

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

IN RE TELE-COMMUNICATIONS, INC. )  
SHAREHOLDERS LITIGATION )

CONSOLIDATED  
C.A. No. 16470

**MEMORANDUM OPINION**

Date Submitted: September 29, 2005

Date Decided: December 21, 2005

Revised: January 10, 2006

Joseph A. Rosenthal, Norman M. Monhait and Carmella P. Keener, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Arthur N. Abbey of ABBEY GARDY, LLP, New York, New York, Attorneys for Plaintiffs.

Kevin G. Abrams, of ABRAMS & LASTER LLP, Wilmington, Delaware, and Thomas A. Beck, of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Individual Defendants John C. Malone, John W. Gallivan, Paul A. Gould, Leo J. Hindery Jr., Robert A. Naify, Donne F. Fisher, Kim Magness, J.C. Sparkman and Jerome H. Kern.

CHANDLER, Chancellor

The plaintiffs in this purported class action are shareholders of Series A TCI Group Common Stock (“TCOMA”), a tracking stock reflecting the performance of the TCI Group division of Tele-Communications, Inc. (“TCI”). The TCOMA shareholders have brought various civil actions, which have now been consolidated into this action, alleging breaches of fiduciary duties by the directors of TCI<sup>1</sup> in relation to a merger with a subsidiary of AT&T Corp. (“AT&T”). The Consolidated Amended Complaint (“the Complaint”) also purported to state a claim for aiding and abetting a breach of fiduciary duty against AT&T, but that claim was dismissed more than two years ago.<sup>2</sup> Presently before this Court is the individual defendants’ motion for summary judgment. Because the record raises triable issues of fact as to whether the merger was entirely fair to the TCOMA shareholders and in respect to certain disclosure claims, the motion for summary judgment is denied in respect to such claims; in all other respects the motion for summary judgment is granted.

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<sup>1</sup> The individual defendants were directors of TCI, and are John C. Malone, chairman of the board, and chief executive officer; Leo J. Hindery, president and chief operating officer; Donne Fisher; J.C. Sparkman (both Fisher and Sparkman are consultants and former executive vice presidents of TCI); Kim Magness; John W. Gallivan; Paul A. Gould; Jerome H. Kern, vice-chairman of the board as of June 15, 1998, and special counsel with Baker & Botts, L.L.P., TCI’s principal outside counsel; and Robert Naify.

<sup>2</sup> *In re Tele-Communications, Inc. S’holders Litig.*, 2003 WL 21543427 (Del. Ch. July 7, 2003).

## I. FACTUAL BACKGROUND

TCI was a Delaware corporation organized into three divisions: TCI Group, TCI Liberty Media Group (“Liberty”), and TCI Ventures Group (“Ventures”). TCI stock was issued in six series of “tracking stocks” with two separate series, designated A and B, tracking the performance of each division. The performance of TCI Group was tracked by TCOMA and TCOMB; the performance of Liberty by LBTYA and LBTYB; and the performance of Ventures by TCIVA and TCIVB. For each division’s two series of stock, the A shares were entitled to one vote per share on all matters subject to shareholder vote and the B shares were entitled to ten votes per share; otherwise the rights of A and B shareholders for each division were identical.

TCI and AT&T had considered for some time a form of joint venture, but sometime between mid-May and mid-June 1998, the topic of discussions between the two companies shifted to a merger of an AT&T subsidiary into TCI.<sup>3</sup> In particular, it appears that the persons most involved in the

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<sup>3</sup> See PX 5 (“1999 Proxy Statement”) at 28; PX 9 at 2. The precise timeline is not of any great import, but for purposes of this motion and determining fair dealing, I will assume in plaintiffs’ favor that the first discussions of a merger occurred no earlier than mid-June.

discussions on behalf of TCI were defendants Malone and Hindery.<sup>4</sup> The record is clear that Malone insisted from the outset that, in order to obtain his consent and approval for the transaction, the TCOMB would have to receive a premium of ten percent over the consideration received by the TCOMA.<sup>5</sup>

At a meeting of the TCI board on June 15, 1998, Hindery reported on the discussions with AT&T and informed the board that merger negotiations were underway.<sup>6</sup> The board was generally supportive of the possibility of a merger with AT&T, and Hindery further informed the board that he was in discussions with Donaldson, Lufkin & Jenrette (“DLJ”) to serve as TCI’s financial advisor in connection with the AT&T transaction.<sup>7</sup> Aware of the potential conflicts faced by several of the board members, Kern proposed a special committee to “review any potential transaction,” noting that several members of the board would have significant financial and other interests in such a transaction.<sup>8</sup> Following some discussion, the board elected Gould

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<sup>4</sup> See App. To Pls.’ Br. In Opp’n to Defs.’ Mot. For Summ. J. (“PA”) Tab 11; Deposition of Leo Hindery at 26 (hereinafter all citations to depositions will be in the form of “[deponent’s surname] [page]”).

<sup>5</sup> See Malone 22, 122.

<sup>6</sup> PX 9 at 3.

<sup>7</sup> *Id.*; PX 10 at 2-3.

<sup>8</sup> PX 9 at 3-4.

and Gallivan to serve as the Special Committee.<sup>9</sup> Malone recommended that Gould and Gallivan be reasonably compensated for their efforts in connection with the transaction, though no action was taken with respect to their compensation at this time.<sup>10</sup> Before concluding the meeting, the board “determined that it would not recommend [the AT&T transactions] for approval by TCI’s stockholders or otherwise approve [the transactions] without the prior favorable recommendation of the Special Committee.”<sup>11</sup>

The Special Committee first met on June 19, 1998. The minutes of that meeting indicate that TCI and AT&T were still in discussions over key provisions of the deal, but it was understood that the proposal then on the table included a ten percent premium for the TCOMB shares.<sup>12</sup> The Special Committee discussed the premium and received advice from Dennis Friedman, counsel to DLJ, in regard to their fiduciary duties in considering the premium.<sup>13</sup> The Special Committee met again two days later, once in the morning and again in the evening,<sup>14</sup> and finally on the morning of June 23, 1998. On June 23, DLJ presented to the Special Committee their analysis and fairness opinion, and answered questions regarding the premium to be

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<sup>9</sup> *Id.*; PX 10 at 1.

<sup>10</sup> PX 9 at 4.

<sup>11</sup> PX 9 at 4; PX 10 at 1-2.

<sup>12</sup> PX 13 at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4-7.

paid to the TCOMB shares.<sup>15</sup> Friedman, together with DLJ, indicated to the Special Committee that although there had been past transactions where high-voting stock received a premium to the low-voting stock, those transactions “were less common” than when all shares were compensated equally, regardless of voting power.<sup>16</sup> Friedman then reviewed the draft merger agreement, together with a summary, explained the relevant terms and provisions to the Special Committee, and responded to questions.<sup>17</sup> After these presentations, the Special Committee voted unanimously to recommend the transactions to the full board.<sup>18</sup>

TCI’s full board met during the afternoon of June 23, 1998, and after presentations by Malone, Kern, and Hindery regarding the merger, the board deliberated, received DLJ’s board book and then Jill Greenthal, one of DLJ’s managing directors, presented DLJ’s analysis and fairness opinion to the board.<sup>19</sup> The Special Committee made a presentation,<sup>20</sup> and following further advice from counsel,<sup>21</sup> the board unanimously approved the merger.<sup>22</sup>

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<sup>15</sup> *Id.* at 8-9; PX 15.

<sup>16</sup> PX 13 at 9.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> *Id.*

<sup>19</sup> PX 16 at 1-23 (pages 2-5 and 8 are missing); PA Tab 33.

<sup>20</sup> *Id.* at 23-24.

<sup>21</sup> *Id.* at 24[-25] (page 25 is missing, but the context would indicate that it contains information regarding the presentation by counsel).

<sup>22</sup> *Id.* at 26.

TCI and AT&T publicly announced the merger the next day, on June 24, 1998. For present purposes, the relevant terms of the merger were the exchange ratios for the TCOMA and TCOMB shares: each TCOMA share was to be exchanged for .7757 of a share of AT&T common stock, and each TCOMB share was to be exchanged for .8533 of a share of AT&T common stock.<sup>23</sup> On June 22, 1998, TCOMA closed at \$35.6875, TCOMB closed at \$35.50,<sup>24</sup> and AT&T common stock closed at \$63.06. If the transaction had been consummated on that day, the TCOMA holders would have received \$48.92, a premium of \$13.23 or 37% above its market price, and the TCOMB holders would have received \$53.81, a premium of \$18.31 or 52% above its market price. The proceeds from the TCI directors' holdings in TCOMA and TCOMB had the transaction been consummated on that day are also listed below, including a column of percentage total voting power of TCI, a column of the hypothetical proceeds to each director assuming that the TCOMA and TCOMB had been treated equally, and a column for the hypothetical gain (loss) each director would have incurred had there been such equal treatment.

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<sup>23</sup> 1999 Proxy Statement, at iii.

<sup>24</sup> PX 55 at 28.

	<u>Holdings</u>		<u>% Vote</u>	<u>Proceeds</u>	<u>Proceeds (assuming equal treatment)</u>	<u>Hypothetical Gain (Loss) of:</u>
	<u>TCOMA</u>	<u>TCOMB</u>				
<u>Board of Directors</u> <sup>25</sup>						
Malone	1,350,146	30,401,772	27.3% <sup>26</sup>	\$ 1,701,935,187	\$ 1,571,786,620	\$ (130,148,567)
Magness	50,000	21,874,613	19.6%	\$ 1,179,498,977	\$ 1,085,314,385	\$ (94,184,592)
Naify	16,604,945	-	1.5%	\$ 812,241,545	\$ 821,979,648	\$ 9,738,103
Hindery	2,924,534	1,684,775	1.8%	\$ 233,711,681	\$ 228,170,475	\$ (5,541,206)
Kern	1,929,746	-	0.2%	\$ 94,394,764	\$ 95,526,479	\$ 1,131,715
Fisher	435,884	184,818	0.2%	\$ 31,266,436	\$ 30,726,052	\$ (540,383)
Gould	88,090	246,271	0.2%	\$ 17,560,599	\$ 16,551,572	\$ (1,009,028)
Sparkman	171,056	-	0.0%	\$ 8,367,314	\$ 8,467,631	\$ 100,317
Gallivan	73,154	-	0.0%	\$ 3,578,375	\$ 3,621,277	\$ 42,902
Special Committee	161,244	246,271	0.2%	\$ 21,138,974	\$ 20,172,848	\$ (966,126)
Board Total	23,627,555	54,392,249	50.8%	\$ 4,082,554,879	\$ 3,862,144,140	\$ (220,410,739)

Assumptions

AT&T Common Stock, June 22, 1998 Closing Price	\$	63.06
Blended Weight		0.785
TCOMA Exchange Rate		0.7757
TCOMB Exchange Rate		0.8533
Total TCOMA Shares Outstanding <sup>27</sup>		473,657,007
Total TCOMB Shares Outstanding <sup>28</sup>		64,444,193

<sup>25</sup> See PB at 11, Ex. J to Affidavit of Thomas A. Beck in support of Defs.' Mot. For Summ. J.

<sup>26</sup> Pursuant to a voting agreement with the Magness estate, Malone had the right to vote all Magness's TCOMB shares. See Malone 24-26. Malone therefore had the right to vote approximately 47% of the total voting power of the TCI shares entitled to vote on the AT&T merger.

<sup>27</sup> 1999 Proxy Statement at 167.

<sup>28</sup> *Id.*



On December 10, 1998, the TCI board met to consider the Proxy Statement issued in connection with the merger, and again reaffirmed its support for the merger.<sup>29</sup> On February 17, 1999, the TCI board met to conduct the necessary business before shareholder approval of the merger, which occurred at the special meeting held that same day.<sup>30</sup> In addition, hearkening back to the promise of “reasonable” compensation for the Special Committee members, Kern proposed, and the full board approved (with Gallivan and Gould abstaining), a payment of \$1 million each to Gallivan and Gould for their service on the Special Committee.<sup>31</sup> TCI’s shareholders overwhelmingly approved the merger, with 2,319,128,104 votes cast in favor of the merger, 1,362,742 against, and 1,188,489 withheld, or in other words, 99.89% of the votes cast were cast in favor of the merger.<sup>32</sup> The merger was consummated on March 9, 1999, when AT&T common stock closed at a price of \$85.56.

## II. STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

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<sup>29</sup> PX 19 at 1-2.

<sup>30</sup> See PX 14.

<sup>31</sup> *Id.* at 8-9.

<sup>32</sup> Ex. K to Affidavit of Thomas A. Beck in support of Defs.’ Mot. For Summ. J., at 75-76.

affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”<sup>33</sup> In ruling on the motion, this Court must view the facts in the light most favorable to the non-moving party, and make all reasonable inferences in favor of the non-moving party.<sup>34</sup> In the event that the moving party demonstrates that no genuine issue of material fact exists, the non-moving party must then produce evidence that creates a triable issue of material fact, lest summary judgment be entered against the non-moving party.<sup>35</sup>

### III. ANALYSIS

#### A. *Duty of Disclosure*

Before I reach the substantive issues regarding the transaction, I first consider plaintiffs’ disclosure claims. Plaintiffs have alleged five disclosure violations in the 1999 Proxy Statement.<sup>36</sup> Delaware follows the federal standard articulated in *TSC Industries v. Northway*<sup>37</sup> for determining materiality.<sup>38</sup> Omitted information is material if it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of

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<sup>33</sup> CT. CH. R. 56(c).

<sup>34</sup> *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

<sup>35</sup> *McGowan v. Ferro*, 859 A.2d 1012, 1027 (Del. Ch. 2004), *aff’d*, 873 A.2d 1099 (Del. 2005).

<sup>36</sup> Compl. ¶¶ 26-27.

<sup>37</sup> 426 U.S. 438, 449 (1976).

<sup>38</sup> *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

information available,” and there is a “substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”<sup>39</sup> Materiality is generally considered a question of fact, but summary judgment of materiality claims is appropriate when established omissions are “so obviously unimportant to an investor, that reasonable minds cannot differ on the question of materiality.”<sup>40</sup>

Of the five disclosure violations alleged in the Complaint, plaintiffs have only briefed four of those five alleged violations in opposition to the motion for summary judgment, even though all five were briefed by defendants.<sup>41</sup> I therefore treat the alleged disclosure violation stemming from the incorrectly calculated premium for the TCOMB shares as waived.<sup>42</sup>

### 1. Value of Equity-Related Benefits

Plaintiffs first allege that the 1999 Proxy Statement contained inadequate disclosures as to the value of certain equity-related benefits possessed by TCI’s officers and directors.<sup>43</sup> Plaintiffs argue that this

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<sup>39</sup> *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

<sup>40</sup> *Id.* at 450 (quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)).

<sup>41</sup> The first and fourth allegations regarding valuation of insider stock and stock options were addressed together by the defendants, and I do the same.

<sup>42</sup> See *Clements v. Rogers*, 790 A.2d 1222, 1239-40 (Del. Ch. 2001).

<sup>43</sup> Compl. ¶ 27(a), (d); 1999 Proxy Statement at 54-55.

information is material to a reasonable shareholder in determining the defendants' financial interests in the merger. Even if I were to agree with plaintiffs' position that this information is material in this case, the information plaintiffs seek is contained in sufficient detail in the 1999 Proxy Statement and the documents expressly incorporated therein, negating a disclosure violation.<sup>44</sup>

The proxy statement for TCI's 1998 annual stockholder meeting contained the most valuable and detailed information incorporated by reference into the 1999 Proxy Statement.<sup>45</sup> That document outlines in detail the stock and options held by TCI insiders and other financial connections that might be relevant.<sup>46</sup> To the extent the values of those equity-related benefits are not expressly calculated, the ordinary shareholder could simply multiply the number of shares and the share price; it is not necessary that the 1998 Proxy Statement contain each such calculation.<sup>47</sup> The value of the options are not as easily calculated, as valuation metrics for options (*e.g.*, intrinsic value, Black-Scholes, etc.) require knowledge of the strike price, and the 1998 Proxy Statement did not exhaustively detail the strike price of

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<sup>44</sup> See 1999 Proxy Statement at 19; *Orman v. Cullman*, 794 A.2d 5, 35 (Del. Ch. 2002) (information contained in document incorporated by reference is sufficiently disclosed).

<sup>45</sup> PX 24.

<sup>46</sup> *Id.* at 3-16, 20-36, 42-62 (pagination from original document).

<sup>47</sup> See *Kahn v. Roberts*, 679 A.2d 460, 467 (Del. 1996).

each option. Nonetheless, assuming either miniscule or massive strike prices, a reasonable shareholder might assemble a range of option values extending from nearly zero up to nearly the share price. The issue then is the materiality of the difference between the actual option values and the range of values effectively disclosed by the 1998 Proxy Statement. I conclude that there was no duty to exactly specify and disclose such information. First, the range of values disclosed by the 1998 Proxy Statement can be sufficiently informative in this case. Second, for the most part the options were to purchase TCOMA shares—not TCOMB shares. In the context of this transaction and potentially misaligned interests of directors, such options would have been inconsequential to a reasonable investor examining the possibility of divergent financial interests of a board holding inordinate amounts of TCOMB shares.

## 2. The Compensation Promised to the Special Committee

Plaintiffs argue that the financial interests of the Special Committee were not disclosed in the 1999 Proxy Statement. Additionally, plaintiffs argue that the \$1 million payments to each member in connection with their efforts were not disclosed. Though the latter allegation (both substantively and in the disclosure context) does not appear in the Complaint, I will infer it from the allegation that “the public holders of TCOMA shares are entitled to

full and fair disclosure concerning the specifics of these defendants' financial interests in the transactions."<sup>48</sup> As a matter of fact, it is true that the 1999 Proxy Statement does not disclose any plan of compensating Gould and Gallivan, nor the eventual payments of \$1 million to each member of the Special Committee. Because of the non-disclosure, materiality then becomes the issue. Beginning with the latter bit of information, the \$1 million payments were only considered and approved by the TCI board on February 17, 1999, well after the Special Committee had conducted its duties.<sup>49</sup> Defendants thus argue that the final \$1 million payments could not be material to a shareholder, as they could not contaminate a Special Committee's independence and process that had taken place over six months earlier.

The *plan* to reasonably compensate the Special Committee, however, was approved on June 15, 1998, *before* the Special Committee's deliberations and negotiations.<sup>50</sup> I conclude that non-disclosure of the plan to reasonably compensate the members of the Special Committee could be material to the reasonable shareholder: the uncertain, contingent, and potentially large nature of the payments, without any objective benchmarks

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<sup>48</sup> Compl. ¶ 27(a).

<sup>49</sup> PX 14, 8-9.

<sup>50</sup> PX 9 at 4.

or other measures,<sup>51</sup> could have given Gould and Gallivan additional and undisclosed financial interests in the transaction that might have affected their judgments. Compensation of Special Committee members that is contingent, ambiguous, or otherwise uncertain, raises a triable issue of material fact as to what each member anticipated in the event the Special Committee approved the transaction, and whether such anticipated reward was significant to the reasonable shareholder.<sup>52</sup>

### 3. The Board's "Careful Consideration" of the TCOMB Premium

Plaintiffs allege that the statement that the "TCI Board and the Special Committee *carefully considered* the premium payable to the [TCOMB shareholders] in connection with its decision to approve the Merger Agreement and determined that such premium was an acceptable control premium to such holders under the circumstances,"<sup>53</sup> "fails to disclose what the 'careful consideration' of the Special Committee and the TCI Board entailed and what factors led them to determine that the 10% premium was

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<sup>51</sup> *Id.* The definition of "reasonable" compensation, as used by the board, turned out to be quite elastic.

<sup>52</sup> I pass over, for the moment, how one might rationally consider a \$1 million payment for four meetings over a one-week period to be "reasonable" compensation. I also pass over, for the moment, the rather obvious question of how a Special Committee member might act when he suspected that potential compensation might hinge on the answer he were to give.

<sup>53</sup> 1999 Proxy Statement at 52 (emphasis added).

in fact acceptable.”<sup>54</sup> In their brief, however, plaintiffs take a slightly different tack, arguing instead that this statement was false and misleading because the Special Committee did not, in their view, “carefully consider” the premium paid to the TCOMB holders. As set forth below, only the latter theory will survive. Furthermore, plaintiffs also attempt to invoke the rule relating to partial disclosures and argue that, in light of the Proxy Statement’s declaration of “careful consideration,” defendants are required to “provide the stockholders with an accurate full, and fair characterization of those historic events.”<sup>55</sup> The rule that a board is not required to disclose “all available information,”<sup>56</sup> much less the “various discussions and deliberation of the various board members,”<sup>57</sup> is more applicable here.

The 1999 Proxy Statement discloses both the relevant history of the merger,<sup>58</sup> the actions taken by the Special Committee,<sup>59</sup> and the reasons for those actions.<sup>60</sup> It is true that the 1999 Proxy Statement does not outline in detail the precise actions and deliberations by the Special Committee that would allow a reader of the 1999 Proxy Statement to decide for herself

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<sup>54</sup> Compl. ¶ 27(c).

<sup>55</sup> *Arnold v. Soc’y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994).

<sup>56</sup> *Stroud v. Grace*, 621 A.2d 75, 85 (Del. 1992).

<sup>57</sup> *Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996).

<sup>58</sup> 1999 Proxy Statement at 28-30.

<sup>59</sup> *Id.* at 29.

<sup>60</sup> *Id.* at 34-39.



whether the Special Committee’s consideration of the merger premium constituted “careful consideration” as opposed to ordinary consideration. This, however, is not required. No Delaware decision has ever held that a more detailed description of a committee’s deliberations, either akin to the minutes of that committee, or a transcript of committee meetings, or some other description of the give and take and discussions of the committee must be disclosed in order to support a statement of “careful consideration.” Instead, the courts of Delaware have repeatedly stated that, in the context of disclosures, less disclosure is often more appropriate than more in order to avoid burying shareholders beneath a tome of impenetrable complexity and length.<sup>61</sup>

Plaintiffs further argue that the statement in the 1999 Proxy Statement regarding “careful consideration” of the TCOMB premium was simply inaccurate. In *Clements v. Rogers*, a special committee of independent directors was charged with negotiating on behalf of the subsidiary (Chapparral) on whose board those directors sat.<sup>62</sup> Chapparral’s parent

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<sup>61</sup> See *In re Santa Fe Pacific Corp. S’holder Litig.*, 669 A.2d 59, 67 (Del. 1995); *In re Vitalink Commc’ns Corp. S’holders Litig.*, 1991 WL 238816, at \*14 (Del. Ch. Nov. 8, 1991), *aff’d sub nom. Grimes v. John P. McCarthy Profit Sharing Plan*, 610 A.2d 725 (Del.), *cert. denied*, 506 U.S. 861 (1992); *Zirn v. VLI Corp.*, 1995 WL 362616, at \*4 (Del. Ch. June 12, 1995), *aff’d*, 681 A.2d 1050 (Del. 1996). It bears noting that the 1999 Proxy Statement was already more than 200 pages long, excluding exhibits.

<sup>62</sup> 790 A.2d 1222.

corporation, Texas Industries (TXI), had offered to purchase the remaining 16% of the subsidiary's stock by merger, and the special committee was to negotiate with TXI, which had made an initial offer. The proxy statement contained statements that the Chaparral special committee was "knowledgeable," disinterested, well advised, and had negotiated with TXI at arms-length.<sup>63</sup> The proxy statement further advised the Chaparral shareholders that the special committee "was solely concerned with the public stockholders' welfare" and that its recommendation of the merger "was based solely on what was in the best interests of the public stockholders."<sup>64</sup> The defendants' motion for summary judgment on disclosure claims based upon these statements was denied because depositions of the members of the special committee indicated that they believed that their duty in negotiating with TXI was not "solely" for the benefit of the minority, and that assuming the facts in the favor of the plaintiffs, this misrepresentation could constitute a violation of the duty of disclosure.<sup>65</sup>

Regarding plaintiffs allegation that the statement of "careful consideration" was false or misleading, this case is quite similar. The record

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<sup>63</sup> *Id.* at 1240.

<sup>64</sup> *Id.* at 1242.

<sup>65</sup> *Id.* at 1242-43, 1247-48.

raises genuine issues of material fact regarding the level of care applied by the Special Committee in considering the TCOMB premium, as will be discussed below, including whether the historical average of the TCOMB trading premium was ever examined,<sup>66</sup> and the muddled mandate of the Special Committee.<sup>67</sup>

For all these reasons, I conclude that genuine issues of material fact remain in relation to the non-disclosure of plans to compensate the members of the Special Committee and in the disclosure describing the Special Committee's level of care in examining the TCOMB premium. Summary judgment is granted in favor of the defendants, however, on all other disclosure claims asserted in the complaint.

*B. Substantive Standard of Review*

1. Entire Fairness Applies to the Transaction

The business judgment rule is a presumption that a board of directors, “acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.”<sup>68</sup> A plaintiff generally rebuts the business judgment rule by alleging (and then

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<sup>66</sup> Gould 59-60.

<sup>67</sup> Gallivan 38-40.

<sup>68</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

demonstrating at trial) a breach of fiduciary duty.<sup>69</sup> In transactions where directors stand “on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.”<sup>70</sup> A demonstration of fairness is also appropriate in evaluating transactions between the corporation and a third party when the directors of the corporation (and the affiliates of such directors) own significant non-majority stakes of the corporation’s voting shares and have personal interests that significantly diverge from those of other equity holders.<sup>71</sup>

In *In re FLS Holdings, Inc. Shareholders Litigation*, the allocation of proceeds in a cash merger was challenged by holders of non-voting preferred shares.<sup>72</sup> The FLS senior management, directors, and their affiliates held over 80% of the voting common stock as follows: senior management held 33.78%, one investor held 45.56%, and a second investor held 4.3%.<sup>73</sup> In other words, no single investor held more than 50% of the voting common stock. Nonetheless, in rejecting a proposed non-monetary settlement, then-

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<sup>69</sup> *Solomon v. Armstrong*, 747 A.2d 1098, 1111-12 (Del. Ch. 1999), *aff’d*, 746 A.2d 277 (Del. 2000).

<sup>70</sup> *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

<sup>71</sup> *See In re FLS Holdings, Inc. S’holders Litig.*, 1993 WL 104562, at \*5 (Del. Ch. Apr. 21, 1993).

<sup>72</sup> *See id.* at \*1.

<sup>73</sup> *See id.* at \*2.

Chancellor Allen determined that entire fairness applied to the transaction, and further that defendants would bear the burden of establishing the fairness of the allocation at trial.<sup>74</sup>

In *Levco Alternative Fund Ltd. v. Reader's Digest Association, Inc.*, holders of Class A non-voting common stock challenged the recapitalization of Reader's Digest Association, Inc., and sought a preliminary injunction.<sup>75</sup> The key to the recapitalization proposal was the agreement by Reader's Digest to purchase shares of Class B voting stock owned by a group of funds that controlled 50% of the Class B voting stock.<sup>76</sup> In a brief ruling, the Delaware Supreme Court noted that entire fairness applied when a party stands on both sides of a transaction, and applied entire fairness to the proposed recapitalization.<sup>77</sup>

TCI directors held significantly more TCOMB shares than TCOMA shares. Of the total TCOMA and TCOMB shares outstanding as of December 31, 1998, only 12% were TCOMB shares,<sup>78</sup> and of the shares

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<sup>74</sup> *See id.* at \*5. Assumedly, defendants failed to shift the burden of proving entire fairness because there was no informed shareholder vote by the non-voting preferred shareholders, and because there was no “truly independent agency” acting on behalf of the preferred shareholders—i.e. there was no independent special committee. *See id.*

<sup>75</sup> *See Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, Inc.*, 2002 WL 1859064, at \*1 (Del. 2002).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*2.

<sup>78</sup> 1999 Proxy Statement at 167 (  $64,444,193 / ( 473,657,007 + 64,444,193 ) = 11.98\%$  ).

available to the public (excluding the board's holdings), only 2% were TCOMB shares.<sup>79</sup> In contrast, of the TCOMA and TCOMB shares held by the TCI directors, nearly 70% were TCOMB shares.<sup>80</sup> Additionally, the TCOMB class was almost entirely comprised by the board: 84% of all the TCOMB shares outstanding were held by five members of the board,<sup>81</sup> so any premium exclusively granted to the class would primarily benefit these directors. With the AT&T common stock price of June 22, 1998 (immediately before the board's approval of the merger), those five members of the board would have received an additional \$220 million due to the TCOMB premium.<sup>82</sup> Overall and upon closing, the holders of TCOMB received an additional \$376 million premium at the expense of the TCOMA holders.<sup>83</sup>

As in both *FLS* and *Levco*, the interests of two distinct classes significantly diverged in this transaction, by over \$350 million at closing. As in *FLS*, no single shareholder possessed more than 50% of the vote, but the financial interests of a number of directors holding large amounts of

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<sup>79</sup> *Id.* at 52, 167.  $( ( 64,444,193 - 54,392,327 ) / ( ( 473,657,007 - 23,627,555 ) + ( 64,444,193 - 54,392,327 ) ) = 2.18\% )$ .

<sup>80</sup> *Id.*  $( ( 30,401,772 + 23,990,555 ) / ( 23,627,555 + 30,401,772 + 23,990,555 ) = 69.72\% )$ .

<sup>81</sup> *Id.*  $( ( 30,401,772 + 23,990,555 ) / 64,444,193 = 84.40\% )$ .

<sup>82</sup>  $\$220,410,739 = \$63.06 * ( 54,392,249 * ( 0.8533 - 0.785 ) + 23,627,555 * ( 0.7757 - 0.785 ) )$ .

<sup>83</sup>  $\$376,595,624 = \$85.56 * 64,444,193 * ( 0.8533 - 0.785 )$ .

TCOMB shares significantly diverged from the interests of their constituent shareholders. Because a clear and significant benefit of nearly \$300 million<sup>84</sup> accrued primarily (over 84% of the total TCOMB premium proceeds) to such directors controlling such a large vote of the corporation, at the expense of another class of shareholders to whom was owed a fiduciary duty, then a standard of entire fairness applies.<sup>85</sup>

Alternatively, evidence in the record suggests that a majority of the board of directors were interested in the transaction, requiring an entire fairness analysis. Delaware law requires courts to consider the independence of directors based on the facts known to the court about them specifically, the so-called “subjective ‘actual person’ standard.”<sup>86</sup> In order to rebut the presumption of director disinterestedness and independence, a stockholder must show that the directors’ self-interest materially affected their independence.<sup>87</sup> In other words “[t]o be disqualifying, the nature of the director interest must be substantial,” not merely “incidental.”<sup>88</sup> A “de

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<sup>84</sup>  $\$299,053,962 = \$85.56 * ( 54,392,249 * ( 0.8533 - 0.785 ) + 23,627,555 * ( 0.7757 - 0.785 ) )$ .

<sup>85</sup> I note that at oral argument defendants attempted to distinguish these cases from the facts at hand, by pointing to distinctions in respect to fairness of process and price—issues that are quite different from the threshold question of whether to apply an entire fairness standard at all.

<sup>86</sup> *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995).

<sup>87</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993).

<sup>88</sup> *Cinerama v. Technicolor*, 663 A.2d at 1169.

minimus departure” from the requirement that all stockholders be treated equally does not “amount to an actionable breach of fiduciary duty.”<sup>89</sup>

Evidence in the record suggests that a majority of the board of directors materially benefited from the TCOMB premium: Malone (over \$100,000,000), Magness (over \$90,000,000), Hindery (over \$5,500,000), Gould (over \$1,000,000<sup>90</sup>) and Fisher (over \$500,000). In light of what these directors actually received in the transaction, such interests in approving the TCOMB premium were substantial, and the benefits were material to each respective director. Therefore, a standard of entire fairness applies.

## 2. The Burden of Proving Entire Fairness Rests on Defendants

The initial burden of proof rests upon the director defendants to demonstrate the fairness of a particular transaction. Ratification of the transaction by disinterested directors or shareholders can have a powerful legal effect. Ratification by a majority of disinterested directors, generally serving on a special committee, can have the effect of shifting the burden

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<sup>89</sup> *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 595 n.7 (Del. Ch. 1986) (controlling shareholder’s ownership interests created no significant bias where such ownership of each class was substantially equal).

<sup>90</sup> As mentioned earlier, what sort of compensation Gould expected as a member of the Special Committee, and whether Gould expected different compensation for approving or rejecting the transaction (and the TCOMB premium) remains a triable issue of material fact.



onto the plaintiff shareholders to demonstrate that the transaction in question was unfair.<sup>91</sup> In order to shift the burden, defendants must establish that the special committee was truly independent, fully informed, and had the freedom to negotiate at arm's length.<sup>92</sup>

On this motion, where I must draw all reasonable inferences in favor of plaintiffs, facts in the record suggest that the Special Committee was not fully disinterested. Gould's holdings of TCOMB dwarfed both his and Gallivan's TCOMA holdings: Gould beneficially owned 246,271 TCOMB shares, and both he *and* Gallivan combined beneficially to own only 161,244 TCOMA shares.<sup>93</sup> Such holdings, together with the suspiciously contingent compensation of the Special Committee discussed earlier, sufficiently impugn the independence of the Special Committee to prevent any burden shifting. I cannot conclude at this summary judgment stage that Gould and Gallivan constitute a Special Committee of disinterested directors such that their approval of the merger with AT&T would shift the burden upon the plaintiffs to demonstrate unfairness.

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<sup>91</sup> See *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).

<sup>92</sup> See *Kahn v. Tremont*, 694 A.2d 422 (independent committee does not shift burden when two members showed lack of diligence, the most active member of the committee had long history of providing legal and advisory services to controlling shareholder, and committee's advisors had numerous relationships with interested parties); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at \*5 (Del. Ch., 2004).

<sup>93</sup> 161,244 = 88,090 + 73,154.

Informed ratification by a majority of disinterested shareholders can create a burden-shifting effect even when persons whose interests arguably differ from those of the disinterested shareholders perform the remainder of the process by which the transaction is negotiated and structured.<sup>94</sup> Defendants, however, retain the burden of showing complete disclosure of all material facts relevant to the transaction.<sup>95</sup> As stated earlier, issues of material fact remain regarding disclosure of both the planned payments to Gould and Gallivan and the “careful consideration” of the Special Committee. As I am required to view all the facts in the light most favorable to plaintiffs, at this stage the defendants shall continue to bear the burden of proving entire fairness.

### *C. Fair Dealing*

As previously stated, a test of entire fairness is a two-part inquiry into fair dealing—the process leading to the consummation of the transaction—and fair price—the end result.<sup>96</sup> As defendants still carry the burden of demonstrating fair dealing, defendants must show the lack of any process

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<sup>94</sup> *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985); *Solomon*, 747 A.2d at 1113-17.

<sup>95</sup> *Weinberger*, 457 A.2d at 703.

<sup>96</sup> I note that even if the price is found to be unfair, an analysis of fair dealing is required to determine the extent of liability to directors under DGCL §102(b)(7). *Emerging Communications*, 2004 WL 1305745, at \*28.

flaws that would likely lead to an unfair result.<sup>97</sup> Defendants have not successfully addressed certain process flaws suggested by the record. Though these flaws might be adequately explained at trial, they do not presently support defendants' motion for summary judgment. The nature of these process flaws are discussed in roughly chronological order.

#### 1. The Special Committee Did Not Have a Clear Mandate

Perhaps the most daunting problem facing the Special Committee was the ambiguity of its mandate, as this weak cornerstone seemingly contributed to numerous flaws that followed. A special committee's clear understanding of its own mandate is an important factor facilitating the knowledgeable and careful fulfillment of its purpose.<sup>98</sup> The June 15 board meeting minutes describe the formation of a Special Committee of outside directors to review any proposed transaction with AT&T.<sup>99</sup> The board reasoned that because several of the board's members would have significant financial and other interests in such a transaction, they might be deemed "interested" directors under Delaware law.<sup>100</sup> The minutes do not describe how certain directors might be interested or the Special

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<sup>97</sup> *Emerald Partners*, 2003 WL 21003437, at \*28.

<sup>98</sup> See *Clements*, 790 A.2d 1222 (finding that repeated statements indicating a member's misunderstanding of the special committee's mandate was factor in determining that the special committee's review was less pristine than disclosed).

<sup>99</sup> PA Tab 19.

<sup>100</sup> *Id.*

Committee’s exact assignment. Deposition testimony in this respect is less than helpful, as Gallivan and Gould had different understandings of the committee’s duties. Gallivan understood that the committee’s assignment was to represent TCOMA holders and to ensure that they received fair consideration;<sup>101</sup> in particular, his own assignment was to ensure that what the TCOMA holder received was fair in relation to what the TCOMB holders received.<sup>102</sup> Gould understood his assignment to look after all the shareholders’ interest—not the TCOMB solely and not the TCOMA.<sup>103</sup>

Defendants tacitly argue that there were no misunderstandings, but rather that each member of the Special Committee saw their discrete individual tasks as combining to further the single (or possibly multifaceted) mandate of the Special Committee.<sup>104</sup> This additional mandate was to “have more effective day-to-day oversight of a transaction which was expected to unfold quite quickly.”<sup>105</sup> Possibly the Special Committee’s division of labor

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<sup>101</sup> Gallivan 38 (“Well, it was my understanding that we were representing the [TCOMA holders] to determine fair valuations .... [Representing the TCOMB holders] wasn’t the job of this committee.”).

<sup>102</sup> *Id.* 40, 77 (“As far as I was concerned, I was just a member of the committee to be satisfied that the evaluation of the A [TCOMA] and B [TCOMB] stock was fair to the A’s[TCOMA].”)

<sup>103</sup> Gould 72, 74, 76.

<sup>104</sup> Defendants acknowledge the Special Committee members’ divergent beliefs but do not clarify or explain them. Individual Defs.’ Opening Br. in Supp. of Their Mot. for Summ. J. at 27.

<sup>105</sup> Oral Argument Transcript, at 18.

was efficient and allowed it to monitor multiple aspects of the transaction.<sup>106</sup> Such efficient division of labor, however, comes with a price when it is not clearly described, and when roles of each member are not clearly delineated: it would have a dilutive effect on the power and direction of the Special Committee's aim of protecting the interests of the TCOMA holders. Nonetheless, reasonably construing this record in the light most favorable to plaintiffs, the members of the Special Committee disagreed over the Special Committee's mandate, initiating a structural flaw that fissured throughout the process that followed.

## 2. Choice of Directors

The ambiguous or misunderstood mandate of the Special Committee probably foreordained a choice of directors not ideally aligned with those of the TCOMA holders. Gallivan's own holdings adequately represented the financial interests of a TCOMA shareholder: he held no TCOMB shares but held nearly \$5 million worth of TCOMA shares,<sup>107</sup> and eventually suffered a loss of nearly \$60,000 due to the preferential treatment of the TCOMB

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<sup>106</sup> See PA Tab 31 at 2 (Special Committee addressed: actual terms of the transaction, including break-up fee; components of the transaction which might be viewed as providing special benefits to the directors and officers of TCI subsidiaries, and to TCI management, including Malone).

<sup>107</sup>  $\$4,855,150 = (73,154 * 0.7757 * \$85.56)$ .

shares.<sup>108</sup> As mentioned earlier, however, Gould primarily held TCOMB shares, and with the preferential treatment of the TCOMB shares actually gained \$1.4 million.<sup>109</sup> Defendants could not explain why Naify, a director who suffered a loss of over \$13 million due to the TCOMB premium,<sup>110</sup> was not selected to be on the Special Committee.<sup>111</sup>

### 3. Choice of Advisors

The effectiveness of a Special Committee often lies in the quality of the advice its members receive from their legal and financial advisors.<sup>112</sup> Rather than retain separate legal and financial advisors, the Special Committee chose to use the legal and financial advisors already advising TCI.<sup>113</sup> This alone raises questions regarding the quality and independence of the counsel and advice received. Furthermore, the contingent compensation of the financial advisor, DLJ, of roughly \$40 million creates a serious issue of material fact, as to whether DLJ (and DLJ's legal counsel) could provide independent advice to the Special Committee. Malone's explanation of the contingent fees paid to financial advisors of the company

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<sup>108</sup>  $\$58,209 = (73,154 * (0.785 - 0.7757)) * \$85.56$ .

<sup>109</sup>  $-\$1,369,052 = \$85.56 * (88,090 * (0.785 - 0.7757)) + 246,271 * (0.785 - 0.8533)$ .

<sup>110</sup>  $\$13,212,688 = \$85.56 * (16,604,945 * (0.785 - 0.7757))$ .

<sup>111</sup> Oral Argument Transcript, at 15-16.

<sup>112</sup> Allen, *Independent Directors in MBO Transactions: Are They Fact or Fancy?* 45 BUS. LAW. 2055, 2056 (1990).

<sup>113</sup> PX 13, at 2; Malone 82-83.

does not apply symmetrically to a Special Committee: “The company had an interest in not having the big expense that was being borne by the company absent a deal.”<sup>114</sup> A special committee does have an interest in bearing the upfront cost of an independent and objective financial advisor. A contingently paid and possibly interested financial advisor might be more convenient and cheaper absent a deal, but its potentially misguided recommendations could result in even higher costs to the special committee’s shareholder constituency in the event a deal was consummated.

#### 4. Diligence of Research and the Fairness Opinion

As discussed earlier, an important element of an effective special committee is that it be fully informed in making its determination.<sup>115</sup> The record includes evidence that the Special Committee lacked complete information with respect to both the premium at which the TCOMB shares historically traded, and precedent transactions involving high-vote stock premiums.

Gould testified that in assessing the historical premium of an illiquid stock such as the TCOMB, one must look at the individual transaction prices

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<sup>114</sup> Malone 81-2.

<sup>115</sup> *Emerging Communications*, 2004 WL 1305745, at \*31, *Kahn v. Lynch*, 638 A.2d at 1120.

of the illiquid stock (not the closing prices).<sup>116</sup> Gould also asserted, however, that he did not need such historical information, and that he simply relied on the closing prices on a multiple page printout presented to him.<sup>117</sup> Gould could have further investigated the historical transactional price difference between the TCOMB and TCOMA, to augment his twenty-eight years experience generally observing the market, and nine years specifically observing where the TCI stocks traded on a “minute to minute basis.”<sup>118</sup> By his own admission, he did not.<sup>119</sup>

Plaintiffs, on the other hand, have presented data showing the trading prices and volumes of TCOMA and TCOMB from January 1997 to the announcement of the transaction.<sup>120</sup> According to such data, during those approximately eighteen months the historical TCOMB premium was 10% or greater only during a single five-trading day interval.<sup>121</sup> This matter clearly will require greater explication at trial, particularly with regard to liquidity discounts and how to properly measure the price of an infrequently traded stock. For the time being, plaintiffs’ data suffices to demonstrate a factual

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<sup>116</sup> Gould 57.

<sup>117</sup> I note here that Gould could not identify the person who generated the printout, nor could he provide a copy of the printout. Gould 51.

<sup>118</sup> *Id.* at 47 and 54.

<sup>119</sup> *Id.* at 59.

<sup>120</sup> PA Tab 55 at 21-28.

<sup>121</sup> *Id.* at 22 (Apr. 22-28, 1997).



dispute regarding the historical TCOMB premium, and an information gap in the Special Committee's research.

Gallivan's testimony points to his personal satisfaction that the TCOMB premium was fair to the TCOMB holders, but does very little to show what informed him,<sup>122</sup> other than the DLJ presentations.<sup>123</sup> Therefore, I now turn to such presentations and the information upon which they were based.

At the Special Committee meeting on June 23, DLJ distributed a board book that primarily justified the TCOMB premium in two respects.<sup>124</sup> First, the board book discussed a call option agreement that TCI had entered into with Malone allowing TCI to purchase Malone's TCOMB shares at market price (as defined in the call option agreement) plus up to a 10% premium.<sup>125</sup> Although an earlier transaction may evidence the fairness of the TCOMB premium, such a transaction should at a minimum be between third parties bargaining at arm's length. In fact, construing all reasonable factual disputes in favor of the plaintiffs, the call option agreement was neither of these, and therefore is not dispositive.

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<sup>122</sup> See Gallivan 47 ("I do not remember the details. I was just personally satisfied that 10 percent was fair as a class A shareholder.").

<sup>123</sup> See Gallivan 42 (DLJ's representations "satisfied me that 10 percent premium for [TCOMB] was fair").

<sup>124</sup> PA Tab 12.

<sup>125</sup> *Id.* at TCI0011626.

Second, the DLJ board book presented four precedents of premiums paid for high-vote stock, one of which was the Bell Atlantic/TCI failed merger.<sup>126</sup> Without examining in detail the symmetry of each precedent with the AT&T transaction, I note that a salient factor was quickly glossed over. During the presentation of these four precedents, DLJ expressly confirmed that a premium for high-vote stock was not the norm:

Mr. Friedman noted, and DLJ agreed, that such transactions [where holders of high voting stock received a premium] were less common than transactions where holders of high voting stock and low voting stock received the same consideration.<sup>127</sup>

The lingering question that the Special Committee failed to ask was how less common are such high vote premiums than equal treatment? The four precedents arguably supporting a high-vote premium could be in a universe of ten sales or one hundred sales. In fact, plaintiffs have presented approximately twenty transactions taking place from 1990 to 1998 in which publicly traded high-vote and low-vote stock were treated equally (in one additional transaction, the *low-vote stock* received a premium).<sup>128</sup> These transactions create a large universe in which not even one high-vote stock received a premium. Reasonably construing the record in the light most

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<sup>126</sup> *Id.* at TCI001628.

<sup>127</sup> Tab 31 at TCI4085.

<sup>128</sup> PA Tab 55 at 20.

favorable to the plaintiffs, the Special Committee was simply inadequately informed in respect to such high-vote precedents.

At the present stage of summary judgment, defendants have failed to demonstrate that the Special Committee was fully informed in respect to the historical TCOMB premium and in respect to the general premium received by high-vote stock during a sale of the entire company.

#### 5. Arm's Length Bargaining

The principal negotiator of the TCOMB premium on behalf of the TCOMA holders was Gould, despite his own perceived role as representative of all TCI shareholders. On a number of occasions between June 15th and 24th, 1998, Gould discussed with Malone the terms of the transaction, including the TCOMB premium.<sup>129</sup> Gallivan did not have any conversations with Malone during this same period.<sup>130</sup> Additionally, Gallivan's testimony states that the duties and obligations of the Special Committee were not to negotiate, but solely to determine fairness.<sup>131</sup> Again, Gallivan's reticence was possibly a result of the muddled mandate of the Special Committee.

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<sup>129</sup> See Gould 35.

<sup>130</sup> See Gallivan 34.

<sup>131</sup> *Id.* at 58 (Q: "Sir, did you consider it part of the duties and obligations of the special committee to negotiate any portion of the AT&T/TCI transaction?" A: "We were not negotiating. We were just determining the fairness.").

For his part, Gould did raise the TCOMB premium with Malone on a number of occasions, but considered it “a very small pinhole part of the transaction,” and that belaboring the premium could threaten getting the much larger transaction done.<sup>132</sup> Defendants repeat that Malone was immovable regarding the TCOMB premium. Judging from his own testimony, the possibility of Malone walking away was always present.<sup>133</sup>

At this stage, certain factors appear in the record suggesting that the Special Committee process was flawed, providing an inhospitable climate for arm’s length bargaining to blossom. They include the Special Committee’s unclear mandate, Gould’s TCOMB premium windfall of well over \$1 million, the Special Committee’s unspecified compensation, and the Special Committee’s lack of information regarding both historical TCOMB trading prices and proceeds for high-vote stock in precedent mergers. As I must make all reasonable inferences in favor of the plaintiffs, I cannot conclude at this time that defendants’ conduct can properly be construed as fair dealing.

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<sup>132</sup> Gould 70-72.

<sup>133</sup> Malone 86. (“I didn’t think that the 10 percent premium mattered in any way, shape, or form because this transaction was not going to take place unless that was part of the deal. And I had made that clear from the beginning. And I didn’t care if the special committee came back and said it’s grossly unfair. I would have just said, that’s how life is. You want the deal, you pay the 10 percent. You don’t want the deal, don’t pay the 10 percent. I think they had to make a judgment call of was this a good transaction despite what might be an unfair payment of 10 percent to the B shareholders.”)

#### *D. Fair Price*

Fair price is the other component of determining entire fairness. The price obtained by the TCOMA holders was clearly higher than the market price, and within the range of DLJ's valuations. Nonetheless, reasonably construing the evidence in the light most favorable to plaintiffs, the price the TCOMA holders received was unfair in light of the premium received by the TCOMB holders.

For the thirty days ending June 22, 1998 (preceding market speculation of the merger the following day), TCOMA shares closed at an average price of \$34.60.<sup>134</sup> The closing price of TCOMA on June 22, 1998 was \$35.69 and the closing price of AT&T common stock that same day was \$63.06.<sup>135</sup> At an exchange ratio of .7757 AT&T shares for each TCOMA share, and based on the closing prices of June 22, 1998, the merger valued each TCOMA share at \$48.92, a premium of more than thirty-seven percent.

Before moving on to the balancing of the premium received by the TCOMA holders, with the TCOMB premium, I turn briefly to why the rise

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<sup>134</sup> Ex. A to The Individual Defs.' Opening Br. in Supp. of Their Mot. for Summ. J.

<sup>135</sup> *Id.*

in AT&T's stock price between announcement and consummation of the merger is inapplicable to the present analysis.<sup>136</sup>

On March 9, 1999, the date the merger closed, AT&T common stock closed at \$85.56 per share.<sup>137</sup> At an exchange ratio of .7757, each TCI share was converted into \$66.37 worth of AT&T stock. Defendants correctly state that this represents a premium of eighty-six percent over the June 22, 1998 price of \$35.69. This increased premium is illusory, however, as it ignores cumulative market returns during the period from signing to closing. In fact, the Nasdaq composite increased during the same period by approximately thirty-three percent, roughly matching the thirty-six percent rise in AT&T stock. Defendants improperly claim the benefits of AT&T's increase in stock price without acknowledging the general market trends that would likely have applied equally to TCOMA (if an exchange ratio had not tightly pegged TCOMA to the price of AT&T stock). If defendants continue to urge that the premium enjoyed by the TCOMA holders is best judged as of the closing date, then I must compare the March 9, 1999 AT&T common stock price to a March 9, 1999, TCOMA price derived by attributing the normal market returns of thirty-three percent to TCOMA's June 22, 1998

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<sup>136</sup> The exchange ratios were not subject to caps or collars.

<sup>137</sup> Ex. A to The Individual Defs.' Opening Br. in Supp. of Their Mot. for Summ. J.

price. For the time being, rather than engage in such assumption riddled calculations, I will examine the thirty-seven percent premium above the market price, enjoyed by the TCOMA holders as of the date of signing.

DLJ's presentation to the TCI board indicated that the TCOMA exchange ratio was within or, in many cases, higher than the implied range of exchange ratios in comparable transactions based on multiples of EBITDA, enterprise value per subscriber, premiums paid, and discounted cash flow.<sup>138</sup> DLJ opined "that, with respect to the holders of each series of [TCI] Common Stock ..., the Exchange Ratio relating to such series is fair to such holders from a financial point of view."<sup>139</sup> In other words, DLJ made parallel but separate analyses with respect to each class: the TCOMA exchange ratio was fair to the TCOMA holders; the TCOMB exchange ratio (including the TCOMB premium) was fair to the TCOMB holders. Notably, the DLJ opinion does not discuss the effect of the TCOMB premium upon the TCOMA holders, *i.e.*, whether the TCOMB premium was fair to the TCOMA holders. Unfortunately for defendants, *Levco* appears to mandate exactly such an analysis: that the relative impact of a preference to one class be fair to the other class.

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<sup>138</sup> 1999 Proxy Statement at 46-48.

<sup>139</sup> PX Tab18 at 3.

To reiterate, *Levco* involved a challenge to the recapitalization of Reader's Digest by the holders of Class A non-voting common stock.<sup>140</sup> The key to the recapitalization proposal was the agreement by Reader's Digest to purchase shares of Class B voting stock owned by the funds at \$27.50 per share, for an aggregate purchase price of approximately \$100 million.<sup>141</sup> As a result of the recapitalization, the Class A shareholders would receive voting rights.<sup>142</sup> In reviewing the Court of Chancery's denial of an application for a preliminary injunction, the Supreme Court conducted an entire fairness analysis and found the Reader's Digest Special Committee evaluation of the fairness of the transaction to the Class A shareholders to be lacking.<sup>143</sup> The Reader's Digest Special Committee never sought, nor did its financial advisor ever tender, an opinion as to whether the transaction was fair to the Class A shareholders.<sup>144</sup> The Court elaborated upon this failure, noting that while the Class A shareholders did receive voting rights, their equity interests decreased by at least \$100 million.<sup>145</sup> The Court stressed that the Reader's Digest Special Committee failed to focus on the specific impact upon the Class A shareholder of the Reader's Digest payment of

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<sup>140</sup> *See Levco*, 2002 WL 1859064, at \*1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*2-3.

<sup>144</sup> *Id.* at \*2.

<sup>145</sup> *Id.* at \*2-3.



\$100 million to the Class B shareholders.<sup>146</sup> In other words, the Reader's Digest Special Committee should have sought an opinion as to whether the transaction was fair to the disadvantaged class of shareholders, and should have focused on the specific impact of the preferential payment upon the disadvantaged class.<sup>147</sup>

In the present transaction, the Special Committee failed to examine, and DLJ failed to opine upon, the fairness of the TCOMB premium to the TCOMA holders. DLJ provided only separate analyses of the fairness of the respective exchange ratios to each corresponding class. The *Levco* Court mandated more than separate analyses that blindly ignore the preferences another class might be receiving, and with good intuitive reason: such a doctrine of separate analyses would have allowed a fairness opinion in our case even if the TCOMB holders enjoyed a 110% premium over the TCOMA holders, as long as the TCOMA holders enjoyed a thirty-seven percent premium over the market price. Entire fairness requires an examination of the fairness of such exorbitant premiums to the prices received by the TCOMA holders. This is not to say that the premium

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<sup>146</sup> *Id.* at \*3.

<sup>147</sup> *Id.*

received by the TCOMA holders is irrelevant—obviously, it must be balanced with the fairness and magnitude of the 10% TCOMB premium.

The impact of the TCOMB premium on the holders of TCOMA was not large; effectively, the TCOMB premium only lowered the price paid to holders of TCOMA by approximately 1.2%, from \$67.19 to \$66.37. Nonetheless, the fairness of the TCOMA exchange ratio as impacted by the TCOMB premium requires a more complete analysis of the fairness of the TCOMB premium. As discussed earlier, plaintiffs have presented sufficient evidence of the historical TCOMB premium and comparable precedent high-vote stock premiums to demonstrate a triable issue with respect to the fairness of the TCOMB premium to the TCOMA holders. Additionally, plaintiffs have cast into doubt the need to pay a TCOMB premium to all TCOMB holders, if only Malone was entitled to a control premium as a control shareholder. Defendants respond that discriminating between shareholders of the same class would have invited lawsuits from the TCOMB holders and would simply be unfair. Reasonably construing the facts in favor of plaintiffs, if Malone wished to be fair, then he could have shared some part of the value of his own stock holdings.<sup>148</sup> Defendants

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<sup>148</sup> See *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 598 (Del. Ch. 1986) (“It follows that should a controlling shareholder for whatever reason (to avoid entanglement

additionally respond that discriminating between shareholders of the same class would vitiate certain preferential tax treatments, but such a factor similarly argues for the treatment of the TCOMB shares equally with the TCOMA shares. For these reasons, the fairness of the TCOMB premium and the price received by the TCOMA holders are clearly disputed issues of fact requiring a trial.

#### **IV. CONCLUSION**

Genuine issues of material fact remain in relation to the non-disclosure of plans to compensate the Special Committee and in the disclosure describing the Special Committee's level of care in examining the TCOMB premium. Summary judgment in respect to those disclosure claims is hereby denied; summary judgment is granted on all other disclosure claims asserted in the complaint.

Because defendants have not demonstrated that the merger was entirely fair to the TCOMA holders, defendants' summary judgment motion is hereby denied.

**IT IS SO ORDERED.**

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in litigation as plaintiff suggests is here the case or for other personal reasons) elect to sacrifice some part of the value of his stock holdings, the law will not direct him as to how that amount is to be distributed and to whom.”)