1991 WL 111134

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

CINERAMA, INC., a New York corporation, Plaintiff,
v.
TECHNICOLOR, INC., a Delaware corporation, Morton Kamerman, Arthur N. Ryan, Fred R. Sullivan, Guy M. Bjorkman, George Lewis, Richard M. Blanco, Jonathan T. Isham, MacAndrews & Forbes Group, Incorporated, a Delaware corporation, Macanfor Corporation, a Delaware corporation, and Ronald O. Perelman, Defendants.

Civ. A. No. 8358. | Submitted: July 12, 1990. | Decided: June 24, 1991. | Revised: June 24, 1991.

Attorneys and Law Firms

***556** Peter M. Sieglaff, and Arthur L. Dent, of Potter Anderson & Corroon, Wilmington (Gary J. Greenberg, Sylvia L. Shapiro, New York City, of counsel), for plaintiff.

Rodman Ward, Jr., Thomas J. Allingham, II, David J. Margules, John G. Day, Brian C. Vance, Robert M. Omrod, and R. Michael Lindsey, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, for defendants MacAndrews & Forbes Group, Incorporated, Macanfor Corporation and Ronald O. Perelman.

Stephen E. Herrmann of Richards, Layton & Finger, Wilmington, for defendants Technicolor, Inc., Morton Kamerman, Arthur N. Ryan, Fred R. Sullivan, Guy M. Bjorkman, George Lewis, Richard M. Blanco and Jonathan T. Isham.

MEMORANDUM OPINION

ALLEN, Chancellor.

This action seeks, *inter alia*, to impose personal liability upon corporate directors of Technicolor, Inc., for alleged breaches of the corporate directors' duty to exercise directorial power with care and for the best interests of the corporation and its shareholders. The ***557** litigation arises out of a third party, two-step acquisition of all of the stock of Technicolor by a subsidiary of MacAndrews and Forbes Group, Inc. ("MAF") at $23.00 per share cash. Technicolor's stock had been actively traded on the New York Stock Exchange in a range of $9 to $11.50 in the weeks preceding the emergence of MAF as a party interested in the acquisition of Technicolor.

Plaintiff, Cinerama, Inc., was the beneficial owner of 4.4% of Technicolor's stock (201,200 shares) which it began accumulating some months earlier, in June 1982. It did not tender into the first leg of the MAF acquisition transaction which commenced on November 4, 1982, and it dissented from the second stage merger which was effectuated on January 24, 1983. Cinerama sought a judicial appraisal of the fair value of its stock. During the course of the pre-trial phase of that appraisal proceeding, plaintiff developed testimony apparently leading it to the belief that misconduct had occurred in the sale of the company. Specifically, it appeared from the testimony of one director (Charles Simone) that he had disapproved the transaction at the board meeting at which the transaction was purportedly unanimously approved and recommended to shareholders. That fact, if it were a fact, was not disclosed and would be significant. The company's governing instruments required unanimous director approval of the merger agreement. Mr. Simone's testimony was not corroborated, but it, together with the emergence of a more highly particularized jurisprudence in the sale of corporate control following the Delaware Supreme Court's 1985 opinion in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1985), led to the filing in January 1986, of this broadside attack upon, *inter alia*, the directors who negotiated and approved the two-step acquisition transaction.

This later suit, which plaintiff calls the "fraud" case to distinguish it from its appraisal case and which I will refer to as the personal liability case (because, as set forth below, I find no credible evidence of fraud or any intentional wrong whatsoever), claims, essentially, that the $23.00 price received by the Technicolor shareholders was so grossly inadequate as to constitute a "badge of fraud." According to plaintiff, the intrinsic value of the company on January 24, 1983, was at least $62.75.[1] Thus a sale at $23 a share is seen by plaintiff as a pitiably poor deal for the Technicolor shareholders. Plaintiff ***558** accounts for what it sees as an astonishingly bad performance in the sale of Technicolor in two ways.

First, plaintiff says that, although the MAF transaction appears on the surface to be an arm's-length deal, in fact, there were conflicting interests on the Technicolor board that inclined a majority of members of the board to prefer to sell to MAF at the $23 price instead of searching out a buyer who would pay a higher price.[2] Second, plaintiff says that the board was, in all events, grossly negligent in agreeing to the MAF merger agreement. The board was not, plaintiff says, sufficiently informed of alternatives to MAF's proposal to make an informed decision qualifying for business judgment deference. There was, plaintiff says, no auction, and an option covering about 18% of the company's stock, together with a stock purchase agreement with two directors as individuals, precluded an effective post-agreement market check. The board had only the frail reed of an investment banker's opinion hurriedly given to support its judgment that the price was a good one. The board decision to sell the company, plaintiff says, was made at a single rather brief meeting. In all, plaintiff contends that this case presents a compelling case for another administration of the discipline applied by the Delaware Supreme Court in *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858 (1985).

Plaintiff adds that disclosures contained in a November 4, 1982 Schedule 14D-9 filing, in a November 5, 1982 Schedule 13D filing (both filed in connection with the tender offer), and in proxy solicitation materials dated December 27 (filed in connection with the vote on the merger) were less than candid and give it a right to rescind the merger (or collect rescissory damages as an alternative).

Finally, plaintiff asserts that MAF as a controlling shareholder breached a duty to pay a fair price in the second step merger and that MAF and its controlling shareholder Ronald O. Perelman conspired with the breaching directors and participated in their violations of fiduciary duty.

For all of this, plaintiff seeks damages against the Technicolor directors and the other defendants in an amount of $32.9 million ($162.00 per share) plus interest and attorney's fees.

***559** The appraisal case and these claims for personal liability were tried jointly. The trial consumed 47 days during which proceedings were begun early and continued late. On October 19, 1990, a decision in the appraisal was rendered finding that the fair or intrinsic value of Technicolor as of January 24, 1983, excluding elements of value arising from the accomplishment or expectation of the Technicolor-MAF merger, was $21.60 per share.

The present opinion addresses the issues raised by the claims of personal liability. For the reasons set forth below, I conclude, first, that the evidence will not support a conclusion that the board of directors, taken as a whole deliberative body, labored under a circumstance that created any impairment of its independence with respect to its decision to enter into the MAF merger agreement and to endorse the tender offer and merger that that agreement contemplated. Moreover, a review of the credible evidence (*see* pp. 27-35, *infra*) persuades me not only that the board as a whole had no such disability, but that no member of the board other than Fred Sullivan, an outside director, had on balance a material financial interest conflicting with that of the corporation's stockholders.[3]

Second, I conclude that the directors acted in good faith with respect to the merger agreement and the transactions it contemplated. *See* pp. 36-37, *infra.* I note first that this conclusion entails a rejection of the testimony to the effect that Charles Simone voted against the resolution authorizing the acceptance of the MAF offer. In addition, the conclusion that the board acted in good faith implies a conclusion that a majority of directors (and, in fact, I conclude that all directors excepting Mr. Sullivan and Mr. Ryan whom I do not need to address specifically) were motivated in the transaction, appropriately, to promote the best interests of the shareholders.

Third, with respect to the level of care taken in that effort, I conclude that plaintiff's claim that the board was insufficiently informed (because it had not conducted a *Revlon* auction, did not negotiate an effective post-agreement "market check" mechanism, and was hurried and ill-advised) to meet its obligation of care, is a close question. The board apparently relied upon very ***560** competent and experienced counsel. Nevertheless, from the perspective of the law as it has emerged over subsequent years, one is entitled to entertain grave doubts whether the Technicolor board had properly put itself in a position to enter into the agreement that it authorized in October 29, 1982. That agreement was not preceded by a prudent search for alternatives, nor, given its terms and the surrounding circumstances, could a director reasonably assume that, following its signing, any better offer that might be feasible would emerge. *Compare In re Fort Howard Corp. Shareholders' Litig.,* Del.Ch., C.A. No. 9991, Allen, C. (Aug. 8, 1988).

But I am of the view that the questions of due care (or of the reasonableness of the director action in the circumstances), *see Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261, 1287-88 (1989), need not be addressed in this case, because even if a lapse of care is assumed, plaintiff is not entitled to a judgment on this record. That is because in this situation, where there is no self-dealing or other breach of loyalty, it is plaintiff's burden to establish by evidence that it was injured as a result of the board's action. This it has not done. *See* pp. 41-45, *infra.*

Fourth, I conclude that the 13D and 14D-9 filings disclosed all material facts relating to the transaction as that term is defined in *Rosenblatt v. Getty Oil Co.,* Del.Supr., 493 A.2d 929 (1985)

Fifth, I conclude that the disclosure in the proxy solicitation materials was full and complete.

Sixth, I conclude in the circumstances present that MAF had no duty to pay any price in the January merger other than the $23 price it had negotiated at arm's-length. The circumstances to which I refer include that fact that (1) the controlling shareholder negotiated the terms of the transaction at a time when it had no interest in the Company and acted, and was seen by all as acting, as a third party; (2) the second step merger occurred within the time that the Technicolor board had in view when it negotiated the transaction and; (3) there were no material changes in the underlying value of the enterprise during the intervening three months.

In my opinion, where these three factors are present [4] a person who arguably assumes the mantel of a fiduciary towards minority ***561** shareholders by closing the first step of a negotiated two-step transaction does not violate a fiduciary duty by exercising rights acquired under the merger agreement. *Citron v. Fairchild Camera & Instrument Corp.,* Del.Ch., C.A. No. 6085, Allen, C. (May 19, 1988), *aff'd,* Del.Supr., 569 A.2d 53 (1989).

Accordingly, I conclude that, even assuming that the Technicolor directors failed to exercise due care, as in *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858 (1985), and were not adequately informed, *see Revlon v. MacAndrews & Forbes Holdings, Inc.,* Del.Supr., 506 A.2d 173 (1986), when they agreed to the sale of Technicolor, because the board as a deliberative body was disinterested in the transaction and operating in good faith, plaintiff bears the burden to show that any such innocent, through regrettable, lapse was likely to have injured it. *See, e.g., Barnes v. Andrews,* 298 F. 614 (S.D.N.Y.1924). Since I conclude on the evidence that plaintiff has not done that nor established any other violation of duty, judgment will be given to the defendants on all claims.

In what follows, a general narrative leading up to the negotiation and effectuation of the two-step agreement of merger is first set forth. Thereafter, each of the foregoing six conclusions will be elaborated upon. In that connection, additional facts will in some instances be set forth. In all instances, the facts set forth are determined by an assessment of the preponderance of the credible, admissible testimony.

I.

An elaborate description of Technicolor's business in the mid to late 1982 period is contained in the Appraisal Opinion and need not be repeated here. The necessary narrative background of the ***562** issues of personal liability tried in this case might commence with the recognition that in the early 1980's MAF was a small company (about half the size of Technicolor) interested in acquiring established, low-technology companies with core operations that had stable cash flows. After several unsuccessful bids for other companies, Ronald Perelman, the controlling stockholder, Chairman, and CEO of MAF, came to focus upon Technicolor.

Technicolor was well equipped to defend itself against any hostile effort to gain control over it. Pursuant to a supermajority provision in its certificate of incorporation, ninety-five percent of the outstanding shares would have to vote for a merger or to amend or repeal the supermajority provision. If repeal were recommended by all of Technicolor's directors, however, then a two-thirds shareholder vote would be sufficient to repeal the supermajority provision. Given this fact, Ronald Perelman recognized that any deal he might pursue would have to be on friendly terms. [5]

Consequently, after gleaning information about Technicolor from various public sources and private individuals familiar with Technicolor's operations, [6] Mr. Perelman turned to his investment banker for advice on how to get his foot in Technicolor's door. Michael Tarnopol, a managing director at Bear Stearns, advised Perelman that he (Tarnopol) had a long-standing business relationship with Fred Sullivan, one of the Technicolor directors. On September 10, 1982, Tarnopol telephoned Sullivan to arrange a meeting between Sullivan and Perelman. Sullivan had never heard of Ronald Perelman at the time but agreed to meet with him. One week later, Sullivan had lunch with Perelman and another Bear Stearns managing director. At that time, Perelman indicated that he was interested in acquiring 100% of Technicolor's equity. Sullivan asked about the price that Perelman had in mind and was told about $15 per share. Sullivan said he did not think that Morton Kamerman, Technicolor's CEO, would have any interest at that level but he agreed, nevertheless, to pursue the matter with Kamerman. [7]

***563** After this meeting with Perelman, Mr. Sullivan purchased 1,000 shares of Technicolor stock at an average price of $9.4375 per share. Sullivan had previously owned some 21,250 shares of Technicolor. [8]

A week after his lunch with Perelman, Sullivan called Kamerman to suggest a meeting between Perelman and Kamerman. Mr. Kamerman agreed, and Sullivan relayed the message to Perelman who then set the meeting for October 4, 1982. Prior to that meeting, Perelman asked Sullivan to visit his office so he could be briefed on Kamerman, which Sullivan did.

On October 4, Kamerman, Sullivan, and Perelman met in Los Angeles. The meeting lasted for four hours. During the course of that meeting, Mr. Perelman suggested that MAF would be willing to pay $20 per share to acquire Technicolor to which Kamerman responded that he would not be interested in recommending the sale of the company at that price. Kamerman indicated that he would be unwilling to take any offer under $25 to the board.

Plaintiff attempts to make a great deal out of Kamerman's response to this initial indication of interest. It claims that, without consulting his board, any investment banker, or even getting advice from other senior members of management, Kamerman at this meeting in effect disclosed that he *would* recommend a sale at a price of $25 a share which plaintiff contends was a grossly low price. Having now labored through a three month trial that focussed importantly on the issue of Technicolor's value, my view on value is somewhat different than this contention asserts, as the Memorandum Opinion in the appraisal case reflects. Putting questions of value aside, however, I cannot interpret Mr. Kamerman's response as reckless or as negligent. Whether that response was smart negotiating or not is not relevant to questions of personal liability. In all events, Kamerman did not legally commit himself or Technicolor to any course of action at that meeting.

During the first week of October, Kamerman consulted Technicolor Treasurer Wayne Powitzky and General Counsel John Oliphant about his negotiations with Perelman. Kamerman also discussed his employment contract, possible representation on the MAF board, and the tax effect an acquisition would have on his option shares.

***564** Kamerman disclosed the Perelman approach to certain other Technicolor directors. He informed Guy Bjorkman, a 9% shareholder who had obtained a seat on the board as a result of the same 1970 proxy fight that had secured Kamerman's seat. He informed George Lewis, a Technicolor director who also served as his tax lawyer. Lewis gave Kamerman advice on the tax effect of an acquisition on the directors' option shares. Jonathan Isham, a member of the board executive committee, was also advised of Perelman's interest in Technicolor. Kamerman did not inform any other directors at that time, purportedly fearing leaks that could harm Technicolor. Notably, he did not inform Arthur Ryan, the company's chief operating officer, with whom his relations were not good.

On October 12, Perelman, accompanied by Robert Carlton, met with Kamerman and Powitzky in Los Angeles. The purpose of this meeting was to review certain financial data that MAF would present to its lenders. MAF was provided with some segment balance sheets. Perelman and Carlton were also given a tour of Technicolor's facilities. During the course of this October 12 meeting, Perelman expressed a desire to continue existing management in office after an acquisition and agreed that, if an acquisition were to occur, Kamerman and Sullivan would be designated to sit on MAF's board of directors.

After the October 12 meeting, Kamerman decided that it would be prudent for Technicolor to retain outside legal and financial advisors. With respect to legal advice, Kamerman first approached Skadden Arps in New York but, after learning that it represented Perelman, Technicolor engaged Meredith Brown, a partner at Debevoise, Plimpton in New York. Mr. Brown was highly experienced in the field of mergers and acquisitions. He had practiced actively in the field for some years, published scholarly articles on contests for corporate control, and taught an advanced course in securities regulation at Columbia Law School. [9]

On October 14, Joseph Sullivan, a partner at Goldman Sachs, Technicolor's long-time investment bankers, called the company inquiring about rumors concerning Technicolor. Promptly thereafter, Kamerman decided to retain that firm as financial advisors with ***565** respect to any transaction occasioned by the Perelman negotiations. Goldman was asked to advise the management in negotiating any transaction and to opine to the board on the fairness of any proposal that might eventuate. Goldman Sachs was to receive $625,000 of which $200,000 was payable if and when a deal was completed.

Goldman Sachs assembled a project team consisting of a Vice President and two junior associates. In preparation for their fairness opinion, the two associates flew to Los Angeles for meetings with Technicolor. While in Los Angeles, the Goldman Sachs team was briefed on Kamerman's negotiations with Perelman. The Goldman Sachs team identified several potential alternatives to the Perelman deal, including transactions with other potential bidders they identified. Kamerman was fearful that prematurely pursuing a public sale might injure the company's relations with its customers and might injure employee morale as well. He remained doubtful that MAF would or could finance a deal that he could endorse. At the conclusion of the Los Angeles meeting, Kamerman asked Goldman Sachs to consider whether Perelman's $20 price was such that negotiations were worth pursuing.

After reviewing Technicolor's public documents and talking to Technicolor management, its own entertainment industry analyst, and the senior members of the M & A department, the Goldman Sachs officer in charge concluded that the proposal was such as to justify further negotiations. Having rendered this preliminary view, Goldman Sachs began preparation to give a fairness opinion should the board be asked to consider a proposal. Toward that end, it developed an LBO model which it ran at several different hypothetical prices. Goldman Sachs's first run indicated that an LBO at $22.50 per share was feasible given its interest rate and other assumptions. In subsequent runs, Goldman Sachs concluded that an LBO at $23 would be feasible but that debt coverage would make such a transaction problematic at prices significantly above $23 per share. Given the projections and business plan Goldman Sachs employed for its LBO analysis (which in some respects was more optimistic and in some respects less optimistic then management's plan), it thought that a $25 deal price might be feasible but that a $27 LBO was “almost impossible to do.” [10] During the period prior to October 29, Kamerman checked with other members of senior management (except Ryan) to see if they had an interest in trying to arrange a possible ***566** LBO. There was no general interest in pursuing such an effort. [11]

Negotiations between Kamerman and Perelman continued after October 12. These discussions focused on price, conditions of the offer (particularly financing contingencies), and Perelman's commitment to closing a deal with Technicolor. Kamerman sought assurance that if a deal were to be reached MAF would be obligated to close it; Perelman was concerned to reach an agreement that would give Technicolor no outs. In that connection, Perelman insisted that Kamerman and Bjorkman personally enter into a Stock Purchase Agreement which would guarantee him that their stock could be acquired. The offer was to be conditioned on at least 50% of Technicolor's shares tendering into the offer. Perelman also sought a Stock Option Agreement which would give MAF a right to purchase 18% of Technicolor's stock if another bidder emerged and topped its price. After some further negotiations about price, on October 17, Perelman finally proposed a transaction at $23 per share. Kamerman said that that was an offer he could “take to the board.”

Kamerman then called a special board meeting and Mr. Oliphant, Technicolor's general counsel, notified the directors. One of the items that was to be included on the agenda of that meeting was a finder's fee of $150,000 for Fred Sullivan. As part of the merger negotiations, Bear Stearns had proposed and Perelman and Kamerman had agreed that Sullivan should be paid a fee for introducing the parties. This fee was originally to be paid directly by Bear Stearns but, prior to the Technicolor board meeting, was restructured to be paid by Technicolor (after the merger) and Bear Stearns' $500,000 finder's fee was to be reduced by $150,000.

The full Technicolor Board met in New York on October 29, 1982, to consider the Perelman offer. All the directors attended this meeting as well as Brown, another lawyer from Debevoise, the Goldman Sachs team, and the company officers, Powitzky and Oliphant. At this meeting, Mr. Kamerman described the course of the negotiations with Perelman. The board, after disclosure of the various potentially conflicting interests, including an employment contract for Kamerman roughly ***567** similar to his existing contract (*see* pp. 28-30, *infra*), the MAF board seats, and the Sullivan finder's fee, approved the modification to Kamerman's employment agreement and Sullivan's finder's fee. Brown walked the directors through the terms of the merger documents. He reviewed with the directors the terms of the Stock Option Agreement (granting MAF an option on stock that would represent 18% of the outstanding stock) and the Stock Purchase Agreement (by which directors Kamerman and Bjorkman would personally obligate themselves to sell their stock to MAF).

Goldman Sachs made their presentation. They distributed and explained the board books which contained information relating to Technicolor's stock history and stock ownership, financial projections with and without the One Hour Photo division, an LBO analysis, and an S & P tear sheet. After discussing the financial information contained in the board books with the directors, Goldman Sachs orally advised the board that, in its opinion, a cash offer at $23 per share was a fair price for Technicolor. The board was also advised that Goldman Sachs could not issue a written fairness opinion until completing some confirmatory due diligence. [12]

During the course of the directors' discussion of the Perelman offer, several directors urged Kamerman to press Perelman for more money. The board was advised that Perelman had tapped out his financing and could not realistically bid more. Brown advised the board that it had no obligation to accept Perelman's offer, or anyone else's for that matter. Brown further advised the board that it had no obligation to shop the company. One of the directors, Simone, voiced concerns about selling the company to the first bidder. Simone suggested that the board might give him time to approach some persons of means with whom he was acquainted to see if they might be interested in purchasing the company as well. Considerable discussion followed as to whether a bird in hand was worth more than a fatter bird that might be in the bush. In the end, however, the board unanimously approved the Merger Agreement, the Stock Option, the certificate amendment repealing the supermajority provision, the Kamerman employment modification and the Sullivan fee.

Promptly following the board meeting on October 29, Technicolor issued a press release announcing approval of the merger agreement.

***568** On November 4, 1982, MAF commenced a $23 per share all-cash offer for all outstanding Technicolor stock. By December 3, MAF had acquired enough shares to give MAF over 82% of Technicolor's outstanding shares.

In connection with a special stockholders' meeting called to approve the merger, a proxy statement was disseminated to the Technicolor shareholders on December 27, 1982. Attached to this proxy statement was Goldman Sachs' November 19 written fairness opinion. Goldman Sachs did not update the fairness opinion between November 19 and the time it was released with the proxy statement.

At the special shareholders' meeting on January 24, 1983, 89% of the Technicolor shareholders approved the MAF merger. The merger was accomplished promptly, and the Technicolor directors resigned their office.

No fact materially affecting the value of Technicolor occurred between October 29, 1982 and January 24, 1983.

II.

The question whether the directors of Technicolor breached their duties of care or loyalty to the Technicolor shareholders [13] in the negotiation and sale of the Company in this two-step transaction raises a host of legal issues. The first or most basic of these questions, at least as I view this matter, is the question of what form of judicial review is appropriate-that is-whether this case is considered to invoke the burdens, standards and distinctive remedies of the entire fairness form of judicial review or rather whether it entails the more conventional burdens, standards and remedies reflected in the business judgment form of review. I thus turn to that question first.

The business judgment form of judicial review entails three distinct elements or inquiries. I quote the following not as authoritative but as a summary of my previously expressed view concerning the overall approach that form of review requires:

The business judgment form of judicial review encompasses three elements: a threshold review of the objective financial interests of the board whose decision is under attack (*i.e.,* independence), a review of the board's subjective motivation ***569** (*i.e.,* good faith), and an objective review of the process by which it reached the decision under review (*i.e.,* due care). *Polk v. Good,* Del.Supr., 507 A.2d 531 (1986); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805 (1984); *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858 (1985); *Grobow v. Perot,* Del.Supr., 539 A.2d 180 (1988). The first of these factors is, of course, a condition to the use of the business judgment form of review; if the board is financially interested in the transaction, the appropriate form of judicial review is to place upon the board the burden to establish the entire fairness of the transaction. *Weinberger v. UOP, Inc.,* 457 A.2d 701 (1983); *Grobow v. Perot,* Del.Supr., 539 A.2d 180 (1988). Each of the second two elements of the rule reflects one of the two theoretically possible bases for director liability in a disinterested transaction. If each is satisfied (*i.e.,* plaintiff cannot show a *prima facie* case of, or, if such a case is made out, the balance of the evidence does not establish, bad faith or gross negligence), then there is, in my opinion, no basis to issue an injunction or to impose liability.

In re RJR Nabisco, Inc. Shareholders' Litig., Del.Ch., C.A. No. 10389, slip op. at 35-36, Allen, C. (Jan. 31, 1989) (footnotes omitted).

A most important aspect of business judgment form of review is that, as in most litigation, when it is employed the plaintiff bears the burden to establish each element of the claim he asserts. The claim must be proven by a preponderance of credible evidence, and upon its proof, plaintiff (or the corporation when the suit is brought derivatively) is entitled to an award of compensatory damages.

The alternative entire fairness form of judicial review is importantly different. Once it is properly invoked, it is the defendant who is called upon to establish that the transaction attached was on terms entirely fair to the corporation or, in some circumstances, to the corporation's stockholders. Equally important, should the defendants fail to carry this burden, they may be liable not simply to compensate the corporation or its shareholders for losses sustained, but defendants may be required to rescind the transaction or pay rescissory damages. This measure, while not definitively described, may certainly exceed loss to the corporation and its shareholders and may, analogously to trust measures of recovery, *see, e.g.,* 3 A. Scott & W. Fratcher, *The Law of Trusts,* § 201, at 241-42 (4th ed. 1988), in some instances, capture defendants' profit from the transaction.

***570** Thus, the question which form of judicial review is called forth is an important one that transcends the questions of burden of going forward.

In my opinion, the inquiry that determines whether or not the burdens, standards and remedies of the business judgment form of review will structure and guide judicial review concerns the independence of the directors with respect to the transaction under review.

A.

The threshold question whether directors are independent is factual. The general principle is well established that divided loyalties arising from financial interest in a transaction adverse to the corporation triggers the burdens, standards and remedies of the entire fairness form of judicial review. In *Weinberger v. UOP Inc.,* the Court said:

When directors ... *are on both sides of a transaction,* they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain.... [W]here one stands on both sides of a transaction, he has the burden of establishing its entire fairness...."

Weinberger, 457 A.2d at 710 (emphasis added).

Occasions for the proper invocation of this rule are frequently quite clear. The polar instance is a case in which a controlling shareholder fixes the terms of an interested transaction and forces it to be effectuated. *See Sinclair Oil Corporation v. Levien,* Del.Supr., 280 A.2d 717, 720 (1971). The principal area of unclarity in recent years has centered on the appropriateness of a particular form of judicial review when an allegedly independent entity has been interposed between a controlling shareholder and the effectuation of a transaction in which it is interested. (*i.e.,* committees of allegedly disinterested directors or majority of minority vote provisions). *See, e.g., Citron v. E.I. duPont de Nemours & Co.,* Del. Ch., 584 A.2d 490, 499-502 (1990); *In re TWA Shareholders' Litig.,* Del. Ch., C.A. No. 9844, slip op. at 16-17, Allen, C. (Oct. 21, 1988). Happily, this case does not require one to reenter that thicket.

This case does raise an issue that the cases have not been required to deal with very much. That is, the question of what factors other than a frank self-dealing transaction will cause a shift and redefinition ***571** of litigation burdens and, perhaps more importantly, will make a rescission remedy for breach of duty possible. [14]

This case plainly does not involve classic self-dealing. The Technicolor directors were not directors, officers, or stockholders of MAF, nor did they have any other pre-existing interest in it. Nevertheless, plaintiff asserts that the directors were in several instances financially interested in the merger transaction in ways different from the stockholders generally. Plaintiff asserts that these interests mandate the invocation of the entire fairness form of review here.

In evaluating these arguments, I start from the premise that not every arguable financial interest in a merger differing from the stockholders' interest generally, even if held by a majority of the board, is sufficient to invoke the entire fairness form of judicial review. The preliminary or threshold question of independence is factual: is any differing financial interest sufficient to create a reasonable likelihood, considering all of the circumstances, that it actually affected the directors' actions to the corporation's detriment? In some instances an arguable or an established personal financial benefit may, when viewed in context, be found to be immaterial in fact to the exercise of a judgment motivated entirely to achieve the best available result for the corporation and (in the sale context) for its shareholders.

An example will, I think, demonstrate the point. Consider the case of the sale of a public company which is owned 35% by the CEO and 10% by the company's vice president. The company has a market capitalization of $100 million. The two officers constitute a majority of the board. Each has a salary and benefit package worth approximately $550,000 per year. During arm's-length bargaining an acquisition of the corporation is negotiated with a third party for $160 million cash. As part of the transaction, it is agreed that the two officers will remain as officers of the company at a new higher (say doubled) salary.

Assume now that a shareholder sues the directors claiming that they negligently failed to get the best available price. The directors didn't shop the Company, "locked up" the sale, and had no fiduciary ***572** out in the merger agreement. Plaintiff also (implausibly) asserts that the directors pushed this transaction rather than search for a higher alternative that might have been found in order to get the higher salaries that the acquiror proposed. Must the directors assume the burden of establishing the entire fairness of the transaction? They do have a financial interest in the merger not shared by the other shareholders.

Before giving an answer, one might pause to consider the implications of the answer. Invocation of the entire fairness test is a significant event for defendants. It does not involve just the question who has the burden of proof or of moving forward with evidence. It involves substantive differences in law. Under the conventional (business judgment) approach to a claim that an arm's-length sale (of an asset or the company) was at too low a price, plaintiff must show that director gross negligence is involved and must show as well that the stockholders were injured by that negligence. *See, e.g., Barnes v. Andrews,* 298 F.614 (S.D.N.Y.1924). Moreover, if plaintiff proves negligence and injury, he will still only be awarded damages measured by what should have been achieved at that time; rescission will not be available. (*See* pp. 41-45, *infra*). Where the entire fairness form of review is employed, the "self-dealing" fiduciary must show that the transaction was at an entirely fair price. If he cannot do so (perhaps because he made a misjudgment or perhaps because he *was* negligent), he is liable. There is no "business judgment" defense. Moreover, the remedy may include rescission or rescissory damages in most "entire fairness" cases and perhaps so in a case in which the directors were not involved as buyers (plaintiff asserts that position here). Thus, the realm of possible liability is enormous given the fact that cases of this sort cannot be litigated to judgment promptly.

There are, thus, enormous substantive law, not just procedural, consequences to employing the entire fairness form of judicial review. These consequences do not seem inappropriate in self-dealing transactions. That is the traditional place both in trust law and in corporation law in which they have evolved and been applied. To follow a rule, however, that mechanically invokes the consequences of the entire fairness form of judicial review whenever the plaintiff can identify one or more particulars in which a director's financial interest in a merger differs from the shareholders' interests generally is not required. What is required for the burdens, standards, and remedies of the entire fairness form of review to be followed is that the plaintiff plead and prove facts from which the court can and does conclude, from an examination of all of the credible evidence, that as a matter ***573** of fact the director or directors involved had material financial or other interest in the transaction different from the shareholders generally. "Material" in this setting refers to a financial interest that in the circumstances created a reasonable probability that the independence of the judgment of a reasonable person in such circumstances could be affected to the detriment of the shareholders generally. This will be self evidently the case in classic self-dealing situation.

In our hypothetical set forth above, the two directors would under this test be treated as independent directors and would thus not be required by the imposition of the entire fairness rule *to prove that they made no mistake* or to be at risk *to pay rescissory damages if in good faith they did make mistakes* (or were negligent). For the reasons that follow, I conclude that an overwhelming majority of the Technicolor directors were independent under this test as well. The basis for that conclusion is set forth below. The consequence of it is that I adopt the business judgment form of review here and thus (most pertinently) locate with plaintiff the burden to establish that it was injured in fact by the directors' conduct.

B.

The Technicolor board on March 29, 1982, consisted of nine members, three of whom were officers of the company: CEO Morton Kamerman, President Arthur Ryan and Richard Blanco, CEO of the Government Services Division. In addition, Guy Bjorkman (who was the Company's largest shareholder at 9%) received substantial compensation ($100,000 per year) as chairman of the executive committee of the board. All of the directors, except Jonathan Isham who joined the board in 1980, had served on the Technicolor board since at least 1972. The executive committee consisted of Kamerman, Ryan, Bjorkman and Isham.

Cinerama claims that five of these nine members were “interested” in the MAF merger, in a way inconsistent with the interests other shareholders. From this assertion, it argues that the Technicolor board was, as a whole, subject to conflicting interests that shifts to the director defendants the burden of proving the intrinsic fairness of the MAF merger.

1. *Morton Kamerman*

Central to Cinerama's vision of the case is the claim that Morton Kamerman was not simply negligent in the way he pursued the negotiation and the board's consideration of the MAF proposal but ***574** that he was throughout motivated chiefly to protect and enhance his personal financial interests which were in conflict with those of the shareholders generally whose only interest was to get the best price on the sale. Cinerama fashions a long list of claimed conflicts.

(a) *Amendments to Kamerman's employment contract.* In connection with negotiation of the acquisition, Mr. Kamerman negotiated certain amendments to his employment agreement. Cinerama attacks this as part of a pay-off to Kamerman (or, more gently, the reason he was not fully concerned to exercise care to get the best price). In making this argument, Cinerama grossly exaggerates the value of these amendments. It claims that they were worth $3 million dollars to him or $30 per Technicolor share that he owned. This statement is a distortion because it does not take into consideration the value to Kamerman of his existing employment contract, nor does it consider the power Kamerman would have had (if no sale were made) to influence future increases in his present compensation. [15] Elsewhere, Cinerama portrays Mr. Kamerman as domineering (it tries very noticeably, with no doubt one eye on *Smith v. Van Gorkom,* to create an off-putting view of Kamerman as arrogant, domineering, and self-centered). It thus seems especially noticeable when, in considering the value of his employment contract, Cinerama fails to consider the future enhanced personal benefits that one in his position would reasonably expect to have occurred as his tenure as CEO continued. He was at the time of the transaction not yet 60 years of age.

In all events, Kamerman's *existing* contract was for five years at a minimum annual salary of $426,216 and provided for Mr. Kamerman to receive compensation of $100,000 per year for an additional five years following termination or expiration of the contract term ($2,631,080 future dollar).

Under the new contract he would receive *the same salary for the same period.* His consulting contract would be increased from $100,000 to $150,000 per year under the same conditions and for the same period. The existing contract had contemplated his receiving his salary for the period; the amended contract permitted Kamerman to continue to receive his salary for the remaining part of the term of his contract in the event he chose to leave the company after two years.

***575** These amended benefits are modest. While I do not conclude that Mr. Kamerman dominated the board and could get whatever he would have sought in the way of future increases in compensation, he was an active CEO respected by the board and important to the company. It is unlikely he could not have gotten more generous amendments than these to his employment contract over the course of the following five years (his contract ran until June 1988). These modest changes create no financial incentive to sell the company once one focuses on what, as a practical matter, was given up by Kamerman in the transaction. Equally important, it is naive to think that comparable amendments would not have been available from any buyer; they were *de minimus* from the buyer's point of view and reasonable in all events. Thus, I cannot conclude that a realistic rather than a formalistic analysis of this aspect of the transaction leads to the conclusion that the negotiation of these amendments to Mr. Kamerman's employment agreement created any material conflict between his interest as a stockholder in the sale transaction and his interest as the company's CEO.

(b) *The understanding that Kamerman would go onto MAF's board.*

In connection with the negotiation of the Perelman proposal, it was also agreed that Mr. Kamerman and Mr. Sullivan would go into MAF's board following an acquisition. This was disclosed to the Technicolor board (as was the amendment to Kamerman's employment contract). Cinerama points to this as a further conflict that requires invocation of the entire fairness form of review. I cannot agree. Viewed in context, this matter appears truly *de minimus. See Weinberger v. United Financial Corp.*, Del. Ch., C.A. No. 5915, Hartnett, V.C. (Oct. 13, 1983) (that director was "offered a directorship ... while working for the acquiring company, without more, is not sufficient to rebut presumption of propriety ...").

(c) *Stock Purchase Agreement.* In order to promote the success of his effort, Mr. Perelman insisted that Messrs. Kamerman (who beneficially owned or had options on 128,874 shares) and Bjorkman (who beneficially owned 409,406 shares) become contractually bound to sell their stock. The Stock Purchase Agreement that did so bind them was for the same $23 cash as was contemplated in the Merger Agreement. It contained a term that provided that MAF would be bound to pay to them a higher price if it paid a higher price to any other shareholder. Cinerama argues that the other shareholders had no such price protection. Such a provision was prudent from the point of view of the individual sellers (in case a higher offer emerged) and was not in conflict with other shareholders. Indeed, in terms of incentives, it reinforced the incentive to get the highest price for ***576** others as that would then affect the price paid under their Stock Purchase Agreement. This agreement was part of Perelman's effort to "lock-up" the purchase. It was instigated by him and conferred no substantial benefit on Kamerman other than fostering and protecting the $23 cash transaction which for good (as defendant's claim) or ill (as Cinerama asserts) was an effect shared by all stockholders.

(d) *Capital gains treatment.* There is no persuasive evidence that the merger transaction was delayed in any respect in order to assist Mr. Kamerman to achieve capital gains tax treatment on his option shares.

Thus, taking each of these claims separately, or looking at them together, I cannot conclude that the circumstances complained of created any significant incentive for Mr. Kamerman not shared by other stockholders to promote or encourage the sale of his company or the sale of the company to MAF in particular. With respect to Mr. Kamerman, I thus conclude that his judgment to support the proposal he presented to the board on October 29, 1982, was independent for purposes of deciding whether the burdens, standards and remedies associated with the entire fairness form of judicial review are applicable here.

2. *Guy Bjorkman*

Together with his wife, Mr. Bjorkman was Technicolor's largest shareholder, owning 409,406 shares (about 9% of the outstanding stock). In addition, he received compensation of $100,000 per year from the company in his capacity as chairman of the executive committee of the board. That amount would be lost following an MAF deal and that, I suppose, created some incentive not to sell at all. Obviously Mr. Bjorkman's financial interest was, as a shareholder, to get the best available price. Cinerama suggests he had special estate planning reasons to want a quick sale, but the record does not support that speculation. It points also to the "price protection" provision in the Stock Purchase Agreement but, as noted above, that provision created no conflict with the interests of other shareholders. It was quite reasonable and appropriate for a fiduciary to negotiate such a provision in the circumstances. Mr. Bjorkman was, in my opinion, capable and did exercise independent judgment on March 29, 1982, when the Technicolor board acted on this matter.

3. *Arthur Ryan*

Cinerama's account of why Arthur Ryan was in a disabling conflict position is as follows. Ryan and Kamerman had a very poor relationship. Ryan ***577** thought a recent reorganization of responsibilities had breached his employment contract. He felt he had no future with Technicolor. Kamerman did not trust Ryan and excluded him from much in the company, including negotiation or consideration of Perelman's proposal, until the special board meeting on March 29. Ryan had a friend who was acquainted with Ronald Perelman. This friend let Ryan know (although Kamerman had not told him of the Perelman approach) that Ryan would have a future with a Perelman-controlled company. This could only mean Kamerman's job. Plaintiff concludes that Ryan, who had little stock in the company, had as a principal interest in the transaction the prospect that it would provide a way to overcome his nemesis, Kamerman.

The evidence supports the conclusion that Ryan and Kamerman had a poor and probably ineffective working relationship. It is the case that Ryan was unhappy, and no doubt it is true that he would welcome any change in control that might promise to remove Kamerman from the scene. Ronald Perelman had learned of Ryan's situation in talking about Technicolor with a senior executive at Gulf & Western (which owned, and is now called, Paramount). That individual gave Ryan progress reports on negotiations. Ryan thought Perelman would "give [him] a fair chance when and if the deal went through." Ryan Dep. 100-01. In fact, Kamerman was terminated in February 1983, and Ryan was promoted.

At the March 29 special meeting, Ryan apparently said nothing and voted with the unanimous board to approve the merger agreement.

The question of fact whether Mr. Ryan was in a position to exercise and did exercise an independent judgment turns on the question of how much weight is to be given to the presumption that the judgment of a director is a business judgment unaffected by personal considerations. The record is consistent with but does not establish the fact that Ryan's decision was affected by his hope that a change in ownership to MAF would improve his prospects for advancement. Mr. Perelman made no overtures to Ryan. Trying to apply a realistic, not formal, analysis, I conclude that the facts here created a large risk that Ryan's judgment on the matter could have been affected by his personal situation, and that situation could well lead to disfavoring the interests of stockholders in favor of his own. It is unknowable whether his judgment was affected. I do conclude that it was subject to sufficient incentives that I will assume for these ***578** purposes that it was not entitled to the presumption of valid business judgment.

4. *George Lewis*

Director George Lewis was a tax attorney for Kamerman and Bjorkman. For this reason, since each of them are asserted to have been in conflict with the Technicolor shareholders, Lewis is said to have been incapable of exercising business judgment. As I have concluded that each of these men were in a position to exercise an independent judgment, I need not address the question posed concerning Mr. Lewis' duties as a tax lawyer and as a director.

5. *Fred Sullivan*

Mr. Sullivan made money on the transaction ($150,000 fee paid by MAF-*i.e.,* Technicolor after the merger) and apparently engaged in or instituted some trades in Technicolor stock while in possession of non-public information. The fee was fully disclosed to the board. That fact does not render him disinterested in the transaction. Plainly, a $150,000 cash payment contingent upon the closing of the deal is a circumstance that has a substantial probability of affecting the independence of Mr. Sullivan's judgment to the detriment of the company's shareholders, given all of the circumstances (*i.e.,* his very modest stock holding in the company).

Thus, considering Cinerama's claim that five of the nine Technicolor directors had a conflicting interest in the transaction approved on October 29, I conclude that only Sullivan has been shown to have had a material conflicting interest. The possibility of conflicting motivation affecting Mr. Ryan is such as to justify excluding him from a listing of disinterested directors even though the record does not plainly establish that fact. Thus, for purposes of analyzing the issues presented in this case, I conclude that at least seven of the nine members of the Technicolor board were not financially interested in the transaction in any way materially adverse to the shareholders and that, moreover, those independent directors were not dominated or materially manipulated by Sullivan or Ryan in a way that makes the employment of the business judgment form of judicial review inappropriate. *Compare Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261, 1287-88 (1989).

Given these facts, I conclude that the proper form of judicial review of the October 29, 1982 decision to authorize and recommend ***579** stockholder approval of the merger agreement is the business judgment form of review, which places the burden on the plaintiff to establish either that the directors are not independent, did not act in good faith, or were negligent in a way that proximately caused it injury. *See Citron v. Fairchild Camera & Instrument Corp.,* Del. Ch., C.A. No. 6085, Allen, C. (May 19, 1988), *aff'd,* Del.Supr., 569 A.2d 53 (1989).

III.

There is no persuasive evidence of bad faith on the part of any director defendant, excluding Mr. Sullivan.[16] With respect to the key player, Mr. Kamerman, what has been said above with respect to his various financial interests in the Company and in the transaction expresses my conclusion that he had a dominant financial interest to achieve the best available transaction in the sale of the Company. Nor can I find sufficient evidence of any non-financial motivation that could possibly justify a conclusion that the CEO was not proceeding in the utmost good faith. That he took steps to consider how a sale to MAF would affect his personal situation gives rise to no suspicion or inference in my mind. Directors are fiduciaries; they must not use their corporate power for personal gain at the expense of the corporation. Their dealings with the corporation must be on terms that are inherently fair to the corporation. But in defining the contours of the directors' fiduciary duty, we must remain mindful of the nature of the institution involved. The law cannot sensibly demand that directors abandon personal financial concerns in order to serve on a corporate board; it is enough that directors meet their duty of loyalty and care to the corporation. Thus, I draw no inference of impropriety in the attention that Mr. Kamerman paid to the personal financial implication that a sale transaction would have for him. That attention was not inconsistent with his fully satisfying the duties he owed to the corporation.

IV.

The core of a directors' fiduciary duty is the obligation of loyalty. But a board does not exhaust its obligation when it acts ***580** with a genuine belief that its action is in the best interest of the corporation. Directors also have an obligation to proceed prudently in the circumstances; to inform themselves of all of information material to their decision that, in the circumstances, they believe in good faith, is necessary or prudent to possess.[17] Because business corporations are risk-taking institutions and because the intelligent assumption of risk can be impeded were courts free to second-guess questions of whether a board had enough information to act prudently, the legal test of whether directors are adequately informed is rather high: gross negligence. *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858 (1985); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805 (1984).

What acts may constitute negligence or gross negligence will of course be affected by the significance of the matter that turns on the decision. Prudence ordinarily would be expected to require a greater depth of knowledge of alternatives, of costs and consequences when the decision being made is of greater potential impact or importance.

Plaintiff here claims that the directors of Technicolor were grossly negligent in the way in which they proceeded to authorize the sale of the company and recommend that transaction to the shareholders. Plaintiff also argues that in "granting Perelman a lock-up" and "fail[ing] to initiate a canvas of the market" (Plaintiff's Opening Brief (Vol. 11) p. 362), defendants breached a duty (later) recognized in *Revlon v. MacAndrews & Forbes Holdings, Inc.,* Del.Supr., 506 A.2d 173 (1986)[18] "[to] maximize shareholder value" (Opening Brief at 362).

Defendants responded that they acted prudently in making the decisions they made. They were advised by expert bankers with respect to value and followed the advice of able and experienced legal counsel in exercising a business judgment.

With respect to this matter, I note first that *where there is no breach of loyalty pleaded* (or after trial *proven*), as I find to be the case ***581** here, the due care theory and the *Revlon* theory do not present two separate legal theories justifying shareholder recovery.[19] *Barkan v. Amsted Indus., Inc.,* Del.Supr., 567 A.2d 1279, 1286 (1989). In such a context, both theories reduce to a claim that directors were inadequately informed (of alternatives, or of the consequences of executing a merger and related agreements). An auction is a way to get information. A pre- or post-agreement market-check mechanism is another, less effective but perhaps less risky, way to get information. A "lock-up" is suspect because it impedes the emergence of information in that an alternative buyer that would pay (or would have paid) more is less likely to emerge once such an impediment is in place.

In short, in the arm's-length sale of the company context, as elsewhere, when disinterested directors act in good faith,[20] the only remaining fundamental basis upon which their action may be attached is lack of due care.

I assume for purposes of deciding this case (1) that the *Revlon* case, which does illuminate the scope of a board's due care obligations in the sale of a company, has pertinence to the determination of whether the Technicolor board met its obligation to be informed in the sale of that company some years earlier; (2) that the absence of a public auction, or of a meaningful pre- or post-agreement market check procedure (*compare In re Fort Howard Corp. Shareholders' Litig.*, Del.Ch., C.A. No. 9991, Allen, C. (Aug. 8, 1988)), suggests that there was a material possibility that, were this matter presented to the court today, a preliminary injunction restraining the board from fulfilling its obligations under the merger agreement would issue, at least until a mechanism to reasonably assess possible alternatives could be structured and implemented; and (3) that, indeed, the board here did not satisfy its obligation to take reasonable steps in the sale of the enterprise to be adequately informed before it authorized the execution of the merger agreement. *Compare Roberts v. General Instrument Corp.,* Del.Ch., C.A. No. 11639, Allen, C. (Aug. 13, ***582** 1990) (post-agreement market check was sufficient to preclude preliminary injunction on basis of lack of information on alternatives to all cash, all shares offer).

Making these assumptions avoids any necessity to evaluate the claim of negligence closely or to assess the effect of the apparent reliance by the board on the advice of its special legal counsel. I make these assumptions freely because they highlight what I view to be a fatal weakness in plaintiff's case. It is not the case, in my opinion, that *in an arm's-length, third party merger* proof of a breach of the board's duty of due care itself entitles plaintiff to judgment. Rather, in such a case, as in any case in which the gist of the claim is negligence, plaintiff bears the burden to establish that the negligence shown was the proximate cause of some injury to it and what that injury was.[21] *See Barnes v. Andrews,* 298 F. 614, 616-18 (S.D.N.Y.1924); *Cf. Virginia-Carolina Chemical Co. v. Ehrich,* 230 F. 1005, 1013 (D.S.C.1916); *Hathaway v. Huntley*, Mass.Supr., 188 N.E. 616, 618-19 (1933).

In *Barnes v. Andrews*, then District Judge Learned Hand addressed the liability of a corporate director whom he found to have been negligent, "though his integrity was unquestioned." The suit was brought by the receiver of a corporation that had been ruined by mismanagement and waste. The court denied a judgment to the plaintiff despite the determination of negligence by the director-defendant:

This cause of action rests upon a tort, as much though it be a tort of omission as though it had rested upon a positive act. The plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided.

But when a business fails from general mismanagement, business incapacity, or bad judgment, how is it possible to say that a single director could have made the company successful, or how much in dollars he could have saved? Before this cause can go to a master, the plaintiff must show that, had Andrews done his full duty, he could have ***583** made the company prosper, or at least could have broken its fall. He must show what sum he could have saved the company. Neither of these has he made any effort to do.

The defendant is not subject to the burden of proving that the loss would have happened, whether he had done his duty or not.

I conclude, therefore, as to this first claim that there is no evidence that the defendant's neglect caused any losses to the company, and that, if there were, that loss cannot be ascertained.

298 F. at 616-618.

The principle of *Barnes* is still good law and is applicable here in my opinion. Absent proof of self-interest that casts upon the director the burden to prove the entire fairness of an interested transaction, a shareholder-plaintiff must prove by a preponderance of evidence that director negligence did cause some injury and must introduce sufficient evidence from which a responsible estimation of resulting damage can be made. Of course in a case in which the plaintiff proves at trial (or as here it is assumed) that the board was negligent, there will frequently be no conclusive evidence available on the counter-factual question what would have happened if the directors had proceeded prudently. But that fact, while it may properly affect the court's assessment of what is sufficient proof of damages,[22] cannot relieve plaintiff in an arm's-length transaction of its obligation to prove that in fact it was injured by director negligence.

Here I conclude that plaintiff has not shown that the (assumed) flawed technique employed in reaching agreement with MAF and ***584** recommending that transaction to the Technicolor shareholders did result in any injury to Cinerama. In reaching this conclusion, I note first that the (unaffected) market capitalization of Technicolor was very much less than the purchase price and that the court has now completed a painstaking valuation of the Company and concluded that the fair value of the Company as a going concern on January 24, 1983 was something less than $23 per share. There were no material changes in the condition of the Technicolor business or markets within which it operated to suggest that the Company's "going concern" value was materially greater on October 29, 1982.[23] Nor is there persuasive evidence that the company's "private market" or public sale value was greater than $23 per share.

While Goldman Sachs ran some hypothetical studies of LBO transactions in excess of $23 per share, the company's management, after considering the matter, declined to pursue such a purchase offer in excess of the price that MAF offered. Finally, a comparison of the premium paid by MAF in this transaction with other transactions in the period shows that it was substantially larger than the average premium paid for comparably sized companies during the period. (*See* Alcar Report, Dx. 344 at 8.2-8.4).

Considering the record as a whole, I cannot conclude that the (assumed) negligence of the Technicolor board in negotiating and recommending the October 29 agreements resulting in any financial injury to the company's shareholders who chose to accept that transaction.

V.

The foregoing analysis looks at the conduct of the director defendants on October 29, 1982-the date on which they acted to approve the MAF merger agreement and related agreements. It proceeds, of course, on the basis that the decisions of the board under review represented arm's-length transactions in which there was no dominating conflicting financial interest.

Cinerama, of course, did not accept the $23 tender offer or the $23 merger consideration. It dissented and sought the appraised ***585** value of its stock which has now been determined to be $21.60. In this personal liability action it seeks, among other forms of relief, an award of the fair value of its stock from MAF on the theory that MAF, at the time of the merger, was a self-dealing fiduciary who did owe it the duty of entire fairness. This is a duty that it breached, plaintiff argues, in several respects. First, it contends that the $23 price it was offered was unfairly low. Second, it contends that MAF's disclosures both in the tender offer and in the merger were inaccurate and incomplete. Third, it contends that MAF conspired with or participated in breaches of duty by the director defendants.

The duty of a controlling shareholder in a merger in which it bears a duty of entire fairness includes a duty to pay a fair price and a duty to deal fairly with minority shareholders. *Weinberger v. U.O.P., Inc.,* Del.Supr., 457 A.2d 701 (1983). This latter duty may arise in any number of ways and may involve questions of timing or disclosure of the transaction.

A. *The Duty of MAF To Pay A Fair Price and the Conspiracy Claim.*

A fiduciary duty is imposed upon controlling shareholders in certain circumstances not formalistically, but for good reason. That protective device is in substitution for the protection that a corporation or its shareholders ordinarily receives from the business judgment of the men and women who comprise the company's board of directors.

Thus, when a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation. When, on the other hand, a majority shareholder takes no such action, generally no special duty will be imposed. More specifically, when a majority shareholder takes no action with respect to the negotiation for the corporation or approval of a proposed transaction (and uses no corporate information that would not be available to an arm's-length party), he has no duty to the corporation or its shareholders with respect to that transaction apart from such duties as are owed by any person in such circumstances.[24] *Sinclair Oil Corp. v. Levien,* Del.Supr., 280 A.2d 717 (1971).

***586** Control, of course, may be exercised subtlely or indirectly. When the power of a controlling shareholder is projected into a negotiation and affects that process, the protective device of the entire fairness standard is triggered. But, in my opinion, when a court determines that in fact a controlling shareholder has not resorted to that power, because a special committee functioned and that special committee in fact understood its duty and its power (*i.e.,* to say no when a proposed transaction is not both fair and the best deal that can be negotiated) and satisfied that duty, then it is that process that protects the minority shareholders, subject to business judgment review. *See Citron v. E.I. duPont de Nemours & Co.,* Del. Ch., 584 A.2d 490, 499-502 (1990); *In re TWA Shareholders' Litig.,* Del. Ch., C.A. No. 9844, slip op. at 16-17, Allen, C. (Oct. 21, 1988). If courts exercise sensitive review to determine whether, in fact, that process itself was effectively employed, this dichotomy between the use of power and its non-use is fully consistent with the full protection of shareholder interests, while freeing the court, where feasible, from the difficult burden of adjudicating substantive fairness in business transactions. In this effort, courts must be probing and, indeed suspicious. But that attitude of suspicion ought not, in my judgment, go so far as to assume that the process of special committees is inherently invalid.

Thus, when a controlling shareholder does not set the terms of a transaction unilaterally, use confidential corporate information in the negotiation process, or otherwise use his power to impede or impair the effectiveness of a negotiation, he has not used his power to impair the normal and primary protection that the law affords the corporation and its shareholders: the judgment of its independent board of directors. Thus, in that circumstance, a controlling shareholder owes to the corporation only those duties owed by every person to every other with whom she deals.

These principles apply here. At the time the cash-out merger was effectuated, MAF was, of course, the controlling shareholder of Technicolor. But, the deal it effectuated at that time was one that it had negotiated at arm's-length with Mr. Kamerman and had been approved by the disinterested Technicolor board. That negotiated agreement provided that the merger was to take place promptly ***587** following the closing of the tender offer (and in all events within the period of time that the Technicolor board had in mind when it approved of the proposal). No material change in the value of Technicolor had occurred.

The board with which MAF dealt was not limited in the way some special committees have been limited (*compare In re TWA Shareholders' Litig., supra*), nor did MAF have access to confidential information by reason of any breach of confidence. Moreover, the information it was afforded was not of a kind that is atypical in a negotiated transaction.

In all of these respects, the arm's-length character of the transaction supports the assertion that, in arriving at the terms of the $23 merger transaction, the interests of the shareholders were protected by the board that they had elected.

Given Technicolor's certificate of incorporation and his prior stock ownership (about 5%), Mr. Perelman did, probably, effectively lock-up the transaction on October 29 when he acquired rights to buy the Kamerman and Bjorkman shares (about 11% together) and acquired rights under the stock option agreement [25] to purchase stock that would equal 18% of the company's outstanding stock after exercise. That fact constituted no wrong by Mr. Perelman, however, unless one concludes there was a conspiracy between him and Mr. Kamerman and the other Technicolor directors to breach the directors' duty to the shareholders. Unless one could so conclude, one would have to view Mr. Perelman as engaged in honest, arm's-length bargaining. It would be odd, if that is how one views the facts, to conclude that such a bargainer had a legal right (and duty) to complete the merger on the terms agreed and a fiduciary duty not to do so. Indeed, I conclude that if one views the negotiation of the merger agreement, stock purchase agreement and stock option agreement as arm's-length negotiation in which the third party had no knowledge of a breach by the directors of their duty (as I do), one must conclude that the absence of an effective market check does not strip from MAF its contractual rights to complete the merger on the terms negotiated. If the directors were mistaken in their view of fair value when they approved the merger agreement (which has ***588** not been shown), the appraisal process is available to remedy such honest error.

B. ***The Disclosure Claims Against All Defendants.***

Fiduciaries, of course, are required to be candid when making corporate disclosures to the corporation's shareholders. When they make a disclosure to shareholders, they must inform the shareholders of all material information in their possession bearing on the subject (a more complete definition is set forth below). Cinerama charges that it was not afforded complete relevant information by the directors or, later, by MAF. Since it did not tender, one might say Cinerama was not misled by any lack of complete candor, but I assume that it has standing to test the adequacy of disclosure. It was plainly, though indirectly, affected by the tender offer. It was that transaction that put MAF in a position to exercise cash-out rights under Section 253 of the Delaware Corporation Law. Thus, I assume it has standing to litigate concerning the quality of disclosure.

Plaintiff's attack upon disclosures is, as elsewhere in its action, energetic. The following list of thirty-three charges is a summary of some of those allegations and may not be complete.

October 29, 1982 Press Release

1. Plaintiff says that the statement indicating that "the agreement has been approved by the boards of directors of MacAndrews & Forbes and Technicolor" is false since, plaintiff alleges, director Simone never approved the transaction, and therefore, there was never unanimous approval by the Technicolor board.

2. Plaintiff alleges that the statement that the tender offer was subject to "financing of the offer under commitments MacAndrews & Forbes has already obtained" was misleading because, plaintiff charges, MAF had no firm financing in place.

November 5, 1982 Schedule 13D

3. According to plaintiffs, this document was materially omissive because it failed to disclose why Kamerman was not selling his 15,249 option shares until after January 1, 1983.

***November 4, 1982 Schedule 14D-9*-Plaintiff charges that this document:**

4. failed to disclose that Perelman initiated the negotiations by approaching Sullivan;

5. failed to disclose that Perelman met with Sullivan on September 17, 1982;

***589** 6. failed to disclose that Sullivan contacted Kamerman to advise him of Perelman's interest;

7. failed to disclose that Perelman met with Sullivan at Perelman's request to obtain information on how best to approach Kamerman;

8. failed to disclose that the transaction price was set at the October 4, 1982 meeting;

9. failed to disclose that Kamerman's initial $25 per share "asking price" was arrived at without benefit of investment advice;

10. failed to disclose that no significant price negotiations occurred after October 4, 1982;

11. failed to disclose that Sullivan traded in Technicolor stock while in the possession of material, non-public information;

12. failed to disclose that Sullivan's finder's fee was originally to be paid by Perelman and MAF through Bear Stearns and was switched to Technicolor only on the eve of the special board meeting;

13. was misleading because it represented that Sullivan's finder's fee was in consideration for services rendered;

14. failed to disclose that neither Sullivan's finder's fee nor the amendment to Kamerman's employment contract were submitted to the compensation committee;

15. failed to disclose that Simone resigned as chairman of the compensation committee to protest Sullivan's finder's fee;

16. failed to disclose that Kamerman's support for the MAF transaction was conditioned on amendment of his employment contracts;

17. failed to disclose that Kamerman insisted on delaying the merger until after January 1, 1983, in order to obtain capital gains treatment for his option shares;

18. failed to disclose that Bjorkman and Kamerman were guaranteed the highest price paid by MAF for Technicolor stock for one year after approval of the transaction;

19. failed to disclose that Lewis represented Kamerman and Bjorkman as tax counsel;

20. falsely disclosed that the vote of the Technicolor board in favor of the merger was unanimous when, in fact, plaintiffs say, director Simone voted against the merger;

21. failed to disclose that Goldman Sachs conducted no due diligence prior to rendering its opinion at the special board meeting;

***590** 22. failed to disclose that the Goldman Sachs opinion was an oral opinion and subject to revocation;

23. was misleading as to the scope of the Goldman Sachs advice. According to plaintiff, the Goldman Sachs letter says the opinion was limited to "as of this date"; plaintiff reads Item 4 of the Schedule 14D-9 as saying that the opinion was given with respect to the fairness of the price at the time of the tender offer and merger;

24. failed to disclose that as recently as the second quarter of 1981 Technicolor stock had been trading as high as $28.50 a share;

25. failed to disclose that the market for Technicolor stock had been artificially depressed by the negative reaction to the One Hour Photo business;

26. failed to disclose that Perelman had already acquired 4.8% of the Technicolor stock prior to commencing the tender offer;

27. failed to disclose that the Stock Option Agreement and the Stock Purchase Agreement had the effect of granting an absolute lock on Technicolor;

28. failed to adequately disclose the number of shares held by directors that were already committed to MAF since this information could be obtained only by reference to exhibits to the Schedule 14D-9;

29. failed to disclose that management had considered an LBO; and

30. failed to disclose that an LBO at prices higher than $23 per share was "possible."

December 27, 1982 Proxy Statement-plaintiff reiterates many of the same objections to this document as those asserted against the November 4, 1982 Schedule 14D-9, but in addition asserts that the proxy statement:

31. failed to disclose that nothing was done to update the Goldman Sachs opinion;

32. falsely disclosed that, following the October 4, 1982 meeting, Perelman and Kamerman "had further discussions in subsequent telephone conversations and met again on two occasions to continue such discussions;" and

33. failed to disclose the Technicolor directors' conflicts.

In order to prevail on the claims that defendants breached their ***591** duties of candor, plaintiff must show that the alleged nondisclosures are material. The standard for materiality is well established in Delaware; plaintiff must demonstrate

a substantial likelihood that, under all of the circumstances, *the omitted fact would have assumed actual significance in the deliberations of a reasonable stockholder.* Put another way, there must be *a substantial likelihood that* the disclosure of *the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information* available.

Rosenblatt v. Getty Oil Co., Del.Supr., 493 A.2d 929, 944-45 (1985) (emphasis added) (quoting *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438 (1976)). In my opinion, the bulk of plaintiff's alleged nondisclosures are plainly not material. For example, it is incorrect to think that expressly disclosing what Technicolor stock was trading at in the second quarter of 1981 (*see* alleged nondisclosure number 24)-publicly available information-could have conceivably affected the "total mix" of information. It also seems unlikely that the fact that it was Perelman who initiated contact with Technicolor through Sullivan is a fact that would have assumed actual significance in the deliberations of a reasonable shareholder. *See* alleged nondisclosure number 4. I take a similar view of the materiality of alleged nondisclosures numbers 2, 3, 6, 9, 12, 14, 15, 18, 19, 21, 22, 24, 26, and 29.

Others of the alleged nondisclosures have no basis in fact-that is, they are based on untrue assertions or versions of the facts upon which plaintiff has not sustained its burden of proof. They amount to nothing more than claims that defendants failed to disclose plaintiff's erroneous view of the facts. The best illustrations include alleged nondisclosures numbers 1 and 20 which are based on plaintiff's scenario that director Simone did not approve the transaction, a version of the facts that I explicitly reject. Other alleged nondisclosures which are not based soundly in the facts as they have been proven at trial include alleged nondisclosures numbers 8, 10, 13, 16, 17, 25, and 30.

Alleged Nondisclosures Nos. 5 & 7

Plaintiff cites several omitted facts which, standing alone, are immaterial, but which, if disclosed, plaintiff argues, would lead a reasonable shareholder to the conclusion that Sullivan was Perelman's "inside man." This conclusion, if true, would be material. I do not, ***592** however, find support in the record for any claim that Sullivan was Perelman's inside man. In fact, any attempt to persuade a shareholder that this was the case very well could itself have been considered misleading. Sullivan did have a conflict interfering with his duty of loyalty with respect to his finder's fee, but this was disclosed. The fact of his meeting with Mr. Perelman was also disclosed.

Alleged Nondisclosure No. 11

With respect to Sullivan's insider trading, plaintiff has not established that this was a fact about which the company knew or should have known at the time the relevant disclosure documents were distributed to the shareholders. Absent such proof, the failure to disclose such trading (even if it were assumed to be material to a shareholder) can hardly be a wrong of the board.

A company cannot be required to disclose that about which it has no actual or constructive knowledge, at least so long as it was not reckless with regard to discovering and disclosing the facts. *See, e.g., State Teachers Retirement Bd. v. Fluor Corp.,* 654 F.2d 843, 850-51 (2d Cir.1981); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.,* 480 F.2d 341, 363-64 (2d Cir.), *cert. denied,* 414 U.S. 910, 94 S.Ct. 232 (1973); *Richland v. Crandall,* 262 F.Supp. 538, 553 n. 12 (S.D.N.Y.1967).[26] I am not of the opinion that Technicolor had actual knowledge; nor am I of the opinion that the company had constructive knowledge by way of Sullivan's knowledge of his own bad deeds. The general rule is that the agent's knowledge of his own misdeeds cannot be imputed to the corporation when those acts were committed outside the scope of the agency. *Kerbs v. Fall River Indus., Inc.,* 502 F.2d 731, 740-41 (10th Cir.1974). An exception exists where the "agent" or individual exercises "blanket authority" for the corporation; the knowledge of the individual may be imputed to the corporation where the corporate defendants were "corporate embodiments" of the individual. *SEC* ***593** *v. Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1089 n. 3 (1972). Sullivan was clearly acting outside his authority as a director, and it is not the case that Technicolor was Sullivan's "corporate embodiment." Thus, I find that Technicolor could not be deemed to know of his insider trading, and, therefore, was not responsible for disclosing it.

Alleged Nondisclosure No. 23

The predicate of plaintiff's allegation that the Schedule 14D-9 was misleading with respect to the Goldman Sachs opinion is incorrect. The Goldman Sachs letter opinion is not limited to the fairness of the transaction at the time it was written (November 19, 1982). *See* Px 61, at P301406 (fairness opinion not limited to "as of this date"). Goldman Sachs concludes in this letter that the price to be received pursuant to the tender offer and merger agreement (which "provides for the merger of the Company into Mancanfor following the expiration of the tender offer") is fair. Thus, I cannot conclude that the disclosure in Item 4 of the Schedule 14D-9 is in any way misleading when it says that, in reaching an opinion as to the fairness of the transaction, the board of directors relied upon "[t]he advice of Goldman Sachs & Co.... with respect to the fairness of price to be received by the holders of common stock in the Offer and the subsequent Merger."

Alleged Nondisclosure No. 27

With respect to alleged nondisclosure number 27, I start by noting that both the Stock Option Agreement and the Stock Purchase Agreement were disclosed in the relevant documents. Plaintiff's only complaint on this score is that these documents did not spell out the fact that the two agreements in combination amounted to a lock-up. This characterization, however, I do not find to be material to a reasonable shareholder.

Courts should not "attribute to investors a child-like simplicity...." *Basic, Inc. v. Levinson,* 485 U.S. 224, 108 S.Ct. 978, 985 (1988). Consequently, conclusions that may be drawn from information disclosed need not be disclosed. *Neiken v. Solarex Corp.,* Del.Ch., C.A. No. 6788, Brown, C. (Apr. 30, 1982). Keeping this in mind, I fail to see how spelling out in print the effect that the Stock Option Agreement and the Stock Purchase Agreement might be thought to have had could possibly affect the "total mix" of information. The underlying facts regarding the agreements were disclosed and any reasonable shareholder could readily have done the math to see what effect on ***594** the company the agreements might have. Thus, I do not conclude that the company's failure to do so was material to shareholders deciding to tender into this deal or not.

Alleged Nondisclosure No. 28

Plaintiff further alleges that the disclosure in the Schedule 14D-9 was inadequate because the shareholders would have been forced to refer to exhibits to obtain certain information regarding how many of the directors' shares were already committed to MAF. With this assertion, I cannot agree.

It is neither necessary nor desirable for companies to include every morsel of corporate information in the text of the disclosure document. Such a rule would result in an "avalanche" of information, far more than the average shareholder could or would absorb. *See TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 448-49, (1976). The use of exhibits has developed as a tool for prioritizing information for better shareholder digestion. Just because certain information is contained in exhibits does not mean that that information is not adequately disclosed. Disclosure documents must be read as a whole. *See e.g., Shamrock Holdings, Inc. v. Polaroid Corp.,* 709 F.Supp. 1311, 1328 (D.Del.1989); *Unicorp Financial Corp. v. First Union Real Estate Equity & Mortgage Investments,* 515 F.Supp. 249, 260 (S.D. Ohio 1981); *Galfand v. Chestnutt,* 363 F.Supp. 291, 295-96 (E.D.Pa.1973). This, of course, is not license to "bury" important information in an attempt to make it less accessible to the shareholders. According to the "buried facts doctrine," however, disclosure is inadequate only if there is a reasonable danger that a shareholder would fail to realize the correlation and overall import of facts interspersed throughout the document. *See Kas v. Financial General Bankshares,* 796 F.2d 508, 516 (D.C.Cir.1986).

In this case, I find no such danger inherent in disclosing via exhibits the total number of shares committed to MAF. The Schedule 14D-9 disclosed the fact that the shares beneficially owned by Bjorkman and Kamerman would be sold to MAF pursuant to the Stock Purchase Agreement. To find out exactly how many shares that entailed, reference to exhibits is a natural and reasonable response. I do not find it unduly burdensome to have the shareholders look to exhibits for further information of this kind.

Alleged Nondisclosure No. 31

Plaintiff further faults defendants for failing to disclose in the proxy statement that nothing was done to update the Goldman Sachs ***595** opinion. This may have been a material omission had the value of the company changed substantially between the time Goldman Sachs did its investigation and the date of the proxy statement. However, I cannot agree that this was a material omission in a case such as this where it the evidence at trial indicated that the value *did not* change materially. That is, I cannot conclude that a reasonable shareholder would be very much interested in the fact that no further investigation was conducted so long as all indications were that the opinion as to the fairness of the transaction remained valid.

Alleged Nondisclosure No. 32

With respect to discussions held after the October 4, 1982 meeting, the proxy statement discloses:

Perelman and/or Kamerman had further discussions in subsequent telephone conversations and meetings. Messrs. Sullivan, Kamerman and/or Perelman met or talked by telephone again on subsequent occasions to continue such discussions....

Px 61, at P301344

As a factual matter, I find that this statement is well supported by the record. Hence, I am unable, to conclude that this disclosure was in any way false or misleading.

Alleged Nondisclosure No. 33

To the extent that this disclosure claim is predicated on plaintiff's view of the alleged conflicts of directors other than Sullivan and Ryan, as discussed above, I am not persuaded that this claim has any basis in fact. Director Sullivan did have a conflict (his $150,000 finder's fee), but the MAF defendants clearly did disclose this information in the December 27 proxy statement. As noted above, I also assume that director Ryan had a conflict based on his hostility towards Kamerman, but plaintiff has presented no evidence that MAF knew or should have known about Ryan's dislike of Kamerman. Without such evidence that MAF knew of Ryan's conflict, I cannot find MAF remiss for failing to disclose it. *See* pp. 57-58, *supra.*

Moreover, given his silence at the October 29 board meeting and the unanimous approval of the transaction, I could not conclude that any assumed conflict of Mr. Ryan would have been material to the Technicolor shareholders.

For the foregoing reasons, therefore, I conclude that while in ***596** retrospect the 1982-83 transactions complained of could have been arranged in a way that afforded greater assurance that directors appropriately protected shareholder interests, they were nevertheless transactions that were unaffected by material conflict of interest or otherwise stained with disloyalty. Even assuming, as I do, that the directors should have made better use of the market-by an auction, by a market check, or by other techniques to achieve reliable market information about company value-than they did, I cannot conclude that such deviation from the ideal, in fact caused any financial injury to Cinerama. Indeed, the record in both this case and the appraisal case provides scant basis to support a speculation that Cinerama was not offered a completely fair price in January 1983 for its stock. The extended litigation that it has pursued, has imposed heavy costs on all parties and, significantly, on the public.

Defendants may submit a form of order on notice.

Parallel Citations

60 USLW 2074, 17 Del. J. Corp. L. 551

Footnotes

1 For the details on that assertion, see the memorandum opinion in the appraisal action issued on October 19, 1990.

2 These posited incentives also explain, in plaintiff's view, why the board overrode Mr. Simone's claimed resistance and why the minutes of the board meeting inaccurately portrayed the approval of the MAF deal as unanimous.

3 With respect to director Arthur Ryan, I assume but do not decide that his personal situation in the firm created a conflict with the interests of shareholders to sell for the highest price. *See* pp. 32-34, *infra.*

4 It is unnecessary in this case to delve into the question whether a material change in circumstances of the target between the date of closing of the tender offer and the date of the merger would preclude the majority shareholder from exercising his contract rights. Strong arguments can be made that such an event ought to have no impact upon the duties of the acquiring person. Doctrinally, even though he will cause the effectuation of the merger, such a person would still be in a position to argue that he did not unilaterally set its terms and thus that the merger is not a self-dealing transaction as defined in *Sinclair Oil Co. v. Levien,* Del.Supr., 280 A.2d 717 (1971). Economically, he will be able to assert that the principle purpose of contracts is to allocate market risks and that it would not be productive to, in effect, give the shareholders as a class a one-way option out of the merger agreement. Such a litigant could also argue that the appraisal remedy, which would consider the value of the company affected by any intervening developments, should be adequate protection (and thus preserve the minority shareholder from harm).

5 In addition to the antitakeover provisions, MAF was subject to financing constraints; its banks were not willing to finance a hostile bid.

6 Perelman, for example, consulted Martin Davis of Gulf & Western, now Paramount Communications.

7 Kamerman, Technicolor's second largest shareholder in 1982, was a strong-willed individual who won a seat on the Technicolor board as a result of a proxy contest in 1970.

8 Sullivan's purchase eventually led to an investigation by the Enforcement Division of the Securities and Exchange Commission. Pursuant to this investigation, Sullivan disgorged $13,705.09 back to Technicolor on February 4, 1983.

9 When Technicolor retained Brown, Kamerman inquired of him whether Technicolor should issue a press release at that time. Brown concluded that negotiations were not sufficiently mature to require disclosure and advised Kamerman of that opinion.

10 (Tr. XXX (Sapp) pp. 154, 190; Golden pp. 158, 160-61; Px 190).

11 Bank of America expressed some interest in financing a management-affiliated LBO in the range of prices that Perelman had discussed.

12 Goldman Sachs issued its written opinion on November 19, 1982.

13 I take it to be the case that, at least in the context of a cash-out merger, directors can be said to owe duties of care and loyalty directly to shareholders and not simply to the corporation and derivatively to shareholders.

14 The many cases that have spoken on the subject have generally done so without being required to focus specifically upon the remedy aspects of invoking the entire fairness approach. Most of those cases were preliminary injunction applications or other pre-trial motions. In *Smith v. Van Gorkom,* Del.Supr., 488 A.2d 858 (1985), which was tried, the court did not address the aspect of remedy.

15 Also plaintiff does not reduce the numbers it uses to their present value and ignores Kamerman's option shares in its per share calculation. In all, plaintiff's financial presentation of the effect of the new contract is closer to parody than honest reporting.

16 As to Sullivan there is some such evidence, especially his cooperation with Mr. Perelman before Kamerman met with Perelman. I need not determine whether the evidence, on balance, establishes a corrupt motive on Sullivan's part since, even if one assumes the latter, the circumstances do not support the conclusion that such motive infected the action ultimately authorized by the whole board.

17 That is, since information commands costs of several kinds, what information is "*reasonably* available" is itself a question inevitably calling for business judgment.

18 The principal conceptualization that plaintiff invokes in its effort to win a judgment is the "entire fairness" standard applicable to self-dealing transactions. As indicated above, I reject the appropriateness of that model to the facts here. Thus, in addressing negligence and "*Revlon* " theories, I address plaintiff's secondary theories.

19 In *Mills Acquisition Co. v. Macmillan, supra,* the breach of loyalty was attributable to the inside directors whose manipulations affected the functioning of the committee of outside directors that undertook to function for the whole board. That case did not involve-as this one does-true arm's-length negotiation.

20 *Revlon* itself was a case that entailed a breach of loyalty (motivation to be protected against personal liability to noteholders) that explained the willing impairment of information-gathering mechanism: the auction.

21 On an application to preliminary enjoin a merger this element can play little or no part since the transaction has not yet be effectuated and any damage at all is prospective only.

22 It is elementary that courts will exercise informed judgment on the question what quantum of proof is sufficient, taking into consideration what is possible in the circumstances:

> Where the plaintiff can prove the fact of damage, but not the extent of it, the reasonable certainty rule as it is now applied in most courts does not require proof of damages with mathematical precision. It does require that the plaintiff adduce some relevant datum from which a "just and reasonable" estimate of the amount might be drawn and without any such datum in the evidence, the claim will necessarily be dismissed as speculative and conjectural. Beyond this, the plaintiff is probably expected to prove his damages with as much accuracy as is reasonably possible to him, but precision not attainable in the nature of the claim and the circumstances is not required.

D. Dobbs, *Remedies,* § 3.3, at 151 (1973) (citations omitted); *see also Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946).

23 I do not assume that the "going concern" (appraisal) value is necessarily the appropriate measure of the value that could be achieved in a sale of the whole enterprise, but it has some pertinence in deciding whether a price in excess of the market price and in excess of the going concern value was nevertheless less than the price that could have been achieved by a diligent board.

24 That is, he cannot deceive or defraud, nor may be knowingly participate in a breach of the directors' fiduciary duty. *E.g., Gilbert v. The El Paso Company,* Del.Ch., 490 A.2d 1050 (1984).

25 The option entitled MAF to acquire 844,000 shares at $23 per share. The testimony was that the option was a technique to permit MAF to realize a profit (to cover its costs) should a higher offer materialize.

26 While the bulk of courts have held that intent, or at least recklessness, is necessary to hold a corporation liable for failure to make disclosure, at least one court has accepted negligence as the standard. *See Sirota v. Econo-Car Int'l Inc.,* 61 F.R.D. 604, 607 (S.D.N.Y.1974). Even under a negligence standard, however, I would not find that Technicolor acted inappropriately in failing to discover and disclose Sullivan's trading in the disclosure documents. Corporations, unlike the S.E.C. which itself did not discover the illicit trades until many months later, are not in the business of monitoring their directors' telephone calls and stock transactions. The failure to do so in this case did not imply a lack of due care on Technicolor's part.

End of Document