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

IN RE FREEPORT-MCMORAN SULPHUR, INC. SHAREHOLDER LITIGATION.	)))	Consolidated C.A. No. 16729

MEMORANDUM OPINION AND ORDER

Submitted: April 28, 2005
Decided: June 30, 2005

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LAMB, Vice Chancellor.

I.

In this shareholder class action, the plaintiffs complain about the exchange ratio of a stock-for-stock merger of two widely held public companies. The plaintiffs allege that the ratio favored one company at the expense of the other and that, consequently, they received an unfair price for their shares.

The plaintiffs maintain that the directors of the defendant company breached their fiduciary duties by approving the merger. The plaintiffs allege that the directors were influenced by the shared corporate heritage of the two companies, which includes having common directors. The defendants argue that the common directors were excluded from the special committee that recommended the transaction and that a majority of the board, comprising disinterested and independent directors, approved the merger.

The defendants move for summary judgment, arguing that there is no genuine issue of material fact. For the reasons listed below, the defendants' motion for summary judgment is denied.

II.

A. Background

1. The History Of Freeport-McMoRan

The company at the center of this litigation is Freeport-McMoRan, Inc. Although not a party and apparently without a financial interest in the challenged

transaction, Freeport-McMoRan is the focus of many of the plaintiffs' allegations. A recitation of Freeport-McMoRan's history is therefore relevant to this summary judgment motion because it provides the proper context for the factual allegations.

Freeport-McMoRan was formed by the 1981 merger of Freeport Minerals ("Freeport Minerals") and McMoRan Oil & Gas Co ("McMoRan"). The combined business had operations in various industries, including oil and gas, real estate, minerals, chemicals, and sulphur. Most of Freeport-McMoRan's subsidiaries have a name that includes "Freeport," "McMoRan," or the abbreviation "FM." A list of subsidiaries named in that manner is as follows: FM Services Company, FMI Gas Corporation, FMI Hydrocarbon Company, FMRP Inc., Freeport Coal Company, Freeport Copper Company, Freeport Egyptian Sulphur Company, Freeport Export Sales Corporation, Freeport Geothermal Resources Company, Freeport International, Inc., Freeport Interstate Pipeline Company, Freeport Mining Company, Freeport Overseas Service Company, Freeport Pipeline Company, Freeport Research and Engineering Company, Freeport Rotterdam, Inc., Freeport Sulphur Company, Freeport-McMoRan Advertising, Inc., Freeport-McMoRan Business Enterprises, Inc., Freeport-McMoRan Chile Inc., Freeport-McMoRan Copper & Gold Investment Co., S.A., Freeport-McMoRan European Holdings B.V., Freeport-McMoRan Mexico, S.A. de C.V., Freeport-McMoRan Pacific Inc., Freeport-McMoRan Resource Partners,

Limited Partnership, Freeport-McMoRan Spain, Inc., P.T. ALatieF Freeport Finance Company B.V., and PT Freeport Indonesia.[1] In addition to these subsidiaries, Freeport-McMoRan also shared its name with three former subsidiaries, Freeport-McMoRan Sulphur, Inc. ("Sulphur"), McMoRan Oil and Gas Co. ("MOXY"), and Freeport-McMoRan Copper & Gold, Inc. ("Copper & Gold"), which were all publicly held companies at the time of the merger. Sulphur and MOXY would later merge and become McMoRan Exploration Co. ("MMR") in the transaction about which the plaintiffs complain.

Throughout this opinion, the court will refer to the group of these companies, which consist of Freeport-McMoRan, its subsidiaries, and former subsidiaries, as the "Freeport group" or "Freeport entities." These terms are merely labels and are not meant to connote a controlling interest or an ownership stake by Freeport-McMoRan.

2. The Parties

The plaintiffs are the stockholders of Sulphur. They complain that the merger exchange ratio was unfair to Sulphur and that, as a result, they received a smaller percentage ownership of MMR than they should have.

[1] Pls.' Ex. 72, Wohleber's Responses to Interrogatories, Ex. 1. Freeport-McMoRan also has several subsidiaries with which it did not share a common name. These subsidiaries are as follows: Agrico Chemical Company, Atlantic Copper Holding, S.A., Atlantic Copper, S.A., Delatex Properties, Inc., Eastern Mining Company, Inc., European Copper Holdings B.V., International Administrative Services Company, Island Exploration Company, Louisiana

The defendants are MOXY, Sulphur, and the directors of Sulphur, all of whom voted to approve the merger. At all relevant times, the Sulphur board had the following seven members: James R. Moffett, Richard C. Adkerson, B.M. Rankin, Jr., Robert M. Wohleber, Rene L. Latiolais, J. Terrell Brown, and Thomas D. Clark, Jr.

Sulphur's directors can be split into three categories: Common Directors, Inside Directors, and Outside Directors. The Common Directors are Moffett, Adkerson, and Rankin, who were also directors of MOXY.[2] Moffett was co-Chairman of the Board of Sulphur and co-Chairman of the Board of MOXY.[3] Adkerson was Vice-Chairman of the Board of Sulphur and co-Chairman of the Board and CEO of MOXY.[4] Rankin was a director of Sulphur and a director of MOXY.[5] In addition, Moffett, Rankin, and Adkerson had the following ties to Copper & Gold, the only other publicly traded Freeport entity, during the relevant time: Moffett was Chairman of the Board and CEO, Rankin was a director, and Adkerson was President, Chief Operating Officer, and Chief Financial Officer. Furthermore, Moffett and Rankin are two of the three founders of the original

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Enterprises, Inc., Nicaro Nickel Company, Overseas Service Company, and Swordfish Shipping Limited.

[2] Defs.' Ex. 62 at 24. In addition to sharing common directors, Sulphur and MOXY shared the same general counsel, secretary, and controller. *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

McMoRan company that merged with Freeport Minerals in 1981. W.K. McWilliams, Jr., the third founder, is not a party to this litigation. Together the first few letters of McWilliams, Moffett, and Rankin combine to spell "McMoRan."

The Inside Directors consist of Wohleber and Latiolais. Wohleber was Sulphur's President and CEO, while Latiolais was a consultant.[6] In addition, both had extensive ties to the Freeport group. Wohleber was Senior Vice President of Freeport-McMoRan from November 1996 to December 1997; Senior Vice President of Copper & Gold from November 1997 to August 1999; director and Vice Chairman of FM Services from December 1996 to August 1999; Chairman of the Board and President of ten Freeport entities[7] from December 1997 to August 1999; and director of numerous other Freeport entities.[8] Latiolais was President and CEO of Freeport-McMoRan from August 1995 to December 1997; Vice

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[6] Pls.' Ex. 72, Wohleber's Responses to Interrogatories, Ex. 1. The record is unclear about Latiolais's formal employment position. The defendant's opening brief states that Latiolais was an FM Services consultant, but Wohleber's Responses to Interrogatories does not list any relationship between Latiolais and FM Services. FM Services was an administrative company that provided services to Freeport entities, including Sulphur. Latiolais began work at a Freeport entity immediately following his college graduation in 1969. He continued working within the Freeport group until his retirement in 1998. In 1997, his final year of full time work, Latiolais received approximately $1 million in compensation. Therefore, the court will treat Latiolais as an insider regardless of which company technically employed him.

[7] Wohleber was Chairman and President of the following companies during the time period specified: FMI Hydrocarbon Company, Freeport Egyptian Sulphur Company, Freeport Export Sales Corporation, Freeport International, Inc., Freeport Interstate Pipeline Company, Freeport Pipeline Company, Freeport Rotterdam, Inc., Freeport Sulphur Company, Freeport-McMoRan Business Enterprises, Inc., and Freeport-McMoRan Chile, Inc. *Id.*

[8] Wohleber was a director for the following companies during the late 1990s: Agrico Chemical Company, Atlantic Copper Holding, Delatex Properties, Eastern Mining Company, Inc., and Swordfish Shipping Limited. *Id.*

Chairman of the Board of Copper & Gold from July 1994 to June 2001; Chairman of the Board of 22 Freeport entities[9] from December 1996 to December 1997;[10] Chairman of the Board of Swordfish Shipping Limited from January 1997 to December 1998; and director of numerous other Freeport entities.[11] Neither of the lists of positions held by Wohleber or Latiolais is complete, but both lists are representative of their respective authority within the Freeport group.

In addition to the ties to Freeport-McMoRan entities in general, Wohleber and Latiolais had a specific, although indirect, connection to MOXY through FM Services. FM Services was an administrative company owned 25% by MOXY, 25% by Sulphur, and 50% by Copper & Gold. Even though Wohleber and Latiolais may have received their paychecks through FM Services and may have

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[9] Latiolais was Chairman of the following companies during the time period specified: Agrico Chemical Company, Atlantic Copper Holding, S.A., Atlantic Copper, S.A., FMI Hydrocarbon Company, FMRP, Inc., Freeport Coal Company, Freeport Egyptian Sulphur Company, Freeport Export Sales Corporation, Freeport Geothermal Resources Company, Freeport International Incorporated, Freeport Interstate Pipeline Company, Freeport Mining Company, Freeport Pipeline Company, Freeport Research and Engineering Company, Freeport Rotterdam, Inc., Freeport Sulphur Company, Freeport-McMoRan Advertising, Inc., Freeport-McMoRan Business Enterprises, Inc., Freeport-McMoRan Chile, Inc., Freeport-McMoRan Pacific Inc., Freeport-McMoRan Spain, Inc., and Louisiana Enterprises, Inc. *Id.*

[10] Many of Latiolais's Chairman positions were held for a substantially longer time period. For example, he was Chairman of Agrico Chemical Company, FMI Hydrocarbon Company, FMRP, Inc., Freeport Egyptian Sulphur Company, Freeport Export Sales Corporation, Freeport Geothermal Resources Company, Freeport Interstate Pipeline Company, Freeport Pipeline Company, and Freeport Sulphur Company from May 1992 to December 1997. *Id.* For accuracy, the court has used the shortest time period that applies to all of his Chairman positions.

[11] Latiolais was a director for the following companies during the mid-to-late 1990s: Delatex Properties, Inc., Eastern Mining Company, Inc., Freeport Copper Company, Freeport Overseas Service Company, Freeport-McMoRan Copper & Gold Investment Co., S.A., and Nicaro Nickel Company. *Id.*

been formally employed by FM Services, the defendants maintain that Wohleber & Latiolais really worked for Sulphur.[12]

The Outside Directors consist of Brown and Clark. Brown was President and CEO of United Companies Financial Corporation and a director of Hibernia Corporation. He also served on several alumni committees for Louisiana State University ("LSU"), including the Advisory Board of LSU's College of Business. Clark was the Dean of LSU's College of Business. Except for their positions as directors of Sulphur, Brown and Clark had no other relationship with Freeport-McMoRan or its entities, including MOXY, although there is evidence of some connection between LSU and the Freeport group.[13]

While they may not have had relationships with the businesses of Freeport-McMoRan, the Outside Directors did have relationships with other directors before joining the Sulphur board. Brown met Moffett in 1984 when they both served on the board of Hibernia.[14] Brown also had a social relationship Moffett before joining the Sulphur board.[15] They belonged to the same country club, golfed

[12] For support that Wohleber did not work for MOXY, the defendants point to his deposition, in which he testifies that he did not know that MOXY was part owner of FM Services. But once confronted with the fact of MOXY's partial ownership, Wohleber did acknowledge the possibility that he provided services to MOXY. Defs.' Ex. 85 at 41-42.

[13] Pls.' Ex. 77 at 54-56. Freeport-McMoRan donated $600,000 to LSU, which, along with a state matching donation of $400,000, has endowed a million dollar chair. *Id.* at 54-55. Latiolais, a graduate of LSU, has also contributed to the university. *Id.* at 56.

[14] Pls.' Ex. 79 at 45.

[15] *Id.* at 38.

together, and hunted together.[16] In addition, Moffett asked Brown to join him in an effort at passing fiscal reform legislation in Louisiana.[17] Brown also knew Latiolais since the early 1990s[18] and they served on the board of the LSU Foundation together for at least one year.[19]

Like Brown, Clark had relationships with other directors before joining the Sulphur board. As Dean of the LSU's College of Business, Clark had responsibility to build goodwill and friendship with local business executives.[20] As part of this responsibility, Clark set about meeting 67 prominent business people in Louisiana, which included Moffett, Adkerson, and Latiolais.[21]

The seven defendant directors as a group owned approximately 3% of the outstanding Sulphur stock and 9%, of the outstanding MOXY stock.[22] On an individual basis, they owned the following amounts:[23]

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[16] *Id.* at 48.

[17] *Id.* at 46-47.

[18] *Id.* at 50.

[19] *Id.* at 22.

[20] Pls.' Ex. 77 at 47-48.

[21] *Id.* at 47.

[22] Defs.' Ex. 62 at 54-56.

[23] *Id.* at 54. John G. Amato, the general counsel for both Sulphur and MOXY, owned 553,222 shares of MOXY and 44,102 shares of Sulphur. *Id.* Amato was also Moffett's and Rankin's business partner in a real estate and hotel operation in Steamboat Springs, Colorado. Pls.' Ex. 76 at 38-39. It is unclear from the record why certain of the individual percentages appear to be computed differently in the footnotes of the Joint Proxy Statement as opposed to the charts, but any differences are negligible and immaterial to the court's analysis.

Director	*# of Sulphur shares*	*% of ownership of Sulphur*	*# of MOXY shares*	*% of ownership of MOXY*
Moffett	130,670	1.3%	1,774,359	4.1%
Rankin	37,736	0.4%	1,109,290	2.6%
Adkerson	28,186	0.3%	479,892	1.1%
Latiolais	110,820	1.1%	147,338	0.3%
Wohleber	9,694	0.1%	11,992	0.03%
Clark	500	0.01%	0	0.0%
Brown	0	0.0%	0	0.0%

3. The Formation Of Sulphur And MOXY

In the mid-1990s, Freeport-McMoRan spun off several subsidiaries in an attempt to unlock their investment potential. Two of the spin-offs were MOXY and Sulphur, which each had its own board of directors and management team. MOXY was spun off in May 1994 and concentrated its operations in the oil and natural gas industry. Sulphur, which had previously been Freeport-McMoRan's sulphur business, was spun off in November 1997.[24]

On the record date of the merger, MOXY and Sulphur were widely held by the public. Approximately 14,464 stockholders held 8,790,646 shares of Sulphur while approximately 9,987 shareholders held 42,948,694 shares of MOXY.[25]

[24] The Sulphur spin-off was not a straightforward transaction. Freeport-McMoRan originally spun off its phosphate business, including its sulphur interests, as Freeport-McMoRan Resources Partners, L.P. ("FRP"). Then, in 1993, FRP entered into a joint venture with IMC Global, Inc. ("IGL"). IGL eventually merged with Freeport-McMoRan in 1997. As part of the Freeport-McMoRan-IGL merger, Sulphur was spun off as a separate company consisting of the sulphur business.

[25] Defs.' Ex. 62 at 51.

Additionally, any interest that Freeport-McMoRan once owned in either Sulphur or MOXY had been sold to the public by the time of the merger.[26]

4. The Sulphur Business

At the time of Sulphur's formation, sulphur mining companies faced a threat from recovered sulphur, an inexpensive substitute for mined sulphur that resulted from the processing of sour natural gas and refining of sour crude oil.[27] Recovered sulphur represented a threat not only because it was inexpensive, but also because there is no qualitative difference between it and mined sulphur. Due to increasing competition from recovered sulphur, Sulphur management foresaw the very real possibility that its mined sulphur business would no longer be viable and that its two sulphur mines would need to be shut down. Faced with these long-term problems, Sulphur sought merger and acquisition opportunities that would provide growth for the company and higher returns for stockholders.[28]

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[26] Tr. at 5-8.

[27] Calling recovered sulphur "inexpensive" may be an understatement. Some oil and gas companies would pay for recovered sulphur to be "disposed of."

[28] *See, e.g.*, Defs.' Ex. 3, Memorandum from Latiolais to Moffett re: Monsanto Enviro-Chem at 1 (May 15, 1997) (mentioning a possible joint venture with Monsanto); Defs.' Ex. 14, Memorandum from Wohleber to Sulphur Board of Directors at 2 (Jan. 27, 1998) (referring to potential growth plans); Defs.' Ex. 19, Memorandum from Wohleber to Sulphur Board of Directors at 3 (Apr. 28, 1998) ("We have also been active in talking with the investment banking community and we have let them know of our keen interest for merger and acquisition opportunities."). The plaintiffs dispute the negative account of the sulphur business, calling Sulphur a "cash cow." Pls.' Answering Br. at 8. They argue that Sulphur had a long-term contract with IGL that entitled Sulphur to premium prices. *Id.* Presumably, they also meant that the contract would continue to be profitable. To support their claims, the plaintiffs cite several upbeat documents from Wohleber to the board indicating that Sulphur is "in an excellent

B. The Merger

In the Joint Proxy Statement, there is no explanation why Sulphur narrowed its focus in June 1998 from "a wide variety of growth opportunities in sulphur related businesses"[29] to a possible merger with MOXY, an oil and gas company. In the section entitled "Background of the Mergers," the Joint Proxy Statement says only that "[o]n June 3, 1998, the [Sulphur] Board held a special meeting for the purpose of discussing a possible business combination of [Sulphur] with MOXY."[30] The Joint Proxy Statement uses the same wording to describe MOXY's initiation of its side of the transaction.[31] Nowhere does the Joint Proxy Statement contain a specific reason why Sulphur would merge with MOXY. The only reason implied by the Joint Proxy Statement is that MOXY needed additional financial resources to pursue investment opportunities, while Sulphur had capital and was looking for growth opportunities. These general assertions do not address why Sulphur and MOXY decided to merge with each other as opposed to a non-Freeport entity that fit the same business criteria.

Once the merger process began, the transaction proceeded quickly. The Sulphur and MOXY boards met independently on June 3, 1998 to consider a

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position" and has a "strong financial position." *Id.* The memos, however, do not disprove the increasing competition from recovered sulphur and the fact that Sulphur's mines were at risk.

[29] Defs.' Ex. 62 at 28.

[30] *Id.* at 29.

[31] *Id.* at 28.

business combination with the other. At their separate meetings, the boards each appointed a special committee of two outside directors to consider the transaction.[32] Presumably, the boards formed the special committees because of the obvious conflict of the common directors.[33]

Sulphur's special committee ("Special Committee"), consisting of Brown and Clark, began its process by selecting legal counsel. Brown suggested Jones Day, based on his substantial prior positive experience. After determining that Jones Day was qualified and had no disqualifying conflicts of interest that would affect its representation, the Special Committee retained Jones Day as its legal counsel. Jones Day then assisted the Special Committee in evaluating financial advisors.

The Special Committee analyzed the qualifications of several financial advisors. Based on his prior experience with Lehman Brothers, Clark suggested a closer evaluation of them. Lehman gave a presentation to the Special Committee on June 25, 1998. One of the issues that arose regarding Lehman was its independence. The Special Committee requested that Lehman provide a list of all

[32] The MOXY special committee consisted of Gerald J. Ford and Robert Day, both outside directors of MOXY.

[33] *Id.* at 24 ("As directors of [Sulphur], certain members of the MOXY Board have interests that are different from or in addition to, and inherently conflict with, those of the MOXY stockholders generally. Likewise, as directors of MOXY, certain members of the [Sulphur] Board have interests that are different from or in addition to, and inherently conflict with, those of the [Sulphur] stockholders generally.").

previous engagements or relationships with Sulphur, MOXY, or any other Freeport entity. Lehman had never provided investment banking or financial advisory services to either Sulphur or MOXY. Additionally, Lehman had not been engaged by any Freeport entity since February 1996. The Special Committee then determined that Lehman was both independent and qualified and, it appears, hired them.[34]

On July 14, 1998, MOXY submitted a term sheet to Sulphur, proposing a consolidation of Sulphur and MOXY into a newly formed holding company, MMR. Under the proposal, MOXY would receive 62.5% of the new holding company, while Sulphur would receive the remaining 37.5%. The Special Committee then met to evaluate MOXY's offer. According to Lehman's valuation, Sulphur stockholders should receive between 36% and 49% of the new company. The Special Committee met again on July 22, 1998 to continue discussions about MOXY's offer. Lehman suggested countering the MOXY offer with 43%, which then represented a premium over Sulphur's share price. Lehman offered this suggestion in an attempt to give Sulphur the ability to negotiate a final price between 41% and 42%, which Lehman indicated was fair. After some

[34] The evidence as to when Lehman was actually hired is inconsistent. The Special Committee minutes from June 25, 1998 do not state expressly that Lehman had been hired, but the minutes imply as much, stating that "on July 14 [the Special Committee would] review Lehman's financial analysis of the proposed transaction." Defs.' Ex. 35. But the Special Committee minutes from July 14 state that as of July 2, Clark was still questioning Lehman about its

discussion, the Special Committee decided to submit a counteroffer of 44% based on Clark's reasoning that it would provide a better negotiating strategy.

On July 29, 1998, the chairmen of the two special committees, Ford and Brown, met to discuss their respective positions. During the meeting, Ford increased MOXY's offer from 37.5% to 40%. Brown indicated that Sulphur's Special Committee would not go below 41% and he proposed 42%. The end result was that the Special Committees agreed on a merger exchange ratio of 41.5 % for Sulphur and 58.5% for MOXY.

On August 1, 1998, the Special Committee recommended the proposed combination with MOXY to the full Sulphur board. At this meeting, Lehman discussed its financial review of Sulphur and MOXY and declared that the merger exchange ratio was fair to the Sulphur stockholders. Jones Day then reviewed the process undertaken by the Special Committee and concluded that it fulfilled its duties under Delaware law. The Sulphur board unanimously approved the merger and authorized a special meeting of Sulphur stockholders to vote on the merger.

Sulphur and MOXY issued a Joint Proxy Statement on October 9, 1998.[35] On November 17, 1998, Sulphur and MOXY stockholders approved the merger. A majority of the Sulphur independent stockholders voted in favor of the merger.

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independence, which would imply that Lehman had not yet been hired on June 25. Defs.' Ex. 37.

[35] Defs.' Ex. 62.

There were 8.7 million Sulphur shares outstanding on the record date of the merger. Of the independent shares voted, 82% were voted in favor of the merger. That figure represents 58% of the total outstanding shares.

C. The Dispute

The plaintiffs complain that the merger exchange ratio was unfair to the stockholders of Sulphur. They argue that neither Wohleber nor Latiolais was disinterested and independent under Delaware law. Combining them with the Common Directors, the plaintiffs claim, creates an interested and non-independent majority of the board of Sulphur. The plaintiffs argue that this board structure requires an entire fairness analysis that the defendants cannot meet on the record of this summary judgment action. The plaintiffs also argue that the Special Committee was not truly independent and that it recommended an unfair transaction. Thus, the plaintiffs maintain, despite forming a Special Committee, the Sulphur board's vote is not entitled to the protection of the business judgment rule. Finally, the plaintiffs argue that disclosure violations in the Joint Proxy Statement preclude the defendants from relying on the ratification of the merger by a majority of the disinterested stockholders.

The plaintiffs contend that they have introduced facts into evidence that raise genuine issues of material fact that preclude the court from granting summary judgment. Their general allegation is that the mass of entangled relationships

between Sulphur, MOXY, Freeport-McMoRan, FM Services, and the Sulphur directors call into question the fairness of the merger exchange ratio even though there are no materially conflicting economic interests. The plaintiffs argue that both Wohleber and Latiolais had sufficient ties to other Freeport entities, including MOXY, that would call into question their ability to act independently when presented with a vote on a merger. Additionally, the plaintiffs allege that Brown and Clark cannot be considered independent due to the relationship between them and Sulphur's directors, as well as the relationship between LSU and the Freeport group.

The defendants argue that a majority of the board (Wohleber, Latiolais, Brown, and Clark) were independent and disinterested. They claim that none of the purported ties listed by the plaintiffs raise a triable question of fact. They claim that any interest that any of the directors may have had, for example Latiolais's increased compensation after the merger, was immaterial and does not impinge on the disinterestedness or independence of the four non-Common Directors. Thus, they contend, the merger approval of the Sulphur board should be analyzed under the business judgment rule.

Furthermore, the defendants argue that even if a majority of the Sulphur board was materially interested in the transaction, the board's approval should still come within the scope of the business judgment rule due to either (i) the

independence of the Special Committee or (ii) the ratification of the disinterested stockholders. The defendants maintain that the Special Committee was properly formed with two independent directors and functioned in accordance with Delaware law under Brown and Clark. Since the Special Committee negotiated the deal in good faith with the MOXY special committee, the defendants argue, the Sulphur board's approval of the merger should be given business judgment protection. The defendants also claim that the business judgment rule should apply to the merger transaction because the plaintiffs have failed to raise any actionable disclosure violations in the proxy statement and therefore the ratification by the majority of disinterested stockholders was valid.

D. Procedure

On October 22, 1998, the plaintiffs filed suit, asserting claims for breaches of fiduciary duty against the directors of Sulphur, and for aiding and abetting the breaches against MOXY.[36] On January 11, 2001, Vice Chancellor Jacobs (now Justice Jacobs) granted the defendants' motion to dismiss the complaint, but also granted the plaintiffs leave to amend.[37] The plaintiffs then amended the complaint, which was subsequently dismissed in a bench ruling on September 10, 2002.[38] The

[36] This lawsuit was later consolidated with a later filed action, C.A. No. 16845.

[37] *In re Freeport-McMoRan Sulphur, Inc. S'holders Litig.*, 2001 Del. Ch. LEXIS 5 (Del. Ch. Jan. 5, 2001).

[38] *In re Freeport-McMoRan Sulphur, Inc. S'holders Litig.*, C.A. No. 16729-NC (Del. Ch. Sept. 10, 2002) (bench ruling), *rev'd, Krasner v. Moffett*, 826 A.2d 277 (Del. 2003).

plaintiffs appealed to the Delaware Supreme Court, which reversed and remanded the action.[39]

Following discovery, on March 4, 2005, the defendants moved for summary judgment. The court held a hearing on April 21, 2005. This opinion decides that motion.

III.

Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[40] When determining whether to grant summary judgment, a court must view the facts in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact.[41]

"A party opposing summary judgment, however, may not merely deny the factual allegations adduced by the movant."[42] "If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight."[43]

IV.

[39] *Krasner*, 826 A.2d 277.
[40] Ct. Ch. R. 56(c); *see also Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[41] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).
[42] *Tanzer*, 402 A.2d at 385.
[43] *Id.*

A. Sulphur's Board

1. The Common Directors

The Common Directors are clearly interested in the merger. "A director is deemed interested whenever divided loyalties are present, or a director has received, or is entitled to receive, a personal benefit from the challenged transaction which is not equally shared by the stockholders."[44] In this case, there are several ways in which the Common Directors might meet this standard of interest.

First, Moffett, Adkerson, and Rankin each had a significantly larger number of shares of MOXY than of Sulphur. Moffett had over 13 times more MOXY shares than Sulphur shares, Adkerson had over 17 times, and Rankin had nearly 30 times more MOXY shares than Sulphur shares. If the merger exchange ratio favored MOXY, the Common Directors stood to benefit personally while other Sulphur stockholders would be disadvantaged. Despite the large differences in the Common Director's ownership of Sulphur and MOXY, however, the plaintiffs' counsel appeared to concede at oral argument that these conflicting financial interests are immaterial to the court's analysis. After stating that all three Common Directors had "extraordinary net wealth,"[45] she agreed with the court that

[44] *Jacobs v. Yang*, 2004 Del. Ch. LEXIS 117, at *8 (Del. Ch. Aug. 2, 2004) (citing *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993)), *aff'd*, 2005 Del. LEXIS 38 (Del. Jan. 21, 2005).
[45] Tr. at 52.

"Moffett's ownership in either MOXY or [Sulphur] constituted only a small part of his net worth."[46] She then declined to accept the court's proposed theory that Moffett was "driven to manipulate the process" because of his disparate ownership stakes.[47] Since Moffett had the largest stake of the Common Directors in both Sulphur and MOXY and since the plaintiffs' counsel labeled all of the Common Directors with the same level of net wealth, it is a reasonable inference that the plaintiffs' counsel's answers about the materiality of Moffett's stake would apply with equal force to the stakes of Adkerson and Rankin.

Second, even if their economic interests were immaterial, the Common Directors were still not able to act independently in the transaction because they sat on both boards and owed the same duty of loyalty to both companies. Their conflicting loyalties created a structural problem that precluded them from acting independently as directors of Sulphur, any more than they could act independently as directors of MOXY, in this transaction. Indeed, the Joint Proxy Statement admits as much.[48]

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[46] Tr. at 53.

[47] *Id.*

[48] Defs.' Ex. 62 at 24. ("As directors of [Sulphur], certain members of the MOXY Board have interests that are different from or in addition to, and inherently conflict with, those of the MOXY stockholders generally. Likewise, as directors of MOXY, certain members of the [Sulphur] Board have interests that are different from or in addition to, and inherently conflict with, those of the [Sulphur] stockholders generally. In recognition of those conflicts, each of the MOXY Board and [Sulphur] Board established a special committee of independent directors to evaluate the merits of a business combination of the two companies and to negotiate the terms of such a transaction if it were found to be desirable.").

Such a simple structural conflict would disable the three Common Directors but would not necessarily raise issues about any of the other directors, such as Wohleber or Latiolais, who are arguably subject to the domination or control of one or more of the Common Directors. The question the court is left to ask is whether the record supports a reasonable inference that one or more of the Common Directors acted disloyally by proposing the merger for reasons unrelated to the business of Sulphur and by improperly influencing the other directors to approve the merger for any such reason.

The record on these points is sparse. Nevertheless, applying the summary judgment standard, the court concludes that there is evidence from which it could reasonably infer that one or more of the Common Directors was the motivating force behind the proposal to merge. If that inference is borne out at trial, the inquiry will necessarily focus on whether that Common Director (or Directors) used his (or their) ability to dominate or control any of the other four directors to influence the deliberations of the Special Committee or to secure the approval of the merger by the Sulphur board of directors. The court now turns to the evidence of those other directors' independence.

2. Inside Directors

a. Wohleber

The defendants argue that, as a matter of law, Wohleber is disinterested and

independent. They claim he is disinterested because he did not receive a personal benefit not equally shared by the stockholders. They note that Wohleber's title and compensation did not increase due to the merger. In fact, they argue that he was demoted by becoming the CFO of the resulting entity. The defendants further claim that Wohleber is independent because there is "no evidence" that he was "incapable of forming an independent judgment" about the merger.[49]

The plaintiffs respond by pointing to the numerous Freeport entities in which Wohleber was involved. Wohleber was either Chairman, Vice Chairman, Director, President, Vice President, or Treasurer of at least 25 Freeport entities from 1994 to 1999. The plaintiffs claim that Wohleber had a real and material interest in maintaining his employment throughout the Freeport group and therefore was not disinterested. They further argue that he was not independent because of his relationship with MOXY. They claim that as Vice Chairman at FM Services, a Freeport entity that was 25% owned by MOXY, Wohleber was not able to evaluate the merger on its corporate merits.

The court finds that the plaintiffs' arguments raise genuine issues of material fact about Wohleber's independence from the three Common Directors, one or more of whom apparently suggested the Sulphur-MOXY merger, or from MOXY. Wohleber's employment by FM Services indicates that he had some form of

[49] Defs.' Opening Br. at 24.

relationship with MOXY, even if it was only an indirect relationship. MOXY owned a substantial interest in FM Services when Wohleber worked there. Wohleber was a Director and Vice Chairman of FM Services from 1996-1999, as well as Vice President and Treasurer from 1995-1996. Although MOXY did not own a controlling interest in FM Services, the Freeport group did. Sulphur owned another 25% and Copper & Gold owned the remaining 50%.

The defendants mischaracterize the relationship between Wohleber, FM Services, and MOXY by claiming that "there is no evidence that he ever provided any services to MOXY through FM Services."[50] For this assertion, they rely on Wholeber's deposition for support. After a review of the deposition, it is apparent that the only support the defendants have is Wohleber's lack of memory. He states in his deposition on page 41 that he could not "recall providing any services to MOXY through [his] capacity within FM Services."[51] Tellingly, *in his next answer*, Wohleber admits that "[i]t is possible that [he] could have" provided services to MOXY through his capacity within FM Services.[52] Given this follow-up to the answer on page 41, there is a genuine issue as to whether Wohleber

[50] Defs.' Opening Br. at 24 (citing Defs.' Ex. 85 at 41-42).

[51] Defs.' Ex. 85 at 41.

[52] *Id.* at 42. The defendants disagree that Wohleber conceded this fact. They argue that his statement that he could have provided services to MOXY was merely an adoption of the questioning attorney's statement, not his own testimony. *See* Defs.' Reply Br. at 12 n.12. Since Wohleber did not offer the answer initially, the defendants argue, it is not sufficient to raise a material issue of fact as to whether he actually provided services to MOXY. *Id.*

worked, at least partially, for MOXY. Moreover, Wohleber has a similar lack of recall with regard to the MOXY board meetings. On page 42 of the deposition, immediately after he could not recall providing services to MOXY, Wohleber also could not recall attending MOXY board meetings.[53] Later in the deposition, however, Wohleber admitted that "[he] wasn't aware that [he'd] actually ever attended a MOXY meeting, until [the day before the deposition] when [he] reviewed the MOXY board minutes reflecting [his] presence at one of their meetings."[54]

Wohleber's relationship with Copper & Gold also raises questions about his independence. At Copper & Gold, Wohleber was Vice President and Senior Vice President at the same time that Moffett was Chairman of the Board and CEO, Rankin was a director, and Adkerson was President and Chief Operating Officer. Based on these titles, Wohleber presumably reported to Moffett, Rankin, and Adkerson in the Copper & Gold organizational chart. At the time of the merger, Wohleber was Senior Vice President of Copper & Gold and thus reported to the three Sulphur directors who sat on both the Sulphur and MOXY boards. Therefore, while the defendants may claim that Wohleber, in his position as CEO of Sulphur reported only to the *full* Sulphur board, they are unable to demonstrate

[53] Defs.' Ex. 85 at 42.
[54] *Id.* at 174.

that in his role at Copper & Gold he did not report directly to the Common Directors in their individual roles at Copper & Gold. Although Copper & Gold was not involved in the merger of Sulphur and MOXY, it was run by the Common Directors, who were interested in the Sulphur-MOXY merger. That fact does relate to Wohleber's potential lack of independence in this action.

Whether Wohleber's role at Copper & Gold brings him under the domination and control of one or all of the Common Directors is a triable issue. The court's inquiry into the independence of the directors' judgment "may include the subject whether some or all directors are 'beholden' to or under the control, domination or strong influence of a party with a material financial interest in the transaction under attack, which interest is adverse to that of the corporation."[55] Most relevant here is the relationship between Wohleber and Moffett, who was Chairman and CEO of Copper & Gold at the time of the merger. Given his position, Moffett could obviously fire Wohleber from Copper & Gold. Indeed, it appears as if Moffett succeeded in having Wohleber resign from MMR, the resulting entity of the Sulphur-MOXY merger, on the same day that Wohleber resigned from Copper & Gold, after a disagreement between them.[56] Although Wohleber states that Moffett

[55] *Orman v. Cullman*, 794 A.2d 5, 24 n.47 (Del. Ch. 2002).

[56] Pls.' Ex. 81, Wohleber Dep. at 37-38:

Q: And the reason for your resignation?

did not ask him to resign, the court must read the deposition in the light most favorable to the plaintiffs. In that light, it is a reasonable interpretation of Wohleber's testimony that Moffett, arguably the most powerful person in the Freeport group, caused Wohleber's resignation after a disagreement about the operation of the business. The fact that Wohleber resigned from MMR, where he allegedly had no direct report to Moffett, on the same day that he resigned from Copper & Gold, where he did have a direct report to Moffett, appears to be more than a coincidence. Wohleber's contemporaneous resignations imply that Moffett's power with the Freeport group may extend farther than his formal legal authority.

The defendants' argument that Moffett did not control Wohleber does not foreclose trial on this issue. They focus on Wohleber's response that Moffett did not suggest that he resign.[57] This single fact, isolated from the surrounding testimony, is misleading. The relevant part of Wohleber's testimony proceeded as follows: (i) Wohleber resigned because of a disagreement; (ii) that disagreement

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A: It was related to a different view and disagreement related to how we were attempting to lease our transportation and infrastructure equipment to various fertilizer companies.

Q: And who did you have that disagreement with?

A: With Mr. Moffett.

Q: Anyone else?

A: No.

Q: Okay. Did Mr. Moffett suggest that you resign?

A: No.

[57] Defs.' Reply Br. at 9 n.9.

was with Moffett; (iii) that disagreement was not with anyone else; (iv) Moffett did not suggest Wohleber resign; and (v) no specific person provided Wohleber with the severance agreement that he signed.[58] For the defendants to take one answer in this line of questioning out of context and argue that Wohleber resigned without a suggestion by Moffett distorts the evidence before the court. The issues surrounding Wohleber's resignation and his relationship with Moffett must be explored at trial.

Given Wohleber's employment at FM Services, his employment at Copper & Gold, and his inability to recall important facts, the court concludes that the plaintiffs have raised a genuine issue of material fact with regard to Wohleber's independence, especially with regard to his relationship with Moffett.

b. Latiolais

The defendants argue that, as a matter of law, Latiolais is disinterested and

[58] Pls.' Ex. 81, Wohleber Dep. at 38-39:

Q: Did Mr. Moffett ask that they be held confidential? The terms of your severance packet.

A: Mr. Moffett did not make that request of me.

Q: Did you?

A: No, I did not.

Q: Who did? Lawyers?

A: There wasn't a specific person, there was a document that was provided to me that set forth the terms of my severance agreement which, after review, I signed.

Q: Okay. Who provided it to you?

A: I don't recall specifically who provided it to me.

Q: Mr. Amato?

A: No. It would not have been Mr. Amato.

independent. They claim that he is disinterested because the amount of compensation he received as a consultant to Sulphur was immaterial when compared to his substantial net worth. They acknowledge that Latiolais received a $100,000 raise after the Sulphur-MOXY merger, but they argue that the raise resulted from increased demands on his time, not from his vote on the merger.

As for Latiolais being independent, the defendants argue that even though he once was a board member of MOXY, he resigned more than one year before the Sulphur-MOXY merger.[59] Moreover, they note that, despite holding numerous directorships with Freeport entities, Latiolais resigned from most, if not all, by January 1, 1998.[60]

While the defendants may be technically correct about Latiolais and his severing of relationships with various Freeport entities, they ignore the overarching problem about his involvement with the Freeport group. During his employment within the Freeport group, Latiolais did not distinguish between Freeport entities. Indeed, it appears as if he *could not* distinguish between them. When questioned about the ownership of various Freeport entities, Latiolais confessed that he did not know who owned a substantial number of them, including, for example, Freeport

[59] Pls.' Ex. 75 at 17.

[60] Pls.' Ex. 72, Wohleber Responses to Interrogatories, Ex. 1. Latiolais was Director and Vice President of Freeport-McMoRan Copper & Gold Investment Co., S.A. until September 24, 1998. He seems to have resigned all other Freeport-entity jobs by January 1, 1998.

Coal Company, Freeport Copper Company, Freeport Egyptian Sulphur Company and Freeport Export Sales Corporation, on each of which he was Chairman of the Board for at least four years from 1993 to 1997. Latiolais offered the following explanation for his ignorance at deposition:

> See, I mean, the problem I'm having is that as I worked at these various companies and had these various positions, *it meant nothing to me who owned what*. It was part of the totality of businesses that we ran. Certain of these businesses were created for some specific legal or tax reason. The mechanics of who owned what piece and whether it was part of another one was inconsequential to my activity. My job was everything within the Freeport family of companies was something [sic] that I was supposed to do my best running and making profitable.[61]

In the face of this clear declaration that he treated the Freeport family of companies as one cohesive group to which he reported and for which he performed services, the defendants argue that Latiolais had no business relationships, outside of Sulphur, with Moffett, Rankin, and Adkerson.[62] This is simply not credible given his deposition testimony.

By introducing evidence that Latiolais viewed the Freeport entities as one collective unit and that he spent his entire professional career at Freeport-McMoRan,[63] the plaintiffs raise genuine issues of material fact as to whether

[61] Pls.' Ex. 75 (emphasis added).

[62] Defs.' Opening Br. at 27.

[63] Before the 1981 merger of Freeport Minerals and McMoRan, Latiolais worked at a Freeport entity predecessor.

Latiolais could exercise judgment independent from the Common Directors and MOXY. As the court has observed in the context of a motion to dismiss, "[a]lthough mere recitation of the fact of past business or personal relationships will not make the Court automatically question the independence of a challenged director, it may be possible to plead additional facts concerning the length, nature or extent of those previous relationships that would put in issue that director's ability to objectively consider the challenged transaction."[64]

As the plaintiffs demonstrate, Latiolais viewed all Freeport companies as one family group, indistinct from one another. As he said at deposition, his "job was *everything* within the Freeport family of companies."[65] This testimony raises questions about Latiolais's ability to act independently in a transaction involving two Freeport entities, such as Sulphur and MOXY, even if they were widely held, public companies at the time of the transaction.

The defendants fail to rebut the plaintiffs' contention with any evidence that Latiolais could or did distinguish between Sulphur and MOXY, or any of the Freeport entities. Moreover, Latiolais worked for and received a paycheck from FM Services, which was 25% owned by MOXY and 50% by Copper & Gold, which was run by the Common Directors. Latiolais had worked for the Common

[64] *Orman*, 794 A.2d at 27 n.55.
[65] Pls.' Ex. 75 at 43 (emphasis added).

Directors for almost twenty years and had become a wealthy individual in their employ. To argue that Latiolais was independent of the Common Directors because he formally severed ties with some Freeport entities does not take into account the nature and extent of his overwhelming, career-long involvement with Freeport entities, including the entire span of MOXY's life. Delaware law recognizes that such extensive ties can operate as an exception to the general rule that past relationships do not call into question a director's independence.[66]

Viewing the evidence in the light most favorable to the nonmoving party, the court concludes that there is a material issue of fact about Latiolais's ability to objectively consider the challenged transaction. Thus, the plaintiffs have introduced enough evidence such that the court can reasonably infer that both Wohleber and Latiolais were not independent when they voted on the merger.

3. Remaining Issues

At this point, the court has determined that there is a triable question of fact as to whether a majority of the board of Sulphur could act independently when voting on the merger with MOXY. The three directors who sat on both Sulphur's and MOXY's boards, Moffett, Rankin, and Adkerson, were obviously conflicted

[66] *See, e.g., In re Ply Gem Indus. S'holders Litig.*, 2001 Del. Ch. LEXIS 123, at *4 (Del. Ch. Sept. 28, 2001) (observing, in the context of a motion to dismiss, that "past benefits conferred by Mr. Silverman, [the Chief Executive Officer and Chairman of the Board,] or conferred as the result of Mr. Silverman's position with Ply Gem, may establish an obligation or debt (a sense of 'owingness') upon which a reasonable doubt as to a director's loyalty to a corporation may be premised.").

by their dual roles. The plaintiffs have additionally introduced evidence that calls into question whether the Inside Directors were under the domination and control of the Common Directors, especially Moffett. Although both Inside Directors claim to have been functioning as Sulphur directors with no ties to MOXY, the evidence of their relationships with the Freeport group, including MOXY, combined with their own depositions, create triable issues of fact on these questions.

Trial of those issues should also clarify the remaining legal issues. For example, if, after trial, the court concludes that a majority of the Sulphur directors were free of conflicting interests and, in fact, acted independently, the entire fairness standard may not apply to the court's review of this transaction since there is no controlling stockholder.[67] The issues would be whether the Special Committee operated effectively and whether the ratifying vote of the stockholders was properly obtained. Moreover, a finding that a majority of the directors acted independently could resolve any issue about the legal effect of the vote of the Sulphur board authorizing the merger in which all directors, including the Common Directors, participated.[68] Similarly, a finding that either Wohleber or

[67] As the *Orman* court noted in its discussion of *Kahn v. Lynch Communication Sys.*, 638 A.2d 1110 (Del. 1994), "[e]ntire fairness review is not automatically triggered when a non-controlling shareholder appears on both sides of a challenged transaction." *Orman*, 794 A.2d at 20 n.36.

[68] The Delaware Supreme Court identified as an issue on remand, a question about the legal effect of the Sulphur board's vote since the Special Committee, which recommended the merger

Latiolais was not independent could both implicate the duty of entire fairness and raise an issue about the validity of the board action taken to authorize the merger if fewer than a quorum of independent directors were voting.[69]

The unusual situation presented is that, as a group, the Common Directors and Inside Directors did not own a controlling, or even substantial, interest in Sulphur. They held only 3% of the outstanding Sulphur stock.[70] Additionally, they held only 9%, of the outstanding MOXY stock. Neither of these stakes is large enough to give rise to a concern about controlling the voting power of either company.[71] Indeed, both Sulphur and MOXY were widely held and it is difficult to see how the directors could have caused the approval of the merger by the

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to the full board, consisted of fewer than a majority of a quorum. As that court remarked: "[T]he Court of Chancery may have to determine in the first instance the import of the special committee's negotiation and recommendation here where the independent directors, though less than a quorum, voted with the full board to approve the merger agreement." *Krasner*, 826 A.2d at 288.

[69] *Id.*

[70] The plaintiffs allege that the Sulphur board attempted to buttress its small position with friendly acquisitions of stock by investment companies. Specifically, the plaintiffs allege that after the announcement of the merger, HM 4 FSC, L.P., a partnership affiliated with Hicks, Muse, Tate & Furst Inc., bought a 12% stake in Sulphur and Alpine Capital, L.P. bought an 11.5% stake. *See* Pls.' Br. at 51-52. Yet there is no evidence that HM 4 FSC or Alpine Capital agreed to vote for the merger. Or, perhaps more important, there is no reason given why an investment company would purchase a large block of Sulphur stock if it knew or suspected that the announced merger would yield an unfair price for their stock. Presumably, the implication is that HM 4 FSC and Alpine Capital took positions in order to accommodate Moffett's or the Common Directors' desire to merge Sulphur and MOXY, but there is no evidence to confirm this theory.

[71] *See Jacobs*, 2004 Del. Ch. LEXIS 117, at *16 (finding that ownership of "14.7% of Yahoo!'s common stock . . . is obviously insufficient to control an election of Yahoo!'s directors").

stockholders of either company. These facts distinguish this case from *Lynch*.[72]

B. The Special Committee

Taking the evidence in the light most favorable to the nonmoving party, the court concludes that there is a genuine issue of material fact as to whether the Special Committee was independent of the other directors, especially Wohleber. As the plaintiffs point out, "Wohleber participated in every documented meeting of the [Sulphur] Special Committee including the Lehman presentation on July 14."[73] A close examination of minutes from the Special Committee meeting on July 14, 1998 shows that Wohleber was present during the entire meeting in which Lehman presented its valuation.[74] More important, the minutes state that Wohleber participated in the presentation.[75]

The defendants argue that despite Wohleber's presence, the Special Committee operated independently. They claim that Wohleber was only an informational source for the Special Committee and that he was asked to leave at

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[72] *See In re Western Nat'l Corp. S'holders Litig.*, 2000 Del. Ch. LEXIS 82, at *87-88 (Del. Ch. May 22, 2000) ("[B]ecause the absence of a controlling shareholder removes the prospect of retaliation, the business judgment rule should apply to an independent special committee's good faith and fully informed recommendation."). In *Lynch*, the Delaware Supreme Court's holding about the application of entire fairness was based on the finding that the defendant was a controlling stockholder. "[A] shareholder owes a fiduciary duty only if it owns a majority interest in or *exercises control* over the business affairs of the corporation." 638 A.2d at 1113.

[73] Pls.' Answering Br. at 44.

[74] Defs.' Ex. 44.

[75] Defs.' Ex. 44 at 1 ("Throughout this and the other parts of Lehman's presentation, member of the Special Committee and Mr. Fluckiger asked questions of, and received answer on the matters

key times.[76] This argument does not find full support in the minutes. Furthermore, there is evidence that, at least on one occasion, Wohleber sent a blind copy of a memo to the Special Committee to John Amato, who was the general counsel for *all* of the Freeport entities, as well as Moffett's and Rankin's business partner.[77] Although the memo does not contain confidential information, the fact that Wohleber found it necessary to communicate secretly with Amato raises troubling issues, especially since Amato owned shares in both Sulphur and MOXY, the great majority of which were shares of MOXY. Moreover, Amato was present for at least one Special Committee meeting, although, the minutes state simply that he "was present as a resource for the Special Committee's benefit and would leave the meeting whenever the Special Committee requested."[78] Finally, a small point about Wohleber is that he also signed Lehman's engagement letter "on behalf of" the Special Committee.[79]

If the plaintiffs are able to show that Wohleber was not independent of the Common Directors, they may also be able to show that the Common Directors influenced the Special Committee through the actions of Wohleber. This theory is

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presented and other issues raised in connection therewith from, various members of the Lehman team, as well as Mr. Wohleber, who participated from time to time in the presentation.").

[76] Defs.' Opening Br. at 33.

[77] Pls.' Ex. 20.

[78] Defs.' Ex. 35. Notably, in these minutes, Wohleber is not similarly classified as one who would leave at the request of the Special Committee.

[79] Pls.' Ex. 24 at 5.

supported by the secret communication between Wohleber and Amato, who obviously has close ties to Moffett and Rankin. Furthermore, the plaintiffs raise other issues about LSU's employment of Brown and Clark and the charitable contributions it received from Freeport entities and Sulphur's directors. The plaintiffs also question Lehman's independence because of its past relationship with Freeport entities. These issues do not need to be decided in this motion. It is enough that Wohleber participated in the Special Committee meetings and communicated secretly with Amato about the Special Committee's valuation process.

At this stage of the litigation, the court cannot state with certainty that the Special Committee was independent. Therefore, an analysis of the legal effect of the Special Committee's recommendation and full board vote should await trial.

C. Disclosure Claims

"[D]irectors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[80] "[S]hareholder ratification by a majority of the disinterested shareholders acts as a safe harbor in situations where directors' potentially conflicting self-interests are at issue."[81] "Thus, in a classic self-dealing transaction

[80] *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).
[81] *Solomon v. Armstrong*, 747 A.2d 1098, 1116 (Del. Ch. 1999).

the effect of a fully-informed shareholder vote in favor of that particular transaction is to maintain the business judgment rule's presumptions."[82]

Here, the plaintiffs make several arguments why the joint proxy statement failed to give disinterested stockholders material facts that would have allowed them to make an informed decision. They argue, among other things, that the joint proxy statement (i) did not adequately disclose the interests of Wohleber and Latiolais; (ii) did not disclose the interference with the Special Committee by Wohleber and Amato; and (iii) did not disclose material facts about Lehman's interestedness and lack of independence. The plaintiffs contend that these failures preclude the defendants from being able to rely on the ratification of the Sulphur stockholders to invoke the business judgment rule

The court finds that the disclosure claims relate to the same underlying set of facts that raise issues about the fiduciary duty claims. Since the evidence raises genuine issues of material fact about the directors' and the Special Committee's independence, it also raises issues about the disclosure of those same facts. Without proper disclosure of all material information, the Sulphur board cannot rely on stockholder ratification in its attempt to invoke the protection of the business judgment rule. Therefore, both the fiduciary duty claims and disclosure claims must be tried together.

[82] *Id.*

V.

For the foregoing reasons, the motion for summary judgment is denied. IT IS SO ORDERED.