue to May's shareholders proves that the directors lacked independence or that their primary allegiance was to Hall.

(c). The "Meaningfulness" Of The Negotiations

Emerald argues that there was no meaningful negotiation of the terms of the merger. As evidence, Emerald cites the "facts" that (i) the non-affiliated directors "ceded control over the merger process to Hall and Bear Steams" who then proceeded to negotiate the merger terms; (ii) Bear Steams disclosed the details of their analysis to the full board; (iii) Bear Steams contacted Hall directly to discuss a further downward revision to the exchange ratio, without first advising the non-affiliated directors of what they had done; and (iv) immediately before the consummation, the directors ignored their banker's request to "complete" its fairness opinion.[73]

This Court has already rejected several of the proposed "facts" upon which Emerald bases this claim. Contrary to Emerald's position, the non-affiliated directors did not "cede control" over the merger process to Hall or Bear Steams. Nor did the non-affiliated directors ignore their banker's "request" to "complete"

[73] Emerald Post-Trial Br. at 45.

their opinion, because the banker made no such request: after the March 11, 1988 shareholder vote, Bear Steams regarded its retention as over. Moreover, the directors did, in fact, consider whether or not to obtain a new fairness opinion. And, although Bear Steams did disclose the details of its preliminary valuation analysis to the entire board, including Hall, it is not the case (as Emerald argues) that the disclosure of Bear Stearns's "bottom line" precluded the directors from obtaining more favorable terms. Indeed, the exchange ratio was revised downward, to May's advantage, and Hall's detriment, soon thereafter."

But, wholly apart from the demerit of Emerald's criticisms, the defendants have affirmatively proved beyond serious question the vigor and adversarial quality of the negotiations. The proof lies in the results.

To reiterate: (i) Hall wanted May's valuation to be based on the market price of May stock on the day the agreement in principle was reached ($1.06 per share on November 30, 1987). The non-affiliated directors, however, approved a valuation of May at net asset value ($2.18 per share)—over double Hall's proposed value; (ii) Hall wanted HREG to be valued at up to $105 million; the non-affiliated directors, however, approved a valuation of HREG at $59 million; (iii) Hall wanted

[74] That is why Bear Steams's disclosure to Hall of its valuation analysis, and its disclosure to Hall of the downward adjustment in the exchange ratio before informing its own clients, the non-affiliated directors, even if viewed as process flaws, did not compromise the adversarial quality of the negotiation or the non-affiliated directors' ability to obtain the most favorable price for the May minority. See *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134 (Del. Ch. 1994), *aff'd.*, 663 A.2d 1156 (Del. 1995); *Kahn v. Lynch Communications Systems, Inc., on remand,* C.A. No. 8748 (Del. Ch. Apr. 17, 1995), *aff'd.*, 669 A.2d 79 (Del. 1995) (upholding as entirely fair, a merger transaction that involved deficiencies in the acquired company's board decision-making process).

the valuation of HREG to include $125 million in anticipated disposition fees, and he also wanted a 50-50 split of future disposition fees. The non-affiliated directors rejected the inclusion of the disposition fees in the valuation of HREG, and they approved a split of future disposition fees more favorable to May—65(May)/35 (Hall); (iv) Hall wanted additional May shares on his receipt of payment from prospective property dispositions; the non-affiliated directors however, rejected adding such "back end" consideration to the exchange ratio; (v) Hall wanted May to pay HREG's merger expenses if the transaction did not go forward; the non-affiliated directors rejected that proposal as well; (vi) Hall's initial proposal did not require his personal guarantee of the proxy statement representations that concerned HREG, nor did it require Hall to repay $1.3 million he had borrowed from May. The non-affiliated directors, however, approved the addition of that personal guaranty requirement to the Merger Agreement, and also required Hall to repay the $1.3 million before the non-affiliated directors would agree to the merger; and (vii) Hall's proposal did not provide for equalization of interest rates on loans to and from HREG and Hall, nor did it contain any requirements regarding how the proceeds of syndication puts would be spent. The non-affiliated directors approved a requirement that on loans made by Hall, interest would be equalized, so that the surviving entity would owe interest at 10% rather than at 14%. They also approved a requirement that Hall apply the "upside" from the exercise of syndication puts against the debts owed to the company. Finally, (viii)

the non-affiliated directors approved a requirement that HREG's debt obligations to Hall be deferred, to ensure that the surviving company would have adequate working capital.

These results belie Emerald's assertion that the negotiations over the merger terms were "meaningless."

2. The Informed Nature Of The Directors' Decisions To Approve The Merger Agreement And Conclude The Merger

Emerald contends that the non-affiliated directors were not fully informed when they approved the Merger Agreement in November 1987, or when they decided to consummate the merger in August 1988.[75]

The directors' approval of the Merger Agreement was not fully informed, Emerald argues, because (i) Bear Stearns did not inform them that HREG was insolvent on a liquidation basis, and that it (Bear Stearns) had considered further revising the exchange ratio to 25 million shares; and (ii) Hall never informed the board that his advisers had recommended that he declare personal bankruptcy. The Court finds that these contentions lack merit because those facts, in these circumstances, were immaterial.

That the non-affiliated directors were not told that on a liquidation basis, HREG's liabilities would exceed its assets, is insignificant, because Bear Stearns

[75] Emerald Post-Trial Br. at 46-47.

had concluded that the proper way to measure **HREG's** value was on a going concern basis?[76] That Bear Stearns considered, but then decided not to propose, that the exchange ratio be lowered to 25 million shares, is also immaterial. As Youngquist testified, the issue arose when Bear Stearns updated its opinion for year-end 1987. At that time Youngquist had year-end numbers that were preliminary and incomplete, but, after obtaining the complete data from HREG's Treasurer, she was satisfied (as was Bear Steams) that the 27 million share ratio was appropriate?[77] The immateriality of that information is underscored by the fact that Emerald does not challenge the substantive fairness of the exchange ratio that yielded 27 million May shares on the date that May's stockholders approved the merger.

Nor did the non-affiliated directors' decision not to obtain an updated fairness opinion on August 15, 1988 render their decision to consummate the merger uninformed. Between the date of the stockholder vote approving the merger and the date the merger was consummated, HREG's financial picture had in certain respects worsened, but in other respects it had improved. In its earlier Opinion, this Court found that the non-affiliated May directors could reasonably have concluded-and did conclude in their good faith business judgment-that

[76] See DX 50 at § C. 1 (notes of Bear Steams indicating that "[g]iven the realities of the current real estate market, a liquidation value is unrealistic").

[77] Tr. at 1133-35.

there was no "material adverse change" that would have required them to obtain a new fairness opinion.[78]

But now, this Court, on remand, must evaluate that decision in the more exacting context of entire fairness scrutiny. In that context, the directors must establish that their decision to consummate the merger was duly informed, despite the absence of a fairness opinion effective as of August 15, 1988. Emerald contends that given the decline in HREG's financial picture, and given the board's awareness of Bear Steams's "materiality collar"-i.e., Bear Stearns' (non-binding) view that a 10% or more change in the relative values of the two companies would cause it to revisit its fairness opinion—the defendants were duty-bound to obtain an updated opinion in order for their decision to consummate the merger to be informed.[79]

This Court cannot agree. The board had kept itself well informed about the business developments at both companies, and they had a reasonable basis to conclude in good faith that no "material adverse change" in the relative value of the two businesses had occurred. Although an updated fairness opinion would likely have removed all doubt on that issue, the non-affiliated directors have

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[78] See PTO, 2001 WL 115340, at *15.

[79] In its 2001 post-trial Opinion, the Court did not frontally address the issue of whether the directors' decision to consummate the merger was fully informed, because it concluded that even if the decision was not fully informed, the non-affiliated directors were protected from liability by the exculpatory provision of May's certificate of incorporation. Moreover, in that earlier context the significance of the Bear Stearns "materiality collar" was not so clear, perhaps because it received less emphasis at that time than it was accorded on this remand.

satisfied this Court that an updated fairness opinion was not a *sine qua non* to their being adequately informed. Had they obtained an updated opinion, the resulting information would in all probability have confirmed what this Court finds here-that the merger exchange ratio remained fair to May and its minority stockholders, despite the changes that occurred during the intervening injunction period. See Section III B, ***infra.*** Moreover, the board had quite strong, and justifiable, reasons for wanting to conclude the deal immediately. Not only did the merger make business sense, but also the Koethers could be expected to use the period of delay (while a new fairness opinion was being obtained) to find other ways to obstruct it.

The decision not to obtain a new fairness opinion was one that the defendants were entitled, in their business judgment, to make. The fact that Emerald disagrees with that judgment does not convert that decision into evidence of unfair dealing.

3. The Informed Nature of The Approving Shareholder Vote

Although the approving vote of a "majority of the minority" of May stockholders was not a condition of the merger, it is undisputed that the merger did, in fact, receive majority of the minority shareholder approval. But, Emerald claims that that shareholder vote was not fully informed, because the proxy statement contained several materially false and misleading disclosures.[80] In its

[80] Emerald Post-Trial Br. at 47-55.

initial Opinion, this Court concluded that Emerald's proxy disclosure claims had no merit.[81] Those claims, which Emerald reargues,[82] have not improved with time, and once again, merit rejection.

Emerald first challenges the Proxy disclosure that "the terms-of the Merger, including the exchange ratio of May Common Stock for shares of [HREG), were the result of arms-length negotiations between representatives of [HREG] and the Non-Affiliated Directors."[83] That disclosure, Emerald argues, was false because (i) the exchange ratio was set by Bear Steams; and (ii) any negotiation by the non-affiliated directors was ***pro forma*** and "cosmetic," rather than "arm's-length." The false disclosure was material (Emerald contends), because the accurate facts would create a doubt in the shareholders' minds whether the non-affiliated directors adequately represented the shareholders' interests during the negotiations.

The Court's initial response to this argument-to which the Court adheres— is as complete an answer today as when it was first expressed:

[81] See PTO, 2001 WL 115340, at *27-28.

[82] In addition to its previously asserted claims, Emerald has added a new disclosure claim based on Arthur Andersen having audited the financial statements for both May and HREG/Hall. Arthur Andersen's role as auditor for both May and HREG (then wholly owned by Hall) was disclosed in the 1988 proxy statement. DX 108 at 68 and F-3. The plaintiff never asserted in pleadings or in its pre-trial brief that this fact was improperly disclosed, and that claim was never tried. Accordingly, the assertion of this claim is procedurally unfair, and, because the claim is not properly before this Court, it will not be considered.

[83] DX 108 at 9.

> This claim fails for lack of a valid premise, as this Court has found that the non-affiliated directors negotiated staunchly in favor of May's minority stockholders. That the directors were assisted by Bear Steams does not alter that fact or otherwise render the Proxy disclosure misleading. Indeed, the Proxy Statement . . . discloses that the exchange ratio was based upon the advice of Bear Steams."

Emerald next attacks, as materially misleading, the proxy disclosure that the "Non-Affiliated Directors authorized the retention of a financial advisor and special counsel ."[85] This disclosure was misleading, Emerald claims, because (i) Bear Stearns and Shank Irwin were retained by a vote of the full board, including Berlin, with only Hall (and Strauss, in the case of Bear Steams) abstaining, with Hall and Berlin being present during the discussions leading to those retentions; and (ii) the disclosure suggests that the non-Berlin defendants—and only those defendants-selected their "advisors."

This disclosure claim fails again, as it did initially, for lack of a valid factual premise. The proxy statement disclosed, in the preceding sentence on the same page, that the advisors had been selected at a meeting of the full board. Accordingly, no factual basis exists for Emerald's contrived argument that the May stockholders were entitled to assume that the non-Berlin defendants-and only

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[84] PTO, 2001 WL I 15340,*27. Note 71 to that Opinion recites the proxy statement disclosure that "May retained Bear Stearns ***to advise it as to the appropriate exchange ratio*** and to render an opinion to May as to the fairness, from a financial point of view, of the Merger." ***Citing*** DX 108 at 24 (emphasis added).

[85] DX 108 at 23.

those defendants-had selected "their" advisors.[86] Berlin and Hall were present, and voted, at the meeting at which the non-affiliated directors' advisers were retained. Their presence, whether appropriate or not, was disclosed. The shareholders were therefore not misled on that subject.

Emerald next attacks the Proxy disclosure that "[i]n connection with the Merger, the Non-Affiliated directors frequently held separate deliberations . . . ."[87] In its initial post-trial Opinion, the Court responded to that claim as follows:

> Although the plaintiff cavils with the term "frequent," the evidence establishes that this disclosure was accurate. The non-affiliated directors did meet separately with their counsel to deliberate concerning the merger at least four times after Shank Irwin was retained and before the Proxy Statement was mailed. Those directors also had informal communications with each other and with counsel concerning Hall's initial proposal and, later, concerning drafts of the Merger Agreement.[88]

Emerald's argument also disregards the meeting-by-meeting description found under the heading "Directors' Deliberations" on page 23 of the proxy statement. That description provides a detailed account of the board's deliberations about the merger.[89] Although the parties may disagree about the term "frequent," the underlying facts relating to the board's consideration of

the merger were fully disclosed. The stockholders were not misled in that regard.

Lastly, Emerald claims that the proxy statement contained material misstatements and omissions about May's investment in HSSM#7. The argument is that the proxy statement omitted to disclose that Singer was the acquisition target for which HSSM#7's invested assets were intended. That omission would have been important to shareholders considering how to vote on the merger, Emerald argues, because (i) HSSM#7 represented 20% of May's assets; and (ii) Bilzerian, who later controlled Singer through the partnerships which included HSSM#7, had projected a large increase in the value of May's $8 million HSSM#7 investment. This argument signals a change of emphasis in Emerald's claim, which originally was that the *value* (as distinguished from the ultimate acquisition target) of the HSSM#7 investment should have been disclosed, because that value was far greater than May's $8 million cost valuation.[90]

What drives this disclosure claim is that six weeks after the proxy statement was first disseminated, and three weeks after the March 1988 shareholder vote, May filed a Form 10-K which disclosed that (i) HSSM#7 was a limited partner of Suncoast, whose primary investments were limited partnership interests in partnerships controlled by Bilzerian; (ii) substantially all of the investments of the Bilzerian partnerships were in "Singer Acquisition," whose pm-pose was to

[90] PTO, 2001 WL 115340, at * 28.

purchase all outstanding shares of Singer Corporation; and (iii) at least two steps must be taken before any determination of whether any profits would be available to the investors of the Bilzerian partnerships: a merger of Singer and Singer Acquisition, and a sale of different Singer assets to repay the debt incurred to buy Singer stock. Emerald argues that the Form 1 O-K establishes that the May board knew these facts at the time of the February proxy statement and, therefore, could, and should, have disclosed them.

Even if the non-affiliated directors did know those facts in February 1988, that did not impose on them a fiduciary duty to identify where May's funds were ***ultimately*** invested-several levels removed and far beyond May's control to do anything that could create added value in May. Indeed, any speculation about higher values based upon Bilzerian's illusory representations would have been far more misleading. That is why Bear Steams was unable to value the HSSM#7 investment at other than cost.[91] As this Court earlier noted, the post-vote Form 10-K disclosures were made, not to correct informational deficiencies in the proxy statement, but, rather, to correct what the board believed were "wildly speculative" inaccuracies in an article, written by a friend of the Koethers, about the alleged value of HSSM#7.[92] Accordingly, the Court adheres to its initial conclusion that

[91] Emerald does not refute that the HSSM#7-related disclosures actually made in the proxy statement evolved from earlier Forms 1 0-Q filed by May, and that the board relied on legal and financial advice in determining what to disclose about the investment.

[92] PTO, 2001 WL 115340, at *28; DX 117; Tr. at 220-223, 424.

the proxy disclosures concerning HSSM#7 were accurate and not materially false or misleading.

For these reasons, the defendants have discharged their burden of establishing that the vote of the minority stockholders approving the merger was fully informed.

4. Fair Dealing: An Overall Assessment

To summarize, all relevant aspects of the process that the defendants followed have been found probative of fair dealing, with one exception: the non-affiliated directors' failure to exclude Hall and Berlin from all of their meetings and deliberations relating to the merger. The question is what weight that process defect should be accorded, more specifically, whether that process flaw was so significant in relation to the favorable process factors, that it precludes a finding of fair dealing. In this Court's view, clearly it was not.

The single flaw in the non-affiliated directors' decision-making process was their failure to insist that Hall and Berlin absent themselves entirely from that process. The issue—which neither side has frontally addressed in its briefs-is what magnitude of process flaw is required to compel or justify a finding that the process leading to a transaction did not constitute fair dealing. In my view, common sense would suggest that the process flaw most be one that would be likely to lead to an unfair result. This process deficiency was not of that character. Although Hall's and Berlin's presence at meetings, and their occasional direct

contacts with Bear Steams, was undesirable (indeed, sloppy) if measured against the independent negotiating committee model envisioned by *Weinberger*,[93] that imperfection did not, in fact, impede or in any way compromise these directors' vigorous representation of the May minority. In short, the process imperfection identified here was not of sufficient gravity to preclude a finding of fair dealing in this merger?

The Court next turns to the second aspect of entire fairness-fair price.

B. Fair Price

To put the fair price issue into perspective, it is important to emphasize that Emerald did not challenge, through expert testimony or otherwise, the substantive fairness of the price (the merger exchange ratio) either as of the date the Merger Agreement was signed (November 30, 1987) or as of the date it was approved by May's shareholders (March 11, 1988). Rather, Emerald's contention is that the price had become unfair as of the date the merger was consummated (August 15, 1988) because the value of HREG in relation to the value of May had declined. In a stock-for-stock merger, the test of fairness is whether "the minority stock-holder[s] . . . . [received] the substantial equivalent in value of what [they] had

[93] *457* A.2d 701.

[94] Even if the Court had found that fair dealing was absent, that finding would not necessarily be outcome determinative, as evidenced by *Cede. There,* the Supreme Court remanded the case for a redetermination under the entire fairness standard. On remand, the Chancellor determined that even if the defendant directors violated their duty of care, the merger was, nonetheless, entirely fair. That determination was upheld on appeal. *Cinerama, Inc. v. Technicolor, Inc., 663* A.2d 1134 (Del. Ch. 1994), *aff'd., 663* A.2d 1156 (Del. 1995); *see also, Kahn v. Lynch Communications Systems, Inc. 669* A.2d 75 (Del. 1995).

before? In this merger, all of HREG's outstanding shares were exchanged for (and converted into) 27 million new shares of May, whose name was then changed to "Hall Financial Group, Inc."

The fair price inquiry, therefore, becomes whether each side of that exchange was substantially equivalent in value to the other. Because the parties dispute the value of both May and HREG, the valuation issues that pertain to each company must be analyzed separately.

1. The Fair Value Of May

The parties substantially agree about the value of May, with only two exceptions: the value of the NOLs and the value of May's HSSM#7 investment. Emerald contends that the fair value of the NOLs was $3.4 million, which is the present value (as of August 15, 1988) of the projected future tax savings resulting from utilizing the NOLs. Emerald further contends that the fair value of HSSM#7 was $12 million.

The defendants' position is that (i) the NOLs, on a standalone, going concern basis (i.e., without the synergy of HREG's cash flow resulting from the merger), had no significant value; and (ii) HSSM#7 could not be reliably given a value higher than May's $8 million investment cost. For the reasons next

[95] *Citron v. E.I. duPont de Nemours &* Co., 584 A.2d 490,505 (Del. Ch. 1990) (quoting *Rosenblatt v. Getty Oil Co., 493* A.2d 929, 940 (Del. 1985)).

discussed, the defendants have established, by a preponderance of the credible evidence, that their valuation of May is the correct one.

Before addressing the two areas of dispute, it is useful to summarize the proof of May's value submitted by each side. The defendants presented two valuation experts who testified as to the value of May. Their primary expert was Gregg A. Jarrell, Professor of Economics and Finance at the University of Rochester's William E. Simon Graduate School of Business, and the associate editor of the Journal of Corporate Finance and Governance. Jarrell, who holds an MBA and a PhD degree (in Economics) from the University of Chicago, is a former Chief Economist of the Securities and Exchange Commission, and has published widely in the field of corporate finance, mergers, and acquisitions.

The defendants' second financial expert—who testified as to the fairness of the merger exchange ratio, and, thus, valued both May and HREG-was William H. Purcell, an investment banker with over 30 years of experience as a former Managing Director of Dillon, Read & Co. The experience of Purcell, who holds a BA from Princeton University and an MBA from New York University, includes signing fairness opinions and advising boards and special committees in significant transactions involving fairness opinions.[96]

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[96] DX 218, DX 221; Tr. at 2178-79.

Jarrell valued May using a net asset value ("NAV") approach, and concluded that the NAV of May as of August 15, 1988, was $31.084 million, or $2.12 per share.[97] Jarrell used the same methodology to determine May's value as Bear Steams, which was to treat May essentially as an investment company, and to value separately its components.[98]

Purcell corroborated Jarrell's results. Purcell concluded that Bear Stearns's aggressive valuation of May favored May's public stockholders, and that a reasonable investment banker could have valued May, for purposes of determining a fair exchange ratio, at prices ranging from $1.90 to $2.00 per share, which translates to $27.8 million to $29.3 million.[99]

Emerald's valuation expert was Donna Weintraub, a Senior Valuation Analyst of Management Planning, Inc., a Princeton, New Jersey valuation firm. Weintraub, who holds an MBA in Finance from Drexel University, had previously been a Valuation Analyst and Vice President at Hempstead & Co., Inc.[100] Weintraub valued both May and HREG. She valued May on a net asset value

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[97] DX 219, 28; DX 222; Tr. at 2093-96.

[98] Bear Stearns had calculated May's NAV at $32.3 million (as of November 20, 1987), which was only $.06 per share higher than the value determined by Jarrell.

[99] DX 221 at 9-11.

[100] Weintraub had never valued a real estate management company such as HREG, had never signed a fairness opinion, or advised a board of directors as a banker in a transaction or in connection with merger negotiations. That may be because the majority of Weintraub's work has involved valuations performed for tax or estate planning purposes. Tr. at 2563-65.

basis, arriving at an NAV for May of $2.51 per share. The $.39 per share difference between Weintraub's and Jarrell's results is attributable to their differing valuations of the NOLs and HSSM#7.

(a). The *NOLs*

Weintraub valued the NOLs at $3.4 million ($.23 per share), by projecting the tax savings for the combined company that she attributed to the NOLs, and by reducing that stream of future tax benefits to present value. Jarrell, on the other hand, like Bear Stearns, accorded no ($0) value to the NOLs, because the value of NOLs derives from the ability to offset them against operating revenues. May had no operating revenues against which the NOLs could be offset. Accordingly, Jarrell concluded, the NOLs had no value to May's stockholders on a standalone, going concern basis.

The difference between the two experts' approaches is that Weintraub's methodology presupposes that it is permissible to value the NOLs based upon a stream of income generated by the merged companies, whereas Jarrell's approach did not include any elements of value (e.g. post-merger revenue) that would belong to the merged entity after the merger. The issue-which approach is correct-is easily resolved. Under Delaware law, any speculative elements of value that may arise from the expectation or accomplishment of the merger must be excluded from

consideration."[101] Weintraub's inclusion of projected post-merger earnings of the merged companies in valuing the NOLs transgresses that principle, whereas Jarrell's valuation of the NOLs does not. Accordingly, the defendants' valuation of the NOLs, consistent with the valuation approaches of Bear Steams and Jarrell, is the correct one.

(b). *HSSM#7*

The remaining valuation issue relating to May concerns its investment in HSSM#7. As noted, Bear Stearns determined that May's interest in HSSM#7 should be valued at cost, even though at that time Bear Steams knew that Bilzerian's tender offer for Singer had closed and that Bilzerian planned to sell off some of Singer's divisions.[102] Jarrell, who valued the HSSM#7 investment at book value ($7.2 million), reached the same conclusion. Jarrell recognized that May's interest was illiquid, that it had no readily available market, that the Singer transaction was highly leveraged, and that, by August 1988, the involvement of Bilzerian as a key participant added a "huge risk factor and made it very difficult to come up with a nonspeculative element of value" derived from a supposed value of Singer.[103] Although Jarrell did consider Bilzerian's many promises to Hall that he

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[101] *8 Del. C.* § *262; Weinberger,* 457 A.2d at 713. This exclusionary principle is "designed to eliminate use of *pro forma* data and projections of a speculative variety relating to the completion of a merger." *Id.* Clearly, the projected tax savings calculated by Weintraub fall into that category.
[102] Tr. at 1122-26.
[103] Tr. at 2107

(Bilzerian) would arrange a buy-out of HSSM#7 during the summer and fall of 1988, he determined that no credible valuation analysis could "reliably turn these into values that were anything other than unacceptably speculative."[104]

Weintraub, on the other hand, valued May's HSSM#7 investment at $12 million, based on two approaches. Her first approach was based primarily on Hall's testimony that he believed he had an oral agreement with Bilzerian, as of September 1988, to sell HSSM#7 for approximately $40 million cash. May's contractual share of $40 million would have been $16 million. Weintraub then discounted the $16 million figure by 25%, to reflect the uncertainty of Bilzerian honoring his promise and the potential time delay in receiving the funds.[105] Weintraub's second, "top-down," approach was to accept the reported sales prices for various units of Singer, and the estimated value of the remaining Singer assets, to arrive at a gross value of $583 million, and a net value (after deducting taxes and other liabilities) of $291 million. Of that amount, Weintraub estimated a $204 million distribution for Bilzerian Partners, in which Suncoast Partners L.P. held a 25% interest. Because HSSM#7 was an 80% limited partner in Suncoast Partners, and May held a 40% limited partnership interest in HSSM#7, Weintraub concluded that May's interest in Bilzerian Partners was 8% (40% x 80% x 25%) of

[104] Tr. at 2151; see DX 219,222.
[105] PX 186 at 18-19.

the $204 million, or $16.3 million. Weintraub then discounted that amount by 25%, to arrive at a $12 million value for May's interest in HSSM#7.[106]

Neither of these approaches, in this Court's view, survives scrutiny. The 25% discount used by Weintraub in both of her valuation approaches seems to have been picked "out of the air." Her report discloses no reasoning that supports that figure. In the opinion of Jarrell, whom this Court finds was a highly credible and competent appraisal witness, a 25% discount is inadequate to account for an illiquid, high-risk, speculative minority equity investment, such as May's interest in HSSM#7. Rather, a 50% discount would be more appropriate to reflect the lack of marketability and the uncertain and speculative nature of May's investment position in HSSM#7.[107] Had Weintraub applied a 50% (rather than a 25%) discount, her valuation of the HSSM#7 investment would have been essentially the same as Jarrell's.[108]

In its initial Opinion, this Court found that there were "no facts existing at the time of Bear Steams' valuation of May's HSSM#7 investment, or at the time the merger was consummated, [that] would have compelled a higher-than-cost

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[106] *Id.* at 17-21.

[107] DX 222 at 3-8. In his Rebuttal Report, Jarrell relied on studies showing that (i) ***the average*** minority discount is approximately 40%, and that (ii) in the absence of an effective vehicle, private placements normally sell at a significant discount, "often 30%-60% or even more-from freely traded securities." *Id.* at 5,6. The 50% minority discount that Jarrell concluded was appropriate was higher than the 40% average, because May owned a minority interest in a partnership that in turn owned a minority interest in Singer. Jarrell's 50% illiquidity discount tits comfortably within the 30%-60% range. Id.

[108] Tr. at 2626.

valuation of [that] investment."[109] That finding, recapitulated elsewhere in this Opinion, is reconfirmed here.

Because the Court concludes that the value of May did not materially change between the date of the shareholder vote and the merger consummation date, the issue becomes whether, during that period, the value of HREG decreased in relation to that of May. That issue is next addressed.

2. <u>The Fair Value of HREG</u>

(a). *The Parties' Positions And The Valuation Issues*

As earlier noted, Bear Steams valued HREG, for merger exchange ratio purposes, at $59 million. At trial, the defendants' primary valuation expert, Kevin T. Gannon, a Managing Director of the real estate investment banking firm of Robert A. Stanger & Co., Inc. ("Stanger"), and responsible for that firm's merger and acquisitions activities, valued HREG at a higher range-between $71.9 million and $89 million. Gannon, who is a certified public accountant and a member of the American Institute of Certified Public Accountants, was a former manager at Deloitte, Haskins & Sells. Gannon had over seventeen years of direct involvement in valuing real estate industry specific assets and firms, including real estate management companies such as HREG.[110]

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[109] PTO, 2001 WL 115340, at *13.

[110] DX 201 ¶¶ 1-2, 4, 41 Tr at 1786-90, 1792-99.

The defendants' other expert, Purcell, also valued HREG as part of his analysis of the overall fairness of the merger exchange ratio. Purcell reviewed the work of Bear Stearns, and found that (i) a reasonable investment banker could have fairly valued HREG, for purposes of determining a fair exchange ratio, at $70 million to $75 million; and (ii) if HREG were valued at $70 million, May could have issued 35 million shares of May (valued at $2 per share) to Hall.[111] Thus, Purcell's valuation of HREG corroborated Gannon's.

Emerald's valuation expert, Weintraub, on the other hand, valued HREG at a much lower range than did Bear Steams, Purcell, or Gannon-between $40 million and $43 million. To understand what drives the parties' quite different valuations, and the issues that result therefrom, it is necessary to summarize the different approaches utilized by the parties' trial experts.

The methodology employed by Gannon to value HREG was one that is accepted and utilized by experts in the real estate investment banking field to value real estate management companies, including firms involved in transactions in which Gannon participated. That approach involves valuing separately the real estate management company's two different components: (1) the fee stream generated by the company's management activities and (2) the company's net assets, which consist primarily of its net receivables (receivables net of payables)

[111] DX 221 at 14.

from partnerships. The reason for this bifurcated analysis is that a real estate management company's management fee stream has a level of risk different from the risk level that is applicable to its net receivables.[112] Gannon was personally familiar with HREG, having undertaken a due diligence investigation of that company in 1984-1985, during which he concluded that HREG had excellent management capabilities, good acquisition capabilities, had a fine track record, and was considered a very high-end management company. Indeed, "[we] kind of used [HREG] as something of a bench mark of other quality management companies as we proceeded through the rest of the 1980s."[113]

Gannon valued the management component of HREG at between $42.9 million and $60 million first by estimating the annual management-related revenue, based on 1987 and 1988 financial data, at $17.15 million. He then determined HREG's estimated pre-tax cash flow by applying a normalized expense ratio (consistent with his experience in valuing management companies), to arrive at pre-tax cash flow of about $8.5 million. To that figure Gannon applied a comparable transaction multiple of 5 to 7 times earnings. That multiple conformed to the most relevant comparable transaction during this time period-Southmark Corporation's acquisition of Johnstown American ("Johnstown"), wherein

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[112] **Tr. at 1794-97.**
[113] **Tr. at 1802.**

Southmark purchased Johnstown for about 5.2 times its management business cash flow.[114]

After valuing the management company component, Gannon valued HREG's principal non-operating asset-its receivables from partnerships. As part of that process, Gannon examined the bad debt reserve that Arthur Andersen had reviewed in preparing HREG's financial statements. Although Gannon found that reserve reasonable, in an effort to be conservative he reworked the bad debt analysis and reduced the value of HREG's non-management assets from over $36 million to $29 million. He then combined the values of these two core components to arrive at a total value for HREG ranging from $71.9 million to $89 million.

Weintraub used a completely different, two-step approach to generate her $40 million to $43 million valuation of HREG. First, she used Bear Steams' $59 million valuation as a starting point, although she did not independently determine the fairness of that figure.[115] She then discounted that $59 million valuation by 25%, based on decreases in the market capitalization of selected publicly-traded real estate firms (which did not include the most relevant comparable, Johnstown). Weintraub then averaged the changes in market capitalization represented by the comparables that she had selected.

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[114] DX 220, ¶¶ 40-41; DX 223; Tr. at 1809-12. Bear Steams had deemed Johnstown to be the most comparable company to HREG, as Weintraub acknowledged. Tr. at 2520-21.

[115] Tr. at 2573. Weintraub testified that she merely used Bear Steams' valuation as a starting point, and conceded that HREG's value could have been higher, lower, or equal to $59 million. Tr. at 2573-74.

Weintraub's second valuation approach was to apply a price-to-earnings multiple of 8 to 10 times HREG's estimated earnings for the latest 12 month period ended June 30, 1988 ($4,587,000). The resulting values for HREG as of August 15, 1988 ranged from $36.696 million to $45.870 million.[116]

The defendants' criticisms of Weintraub's valuation are several. The defendants attack Weintraub's first approach-discounting Bear Steams's $59 million valuation by 25%, representing the asserted decline in market capitalization of comparable publicly traded real estate firms-on two grounds. The first is that this "discount method" is not generally accepted in the business valuation community. The second is that the asserted 25% decline has no factual support, because the companies whose multiples were used to compute that decline were not comparable to HREG.[117] The defendants also challenge Weintraub's second approach—capitalizing HREG's estimated earnings for the twelve months ended June 30, 1988—on the basis that the earnings level Weintraub selected (the latest 12 months ending June 30, 1988) was not a stabilized level of earnings for HREG. Defendants contend that stabilized earnings are an essential ingredient in a capitalization of earning analysis.

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[116] PX 186 at 14-15.

[117] PX 186; DX 223 at 3-6. Those changes ranged from +1.8% to -7 1.2%, for companies that had posted losses for the six months ending June 30, 1998, in contrast to HREG, which had posted a net profit for that period.

Emerald, not surprisingly, vigorously endorses its expert's valuation of HREG and criticizes, equally vigorously, the valuation approach adopted by the defendants' experts, Gannon and Purcell. First, Emerald argues that the defendants' valuation must be disregarded as a matter of law, because Purcell testified that his valuation was less than what could have been achieved by a properly functioning special committee. Second, Emerald asserts that, by adding the value of the net receivables to the discounted value of the projected management fees, Gannon improperly double-counted those elements. Third, Emerald contends that Purcell failed to take into account the cost of alternative sources of capital that HREG would need to meet its projections, absent a merger with May. That is, Purcell assumed that May's cash would be used to generate new business for HREG, and he then valued the projected stream of income from that new business. Thus, Emerald concludes, Gannon's analysis must be rejected because it fails to value HREG on a standalone basis.

These contentions generate several HREG-related valuation issues. Three of those issues pertain to Weintraub's valuation of HREG. Specifically, (1) is Weintraub's "discount approach" for valuing HREG generally accepted in the financial/business valuation community? (2) If so, does her 25% discount figure have adequate record support? (3) Regarding Weintraub's capitalized earnings

method of valuation, was the latest 12 months ending June 30, 1988 an appropriate period for determining what earnings should be capitalized?

The defendants' valuation analysis also poses three separate issues, namely, whether their valuation should be rejected (1) on the basis that Purcell testified that it is less than what a fully functioning special negotiating committee would have achieved; (2) on the basis that, by adding the net receivables to the discounted value of the projected management fees, Gannon double counted; and (3) on the basis that Purcell valued HREG by assuming (improperly) the availability of capital that would be contributed by May after the merger.

These issues will now be analyzed. Because the defendants have the burden of establishing the fairness of their valuation of HREG, the Court first addresses the defendants' valuation. Jt concludes that Emerald's challenges are without merit. The Court then turns to Emerald's valuation approach. It concludes that Emerald's valuation methodology is fatally flawed.

(b). *The Valuation Issues Analyzed*

The first issue-whether the defendants' valuation of HREG should be rejected because (it is claimed) Purcell admitted that his value was less than what a fully functioning special committee would have negotiated-is a non-starter. That argument distorts the testimony of Purcell, who made no such admission.

At trial, Purcell testified that the high end of the range of HREG's value, as determined by him, was $70 million. On that basis, with May being valued at

slightly over $2 per share, May could have issued up to 35 million shares to HREG-a result that two parties engaged in arm's-length negotiations could have reached:

> So, I concluded that on the other end up to 35 million shares of [HREG] in balanced arm's length negotiations between two parties could have been issued and that would be still, in my judgment, within the range of fairness, anything up to that number.[118]

If (as Purcell testified) arm's-length negotiators could have negotiated a price up to 35 million May shares that would be fair, then surely the much lower price (for May) that was actually negotiated-27 million May shares-was also the product of an arm's-length negotiation process. The import of Purcell's testimony, properly understood, was that the merger, as consummated, yielded a fair price for May's public stockholders.

The second issue relates to the propriety of Gannon's methodology. To reiterate, Gannon valued HREG first (and primarily) as a management company, by using stabilized management fee revenues offset by normalized expenses for a management company, consistent with HREG's actual experience. The result was an estimated $17.15 million in stabilized management fee revenues (which excluded all other non-management revenues), based upon the average of 1988 and 1987 actual management company revenues, rounded. Management fee revenue

[118] Tr. at 2201, see *also,* Tr. at 2200-02, 22 12.

for HREG increased, from $16.593 million in 1987 to $17.7 million in 1988, during that period. Gannon's $17.15 million revenue figure was also consistent with Weintraub's $17.211 million management revenue figure for the fiscal year ended June 30, 1988. To that $17.15 million management fee figure, Gannon applied a multiple range of 5 to 7-a range that was common in real estate management company transactions. By this method, Gannon arrived at a value range of $42.9 million to $60 million for the management company segment of HREG.[119]

To that value, Gannon added the value (that he determined) of HREG's other segment: the non-operating revenue stream, consisting primarily of the net receivables from the real estate partnerships. Rather than using the value attributed to the net receivable by Arthur Andersen, Gannon reduced that receivable amount (and thereby increased the bad debt reserve) by $7.5 million. The resulting figure, $29 million, was then added to the management value range to arrive at an overall value range for HREG of from $71.9 million to $89 million.

Emerald criticizes this approach on the basis that it "double counts" the same assets, and also that, in any event, the $29 million value attributed to the net receivable is too high. The short answer is that there is no double counting: the value of the management fee stream in no way depends on or includes the receivables, and vice versa. Moreover, even if it is assumed (without deciding)

[119] DX 220, ¶¶ 39-40; Tr. at 1805-07.

that the $29 million value for the net receivable was too high, no basis is shown to conclude that Gannon's valuation of HREG should be adjusted downwards to below Bear Stearns's $59 million valuation. Stated differently, even if the receivable were written down to zero ($0), the management component, standing alone, had a range of fair values up to $60 million, and, thus, was within the range of values actually used in the merger.

The third issue, based on Emerald's criticism of Purcell's methodology, is whether, in arriving at his $70 million value for HREG, Purcell improperly assumed that HREG would have the use of May's cash-a source of capital that would only be available post-merger. The answer to this criticism, as explained in the footnote,[120] is that Purcell made no such assumption.

Apart from these criticisms, which the Court finds to be without merit, Emerald advances no reasons why the defendants' valuation(s) of HREG are unreliable, lack credibility, or are in any other respect unworthy of acceptance. Accordingly, the Court accepts the defendants' valuation, and turns next to the issues that relate to Weintraub's two approaches for valuing HREG.

Weintraub's "discount approach," it will be recalled, involved using Bear Steams's $59 million valuation of HREG as a starting point, and then discounting

[120] Emerald bases its argument on a chart, prepared by Purcell during the trial, to show the conservatism of the multiples he used to arrive at his $70 million to $75 million valuation of HREG. The chart contains a column of numbers, added solely for illustration purposes, which presupposed that the merger had taken place. That data, which Emerald attacks, was not what Purcell relied upon in reaching his valuation conclusion. Tr. at 2496-98; DX 221.

it by 25% to 30%. That methodology raises two issues: (i) whether it is generally accepted in the financial/business valuation community; and (ii) if it is, whether the 25% to 30% discount figure has adequate record support. For the reasons next discussed, the Court concludes that the answer to both questions is no.

From a methodological standpoint, Weintraub's discount approach to valuing HREG is highly problematic, because what it discounts is a *going concern value* based upon a decline in *market capitalization* of selected companies in the same industry. That method of valuation is counterintuitive, because (among other things) it assumes that each firm's going concern value has a constant relationship to the average market capitalization of all comparable firms within the same industry. It may be that the approach represents sound finance theory, but if that is so, one would expect to see that theory validated in one or more reputable finance treatises and journals. Emerald, however, made no effort to cite any finance authority and, on that score, Weintraub's trial testimony was of minimal assistance. When asked on cross-examination whether her discount method enjoyed general acceptance in the business valuation community, Weintraub testified:

> In the particular set of circumstances such as this, when you are comparing value on two different dates, yes, I *believe it would* be generally accepted. If you are comparing. . . ***if you*** *are just looking on one date, which is what most valuation literature deals with, then it* ***'s—*** *obviously you are not going to find this methodology* ***described.***[121]

[121] Tr. at 2574-75 (emphasis added).

Weintraub later conceded that she was determining HREG's value as of a single date-August 15, 1988.[122] But, even if Weintraub was comparing HREG's value as of two different dates, her methodology is flawed because it compares apples to oranges. An apples-to-apples comparison would have involved HREG's going concern value (independently determined) as of both November 30, 1987 and August 15, 1988. Indeed, Weintraub's alternative, capitalized earnings, approach was designed to capture going concern value as of that latter date. Instead, *what* is being compared here is an *undiscounted* going concern value as of one date, to a *discounted* going concern value as of a later date, where the discount is based on a single factor (a decline in market capitalization) that bears no demonstrated relationship to the going concern value being discounted. I conclude, for these reasons, that the valuation resulting from Weintraub's discount approach has not been shown to be generally accepted as valid in the business/financial valuation community.

Even if that approach were a generally accepted valuation methodology, it is flawed because of how it was applied in this case. Weintraub based her 25% to 30% discount to the $59 million Bear Steams valuation, upon the average percentage change in market capitalization of five selected guideline companies between November 30, 1987 and August 15, 1988. Those guideline companies, Weintraub found, indicated an overall change in market capitalization ranging

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[122] *Id.*

from an 1.8% increase to a 71.2% decrease, or an average decrease of 36%. From that data she concluded that a discount rate within a range of between 25% and 30% was appropriate.

The value resulting from that analysis cannot be accepted, because the underlying analysis itself is flawed. As Gannon (whose testimony the Court finds credible) points out in his Supplemental Report, the guideline companies each posted a loss for the six months ending June 30, 1988, for an aggregate loss of over $194 million. HREG, on the other hand, reported a net profit for both the 12 months and for the six months ending June 30, 1988. In Gannon's opinion, the profitability of HREG renders the guideline companies not comparable, because the percentage decline in market capitalization for each of those companies was related directly to the magnitude of the loss reported for each company during the period in question.[123] Moreover, the sample of companies is too small for such an extremely wide range of data. A range of +1.8% to -7 1.2% for only five guideline companies is hardly a reliable basis to reach an opinion regarding an appropriate discount for a sixth, noncomparable firm. For these reasons, Weintraub's first (discount method) valuation of HREG is rejected.

The remaining issue, which relates to Weintraub's second (capitalized earnings) method of valuation, is whether the selected earnings period-the latest

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[123] DX 223 at 3-6.

twelve months ending June 30, 1988—was an appropriate period for determining the earnings to be capitalized. For the following reasons, the Court is unable to conclude that it was.

A capitalization of earnings analysis requires estimating a stabilized level of earnings for the company being valued. HREG's actual adjusted net for the year ended December 3 1, 1987, was $7,838,000. Weintraub estimated earnings for the year ended June 30, 1988, was $4,587,000, which was 41% less than HREG's actual 1987 adjusted earnings levels. To establish a stabilized earnings level, earnings for a longer period of time must be taken into account. Gannon computed HREG's net income (adjusted for the bad debt reserve and a tax provision equal to 40% of net income) for the five years, and also for the three years, immediately preceding the merger. For the five-year period, the average adjusted net income for HREG was $12.591 million, and for the three-year period, the average adjusted net income was $7.906 million.[124]

In Gannon's opinion, which the Court accepts as credible, a reasonable. stabilized level of earnings on which to base a capitalization of earnings analysis would be HREG's average adjusted earnings for the three years before the merger. Using Weintraub's multiple range of 8 to 10, such earnings would produce a range

[124] DX 223 at 7-8.

of capitalized value for HREG of $63.248 million to $79.06 million. Both of these amounts exceeds the Bear Stearns' valuation of $59 million.

On the other hand, using an earnings level of $4.587 million to value HREG, which represents a 42% discount to the average earnings for the three years immediately preceding the merger, would be unreasonable. An amount that is so materially below the recent historical earnings of HREG could not reasonably be expected to be acceptable to a willing seller in an arm's-length transaction.[125]

The Court finds that Gannon's valuation of HREG should be credited over that of Weintraub for two additional reasons. The first is experience in the field. Gannon had valued a multitude of real estate partnerships and management companies over the course of his career; Weintraub, however, had never valued a real estate management company for any purpose.[126] That, perhaps, is why the internal logic of Gannon's valuation and testimony hangs together, in contrast to that of Weintraub, which, in critical respects, does not. The second reason is that Weintraub's analysis appears to be premised on a misunderstanding of the nature of HREG's business. During the period at issue, HREG's core business-real estate management—was improving. Its secondary business-deriving transactional fee revenue from partnerships-was markedly down, because of its

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[125] *Id.* at 9.

[126] DX 223 at 1; Tr. at 2564-66.

nature of the revenues that business generates. The valuation approach taken by the defendants' experts on the other hand, did take these realities into account.

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To summarize, the Court rejects Emerald's valuations of May and HREG. The Court further concludes that the defendants have established by a preponderance of credible evidence that, despite the downturn in HREG's financial picture between March and August of 1988, the merger exchange ratio was entirely fair to May's minority stockholders on the date the merger was consummated.

c. **Entire Fairness Viewed As A Whole**

Although the two aspects of entire fairness-fair dealing and fair price—were analyzed separately, an ultimate determination of entire fairness requires these components to be considered together in a unitary, non-bifurcated way.[127] That is because the entire fairness standard does not "lend itself to bright line precision or rigid doctrine."[128] Here, the Court has found that the merger was the product of fair dealing and that the price (the merger exchange ratio) was also fair. Viewing all aspects of the merger as a totality, the Court concludes that the defendants have established that the merger was entirely fair to May and its minority stockholders.

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[127] *Cinerama, 663* A.2d at 1172.

[128] *Nixon v. Blackwelt, 626* A.2d 1366, 1381 (Del. 1993).

I-V. THE AFFIRMATIVE DEFENSES

Because the merger has been found entirely fair, this Court could, fully consistent with the Supreme Court's Opinion in *Emerald IV,*[129] conclude its analysis at this point. Intending no disrespect for the Supreme Court, this Court has nonetheless, elected to go further and adjudicate the affirmative defenses addressed in its earlier post-trial Opinion. There are two reasons: (i) given the procedural history of this case, whatever might be its outcome at this level, an appeal is highly probable, if not certain; and (ii) an assessment of entire fairness is not scientific, and, therefore, a reviewing court might take a different view and arrive at a different entire fairness result. Thus, the analysis below proceeds on the (*arguendo*) assumption that the merger was not entirely fair.

In those circumstances, under *Emerald IV* this Court is mandated-because of the Article Fifteenth exculpatory charter provision-to determine the nature of the fiduciary duty violation giving rise to the unfairness. The issue is whether the defendants' conduct violated their duty of loyalty or their duty of care. As the Supreme Court has stated earlier the defendants can be exculpated only if the unfairness in the merger was found to have resulted *solely* from a violation of the

[129] *Emerald* IV, 787 A.2d at 98 ("If the Court of Chancery determines that the transaction was entirely fair, the director defendants have no liability for monetary damages. The Court of Chancery should address the Section 102(b)(7) charter provision only if it makes a determination that the challenged transaction was not entirely fair").

duty of care.

This Court concludes, for the reasons discussed below, that even if the merger were found not entirely fair, the director defendants would not be liable for monetary damages because the unfairness would have been, at most, solely the result of a breach of the defendants' duty of care. Moreover, defendant Berlin is not liable on the additional, alternative ground that he did not participate in any legally significant way in the May board's decision-making process.

A. Exculpation Under The May §102(b)(7) Charter Provision

In its 2001 post-trial Opinion, this Court determined that the director defendants were not liable for money damages on plaintiffs claims by reason of Article Fifteenth of May's Certificate of Incorporation. That provision, adopted in 1986 under the authority conferred by 8 ***Del. C.*** § 102(b)(7), pertinently provided:

> A director . . . of this Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (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. . . .

In its initial post-trial Opinion, this Court determined that none of the exceptions enumerated in Article Fifteenth were applicable. That Opinion set forth

the reasoning which led to that conclusion.[130] Those reasons, in the Court's view, remain valid, and are reaffirmed here in their entirety. They are not, however, repeated here in full text. Instead, the Court's reasoning is presented in a more summary form.

Article Fifteenth exculpates the director defendants from liability in this case, unless the defendants, in the merger: (i) breached their duty of loyalty, (ii) did not act in good faith (iii) committed acts that involved either intentional misconduct or a knowing violation of law, (iv) engaged in conduct that violated 8 ***Del.*** C. § 174, or (v) derived an improper personal benefit. It is the law of this case that the burden of establishing the exculpation defense must be borne by the defendants who seek exculpation. This Court previously found, and again finds here, that that burden was amply satisfied.

The analysis begins by identifying what is ***not*** in issue. Emerald advances no claim that the non-affiliated directors violated 8 ***Del. C.*** § 174, that they derived an improper benefit from the merger,[131] or that they engaged in conduct amounting to intentional misconduct or a knowing violation of law. That reduces the exculpation dispute to two issues: whether (as Emerald claims) those directors (i)

[130] PTO, 2001 WL 115340, at *20-*28.

[131] Emerald does contend that Berlin received a personal benefit from the merger, namely, a job promotion after the merger was consummated. This Court found in its earlier Opinion, however, that Berlin's promotion (to President and CEO of the combined entity), even if viewed as a benefit, was not "improper," because Berlin continued to have the same duties, and to receive the same compensation as before the merger. PTO, 2001 WL 115340, at * 19. Emerald has made no effort to confront this finding, or to show why it was incorrect. That finding is hereby reaffirmed.

breached their fiduciary duty of loyalty and/or (ii) engaged in an "act or omission not in good faith."

The duty of loyalty violations are said to consist of three instances of conduct which evidence that those defendants preferred Hall's interest over the interests of the minority stockholders. The claim that the defendants engaged in an act that was not in good faith is based on conduct which (it is argued) evidences that throughout the entire process, the defendants were "deliberately indifferent" to the interests of May's minority stockholders.[132] These arguments, previously rejected and now repackaged in a slightly different form, have no credible evidentiary support and are no more persuasive this time around than they were initially.

To put Emerald's duty of loyalty argument into context,[133] it should be emphasized that Emerald does *not* contend that Florence, Sebastian, or Strauss had an adverse personal financial interest in the merger. These gentlemen had no material financial or personal relationship with Hall that would have impaired their judgment or ability to act in the best interests of May and its public stockholders.

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[132] Emerald Post-Trial Br. at 69-73.

[133] Good faith is a fundamental component of the duty of loyalty, as the Supreme Court recognized in *Technicolor, 634* A.2d *368,* n.6 *(citing Barkan v. Amsted Industries, Inc., 567* A.2d 1279, 1286 (Del. 1989). Confusion about the relationship between the fiduciary duty of loyalty and its good faith component is attributable in part (in my view and the view of other members of this Court) to the way that Section 102(b)(7) is drafted. The structure of Section 102(b)(7) balkanizes the fiduciary duty of loyalty into various fragments, thereby creating unnecessary conceptual confusion. For example, subsection (i) of Section 102(b)(7) excludes conduct violative of the "duty of loyalty" from exculpatory protection, but then goes on, in other subsections, to carve out conduct that amounts to different examples of quintessentially disloyal conduct. One such example of disloyal conduct is unfair self-dealing, which

Nor was any of these directors financially dependent upon Hall or otherwise subject to *his* control. In short, the unaffiliated directors, whose economic interests were aligned with the May minority, were disinterested and independent insofar as this merger was concerned. Therefore, they had no motivation to prefer the interests of Hall in that transaction.

Despite that, Emerald claims that those directors did, in fact, prefer Hall's interests, and cites three "junctures" to support that claim. The first juncture was the November 24, 1987 May board meeting where those defendants allowed Hall and his counsel to access the defendants' bankers' presentation and materials. That conduct, Emerald insists, "had *nothing whatsoever* to do with care [but] [i]nstead . . . was a conscious disregard for the interests of the minority," because after Hall was given their valuation data, the directors knew that "there could be no arm's length negotiation of the most important term of the deal-the price . . . ."[134]

The problem with this contention is that it is all adjective and no noun. In this case, allowing Hall and his counsel access to Bear Steams's valuation could hardly be viewed as sinister, where the merger terms were to be negotiated based on Bear Stearns's valuation. But, even if affording Hall such access is assumed to be a process flaw, there is no evidence that it occurred because the directors deliberately intended to prefer Hall's interests, or were consciously disregarding

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subsection (iv) describes as a director's receipt of "an improper personal benefit" from a transaction. *8 Del. C.* § 102(b)(7)(iv).

[134] Emerald Post-Trial Br. at 70 (emphasis in original).

the interests of the May minority. If the basis of Emerald's theory of "conscious disregard" is the directors' supposed knowledge that there could no longer be an arm's-length negotiation of the price, the undisputed facts show otherwise. In fact, there were further **negotiations**—at arm's-length-f the merger terms. Those negotiations redounded to the disadvantage of Hall and, correspondingly, to the advantage of the May minority.

The second juncture that Emerald claims establishes that the directors breached their duty of loyalty, was their November 1987 decision to "jettison" Article Fourteenth-a decision that, if carried out, would have deprived the minority stockholders of a valuable right (to approve the merger by a super-majority vote) for no consideration in return.

This argument again substitutes adjectives for nouns. The directors did not "jettison" Article Fourteenth; they decided to put the elimination of Article Fourteenth to a vote of the May stockholders, who could have defeated the proposal, assuming the proposal were conditioned either upon Hall not voting his majority interest or upon the approving vote of a majority of the minority shares. Whether or not those conditions would have been imposed will never be known, because no shareholder vote or charter amendment ever occurred. **Instead,** Article Fourteenth remained in place, but was rendered inapplicable by the "drop down"

transaction. That transaction, the Supreme Court has found, did not violate any duty.[135]

There simply is no credible evidence that the non-affiliated directors were motivated to prefer Hall's interests, or to disadvantage the May minority, when they approved proposing to the shareholders that Article Fourteenth be repealed, or when they approved the "drop down" in place of that vote. To the contrary, and as this Court has found, what motivated the defendants was their belief that it would disserve the May stockholders' best interests to allow the merger to be thwarted by the ability of one stockholder (Emerald/Koether)-who had attempted to solicit Hall's participation in their greenmail activities-to utilize the super-majority provision to block a merger that the directors had already concluded was in the best interests of May and its minority stockholders.

The third, and final, juncture, was the non-affiliated directors' August 1988 decision not to obtain an updated fairness opinion from Bear Stearns-a decision that, Emerald claims, "had nothing whatsoever to do with *care.* It had much more to do with a rush to get the deal done—to beat the Koethers and to lock the Company up in Hall's favor—regardless of the cost to the minority."[136]

This Court cannot agree, because the preponderance of credible evidence shows that that decision had ***everything*** to do with care, and nothing to do with

[135] *Berlin,* 552 A.2d 452. That Court also found that, even if the supermajorty provisions did apply to this merger, its requirements had been satisfied in this case. *Id.* at 495.

[136] Emerald Post-Trial Br. at 71 (emphasis in original).

disloyalty. As the Court has concluded elsewhere in this Opinion, given the information then available to them, the directors could have decided-and they did decide-the updated fairness opinion issue, rationally, in good faith and independently of Hall. Manifestly, that decision could not have constituted a breach of the defendants' duty of loyalty. If any duty was breached, it could only have been the defendants' fiduciary duty of care.[137]

The director defendants have established to this Court's satisfaction that they did not breach their fiduciary duty of loyalty in negotiating, considering, approving, and deciding to consummate the merger. That leaves the remaining question, which is whether the defendants engaged in conduct that was not in good faith.

This Court has previously found as fact, in other contexts throughout this Opinion, that the defendant directors acted in good faith. Emerald's lack of "good faith" argument is an effort to reargue that finding, based on factual contentions this Court has previously rejected. Emerald argues that the defendants' conduct was "sufficiently lacking in rational business basis as to lack good faith," and that the defendants were "repeatedly indifferent" to the interests of May's minority stockholders.[138] The particulars upon which Emerald relies are that the defendants:

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[137] In this Court's view, to label the defendants' decision to act without such an opinion as "gross negligence" would, in these circumstances, stretch the commonly understood meaning of that term to (if not beyond) its outer limits.

[138] *Id.*

(i) failed to appoint a special committee to negotiate the merger; (ii) failed to retain truly independent financial advisors; (iii) met **infrequently** and were content to receive information only after crucial issues had already been resolved; (iv) knowingly disseminated false proxy disclosures; and (v) closed the merger without allowing Bear Stearns to finish its work, knowing that HREG was experiencing "financial failings" and that Bear Steams had "demanded" a "last look" before the merger was closed.

These arguments are without merit. As this Court has found (and reiterates): (i) it was not necessary for the May board formally to constitute a special committee, because the three disinterested, independent directors who negotiated the merger, assisted by their advisors, constituted a majority of the board and were fully capable of negotiating in the minority stockholders' interests; (ii) the advisors retained were, in fact, "truly independent;" (iii) the non-affiliated directors met frequently on an informal basis, and remained in communication with each other; (iv) the defendants did not disseminate (let alone 'knowingly" disseminate) any false proxy disclosures; and (v) the defendants' decision not to obtain an updated fairness opinion was made in good faith and with the best interests of the May minority stockholders in **mind.**[139] In short, Emerald's good faith argument lacks a factual foundation.

[139] **Moreover,** Bear Steams did not "demand" that it be allowed to "finish its work." Bear Steams **made no demand** whatsoever in that regard, since it regarded its engagement as completed Once the **May** shareholders voted on the transaction.

Finally, and apart from the specifics discussed above, there is no merit to Emerald's arguments-which Emerald previously advanced and this Court previously rejected in its earlier post-trial Opinion-that (i) the defendants were "indifferent" to the interests of May's minority stockholders; and that (ii) their decisions were so lacking in rational business basis as to lack good faith. The "conscious indifference" argument has no evidentiary or legal basis[140], and the preponderance of persuasive evidence, coupled with this Court's findings of fact, refute Emerald's argument that the merger lacked a "rational business basis." The merger had a compelling business rationale, and Emerald does not seriously contest that fact. Nor does Emerald dispute the fairness of the price and other merger terms as of March 1988, when May's shareholders cast their approving vote. Emerald's argument, therefore, reduces to a contention that it was irrational for the defendants to consummate the merger almost six months later because, after that delay, the price had become unfair to the May minority. But this Court has found the merger exchange ratio was fair as of the date of consummation.

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[140] See, PTO, 2001 WL 115340, at *24 (rejecting the "argument that the defendants' decision not to obtain an updated fairness opinion from Bear Steams evidenced indifference to their fiduciary duty.") and at *24-*25 ("'To [state] merely that [Emerald's] argument is unpersuasive would unfairly and half-heartedly portray the efforts made by the non-affiliated directors on behalf of the minority stock-holders . . . . . [T]hose directors acted steadfastly to assure that May's minority would not pay any more than the lowest price, or agree to any nonmonetary terms but the most favorable, that could realistically be negotiated"). The Court reaffirms these findings. The Court also reaffirms (but does not repeat) the reasons why *Strassburger* v. *Earley*, 752 A.2d 557 (Del. Ch. 2000), the only authority upon which Emerald relies to support its "conscious indifference" argument, is inapposite to the facts as found here.

A merger that has a sound business rationale and an exchange ratio that is fair cannot, at the same time and as a matter of logic, have no rational business basis.

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For these reasons, the Court concludes that (1) if (contrary to the conclusion this Court reaches here) the merger is later determined to be unfair, the unfairness could only have been the sole result of a breach of the defendant directors' duty of care; and (2) the defendants are exculpated from monetary liability for any such duty of care breach by reason of Article Fifteenth of May's certificate of incorporation.

B. Berlin's Nonliability Based On His Abstention From The May Board's Deliberations And Its Approval Of The Merger

In its earlier post-trial Opinion, this Court determined that defendant Berlin was not liable on the separate ground, independent of Article Fifteenth exculpation, that he did not participate in any legally significant way in the Board's decision-making process.[141] Emerald contests that determination, but has presented nothing that persuades this Court to alter that conclusion. Accordingly, the Court adheres to, and reaffirms, its initial determination.

The unrebutted evidence establishes that Berlin abstained from participating in the discussion or vote concerning the negotiations between Hall and the non-

[141] PTO, 2001 WL 115340, at *19. The legal foundation for that determination was Citron, 584 A.2d 490, 494, 499.

affiliated directors on November 24, 1987, the approval of the merger on November 30, 1987, the "drop down" in shares by Hall in January 1988, the filing of the preliminary proxy statement with the SEC in February 1988, the board's reaffirmance of the merger on February 13, 1988, the board's discussions concerning May's options after the issuance of the preliminary injunction, in March 1988, and the board's deliberations concerning a credit facility for HREG.[142] To the extent Berlin attended some of these meetings, or other meetings, his attendance was a process flaw that should not have been allowed to occur. Nonetheless, attendance at a meeting does not translate into participation or voting, and there is no evidence or claim that Berlin attempted to influence the views, or the vote, of any of the non-affiliated directors.

Recognizing that, Emerald advances a new argument, which it never previously advanced in this case, including in its answering brief on remand. Emerald's new argument is that Berlin's wrongdoing was not that he attempted to exert influence, but rather, that his presence (and vote) at the August 15, 1988 meeting made it possible to have a quorum, and, consequently, a valid meeting at which action could lawfully be taken to consummate the merger.[143] Berlin's vote was "key," Emerald urges, because Strauss—the third non-affiliated director—could not be present at the August 15, 1988 meeting.

[142] Tr. at 1699-1702; DX 160,170
[143] Post-Trial Oral Argument Tr., 7/19/2002, at 72-74, 135-38.

At the post-trial oral argument, the Court ruled that it would not consider that contention because it had never been advanced in any brief filed by Emerald in this proceeding. Thereafter, on July 252002, Emerald formally moved for leave to file a post-argument brief advancing that contention. The defendants vigorously oppose that motion, and the Court agrees that Emerald's motion must be denied.

This case has been pending for fifteen years. It has been the subject of many appeals and a lengthy trial with many hundreds of pages of pre-tial and post-trial briefing, including 150 pages of post-trial briefing on this remand. One would think that if Emerald thought its most recent argument had merit, it would have raised that argument in a timely and proper fashion-that is, in 1988, 1989, 1990, or sometime before the completion of this latest (and hopefully last) round of briefing fifteen years later. Emerald never did. It is settled Delaware law that a party waives an argument by not including it in its brief.'" It is also settled that a "party cannot raise anew on remand an issue that it failed to pursue on appeal."[145] Emerald has advanced no reason why this Court should depart from that rule in this case.

Nor would such a departure be equitable or serve any discernible public interest. *If* Emerald's argument were found to have substantive merit (and it is by

[144] *See, e.g., Emerald Partners,* 726 A.2d at 1224 ("issues not briefed are deemed waived"); *In re IBP, Inc. Shareholders Litig., 789* A.2d 14, 62 (Del. Ch. 2001) (party waived argument by not including it in opening post-trial brief).

[145] *Insurance Corp. of America v. Barker, 628* A.2d 38, 42 *(Del.* 1993) (citing *Washington Post Co. v. U.S. Dept. of Health & Human Serv., 865* F.2d 320, 327 (Cir. 1989)).

no means certain that it would be[146]) Emerald has not identified what consequence should flow from it. *If* Emerald's position is that the merger was invalid on the technical ground that there was no proper director action authorizing its consummation, and *if* that argument had been advanced in a timely way, then considerable resources of the parties and of the judicial system could have been conserved, by avoiding altogether, or in part, the need to conduct the kind of highly complex (and expensive to litigate) entire fairness proceeding involved here. By inducing the Supreme Court to reverse this Court's earlier judgment on the basis that an entire fairness review was legally required, and by causing the merits to be relitigated on entire fairness grounds without the benefit of the contention it now raises, Emerald should not now be permitted to make a procedural argument that, if meritorious and advanced in a timely way, might have obviated the need for an entire fairness proceeding.[147] Accordingly, Emerald's motion is again denied and its newly-raised argument is rejected. The Court concludes that Berlin is not liable

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[146] Circumstances that surround the August 15, 1988 directors meeting may be legally significant to Emerald's thirteenth hour argument. For example, at the July 23, 1988 board meeting the non-affiliated directors had decided that if the injunction were lifted, they would consummate the merger. Although Strauss was unable to be present, or vote, at the August 15 meeting, he later made clear (as he had on July 23) that he would have voted to consummate the merger. Moreover, Berlin voted in favor of consummating the merger only after he had inquired of counsel (Small) whether it was appropriate for him to vote. Small confirmed that it would be appropriate. Tr. at 1693, 1723-24. Small testified that he believed it appropriate for affiliated directors, like unaffiliated directors, to "go on record" with respect to the transaction. Tr. at 1490. Because Emerald's argument was not raised in a timely fashion, neither the parties nor the Court had an opportunity to explore the significance of these circumstances, or to uncover any other legally significant circumstances that may have existed at that time.

[147] Or, at the very least, the fair dealing aspect.

with respect to Emerald's claims, because he did not participate in any legally significant way in the conduct that forms the basis for those claims.

V. CONCLUSION

For the foregoing reasons, judgment will be entered against the plaintiff and in favor of all defendants on all of the plaintiffs claims, with costs to be borne by the plaintiff. Counsel shall confer and submit a form of order implementing the rulings contained herein.