

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH ORMAN,)	
)	
Plaintiff,)	
)	
v.)	
)	
EDGAR M. CULLMAN, SR.,)	Civil Action No. 18039
EDGAR M. CULLMAN, JR.;)	
SUSAN R. CULLMAN, JOHN L.)	
ERNST, PETER J. SOLOMON,)	
BRUCE A. BARNET, JOHN L.)	
BERNBACH, THOMAS C. ISRAEL,)	
DAN W. LUFKIN, GRAHAM V.)	
SHERREN, FRANCES T.)	
VINCENT, JR. and GENERAL)	
CIGAR HOLDINGS, INC.,)	
)	
Defendants.)	

OPINION

Date Submitted: December 21, 2001

Date Decided: February 26, 2002

Date Revised: March 1, 2002

Joseph A. Rosenthal and Carmella P. Keener, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Stephen A. Whinston, of BERGER & MONTAGUE, P.C., Philadelphia, Pennsylvania, Attorneys for Plaintiff.

Robert J. Steam, Jr., of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; OF COUNSEL: Curtis P. Lu, Michael J. Golden and Mary E. Britton, of LATHAM & WATKINS, Washington, DC.; Marc Wolinsky and Elaine P. Golin, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, Attorneys for Defendants.

CHANDLER, Chancellor

This purported class action involves alleged breaches of fiduciary duty in connection with the cash-out merger of the public shareholders (“Unaffiliated Shareholders” or “Public Shareholders”) of General Cigar Holdings, Inc. (“General Cigar” or the “Company”). According to the complaint, plaintiff Joseph Orman (“Orman”) is and was the owner of General Cigar Class A common stock at all times relevant to this litigation. Orman brings this suit on behalf of himself and the Public Shareholders of General Cigar Class A common stock against General Cigar and its eleven-member board of directors (collectively the “Board”).’

On January 19, 2000 the Board unanimously approved a merger agreement pursuant to which a subsidiary of an unaffiliated third party, Swedish Match AB (“Swedish Match”), would purchase the shares owned by the Unaffiliated Shareholders of General Cigar.² On April 10, 2000 the Company filed with the

¹ The individual defendant Board members are: Edgar M. Cullman, Sr. (“Culhnan Sr.”), Edgar M. Culhnan, Jr. (“Culhnan Jr.”), Susan R. Culhnan (“Susan Culhnan”), John L. Ernst (“Ernst”), Peter J. Solomon (“Solomon”), Bruce A. **Barnet** (“Bar-net”), John L. Bembach (“Bembach”), Thomas C. Israel (“Israel”), Dan W. Lufkin (“Lufkin”), Graham V. Sherren (“Sherren”), and Frances T. Vincent, Jr. (“Vincent”). The first four directors listed are related to one **another**—Edgar M. Culhnan, Sr. is the father of Edgar M. **Cullman** Jr. and Susan R. Culhnan and John L. Ernst is the nephew of **Cullman**, Sr. and the cousin of Culhnan, Jr. and Susan Culhnan—and are collectively referred to as the “Culhnan Group.”

² The merger provided that Swedish Match would acquire a **64%-equity** “interest in General Cigar through a stock purchase and a merger of its wholly owned subsidiary, SM Merger Corporation, into General Cigar.” Defs.’ Opening Br., Ex. A at 1 (Proxy Statement). Swedish Match incorporated SM Merger Corporation as a Delaware corporation on January **13, 2000** in connection with the proposed merger. *Id.*, Ex. A at 8. Upon SM Merger Corporation’s merger with and into General Cigar, the separate corporate existence of SM Merger Corporation would come to an end and the Company would continue to operate as the surviving corporation. *Id.*, Ex. A at 33.

Securities and Exchange Commission an amended proxy statement (“Proxy Statement”) relating to this proposed merger.

The complaint first alleges breaches of fiduciary duty with respect to the Board’s approval of (and the fairness of) the proposed merger. Orman contends that Board approval of the merger was ineffective and improper because a majority of the defendant directors was not independent and/or disinterested. He further alleges that the defendant directors violated their fiduciary duty of loyalty³ by entering into a transaction that was unfair to the Public Shareholders of General Cigar and usurped for themselves corporate opportunities rightfully belonging to all General Cigar shareholders.

Orman also asserts that the Board breached its duty of disclosure. Specifically, he alleges that the Proxy Statement soliciting shareholder approval of the proposed merger omitted material facts necessary for the Public Shareholders to make a fully informed decision with regard to their vote for or against the merger.

³ Because the duty to act in “good faith” is merely a subset of a director’s duty of loyalty, my consideration of Orman’s duty of loyalty allegations necessarily includes a consideration of whether the facts pled suggest the defendants did not act in good faith with regard to their duty of loyalty to the Company. See *Emerald Partners v. Berlin*, Del. Ch., CA. No. 9700, mem. op. at 64 n.63, Jacobs, V.C. (Feb. 7, 2001) (“Although corporate directors are unquestionably obligated to act in good faith, doctrinally that obligation does not exist separate and apart from the fiduciary duty of loyalty. Rather, it is a subset or ‘subsidiary requirement’ that is subsumed within the duty of loyalty, as distinguished from being a compartmentally distinct fiduciary duty of equal dignity with the two bedrock fiduciary duties of loyalty and due care.”).

The defendants moved pursuant to Court of Chancery Rule 12(b)(6) to dismiss the complaint on the grounds that: 1) **Orman** failed to plead facts sufficient to overcome the presumption of the business judgment rule with respect to the Board's approval of the merger transaction; 2) the merger was ratified by a fully informed majority vote of the Public Shareholders of General Cigar; and 3) **Orman** failed to plead cognizable disclosure claims. Moreover, even if **Orman** had successfully pled cognizable disclosure claims (defendants argue), any possible liability arising from those claims is barred by an exculpatory provision in the Company's certificate of incorporation, adopted pursuant to § 102(b)(7)⁴ of the Delaware General Corporation Law, because only a duty of care violation is implicated by those disclosure claims.

I conclude that the defendants' motion to dismiss must be granted in part and denied in part. The motion to dismiss the duty of loyalty claims must be denied, as **Orman** has pled facts **from** which is it reasonable to question the independence and disinterest of a majority of the General Cigar Board. The motion to **dismiss Orman's** disclosure claims is granted as to all but one claim which, at this stage of the litigation, I cannot say is immaterial as a matter of law. Because I conclude that one of **Orman's** disclosure claims must survive as a matter of law, I am unable

⁴ 8 *Del. C.* § 102(b)(7) (2001).

to find that any possible breaches of fiduciary duty in connection with the challenged transaction were ratified by a fully informed vote of a majority of the Company's disinterested shareholders. Finally, as I conclude that the complaint does not unambiguously state only a duty of care claim, it would be premature for me to consider the effect of the Company's exculpatory charter provision.

I. STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion to dismiss, the Court must assume the truthfulness of all well-pleaded facts contained in the complaint, view those facts and all reasonable inferences drawn therefrom in the light most favorable to the plaintiff, and determine with "reasonable certainty" whether the plaintiff would be entitled to relief under any set of facts that could be proven.' Conclusory allegations unsupported by facts contained in a complaint, however, will not be accepted as true.⁶

⁵ See *Solomon v. Pathe Communications Corp.*, Del. Supr., 672 A.2d 35, 38 (1996); see also *Malpiede v. Townson*, Del. Supr., 780 A.2d 1075, 1083 n.16 (2001) (stating that in the context of a Rule 12(b)(6) motion to dismiss, "'well-pleaded allegations' include specific allegations of fact and conclusions supported by specific allegations of fact").

⁶ See *Solomon*, 672 A.2d at 38; see also *Grobow v. Perot*, Del. Supr., 539 A.2d 180, 188 n.6 (1988) (stating that under Rule 12(b)(6) "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true, but neither inferences nor conclusions of fact unsupported by allegations of specific facts upon which the inferences or conclusions rest are accepted *as true*"); *Crescent/Mach I Partners, L.P. v. Turner*, Del. Ch., C.A. No. 17455, mem. op. at 12, Steele, V.C. (by designation) (Sept. 29, 2000) ("**Notwithstanding** Delaware's permissive pleading standard, I am permitted to disregard allegations which are merely conclusory and lack factual support."); *Lewis v. Vogelstein*, Del. Ch., 699 A.2d 327, 338 (1997) (stating that mere conclusory allegations unsupported by specific factual allegations are not **sufficient** to survive a motion to dismiss).

As a general rule, when deciding a Rule 12(b)(6) motion, the Court is limited to considering only the facts alleged in the complaint and normally may not consider documents extrinsic to it.⁷ There are two exceptions, however, to this general rule. “The first exception is when the document is integral to a plaintiffs claim and incorporated into the complaint. The second exception is when the document is not being relied upon to prove the truth of its contents.” Consideration of the Proxy Statement in this case is appropriate as it falls under both of these exceptions.

First, the Proxy Statement is the basis for Orman’s disclosure claims. Second, it is also integral to his complaint as it is the source for the merger-related facts as pled in the complaint.⁹ Therefore, the Proxy Statement, and any other

⁷ See *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, Del. Supr., 691 A.2d 609, 612 (1996); see also *Malpiede*, 780 A.2d at 1082 (“The complaint ordinarily defines the universe of facts from which the trial court may draw in ruling on a motion to dismiss.”).

⁸ *Vanderbilt*, 691 A.2d at 613 (citation omitted); see also *Noerr v. Greenwood*, Del. Ch., C.A. No. 14320, mem. op. at 6, Jacobs, V.C. (July 16, 1997) (stating that the Court will not “consider facts and documents extrinsic to the complaint, except for those that are ‘integral to the claim and incorporated by reference into the complaint’” (quoting *Sapala v. Forest Health Services Corp.*, Del. Ch., CA. No. 14260, *ltr.* op. at 3, Jacobs, V.C. (May 3, 1996))).

⁹ I note that it is only the undisputed facts contained in integral documents incorporated into a complaint by reference that are considered. The Court does not make its own determination as to the meaning of ambiguous or disputed language contained in those documents and then compare its interpretation with the facts as alleged by the plaintiff. See *Vanderbilt*, 691 A.2d at 613 (“On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents.”). If a plaintiffs complaint alleges a fact that is unambiguously contradicted by an integral document incorporated into the complaint and there are no other facts in that document supporting the allegation, the Court need not accept as true the fact as alleged in the complaint. The Court may accept the fact as set forth in that incorporated document because, by doing so, the Court is not choosing between alternate

documents incorporated into it, are incorporated by reference into the complaint and will be considered on this motion.

II. FACTUAL HISTORY¹⁰

General Cigar, a Delaware Corporation with its principal executive offices located in New York, New York, is a leading manufacturer and marketer of premium cigars. The Company has exclusive trademark rights to many well-known brands of cigars, including seven of the top ten brands that were previously manufactured in Cuba.¹¹

The Company went public in an initial public offering (“IPO”) of 6.9 million shares of Class A stock at \$18.00 per share on February 28, 1997. As of March 30, 2000, the Company had approximately 13.6 million shares of Class A and 13.4 million shares of Class B common stock outstanding. Class A stock was publicly traded and Class B stock was not publicly traded. Class A stock had one vote per share and Class B had ten votes per share. Even though Class B shares had ten times the voting power of Class A shares, the Company’s Certificate of Incorporation required equal consideration in exchange for Class A and Class B shares in the event of a sale or merger. At the time of the proposed merger, the

interpretations of an ambiguous document but permissibly considering a fact recorded in a document integral to the plaintiffs claims.

¹⁰ These facts are taken **from** the well-pleaded allegations of the complaint or, where noted, undisputed facts contained in the Proxy Statement, which, as explained above, is incorporated by reference therein.

¹¹ Compl. ¶¶ 2, 13.

Cullman Group owned approximately 162 shares of Class A and 9.9 million shares of Class B. Although this aggregated to approximately 37% of the Company's total outstanding stock, the Cullman Group had voting control over the Company because the 9.9 million Class B shares it owned represented approximately 74% of that class, which enjoyed a 10:1 voting advantage over Class A shares.¹² The Cullman Group's equity interest, therefore, gave it approximately 67% of the voting power in the corporation.

On April 30, 1999, in a transaction unrelated to the present controversy, the Company sold its cigar mass-marketing business to Swedish Match¹³ for \$200 million in order to focus solely on the Company's premium cigar market. In the early fall of 1999, Swedish Match approached certain members of the Cullman Group (the "Cullmans") about purchasing the interest in General Cigar owned by its Public Shareholders.¹⁴ This was seen to be a logical business combination because General Cigar had a strong presence in the United States premium cigar market and Swedish Match had strength in the international cigar and smokeless

¹² *Id.* ¶ 14.

¹³ Swedish Match is an international group headquartered in Stockholm, Sweden. Its principal office and business address are also located in Stockholm, Sweden. Swedish Match manufactures a broad range of tobacco products, matches and disposable lighters that are sold in approximately 140 countries. Swedish Match is listed on the Stockholm Stock Exchange and on NASDAQ (**SWMAY**). Defs.' Opening Br., Ex. A at 8 (Proxy Statement).

¹⁴ *Id.* ¶ 16; Defs.' Opening Br., Ex. A at 9 (Proxy Statement).

tobacco markets through its established network of international contacts and resources.¹⁵ At a November 4, 1999 General Cigar board meeting, the **Cullmans** informed the Board of Swedish Match's interest. The Board then authorized the **Cullmans** to pursue discussions with Swedish Match assisted by defendant director Solomon's financial advising firm, Peter J. Solomon & Company ("PJSC").

Negotiations between the **Cullmans** and Swedish Match continued during November and December 1999. By the end of December 1999 the structure for a proposed transaction had been determined.¹⁶ That structure included: 1) a sale by the **Cullman** Group of approximately one-third of its equity interest in the Company to Swedish Match at \$15.00 per share; 2) immediately following the **Cullman** Group's private sale, a merger in which all shares in the Company held by the Unaffiliated Shareholders would be purchased for \$15.00 per share; 3) **Cullman** Sr. and **Cullman** Jr. maintaining their respective positions as Chairman and President/Chief Executive Officer of the surviving company and having the power to appoint a majority of the board; 4) three years after the merger, the **Cullman** Group having the power to put its remaining equity interest to the Company and the Company having the power to call such interest; and 5) an agreement by the **Cullman** Group that should the proposed transaction with Swedish Match not

¹⁵ Defs.' Opening Br., Ex. A at 9 (Proxy Statement).

¹⁶ Compl. ¶¶ 15-17.

close, it would vote against any other business combination for a period of one year following the termination of the proposed transaction.”

Once the negotiations reached agreement on the above points, the Board created a special committee (the “Special Committee”), consisting of outside defendant directors Lufkin, Israel, and Vincent, to determine the advisability of entering into the proposed transaction.¹⁸ The Special Committee retained independent legal and financial advisors-Wachtell, Lipton, Rosen & Katz and Deutsche Bank Securities, Inc., respectively--to assist them in this endeavor.¹⁹ In early January 2000 the Special Committee received copies of the proposed agreements previously reached between the **Cullmans** and Swedish **Match**.²⁰ After a review of these proposals by the Special Committee and its legal and financial advisors, the Special Committee directly negotiated with Swedish Match over the terms of the **agreement**.²¹ The substantive changes in the terms of the transaction resulting **from** negotiations by the Special Committee appear to be that the amount of consideration to be received by the Unaffiliated Shareholders for each of their Class A shares increased **from** \$15 .00 to \$15.25 and the length of time the **Cullman** Group would not vote in favor of another business combination if the challenged

¹⁷ Id. ¶ 17(a)-(e).

¹⁸ *Id.* ¶ 18.

¹⁹ **Defs.**’ Opening Br., Ex. A at 11 (Proxy Statement).

²⁰ Compl. ¶ 19.

²¹ **Defs.**’ Opening Br., Ex. A at 9 (Proxy Statement).

merger failed to close increased from twelve to eighteen months. On January 19, 2000 the Special Committee unanimously recommended approval of the transaction as modified as a result of their negotiations. That same day, the General Cigar Board unanimously approved the **transaction**.²²

The relevant terms of the final transaction recommended to the Company's shareholders, and subject to approval of the Unaffiliated Shareholders, included an initial private sale by the **Cullman** Group of 3.5 million shares of its Class B²³ stock, representing about one-third of its General Cigar equity interest, to Swedish Match for \$15.00 per share. The **Cullman** Group was to retain its remaining equity interest, which would then consist of approximately 162 Class A shares and 6.4 million Class B shares. Following the merger, that remaining interest would aggregate to approximately 36% of the total outstanding equity interest in the Company." Immediately following this private sale, a merger would take place in

²² Compl. ¶ 20.

²³ The complaint at ¶ 21(a) states that "approximately 3.5 million shares of its Class A stock" would be sold. It is apparent from the statement in ¶ 21(c) that "the **Cullman** Group will retain their remaining shares consisting of approximately . . . 6.4 million shares of Class B stock" that ¶ 21 (a) should read "Class B stock."

²⁴ Compl. ¶ 21(c). Because of the disproportionate 10: 1 voting strength of the Class B shares compared to the Class A shares, the **Cullman** Group continued to have voting control over the surviving company and, therefore, the merger did not constitute a sale or transfer of control. It is unclear precisely how the **Cullman** Group's equity interest only dropped from 37% to 36% upon the sale of approximately one-third of its equity interest. This post-merger ownership percentage, however, is not challenged by **Orman** and is clearly set forth in the Proxy Statement. See, e.g., Defs.' Opening Br., Ex. A at 1 (Proxy Statement) (stating that "Swedish Match will acquire a 64% interest in General Cigar. . . [and that the **Cullman** Group] will hold 36% of the surviving corporation following the stock purchase and merger"). The fact that the **Cullman** Group will continue to have voting control over the surviving company after the merger was also

which all publicly owned Class A and Class B shares (those not owned by the Cullman Group) would be purchased for \$15.25 per share.²⁵

In addition to the Cullman Group's continuing equity position and voting control in the surviving company, several provisions of the proposed transaction assured ongoing participation of the Cullman Group in the day-to-day operations of that company. Cullman Sr. would retain his position as Chairman of the Board of the surviving company and Cullman Jr. would continue to serve as President and CEO of the surviving company. The Cullman Group would have the power to appoint a majority of the board of the surviving company after the merger.²⁶

Additionally, beginning three years from the date of the merger, the Cullman Group would have the option to put some or all of its remaining equity interest to the surviving company and the surviving company would have a reciprocal right to call some or all of the company's stock retained by the Cullman Group. The Cullman Group also agreed to vote against any proposed merger transaction for

conceded by Orman. At oral argument, in discussing the Cullman Group's controlling position, the plaintiff stated, "to just quote from Lynch, 'This is a party that controls and will continue to control the company,' and the Cullmans fit into that and fit into it precisely." Tr. of Oral Argument at 44.

²⁵ Id. ¶ 21(b).

²⁶ Id. ¶ 21(d)-(f). The complaint states that the Cullman Group announced that its appointments would be Cullman Sr., Cullman Jr., Bamet, and David Dazinger. These four will represent a majority of the new board as the surviving company will have a seven-member board. See Defs.' Opening Br., Ex. A at 23 (Proxy Statement).

eighteen months should the transaction with Swedish Match not be consummated.²⁷

Finally, the transaction was structured in such a way that the **Cullman** Group could not dictate its approval. Despite the fact that the **Cullman** Group possessed voting control over the Company both before and after the proposed transaction, approval of the merger required that a majority of the Unaffiliated Shareholders of Class A stock, voting separately as a class, vote in favor of the **transaction**.²⁸

III. ANALYSIS

A. Fiduciary Duty Claims

Orman alleges that the Board's approval of the Company's merger with Swedish Match was ineffective and improper because a majority of the Board was not disinterested and independent and that the directors breached their duty of loyalty by **approving** a transaction that was unfair to the public **shareholders**.²⁹ **Orman** asserts that he has pled facts sufficient to rebut the presumption of the business judgment rule and that this Court should employ an "entire fairness" analysis. He contends that a determination that entire fairness is the appropriate

²⁷ Compl. ¶ 21(i)-(k).

²⁸ See Defs.' Opening Br., Ex. A at 31 (Proxy Statement). **In** order to assure the Unaffiliated Shareholders had the unobstructed right to determine whether or not the merger would close, the **Cullman Group** "agreed to vote any Class A shares held by them pro rata in accordance with the vote of the Unaffiliated Shareholders." **Id.**

²⁹ Compl. ¶¶ 22, 23.

standard would preclude dismissal at this stage of the litigation regardless of upon whom the Court ultimately were to place the burden of proving, or disproving, the transaction's entire fairness. The defendants contend that these claims must be dismissed because Orman has not pled facts sufficient to overcome the business judgment rule presumption and in such a case the actions of a board should be respected.

“A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation.”³⁰ The business judgment rule is a recognition of that statutory precept. The rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”³¹ Therefore, the judgment of a properly functioning board will not be second-guessed and “[a]bsent an abuse of discretion, that judgment will be respected by the courts.”³² Because a board is presumed to have acted properly, “[t]he burden is

³⁰ *Aronson v. Lewis*, Del. Supr., 473 A.2d 805,811 (1984) (citing 8 Del. C. § 141(a)).

³¹ *Id.* at 812.

³² *Id.*; see also *Parnes v. Bally Entertainment Corp.*, Del. Supr., 722 A.2d 1243, 1246 (1999) (“The presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is ‘so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.’” (quoting *In re J.P. Stevens & Co., Inc.*, Del. Ch., 542 A.2d 770, 780-81 (1988))); *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 634 A.2d 345,361 (1993), modified on reargument in part, Del. Supr., 636 A.2d 956 (1994) (“The rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be

on the party challenging the decision to establish facts rebutting the presumption.”³³

One way for a plaintiff to overcome this burden, for example, is to allege facts demonstrating a squeeze out merger or a merger between two corporations under the control of a controlling shareholder. If facts of that nature are sufficiently alleged, the business judgment presumption is rebutted and entire fairness is the standard of review. “A controlling or dominating shareholder standing on both sides of a transaction . . . bears the burden of proving its entire fairness.”³⁴ Although procedural safeguards may be put in place that shift the burden to the plaintiff to prove the unfairness of the merger (*i.e.*, the negotiation and approval of the transaction by a special committee of independent and disinterested directors or the requirement of approval by a majority of the company’s minority shareholders), “[e]ntire fairness remains the proper focus of judicial analysis in examining an interested merger, irrespective of whether the burden of proof remains upon or is shifted away **from** the controlling or dominating **shareholder**.”³⁵ Regardless of whether the burden of proof is shifted to

‘attributed to any rational business purpose.’” (quoting *Sinclair Oil Corp. v. **Levien***, Del. Supr., 280 **A.2d** 717, 720 (1971))).

³³ *Aronson*, 473 **A.2d** at 8 12.

³⁴ *Kahn v. Lynch Communications Sys., Inc.*, Del. Supr., 638 **A.2d** 1110, 1115 (1994).

³⁵ *Id.* at 1116.

the plaintiff, however, “[t]he *initial* burden” under entire fairness is borne by the controlling party “who stands on both sides of the **transaction**.”³⁶

³⁶ Id. at 1117 (emphasis added). Usually, the entire fairness standard only applies at the outset (“*ab initio*”) in certain special circumstances, viz, a squeeze out merger or a merger between two companies under the control of a controlling shareholder. See, e.g., *Kahn v. Lynch*, *supra*. Entire fairness review is not automatically triggered when a *non-controlling* shareholder appears on both sides of a challenged transaction. Moreover, as explained below, see pp. 18-19, the business judgment standard may apply even when *some* (but less than a majority) of the directors lack independence and/or are interested in the transaction. This distinction remains unaffected by the Supreme Court’s recent *Emerald Partners v. Berlin*, Del. Supr., ___ A.2d ___, No. 96, 2001, slip. op. at 10, Holland, J. (Nov. 28, 2001) (“*Emerald III*”) decision, in which the Court reiterated that entire fairness review applies when a controlling shareholder stands on **both** sides of a challenged transaction. There, the Supreme Court pointedly distinguished between factual settings demanding entire fairness review and those that require business judgment review. See *Emerald III*, slip op. at 13-14. This distinction is of vital importance due to the effects, as a practical matter, of a determination that entire fairness is the appropriate standard **from** the outset (“*ab initio*”).

As our Supreme Court has recognized, a determination that entire fairness is the appropriate standard of review “is often of critical importance.” *Lynch*, 638 A.2d at 1116. That conclusion normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss. Once the business judgment rule presumption is rebutted, the burden of proof shifts to the defendant, who must either establish the entire fairness of the transaction or show that the burden of disproving its entire fairness must be **shifted** to the plaintiff. A determination of whether the defendant has met that burden will **normally** be impossible by examining only the documents the Court is **free** to consider on a motion to dismiss—the complaint and any documents it incorporates by reference. Besides foreclosing dismissal under Rule 12(b)(6), the requirement of an entire fairness review may also preclude the entry of a final judgment even after discovery on a motion for summary judgment, but only if there remains at that point unresolved questions of material fact on either of the two prongs of the entire fairness test. The more difficult of these two prongs to establish on a paper record, however, is the “fair price” prong. See *Weinberger v. UOP, Inc.*, 457 A.2d 701,711 (1983) (explaining that an entire fairness review is not bifurcated and considers both fair dealing and fair price and that fair price “relates to [all relevant] economic and financial considerations of the proposed [transaction]”). Although not inevitable in every case, *in those cases in* which entire fairness is *the initial standard*, the **likely** end result is that a determination of that issue will require a **full** trial.

Recognizing the practical implications of the automatic requirement of an entire **fairness** review has led our Supreme Court to limit such automatic requirement to the narrow class of cases in which there is a controlling shareholder on both sides of a challenged merger. In *Emerald III*, the Court explained that “[t]he category of transactions that require judicial review pursuant to the entire **fairness** standard *ab initio* do so because, by definition, the inherently interested nature of those transactions are inextricably intertwined with issues of loyalty.” *Emerald III*, slip op. at 14-15. The cases cited by the Court to support that statement all involved an entire fairness review when there was a controlling shareholder standing on both sides of the

Here, however, although the Cullman Group was the controlling shareholder of the target company both before and after the merger, the Cullman Group did not stand on both sides of the challenged merger. Instead it was approached by, and

challenged transaction. See *id.* at 15 n.45 (citing *Sterling v. Mayflower Hotel Corp.*, Del. Supr., 93 A.2d 107, 110 (1952) (stating that the majority shareholder standing “on both sides of the transaction, . . . bear[s] the burden of establishing its entire fairness”); *Weinberger*, 457 A.2d at 710 (reiterating that when a *controlling* shareholder proposed a cash-out merger, “[t]he requirement of fairness is **unflinching** in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness”); and *Lynch*, 638 A.2d at 1117 (continuing to assert that “the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction *by a controlling or dominating shareholder* is entire fairness”) (emphasis added)).

Thus, nothing in *Emerald III* should be read as being inconsistent with that distinction. *Emerald III* adhered to existing precedents which held that to require entire fairness *ab initio* a controlling entity, whether a parent corporation or individual shareholder, must stand on both sides of the challenged transaction. In *Emerald Partners* the challenged transaction was a merger between May Petroleum, Inc. (“May”) and thirteen corporations owned by Craig Hall (“Hall”), May’s chairman and CEO. *Emerald III*, slip op. at 3. There, the Court had determined in an earlier appeal that “Hall, as Chairman and Chief Executive Officer of both May and the Hall corporations and sole owner of the Hall corporations, clearly stood on both sides of the transaction.” *Emerald Partners v. Berlin*, Del. Supr., 726 A.2d 1215, 1221 (1999) (“*Emerald I*”). The Court there noted that “at the time the parties entered the proposed merger agreement . . . Hall owned 52.4% of May common stock.” *Id.* Therefore, both triggers for automatically invoking the entire fairness analysis--that an entity stands on both sides of the transaction and that such entity is a controlling shareholder--had been established. *After* the terms of the proposed mergers had been agreed upon, Hall reduced his beneficial interest in May to 25%. *Emerald III*, slip op. at 4. The merger agreement presented to the shareholders, however, was the same (except for noting Hall’s changed ownership level) as the agreement that had been negotiated when Hall held 52.4% of May’s stock. *Id.* at 5. It was in this factual setting, where the challenged merger agreement was proposed by a controlling shareholder standing on both sides of the transaction, that the *Emerald III* Court noted Hall’s subsequent ownership reduction and observed “‘Hall’s stance on both sides as a corporate fiduciary, *alone*, is **sufficient** to require the demonstration of entire fairness.’” *Id.* at 18 (quoting *Emerald II*, 726 A.2d at 1221 n.8) (emphasis added by *Emerald III*). And it is against that backdrop--Hall negotiating the merger agreement as a controlling shareholder standing on both sides of the challenged transaction--that the previously quoted sentence must be understood. The “corporate fiduciary” stance to which the Supreme Court was referring was Hall’s fiduciary *status as a controlling shareholder*. Thus, the *Emerald III* decision, in my opinion, does not alter settled principles of Delaware law concerning the factual setting necessary for the initial application of entire fairness review.

Here, however, although the Cullman Group was the controlling shareholder of the target company both before and after the merger, the Cullman Group did not stand on both sides of the challenged merger. Instead it was approached by, and

challenged transaction. See *id.* at 15 n.45 (citing *Sterling v. Mayflower Hotel Corp.*, Del. Supr., 93 A.2d 107, 110 (1952) (stating that the majority shareholder standing “on both sides of the transaction, . . . bear[s] the burden of establishing its entire fairness”); *Weinberger*, 457 A.2d at 710 (reiterating that when a *controlling* shareholder proposed a cash-out merger, “[t]he requirement of fairness is **unflinching** in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness”); and *Lynch*, 638 A.2d at 1117 (continuing to assert that “the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction *by a controlling or dominating shareholder* is entire fairness”) (emphasis added)).

Thus, nothing in *Emerald III* should be read as being inconsistent with that distinction. *Emerald III* adhered to existing precedents which held that to require entire fairness *ab initio* a controlling entity, whether a parent corporation or individual shareholder, must stand on both sides of the challenged transaction. In *Emerald Partners* the challenged transaction was a merger between May Petroleum, Inc. (“May”) and thirteen corporations owned by Craig Hall (“Hall”), May’s chairman and CEO. *Emerald III*, slip op. at 3. There, the Court had determined in an earlier appeal that ‘Hall, as Chairman and Chief Executive Officer of both May and the Hall corporations and sole owner of the Hall corporations, clearly stood on both sides of the transaction.’ *Emerald Partners v. Berlin*, Del. Supr., 726 A.2d 1215, 1221 (1999) (“*Emerald II*”). The Court there noted that “at the time the parties entered the proposed merger agreement . . . Hall owned 52.4% of May common stock.” *Id.* Therefore, both triggers for automatically invoking the entire fairness analysis--that an entity stands on both sides of the transaction and that such entity is a controlling shareholder--had been established. *After* the terms of the proposed mergers had been agreed upon, Hall reduced his beneficial interest in May to 25%. *Emerald III*, slip op. at 4. The merger agreement presented to the shareholders, however, was the same (except for noting Hall’s changed ownership level) as the agreement that had been negotiated when Hall held 52.4% of May’s stock. *Id.* at 5. It was in this factual setting, where the challenged merger agreement was proposed by a controlling shareholder standing on both sides of the transaction, that the *Emerald III* Court noted Hall’s subsequent ownership reduction and observed “‘Hall’s stance on both sides as a corporate fiduciary, *alone*, is **sufficient** to require the demonstration of entire fairness.”’ *Id.* at 18 (quoting *Emerald II*, 726 A.2d at 1221 n.8) (emphasis added by *Emerald III*). And it is against that backdrop--Hall negotiating the merger agreement as a controlling shareholder standing on both sides of the challenged transaction--that the previously quoted sentence must be understood. The “corporate fiduciary” stance to which the Supreme Court was referring was Hall’s fiduciary *status as a controlling shareholder*. Thus, the *Emerald III* decision, in my opinion, does not alter settled principles of Delaware law concerning the factual setting necessary for the initial application of entire **fairness review**.

began initial negotiations with, an unaffiliated third party, Swedish Match. A Special Committee of independent directors then completed those negotiations. Therefore, the burden remains on **Orman** to allege other facts sufficient to overcome the business judgment presumption. Specifically, **Orman** must allege facts that raise a reasonable doubt as to whether the Board breached either its duty of care or its duty of loyalty to the corporation. In his complaint, **Orman** alleges that the Board breached its duty of loyalty.

As a general matter, the business judgment rule presumption that a board acted loyally can be rebutted by alleging facts which, if accepted as true, establish that *the board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its **shareholders**.³⁷ To establish that a *board was* interested or lacked independence, a plaintiff must allege facts as to the interest and lack of independence of the *individual members* of that board. To rebut successfully business judgment presumptions in this manner, thereby leading to the

³⁷ See *State of Wisconsin Inv. Bd. v. Bartlett*, Del. Ch., C.A. No. 17727, mem. op. at 10-11, Steele, V.C. (Feb. 24, 2000) (“In the context of a merger, a breach of fiduciary duty analysis begins with the rebuttable presumption that a board of directors acted with ‘care, loyalty, and in ‘good faith.’ Unless this presumption is sufficiently rebutted, raising a reasonable doubt about self-interest or independence, the Court must defer to the discretion of the board and acknowledge that their decisions are entitled to the protection of the business judgment rule.”); see also *In re the Walt Disney Co. Derivative Litig.*, Del. Ch., 731 **A.2d** 342,351 (1998), *aff’d in part, rev’d in part on other grounds sub. nom. Brehm v. Eisner*, Del. Supr., 746 **A.2d** 244 (2000) (“Unless **Plaintiffs** can plead with specificity facts that rebut the presumption of the business judgment rule, that the Board was corrupted and could not make a decision fairly and independently, in the best interests of the Corporation, then the Board’s decision will stand.”).

application of the entire fairness standard, a plaintiff must normally plead facts demonstrating “that a *majority* of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested **director**.”³⁸ I recognize situations can exist when the material interest of a number of directors *less* than a majority may rebut the business judgment presumption and lead to an entire fairness review. That is when an “‘interested **director fail[ed]** to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed **transaction**.”³⁹ Nevertheless, in this case the interest that may be attributed to the **Cullman** Croup or other Board members *was* disclosed to the Board and, therefore, **Orman** still must establish that a majority of the Board was interested and/or lacked independence.

If a plaintiff alleging a duty of loyalty breach is unable to plead facts demonstrating that a majority of a board that approved the transaction in dispute was interested **and/or** lacked independence, the entire fairness standard of review is

³⁸ *Crescent/Much I Partners, L.P. v. Turner*, Del. Ch., C.A. No. 17455, mem. op. at 27, Steele, V.C. (by designation) (Sept. 29, 2000) (emphasis added); *see also Cinerama, Inc. v. Technicolor, Inc.*, Del. Supr., 663 A.2d 1156, 1168 (1995) (**affirming** Court of Chancery determination that “if actual self-interest is present and affects a *majority of directors* approving a transaction, the entire fairness *standard* applies” (emphasis added)); *State of Wisconsin Inv. Bd.*, mem. op. at 11 (“In order to require application of the entire fairness standard, the plaintiff has to show that a majority of directors have a financial interest in the transaction or a motive to entrench themselves in office through the merger.”).

³⁹ *Cinerama, Inc. v. Technicolor, Inc.*, Del. Supr., 663 A.2d 1156, 1168 (1995) (emphasis and alteration in original) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, Del. Ch., 663 A.2d 1134, 1153 (1994)).

not applied and the Court respects the business judgment of the **board**.⁴⁰ Whether a particular director is disinterested or independent is a recurring theme in Delaware's corporate jurisprudence. We reach conclusions as to the sufficiency of allegations regarding interest and independence only after considering all the facts alleged on a case-by-case basis.

The Aronson Court set forth the meaning of “interest” and “independence” in this context. It defined interest as “mean[ing] that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.”⁴¹ This definition was further refined in *Rales v. Blasband* when our Supreme Court recognized that “[d]irectoral interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders.”⁴² It should be noted, however, that in the absence of self-dealing, it is not enough to establish the interest of a director by alleging that he received *any*

⁴⁰ In the special category of cases involving a squeeze out merger, or a merger between two corporations under the domination of a controlling shareholder, the entire **fairness** standard is triggered automatically (“*ab initio*”). See footnote 36, *supra*.

⁴¹ *Aronson*, 473 A.2d at 812; see also *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345,362 (1993) (“Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally.”).

⁴² Del. Supr., 634 A.2d 927, 936 (1993); see also *Disney*, 731 A.2d at 354 (citing the *Rales* definition of interest).

benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director.⁴³ Materiality means that the alleged benefit was significant enough “*in the context of the director’s economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.*”⁴⁴

On the separate question of independence, the *Aronson Court* stated that “[i]ndependence means that a director’s decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences.”⁴⁵ Such extraneous considerations or influences may exist when the challenged director is controlled by another. To raise a question concerning the independence of a particular board member, a plaintiff asserting the “control of one or more directors must allege particularized facts manifesting ‘a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.’ The shorthand shibboleth of

⁴³ *Cede*, 634 A.2d at 363.

⁴⁴ *In re General Motors Class H Shareholders Litig.*, Del. Ch., 734 A.2d 611, 617 (1999) (emphasis added); see also *In re Freeport-McMoran Sulphur, Inc. Shareholders Litig.*, Del. Ch., C.A. No. 16729, mem. op. at 13-14, Jacobs, V.C. (Jan. 11, 2001). This is not to say that “material” is the magic word that must be included in a complaint before this Court will question a director’s interest. Conversely, including an allegation that a benefit is “material” to the director in question, without more, would merely be a conclusory allegation and insufficient to raise a reasonable doubt of interest. While it is certainly more compelling for a plaintiff first to plead that an alleged interest is material to a particular defendant director and then to allege facts to support that assertion, so long as facts are pled from which a reasonable inference can be drawn that the benefit received from a challenged transaction by that director to the exclusion of the shareholders generally is material to him, a finding of interest may follow.

⁴⁵ *Aronson*, 473 A.2d at 8 16.

‘dominated and controlled directors’ is **insufficient**.’⁴⁶ This lack of independence can be shown when a plaintiff pleads facts that establish “that the directors are ‘beholden’ to [the controlling person] or so under their influence that their discretion would be sterilized?”

In determining the sufficiency of factual allegations made by a plaintiff as to either a director’s interest or lack of independence, the Delaware Supreme Court has rejected an objective “reasonable director” test and instead requires the application of a subjective “actual person” standard to determine whether a *particular* director’s interest is material and debilitating or that he lacks independence because he is controlled by **another**.⁴⁸

⁴⁶ *Id.* at 816 (citation omitted) (quoting *Kaplan v. Centex Corp.*, Del. Ch., 284 A.2d 119, 123 (1971)).

⁴⁷ *Rales*, 634 A.2d at 936; see *also* *Aronson*, 473 A.2d at 815 (stating that one way to allege successfully that an individual director is under the control of another is by pleading “such facts as would demonstrate that through personal or other relationships the directors are beholden to **the** controlling person”); *Friedman v. Beningson*, Del. Ch., C.A. No. 12232, mem. op. at 9, Allen, C. (Dec. 4, 1999) (“The requirement that directors exercise independent judgment, (insofar as it is a distinct prerequisite to business judgment review **from** a requirement that directors **exercise financially disinterested judgment**), directs a court to an inquiry into all of the circumstances that are alleged to have inappropriately affected the exercise of board power. This inquiry may include the subject whether some or all directors are ‘beholden’ to or under the control, domination or strong influence of a party with a material financial interest in the transaction under attack, which interest is adverse to that of the corporation.” (emphasis in original)).

⁴⁸ *Cinerama*, Del. Supr., 663 A.2d at 1167 (agreeing with the Court of Chancery that the use of a subjective standard was the appropriate one for determining the materiality of a director’s **financial interest** in that case, noting “[t]he subjective standard is consistent with **this** Court’s observation, in *Cede II*, that requiring a shareholder plaintiff to show ‘the materiality of a director’s self-interest to the *given* director’s independence’ was a ‘restatement of established Delaware law’” (quoting *Cede*, 634 A.2d at 363) (emphasis in quotation in original)); see *also* *McMullin v. Beran*, Del. Supr., 765 A.2d 910, 923 (2000) (“In assessing director *independence*,

General Cigar had an eleven-member board. In order to rebut the presumptions of the business judgment rule, Orman must allege facts that would support a finding of interest or lack of independence for a majority, or at least six, of the Board members. Orman asserts, and defendants appear to concede, that the four members of the Cullman Group were interested because they received benefits from the transaction that were not shared with the rest of the shareholders.⁴⁹ Orman, therefore, would have to plead facts making it reasonable to question the interest or independence of two of the remaining seven Board members to avoid dismissal based on the business judgment rule presumption. With varying levels of confidence, Orman's complaint alleges that each of the seven remaining Board members-Israel, Vincent, Lufkin, Bamet, Sherren, Bembach, and Solomon—

Delaware courts apply a subjective 'actual person' standard to determine whether a 'given' director was likely to be affected in the same or similar circumstances." (emphasis added)).

⁴⁹ The Proxy Statement makes explicit reference to this conflict of interest in the section headed "QUESTIONS AND ANSWERS ABOUT THE MERGER" A question concerning "what conflicts of interest did the Board of Directors have in making its recommendation" that the Unaffiliated Shareholders approve the merger was answered with an acknowledgment that "[f]our of the Company's eleven directors have a conflict of interest in recommending adoption of the Merger Agreement because, as members of the [Cullman Group], they will continue to have an equity interest in the Surviving Corporation. As a result, they will receive the benefits of future earnings, growth and increased value of General Cigar, and be subject to the risks of such ownership, while [the cashed-out Unaffiliated Shareholders] will no longer receive any such benefit or be subject to such risks." Defs.' Opening Br., Ex. A at 1 (Proxy Statement).

were interested and/or lacked independence.”

⁵⁰ See Compl. ¶¶ 18, 22(b)-(f). Although interest and independence are two separate and distinct issues, these two attributes are sometimes confused by parties. Many plaintiffs allege facts which they assert establish that the defendant “lacked the disinterest and/or independence” necessary to consider the challenged transaction objectively. The plaintiff then asks the Court to select whichever type of disabling attribute is consistent with the facts alleged and that will support the’ plaintiffs claim. But it is not for the Court to divine the claims being made. A plaintiff must make clear to the Court the bases upon which his claims rest.

As described above, a disabling “interest,” as defined by Delaware common law, exists in two instances. The first is when (1) a director personally receives a benefit (or suffers a detriment), (2) as a result of, or from, the challenged transaction, (3) which is not generally shared with (or suffered by) the other shareholders of his corporation, and (4) that benefit (or detriment) is of such subjective material significance to that particular director that it is reasonable to question whether that **director** objectively considered the advisability of the challenged transaction to the corporation and its shareholders. The second instance is when a director stands on both sides of the challenged transaction. See 8 Del. C. § 144. This latter situation frequently involves the first three elements listed above. As for the fourth element, whenever a director stands on both sides of the challenged transaction he is deemed interested and allegations of materiality have not been required.

“Independence” does not involve a question of whether the challenged director derives a **benefit from** *the transaction* that is not generally shared with the other shareholders. Rather, it involves an inquiry into whether the director’s decision resulted from that director being *controlled* by another. A director can be controlled by another if in fact he is *dominated* by that other party, whether through close personal or familial relationship or through force of will. A director can also be controlled by another if the challenged director is **beholden** to the allegedly controlling entity. A director may be considered beholden to (and thus controlled by) another when the allegedly controlling entity has the unilateral power (whether direct or indirect through control over other decision makers), to decide whether the challenged director continues to receive a benefit, financial or otherwise, upon which the challenged director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit might create a reason to question whether the controlled director is able to consider the corporate merits of the challenged transaction objectively.

Confusion over whether specific facts raise a question of interest or independence arises **from** the reality that similar factual circumstances may implicate *both* interest and independence, one but not the other, or neither. By way of example, consider the following: Director A is both a director and officer of company X. Company X is to be merged into company **Z**. Director A’s vote in favor of recommending shareholder approval of the merger is challenged by a plaintiff shareholder.

Scenario One. Assume that one of the terms of the merger agreement is that director A *was to be an officer in surviving* company **Z**, *and* that maintaining his position as a corporate officer in the surviving company was material to director A. That fact might, when considered in light of **all** of the facts alleged, lead the Court to conclude that director A had a disabling interest.

Scenario Two. Assume that director C is both a director and the majority shareholder of company X. Director C had the power plausibly to threaten director A’s position as officer of

1. Directors Israel and Vincent

Perhaps the weakest allegations of interest **and/or** lack of **independence** are aimed at directors Israel and Vincent, who were both members of the Special Committee that investigated the advisability of the merger and negotiated with Swedish Match. The complaint states that these two defendants “had longstanding business relations with members of the **Cullman** Group which impeded and impaired their ability to function independently and outside the influence of the **Cullman** Group.”⁵¹ The only fact pled in support of this assertion is the mere recitation that Israel and Vincent had served as directors of General Cigar since

corporation **X** should director A vote against the merger. Assume further that director A’s position as a corporate officer is material to director A. Those circumstances, when considered in light of **all** of the facts alleged, might lead the Court to question director A’s independence from director C, because it could reasonably be assumed that director A was controlled by director C, since director A was beholden to director C for his position as officer of the corporation. Confusion over whether to label this disability as a disqualifying “interest” or as a “lack of independence” may stem **from** the fact that, colloquially, director A was “interested” in keeping his job as a corporate officer. Scenario Two, however, raises only a question as to director A’s independence since there is nothing that suggests that director A would receive **something from** the transaction that might implicate a disabling interest.

If a plaintiffs allegations combined all facts described *in* both Scenario *One* and Scenario Two, it might be reasonable to question *both* director A’s interest and independence. Conversely, if all the **facts** in both scenarios were alleged *except* for the materiality of Director A’s position as a corporate officer (perhaps because director A is a billionaire and his officer’s position pays \$20,000 per year and is not even of prestige value to *him*) then *neither* director A’s interest nor his independence would be reasonably questioned. The key issue is not simply whether a particular director receives a benefit from a challenged transaction not shared with the other shareholders, or solely whether another person or entity has the ability to take some benefit away from a particular director, but whether the possibility of gaining some **benefit** or the fear of losing a benefit is likely to be of such importance to that director that it is reasonable for the Court to question whether valid business judgment or selfish considerations animated that director’s vote on the challenged transaction.

⁵¹ Compl. ¶ 18.

1989 and 1992, respectively.⁵² In his brief opposing defendants' motion to dismiss, Orman apparently concedes that Israel and Vincent are independent by omitting these two directors from his contention that, in addition to the Cullman Group, "[p]laintiff has sufficiently pled that Sherren, Bembach, Solomon and Lufkin also suffer disabling conflicts of interest and lack of independence in connection with the transaction."⁵³

At this stage of the litigation, however, the Court must address itself to the allegations contained in the complaint. To make clear my opinion as to the independence of directors Israel and Vincent, therefore, I conclude that the allegations in the complaint with regard to the lack of independence of these two directors fail as a matter of law. The naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence. The law in Delaware is well-settled on this point. For instance, in *Crescent/Mach I Partners, L.P.* this Court held that allegations of a "long-standing 15-year professional and personal relationship" between a director and the CEO and Chairman of the Board of his company were insufficient to support a finding of control? The Court stated that such allegations, without more, "fail[ed] to raise a reasonable doubt that [the director] could not exercise his independent

⁵² *Id.*

⁵³ Pl.'s Br. in Opposition at 9.

⁵⁴ Del. Ch., C.A. No. 17455, mem. op. at 30, Steele, V.C. (by designation) (Sept. 29, 2000).

business judgment in approving the transaction. Therefore, these allegations lack the specific factual predicate” necessary to survive a motion to dismiss.⁵⁵ Here too, allegations concerning longstanding business relations fail as a matter of law to place in issue the independence of directors Israel and Vincent.⁵⁶

⁵⁵ *Id.* (footnote omitted); *see also State of Wisconsin Inv. Bd. v. Bartlett*, Del. Ch., C.A. No. 17727, mem. op. at 17, Steele, V.C. (Feb. 24, 2000) (stating that “[e]vidence of personal and/or past business relationships does not raise an inference of self-interest”); *Disney*, 731 A.2d at 355 (“The fact that [the Chairman/CEO] has long-standing personal and business ties to [the employee] cannot overcome the presumption of independence that all directors . . . are afforded.”). Although mere recitation of the fact of past business or personal relationships will not make the Court automatically question the independence of a challenged director, it may be possible to plead additional facts concerning the length, nature or extent of those previous relationships that would put in issue that director’s ability to objectively consider the challenged transaction. *See, e.g., In re Ply Gem Industries, Inc. Shareholders Litig.*, Del. Ch., C.A. No. 15779-NC, let. op. at 4, Noble, V.C. (Sept. 28, 2001) (stating that “past benefits conferred by [the allegedly dominating director], or conferred as the result of [that director’s] position with Ply Gem, *may establish an obligation or debt (a sense of ‘owingness’)* upon which a reasonable doubt as to a director’s loyalty to a corporation may be premised”) (emphasis added); *In re New Valley Corp. Derivative Litig.*, Del. Ch., C.A. No. 17649, mem. op. at 19, Chandler, C. (Jan. 11, 2001) (noting in connection with the Court’s consideration of allegations of interest and lack of independence that, “[t]he facts alleged in the complaint show that all the members of the current Board have current or past business, personal, and employment relationships with each other and the entities involved”) (emphasis added).

⁵⁶ I note that Israel and Vincent, as well as each of the other Board members, were also shareholders of General Cigar. *See* Defs.’ Opening Br., Ex. A at 45 (Proxy Statement) (reporting the stock ownership of each Board member). As a general matter, that is a fact that weighs in support of the presumption that a director objectively considered the merits of the proposed corporate transaction in determining how to cast his vote on that transaction. A director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders. Of course, the weight given that fact *varies with the* substantiality of *the challenged* director’s holdings. *See, e.g., Unitrin, Inc. v. American General Corp.*, Del. Supr., 651 A.2d 1361, 1380-81 (1995) (stating that, “[i]n particular, it cannot be presumed that the prestige and perquisites of holding a director’s office or a motive to strengthen collective power prevails over a stockholder-director’s economic interest. . . . [S]tockholders are presumed to act in their own best economic interests when they vote in a proxy contest”) (emphasis added); *Cf. Chesapeake Corp. v. Shore*, Del. Ch., 771 A.2d 293, 328 (2000) (“*If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?*”) (emphasis in original).

2. Director Lufkin

Ornan asserts that director Lufkin, who was the third member of the **Special** Committee, lacked independence and was also interested in the merger transaction. With regard to Lufkin's purported lack of independence, Orman makes the same allegations as were directed at Israel and Vincent, namely, Lufkin "had longstanding business relations with members of the **Cullman** Group which impeded and impaired [his] ability to function independently and outside the influence of the **Cullman** Group. Defendant Lufkin had been a Board member of General Cigar or its predecessor since 1976."⁵⁷ For the reasons stated above (and with the caveat expressed in footnote 55), such bare allegation fails as a matter of law to assert a lack of independence on the part of director Lufkin.

Lufkin's supposedly disabling interest results from the fact that he was "a founder of Donaldson, Lufkin & Jenrette ("DLJ") [and that] DLJ, or a successor or affiliate thereof, was one of two lead underwriters in the Company's IPO and obtained a substantial fee as a result thereof."⁵⁸ This bare statement of fact does not suggest, or even lead to a reasonable inference of, a disabling interest on the part of **Lufkin** as that statement does not show that he "will receive a personal financial benefit from [the] transaction that is not equally shared by the

⁵⁷ Compl. ¶ 18.

⁵⁸ Id. ¶ 22(e).

stockholders.”⁵⁹ Inadequate pleadings in support of separate allegations of interest and lack of independence cannot be combined to create an inference that a director’s conduct was improper. Here, the complaint fails, as a matter of law, to set forth facts that would lead this Court to question the presumed objectivity of director Lufkin in making his decision to vote in favor of the merger with Swedish Match.

3. Director Bamet

The *only* fact alleged in support of Orman’s allegation of director Bamet’s interest is that he “has an interest in the transaction since he will **become** a director of the surviving **company**.”⁶⁰ No case has been cited to me, and I have found none, in which a director was found to have a **financial** interest solely because he will be

⁵⁹ *In re the Walt Disney Co. Derivative Litig.*, 731 A.2d 342, 354 (1998) (quoting *Rales v. Blasband*, Del. Supr., 634 A.2d 927, 936 (1993)). It is of no help to Orman that he improperly attempts to expand the scope of his complaint in his brief opposing the motion to dismiss by adding the new allegation that “his [Lufkin’s] company could not reasonably hope to attract the future business of General Cigar . . . if he were to vote against the merger.” Pl.’s Br. in Opposition at 12. As stated above, at this stage of litigation, the Court is only permitted to consider the well-pleaded facts contained in the complaint and any documents incorporated by reference into that complaint. Should a plaintiff become aware that the allegations set forth in his complaint are inadequate to support his claim, he should request leave of the Court to amend his complaint rather than attempt to expand its scope through briefing. See Court of Chancery Rule 15(aaa). Briefs relating to a motion to dismiss are not part of the record and any attempt contained within such documents to plead new facts or expand those contained in the complaint will not be considered. Even if Orman’s new allegation were to be considered by the Court, which it is not, it would still be unconvincing as the Proxy Statement, which is incorporated by reference into the complaint and is a proper document for consideration, reveals that Lufkin is no longer a part of DLJ, thus rendering null Orman’s already inadequate pleading with regard to this defendant. See Defs.’ Opening Br., Ex. A at 49 (Proxy Statement) (listing director Lufkin’s “Principal Occupation and Business Experience During the Past Five Years” as that of a “Private investor”).

⁶⁰ Compl. ¶ 22(c).

a director in the surviving corporation. To the contrary, our case law has held that such an interest is not a disqualifying interest.⁶¹ Even if I were to infer that Orman was alleging that the fees Bamet was to receive as a director with the surviving company created a disabling interest, without more, that assertion would also fail.⁶² Because Orman alleges no facts in addition to the assertion of continued board membership on the part of Barnett, his assertion of interest fails as a matter of law.

4. Director Bembach

Orman alleges that director Bembach was both interested in the merger and lacked the independence to make an impartial decision regarding that transaction because he has “a written agreement with the Company to provide consulting services [and that] [i]n 1998 . . . Bembach was paid \$75,000 for such services⁶³ . . . and additional funds since that date.”⁶⁴ Orman further asserts that the Proxy Statement did not reveal the existence of the consulting contract, which was

⁶¹ See *Krim v. Pronet, Inc.*, Del. Ch., 744 A.2d 523, 528 n.16 (1999) (“[T]he fact that several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest.”).

⁶² See, e.g., *Grobow v. Perot*, Del. Supr., 539 A.2d 180, 188 (1988) (“The only averment permitting such an inference [of financial interest on the part of the directors] is the allegation that all GM’s directors are paid for their services as directors. However, such allegations, without more, do not establish any financial interest.”); *cf. Moran v. Household Int’l, Inc.*, Del. Ch., 490 A.2d 1059, 1074-75 (1985) (“Where a majority of the directors are independent or outside directors receiving no income other than usual directors’ fees the presumption of good faith is heightened.”). It is worth noting that these cases were based on circumstances in which the fees paid to directors were customary and usual in amount. This Court’s view of the disqualifying effect of such fees might be different if the fees were shown to exceed materially what is commonly understood and accepted to be a usual and customary director’s fee.

⁶³ Compl. ¶ 22(f).

⁶⁴ *Id.* ¶ 24(c).

executed in 1997, or “that that the surviving company inherits the Company’s contractual obligations to Defendant **Bembach**.”⁶⁵ Contrary to defendants’ assertion that **Orman** has failed to plead any continuing obligation on the part of General Cigar to Bembach, his complaint clearly states such a continuing obligation.

Orman asserts that Bembach has a written consulting contract with General Cigar, and that he had received, and continued to receive, payments under this contract. He further alleges that the surviving company will be obligated to uphold the contracts of the existing company. Such well-pleaded facts, accepted as true on a motion to dismiss, plainly allege a continuing obligation. Unfortunately for **Orman**, however, this clearly stated allegation is fatal to his assertion that Bembach was interested in the transaction. As this Court has stated previously, “a director is considered interested when he will receive a personal financial benefit *from a transaction* that is not equally shared by the **stockholders**.”⁶⁶ Accepting **Orman’s** allegations as true reveals that Bembach does not meet this definition of “interest.” Bembach had a contract with General Cigar. If the merger were consummated, he would have a contract that the surviving company would be obligated to honor. If the merger were not consummated he would still have his

⁶⁵ *Id.*

⁶⁶ *In re Western Nat’l Corp. Shareholders Litig.*, Del. Ch., **C.A.** No. 15927, mem. op. at 28, Chandler, C. (May 22, 2000) (citing *Aronson v. Lewis*, Del. Supr., 473 **A.2d** 805, 812 (1984)) (emphasis added).

contract with the existing General Cigar that it would be obligated to honor. Therefore, director Bembach would have received no benefit *from the transaction* being challenged that was not shared by the other General Cigar shareholders. As a result of the merger, shareholder Bembach would be cashed out and receive the same consideration for his General Cigar stock as the rest of the Unaffiliated Shareholders. Since he was to receive the same benefit as the Company's other shareholders, his interest in getting as high a price as possible for the Company's stock from the merger transaction was aligned with the Unaffiliated Shareholders. **Orman's** complaint, therefore, fails to plead adequately that director Bembach was interested in the merger. This conclusion obviates the need to examine, for the purpose of determining whether a disabling interest existed, the defendants' further assertion that even if some interest were sufficiently alleged, **Orman** failed to plead the materiality of that contract to Bembach.

Orman also argues that Bembach's consulting agreement suggests a lack of independence. At this stage of the litigation, the facts supporting this allegation are sufficient to raise a reasonable inference that director Bembach was controlled by the **Cullman** Group because he was beholden to the controlling shareholders for future renewals of his consulting contract. In addition to the facts specifically set forth in the complaint, the Proxy Statement reveals that, at the time of the challenged transaction, Bembach's principal occupation was "Chairman and Chief

Executive officer of the Bembach Group, Inc.”⁶⁷ Accepting as true all the well-pled allegations and the inferences reasonably drawn therefrom in this case, I believe it is reasonable to question the objectivity of a director who has a consulting contract with his company and will continue to have a consulting contract with the surviving company. This is particularly true when, regardless of whether the merger is approved or not, the challenged director is beholden to the identical group of controlling shareholders favoring the challenged transaction. The Cullman Group would continue to be in a position to determine whether particular contracts are to be renewed as well as the extent to which the company will make use of the consulting services already under contract. Even though there is no bright-line dollar amount at which consulting fees received by a director become material, at the motion to dismiss stage and on the facts before me, I think it is reasonable to infer that \$75,000 would be material to director Bembach and that he is beholden to the Cullman Group for continued receipt of such fees. Although not determinative, the inference of materiality is strengthened when the allegedly disabling fee is paid for the precise services that comprise the principal occupation of the challenged director.

⁶⁷ Defs.’ Opening Br., Ex. A at 48 (Proxy Statement).

5. Director Solomon

Orman alleges that “Defendant Solomon has an interest in the transaction since his company, PJSC, stands to reap fees of \$3.3 million if the transaction is **effectuated**.”⁶⁸ The reasonable inference that can be drawn **from** this contention is that if the merger is consummated PJSC will receive \$3.3 million. If the merger is not consummated PJSC will not receive \$3.3 million. PJSC, therefore, has an interest in the transaction. Because director Solomon’s principal occupation is that of “Chairman of Peter J. Solomon Company Limited and Peter J. Solomon Securities Company **Limited**,”⁶⁹ it is reasonable to assume that director Solomon would personally benefit from the \$3.3 million *his* company would receive if the challenged transaction closed. I think it would be **naïve** to say, as a matter of law, that \$3.3 million is immaterial. In my opinion, therefore, it is reasonable to infer that director Solomon suffered a disabling interest when considering how to cast his vote in connection with the challenged merger when the Board’s decision on that matter could determine whether or not his firm would receive \$3.3 million.

Directors Bembach and Solomon, at this stage, cannot be considered independent and disinterested. Orman has thus pled facts that make it reasonable to question the independence and/or disinterest of a majority of the General Cigar

⁶⁸ Compl. ¶ 22(b).

⁶⁹ Defs.’ Opening Br., Ex. A at 49 (**Proxy** Statement).

Board-the four **Cullman** Group directors, plus Bembach and Solomon, or six out of the eleven directors. Accordingly, I cannot say, as **a matter of law**, that the General Cigar Board's actions are protected by the business judgment rule presumption. Defendants' motion to dismiss the fiduciary duty claims-based as it is on a conclusion that the challenged transaction was approved by a disinterested and independent board-must be denied."

Reaching this decision with regard to the loyalty of the Board that approved the merger, however, does not rebut the business judgment presumption at this stage of the litigation. It merely means that the business judgment presumption may not be used as the basis to dismiss Or-man's fiduciary duty claims for failure to state a cognizable claim. Further discovery is necessary to determine whether the facts-as they truly existed at the time of the challenged transaction, rather than those accepted as necessarily true as alleged-are sufficient to rebut the business judgment rule presumption and to trigger an entire fairness review. Thus it is unnecessary for me presently to consider Ox-man's allegations concerning the purported unfairness of the price and process of the merger." Such allegations will

⁷⁰ Since **Orman** has pled facts **from** which it is reasonable to question the independence of two of the seven disputed directors, it is unnecessary for me to consider his allegations with regard to director Sherren. Even if I were to determine that it was not reasonable to question either the interest or independence of director **Sherren**, there would still not be a majority of disinterested and independent directors upon which the defendants could rely for the dismissal of **Orman's** fiduciary duty claims.

⁷¹ Compl. ¶ 23(a)-(g).

become relevant only if the business judgment presumption is finally determined to have been successfully rebutted.

B. Disclosure Allegations

Orman next alleges that the Proxy Statement contained material omissions and **misstatements**.⁷² In order for a plaintiff to state properly a claim for breach of a disclosure duty by omission, he must “plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy **materials**.”⁷³ In order for alleged misrepresentations to be material, 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 made available” to the **shareholders**.⁷⁴

Contrary to Orman’s contention that a determination of the materiality of disclosure allegations is not appropriate on a motion to dismiss, this Court has, on several occasions in the context of a motion to dismiss, found it appropriate to dismiss disclosure claims on the basis that the complained of omission was not **material**.⁷⁵ Orman’s reliance on *Crescent/Mach I Partners, L.P. v. Turner*⁷⁶ to

⁷² *Id.* ¶ 24.

⁷³ 0 ‘Reilly v. Transworld Healthcare, Inc., Del. Ch., 745 A.2d 902,926 (1999).

⁷⁴ *Rosenblatt v. Getty Oil Co.*, Del. Supr., 493 A.2d 929,944 (1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438,449 (1976)).

⁷⁵ See, e.g., *Malpiede v. Townson*, Del. Supr., 780 A.2d 1075, 1086 n.35 (2001) (citing cases in which dismissal was appropriate because the statements or omissions were immaterial as a matter of law).

⁷⁶ Del. Ch., C.A. No. 17455, mem. op., Steele, V.C. (by designation) (Sept. 29, 2000).

support his contention is misplaced. In that case the Court refused to dismiss the complaint not because a determination of materiality was inappropriate on a motion to dismiss, but precisely because the plaintiff was able to plead sufficiently “all of the elements necessary to **survive** a motion to dismiss for breach of the fiduciary duty of **disclosure**.”⁷⁷ In fact, the Court there stated that materiality “**is** a matter for the Court to determine from the record at that particular stage of a case when **the** issue **arises**.”⁷⁸ It is proper, therefore, for this Court to address the question of the materiality of the plaintiffs alleged omissions in the context of a Rule 12(b)(6) motion to dismiss.

Or-man lists seven omissions from the Proxy Statement that he asserts would have affected the voting of the Unaffiliated Shareholders had that information been **included**.⁷⁹ First, he alleges the Proxy Statement omitted the fact that defendant Bar-net was subject to a conflict of interest and/or lacked independence because he was designated as a director of the surviving corporation and would benefit from the transaction through fees, stock options and other benefits of a **directorship**.⁸⁰

⁷⁷ *Id.* at 44 (emphasis added); *see also Malpiede*, 780 A.2d at 1086-87 (“To survive a motion to dismiss, the plaintiffs ‘must provide some basis for a court to **infer** that the alleged violations were material. For example, a pleader must allege that facts are missing from the statement, identify those facts, *state why they meet the materiality standard* and how the omission caused injury.’” (quoting *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 142 (1997)) (emphasis added)).

⁷⁸ *Crescent/Mach I Partners*, mem. op. at 46 (emphasis added).

⁷⁹ Compl. ¶¶ 24-25.

⁸⁰ *Id.* ¶ 24(a).

Second, the Proxy Statement omitted the fact that defendant Solomon was subject to a conflict of interest and/or lacked independence because his company, Peter J. Solomon & Co. (“PJSC”), stood to make a fee of \$3.3 million if the transaction was consummated.** Third, the Proxy Statement did not disclose that in 1997 General Cigar entered into a consulting contract with defendant Bembach, the amount Bembach received under that contract, and that the surviving company would inherit General Cigar’s contractual obligations to **Bernbach**.⁸² Fourth, the Proxy Statement did not disclose that defendant **Cullman** Sr. had been the Chairman of the Compensation Committee of the Board of Directors of Centaur Communications Ltd., (“Centaur”) and that that committee sets or recommends the annual compensation to be paid to defendant Sherren as Centaur’s CEO.⁸³ Fifth, the Proxy Statement failed to disclose that defendant Lufkin was a co-founder of DLJ and that DLJ received a substantial fee as an underwriter for General Cigar’s 1997 initial public **offering**.⁸⁴ Sixth, the Proxy Statement failed to disclose that General Cigar’s headquarters building in New York City was only partially occupied and listed its value only as its carrying value (cost less depreciation) rather than giving the building’s market **value**.⁸⁵ Seventh, and finally, the Proxy

⁸¹ *Id.* ¶ 24(b).

⁸² *Id.* ¶ 24(c).

⁸³ *Id.* ¶ 24(d).

⁸⁴ *Id.* ¶ 24(e).

⁸⁵ *Id.* ¶ 24(f).

Statement failed to disclose the “huge financial benefits” that the Company would reap when the United States’ embargo of Cuban products is ultimately removed. As General Cigar owns the trademark rights to seven of the top ten Cuban cigar brands, relaxation of the embargo would likely provide an economic “shot in the arm” for General Cigar.⁸⁶

Orman claims that these omitted facts resulted in the shareholders’ vote not being fully informed. The first five disclosure allegations concerning certain defendant directors would, purportedly, have demonstrated to the Unaffiliated Shareholders that “the Board’s vote in favor of the merger was tainted by self-interest and self-dealing.”⁸⁷ The sixth and seventh disclosure allegations would have made the Unaffiliated Shareholders aware that “the Company had significant assets which were not properly considered in establishing the fair value of the stock [they held] .”⁸⁸

1. Director Bamet

Orman alleges it was a material omission that the Proxy Statement did not disclose that Bat-net was interested and/or lacked independence “since he is designated to be a director of the surviving corporation and will therefore benefit from the transaction through fees, stock options and other emoluments typically

⁸⁶ *Id.* ¶ 24(g).

⁸⁷ *Id.* ¶ 25.

⁸⁸ *Id.*

provided to directors of a **corporation.**”⁸⁹ As discussed above, Ox-man has not pled particularized facts that would support a finding that defendant director Bamet either suffered a disabling interest or lacked independence when he *voted* to approve the merger transaction on January 19, 2000. As a result, there can be no material omission in the failure of the Proxy Statement to mention such nonexistent interest or lack of independence on the part of director **Barnet.**⁹⁰ In addition to **Orman’s** failure to plead facts **from** which it is reasonable to question Bar-net’s disinterest and independence, the underlying information that purportedly supported those assertions was, in fact, included in the Proxy Statement.

The fact that director Bamet is designated to be a director of the surviving corporation is clearly presented in the Proxy Statement. Under the heading “Directors and Management of the Surviving Corporation,” that document recites that “The Merger Agreement provides that the initial board of directors will consist of seven members [including] Bruce **Barnet.**”⁹¹ No purpose would be served by an additional requirement that the Proxy Statement include a statement that as a result

⁸⁹ Compl. ¶ 24(a).

⁹⁰ See, e.g., *Kahn v. Caporella*, Del. Ch., C.A. No. 13248, mem. op. at 15, Berger, V.C. (Mar. 10, 1994) (rejecting plaintiffs claim that failure to disclose directors’ lack of independence was a material omission when the court found no basis to question those directors’ independence); *Michelson v. Duncan*, Del. Ch., 386 A.2d 1144, 1154-55 (1978) (stating that when there was no factual support for the **plaintiff’s** allegations as to the interest of certain directors, the fact that such “interest” was not recited in the proxy materials was a meritless contention), *aff’d in relevant part*, Del. Supr., 407 A.2d 211 (1979).

⁹¹ **Def.’** Opening Br., Ex. A at 23 (Proxy Statement); see *also id.*, Ex. A at 39 (“Following the merger, the board will consist of seven directors, with four directors being nominated by the Family, including . . . Bruce A. **Barnet.**”).

of being a director Bamet would “benefit from the transaction through fees, stock options and other emoluments typically provided to directors of a **corporation**.”⁹² Since Orman is alleging only that Bamet would receive benefits “typically” received by a director, disclosing that **Barnet** was to be a director of the surviving company would inform the Unaffiliated Shareholders that he was to receive the benefits typically associated with such a position. Orman’s disclosure **allegations** with regard to director **Barnet** are, therefore, dismissed.

2. Director Solomon

Ox-man alleges that “Defendant Solomon is also subject to a conflict of interest and/or lacks independence and disinterest since his company, PJSC, stands to make a fee of \$3.3 million if the transaction is **effectuated**.”⁹³ Under the heading “interest of Certain Persons in the Merger; Certain Relationships,” the Proxy Statement expressly states “Peter J. Solomon, whose firm PJSC served as the Company’s financial advisor, sits on the Company’s board of **directors**.”⁹⁴ The Proxy Statement goes on to set plainly forth the fact that PJSC was to receive an estimated \$3,300,000 “in connection with the **merger**.”⁹⁵ The fact that the Proxy Statement did not also include a statement that the disclosed facts meant that

⁹² Compl. ¶ 24(a).

⁹³ Cdmp. ¶ 24(b).

⁹⁴ Defs.’ Opening Br., Ex. A at 23 (Proxy Statement); see *also id.*, Ex. A at 49 (stating Solomon’s principal occupation for the previous five years as “**Chairman** of Peter J. Solomon Company Limited and Peter J. Solomon Securities Company Limited”).

⁹⁵ *Id.*, Ex. A at 29 (Proxy Statement).

Solomon was in fact “subject to a conflict of interest and/or lacked independence and disinterest” was not a material omission. A board’s duty of disclosure does not require it to “engage in ‘self-flagellation’ and draw legal conclusions implicating itself in a breach of fiduciary **duty**.”⁹⁶ Therefore, although “material facts must be **disclosed**”⁹⁷ (and they were with respect to PJSC’s fee and Solomon’s relationship to that firm), “negative inferences or characterizations of misconduct or breach of fiduciary duty need not be articulated.”⁹⁸ As a result, the failure to characterize facts concerning Solomon and PJSC’s fee as a conflict of interest was not a violation of the Board’s duty of disclosure. Orman’s disclosure allegations with regard to director Solomon are dismissed.

3. Director Bembach

Orman asserts that the Proxy Statement did not reveal that since 1997 director Bembach had a consulting contract with General Cigar from which he had been paid \$75,000 in 1998 and “additional funds since that date,” and that the surviving company would be bound by this contract.” General Cigar’s Form 10-K and 10-K/A are incorporated into the Proxy Statement by reference and do

⁹⁶ *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 143 (1997) (quoting *Stroud v. Grace*, Del. Supr., 606 A.2d 75, 84 n.1 (1992)).

⁹⁷ *Loudon*, 700 A.2d at 143.

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 24(c).

disclose that contract.” The 10-K/A states that “[t]he Company entered into an agreement with John L. Bembach in 1997 pursuant it [sic] which, Mr. Bembach provides consulting services to the Company with respect to its international operations. During the Company’s 1999 fiscal year, Mr. Bembach received advisory fees of \$56,250 pursuant to such agreement.”“* The Proxy Statement also includes the statement that “[e]mployment and other agreements currently in effect will become obligations of the Surviving Corporation following the merger.”¹⁰² Therefore, Bembach’s consulting contract and the continuing obligation of the surviving company under that contract are sufficiently disclosed by the Proxy Statement and Orman’s disclosure allegations with regard to director Bembach are dismissed.

¹⁰⁰ See Defs.’ Opening Br., Ex. A at 4, 6 (Proxy Statement) (informing shareholders that “[t]o understand the proposed merger fully and for a more complete description of the terms of the proposed merger, you should read carefully this entire proxy statement, including the annexes to it, and the documents incorporated by reference” and that “Form 10-K for the fiscal year ended November 27, 1999, as filed with the Commission on February 25, 2000, [is] included in this Proxy Statement.” (emphasis in original)). Under the section entitled “WHERE YOU CAN FIND MORE INFORMATION,” the Proxy Statement recites “[t]he SEC allows the Company to ‘incorporate by reference’ information into this proxy statement, which means that the Company can disclose important information by referring you to another document filed separately with the SEC. The following documents previously filed by the Company with the SEC are incorporated by reference in this proxy statement and are’ deemed to be a part hereof: (1) The Company’s **Annual** Report on Form 1 O-K and Form 1 O-WA for the fiscal year ended November 27, 1999.” *Id.*, Ex. A at 54 (Proxy Statement).

¹⁰¹ *Id.*, Ex. B at 26 (Form 10-K/A).

¹⁰² *Id.*, Ex. A at 24 (Proxy Statement).

4. Director Sherren

Orman next alleges “[t]he Proxy Statement fails to disclose that Defendant Cullman Sr. has been the Chairman of the Compensation Committee of the Board of Directors of Centaur Communications Ltd., the body that sets or recommends the annual compensation to be paid to Defendant Sherren in his role as Chief Executive Officer of Centaur.”¹⁰³ Although I did not reach a conclusion as to whether these facts support an unfavorable inference regarding Sherren’s interest and/or independence, all of this **information** was disclosed in the Proxy Statement or documents incorporated by reference into the Proxy Statement. Sherren’s principal occupation during the five years preceding the Proxy Statement was listed as “Chairman and Chief Executive Officer of Centaur Communications Limited.”¹⁰⁴ It was disclosed that Cullman Sr. served as a director of Centaur¹⁰⁵ and that “Mr. Cullman [Sr.] is Chairman of the Compensation Committee of Centaur Communications Limited, of which Mr. Sherren is chief executive officer.”¹⁰⁶ Because this information *was* disclosed, there is no material omission concerning Sherren. Orman’s disclosure allegations with regard to director Sherren are dismissed.

¹⁰³ Compl. ¶ 24(d).

¹⁰⁴ Defs.’ Opening Br., Ex. A at 49 (Proxy Statement).

¹⁰⁵ Id., Ex. A at 48 (Proxy Statement).

¹⁰⁶ Id., Ex. B at 27 (Form 10-K/A).

5. Director Lufkin

Orman alleges “[t]he Proxy Statement fails to disclose that Defendant Lufkin was a co-founder of Donaldson, Lufkin and Jenrette (“DLJ”) and that DLJ received a substantial fee as underwriter for the Company’s IPO.”¹⁰⁷ In fact, the Proxy Statement informs the shareholders that “Dan W. Lufkin, Chairman [of the Special Committee], was a co-founder of Donaldson, Lufkin & Jenrette.”¹⁰⁸ The Proxy Statement also makes clear that although Lufkin “was” a founder of DLJ, he is no longer a member of that investment bank. The Proxy Statement records that Lufkin’s “Principal Occupation and Business Experience During the Past Five Years” was that of “Private investor”¹⁰⁹ and that “[e]xcept as otherwise indicated each director has had the same principal occupation during the past five years.”¹⁰ The fact that a company Lufkin helped to found, by which he is no longer employed, was an underwriter for General Cigar’s 1997 IPO cannot, in my opinion, be considered a material fact that would have altered the total mix of information presented to the Company’s shareholders. Orman’s disclosure allegations with regard to director Lufkin are dismissed.’¹¹

¹⁰⁷ Compl. ¶ 24(e).

¹⁰⁸ Defs.’ Opening Br., Ex. A at 2 (Proxy Statement).

¹⁰⁹ *Id.*, Ex. A at 49 (proxy Statement).

¹¹⁰ *Id.*, Ex. A at 50 (Proxy Statement).

¹¹¹ It is apparent from the Proxy Statement that Lufkin was not even employed by DLJ at the time of General Cigar’s IPO as the February 28, 1997 IPO in which DLJ participated was within the five-year period during which Lufkin’s principal occupation was solely “Private investor.”

Because the facts **Orman** complains of as being omitted with regard to the individual defendant directors either did not require disclosure or were in fact disclosed, all disclosure allegations concerning the individual director defendants are dismissed. All that remains of **Orman's** disclosure allegations, therefore, are the omission of the benefit that would redound to the Company when the Cuban embargo is lifted and the omission of the market value of the Company's headquarters building in New York City. These two omissions must be seen to alter the "total mix" of information available to the shareholders in order to meet the materiality standard and to avoid an entire dismissal of **Orman's** disclosure claims.

6. Cuban Embargo

The allegation that it was a material disclosure violation that "[t]he Proxy Statement **fail[ed]** to disclose the huge financial benefits which the Company would reap when the trade embargo with Cuba is lifted [due to the Company's] exclusive trademark rights to seven of the top ten Cuban cigar brands"¹¹² is almost laughable. Such an allegation barely rises to the level of unsupported speculation that the Courts of this state have never held must be included in proxy **materials**.¹¹³ Perhaps in recognition of the baselessness of this particular allegation, **Orman** did

¹¹² Compl. ¶ 24(g).

¹¹³ See, e.g., *Loudon v. Archer-Daniel+Midland Co.*, Del. Supr., 700 A.2d 135, 145 (1996) ("Speculation is not an appropriate subject for a proxy disclosure.").

not attempt to defend it either in his briefs or at oral argument. This disclosure claim fails as a matter of law and the defendants' motion to dismiss with respect to this alleged omission is, therefore, granted.

7. Headquarters Building

With respect to the disclosures provided in connection with the Company's headquarters building, **Orman acknowledges** that the Proxy Statement discloses the carrying value (cost less depreciation) of that asset. He asserts, however, that it was a material omission that the Proxy Statement did not "disclose that the Company's headquarters building at 387 Park Avenue South, which is owned by the Company, consists of 210,000 square feet of office space of which only 25,000 square feet is used by the Company and also fails to disclose the fair market value of such property."¹⁴ The defendants counter that when an asset is fundamental to a company's operations, as opposed to a surplus asset that could readily be sold for market value, the fair market value of such asset need not be included in a company's proxy materials. They maintain that the Company's headquarters building is fundamental to the Company's operations and, as a result, there was no requirement that the Proxy Statement contain fair market value information about that asset.

¹⁴ Compl. ¶ 24(f).

The defendants correctly point out that in *Citron v. E.I. du Pont de Nemours & Co.*,¹¹⁵ this Court held that under the facts of that case it was not a material omission when only the book value and not the fair market value of a particular asset was disclosed. This finding was made after the Court determined that the asset was not a surplus asset that could have been sold for cash at fair market value, but was integral to the company in question. *Citron*, however, is readily distinguishable both on its facts and procedural posture from this case.

The decision *in Citron* was reached after a full trial on the merits that was followed by post-trial briefing and further oral **argument**.¹¹⁶ Here, the Court does not have the benefit of a fully developed record to assist it in making a determination of whether General Cigar's headquarters building is fundamental to the Company or a surplus asset that could be sold without significantly impairing the Company's ongoing business. The asset in question *in Citron* is also factually distinguishable from the building at issue in *this case*. The asset at issue *in Citron* was a facility that the Court determined was "not a surplus asset, but was an integral part of the educational and public relations side of [the company's] business."¹⁷ This facility was equated with other operating assets such as factories and major equipment. Additionally, the *Citron* Court knew the appraised value of

¹¹⁵ Del. Ch., 584 A.2d 490 (1990).

¹¹⁶ *Id.* at 492.

¹¹⁷ *Id.* at 503.

The defendants correctly point out that in *Citron v. E.I. du Pont de Nemours & Co.*,¹¹⁵ this Court held that under the facts of that case it was not a material omission when only the book value and not the fair market value of a particular asset was disclosed. This finding was made after the Court determined that the asset was not a surplus asset that could have been sold for cash at fair market value, but was integral to the company in question. *Citron*, however, is readily distinguishable both on its facts and procedural posture from this case.

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¹¹⁵ Del. Ch., 584 A.2d 490 (1990).

¹¹⁶ *Id.* at 492.

¹¹⁷ *Id.* at 503.

that facility. This enabled it to calculate that the appraised value was only 1.7% of the fully disclosed book value of the company. These facts led the *Citron Court* to conclude that “[i]n these circumstances, the \$4.4 million difference between appraised and book value would have been quantitatively insignificant to a shareholder considering whether to approve the merger.”“* Based on the facts presented to me at this stage of the litigation, I cannot say, as a matter of law, that the building housing the Company’s corporate offices is integral to General Cigar’s business in the sense that it could be equated to an operating asset. It seems reasonable, at this stage of the litigation, to believe that General Cigar could obtain another location to house its corporate headquarters without adversely affecting the operation of the manufacturing and marketing of the Company’s cigars. It is possible, therefore, that the fair market value of that building might be considered material information.

At oral argument the defendants suggested, for the first time, that the Proxy Statement did, in a way, disclose the value of the Park Avenue building to the shareholders. They based this assertion on the fact that the projections of income on which the Special Committee’s financial advisor, Deutsche Bank, based its valuation of the Company were included in the Proxy Statement. According to the defendants, this is significant because projections of income included lease

¹¹⁸ *Id.*

payments from other non-Company tenants in the Park Avenue building. The defendants reason that since the lease payments from other tenants were included in the income projections and those income projections were used by Deutsche Bank in their valuation of the Company, the “value” of the building was disclosed to the shareholders. Were it determined that the fair market value of the headquarters building was material information that should have been disclosed to the shareholders, I cannot agree with the defendants that this information was disclosed to the shareholders in the manner they propose.

The Proxy Statement does say that the projections of income which were provided by the Company to Deutsche Bank and were used by Deutsche Bank in connection with its January 19, 2000 fairness opinion “[i]nclude[d] income from the Company’s headquarters office **building**.”¹¹⁹ No figures were given, however, either in terms of real dollars or a percentage of income, that showed the significance of these lease payments to that projected income **from** which a shareholder could have even attempted to determine the “value” of the headquarters building as suggested by the defendants. Additionally, those financial projections “were not prepared by the Company with a view to public disclosure or compliance with presentation and disclosure guidelines established by the SEC or the American Institute of Certified Public Accountants regarding

¹¹⁹ **Def.’** Opening Br., Ex. A at 21-22 (Proxy Statement).

prospective financial information.”¹²⁰ The Proxy Statement did include audited financial statements, however, and the “Notes to Consolidated Financial Statements” associated with those audited financial statements declared that “[t]he operations of. . . 387 PAS, which owns and operates the Company’s headquarters building, *were not material* to the Company’s results of operations in any of the periods **presented**.”¹²¹ This statement seems to imply both that the building was not, in and of itself, integral to the business of General Cigar nor a significant income-producing asset of the Company. Although upon examination of additional facts at a later stage of litigation it might well be determined that failure to include the fair market value of this asset was not a material omission, based on the specific facts before the Court now it is impossible for me to reach such a conclusion at this time. Therefore, defendants’ motion to dismiss as it pertains to this one disclosure allegation cannot be granted on the basis of a determination that information regarding the fair market value of the headquarters building was immaterial.

C. Section 102(b)(7)

The defendants argue that even if I find that **Orman** has stated a cognizable disclosure claim, the complaint must still be dismissed because all that it alleges is

¹²⁰ *Id.*, Ex. A at 21 (Proxy Statement).

¹²¹ *Id.*, Ex. A at F-6 (Notes to Consolidated Financial Statements included in Proxy Statement) (emphasis added).

a breach of the duty of care and the Company's certificate of incorporation includes an exculpatory provision adopted pursuant to 8 Del. C. § 102(b)(7) that shields General Cigar's directors from personal liability for breaches of the duty of care. **Orman** responds that he has alleged breaches of the duty of loyalty, liability for which cannot be avoided by the Company's exculpation clause.

Before I can address the parties' contentions as to whether General Cigar's exculpatory provision shields the defendant directors **from** liability, thereby permitting complete dismissal of the disclosure claims, I must first determine whether the Court's consideration of such a defense is premature in light of the facts and procedural posture of this case. Two recent Delaware Supreme Court decisions specifically addressed the proper timing of this Court's consideration of a defense based on a § 102(b)(7) charter provision. *In Malpiede v. Townson*, the Supreme Court affirmed a Rule 12(b)(6) dismissal of the plaintiffs' due care claim based on a § 102(b)(7) exculpatory provision contained in the defendant corporation's charter.¹²² In *Emerald Partners v. Berlin*, the Supreme Court vacated a decision for premature consideration of a § 102(b)(7) provision in a post trial final judgment.¹²³ According to *the Emerald III* Court, the trial court improperly found for the defendants based on the existence of a § 102(b)(7) exculpatory

¹²² Del. Supr., 780 A.2d 1075, 1079 (2001).

¹²³ Del. Supr., ___ A.2d ___, No. 96, 2001, slip. op., Holland, J. (Nov. 28, 2001) ("*Emerald III*").

provision because it failed first to set out explicitly the Court’s findings as to the entire fairness of the challenged transaction.¹²⁴ Consideration of the exculpatory provision was held to be premature even though the trial court explicitly determined, after a complete trial on the merits during which both sides were fully able to present all the evidence at their disposal, that even if the transaction was unfair, there was no evidence that in any way showed such unfairness resulted from a breach of the duty of loyalty and that any unfairness could only have been due to a breach of the duty of care.¹²⁵ Nevertheless, the ***Emerald III Court*** reiterated *Malpiede*’s holding that “if a shareholder complaint unambiguously asserts *only* a due care claim, the complaint is dismissable once the corporation’s Section 102(b)(7) provision is properly invoked.”¹²⁶ ***The Malpiede*** Court stated, however, that:

[i]n the case of a Rule 12(b)(6) motion, . . . if the Section 102(b)(7) charter provision is raised for the first time in the motion or brief in support of the motion, it is a matter outside the pleading. If not excluded by the court, the existence of such matter means that the motion will be converted, by clear force of the pleading rules, into a motion for summary judgment under [Court of Chancery] Rule 56.¹²⁷

¹²⁴ *Emerald III*, slip op. at 2 1.

¹²⁵ See *Emerald Partners v. Berlin*, Del. Ch., C.A. No. 9700, mem. op. at 52-64, Jacobs, V.C. (Feb. 7, 2001) (stating that it was undisputed and conceded by the plaintiff that the non-affiliated directors were disinterested, that those directors were independent **from** an interested director, and proceeding to demonstrate that the facts found by the trial court clearly establish that, *at most*, the plaintiffs duty of loyalty arguments only implicated a possible breach of the duty of care).

¹²⁶ *Emerald III*, slip op. at 11 (emphasis in original).

¹²⁷ *Malpiede*, 780 A.2d at 1092.

Although the Court must permit discovery when considering a Rule 56 motion for summary judgment, any discovery associated with a matter outside the pleadings considered by the Court may, within the Court's discretion, be limited so as to focus any permitted discovery on the narrow issue presented by that **matter**.¹²⁸

The defendants in this case first raised the issue of an exculpatory provision, purportedly contained in General Cigar's Certificate of Incorporation at Article Fifth (d), in their brief in support of their motion to **dismiss**.¹²⁹ This being a matter outside the pleadings I **have, as** instructed by *Malpiede*, converted my consideration of it from a Rule 12(b)(6) standard to a Rule 56 standard. The only discovery relevant to that matter was the very narrow one concerning the existence or authenticity of the Company's exculpation provision. **Orman** was given the opportunity to conduct limited discovery, but he declined to challenge either the existence or authenticity of General Cigar's exculpatory provision.¹³⁰ That provision is, therefore, an undisputed fact that may be considered by the Court. It reads:

No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a

¹²⁸ See *id.* at 1091.

¹²⁹ See Defs.' Opening Br. at 23-24.

¹³⁰ The plaintiff, by a **letter** to the Court dated December 21, 2001, stated, "Plaintiff does not contest the existence or authenticity of the exculpation provision contained in the Certificate of Incorporation of General Cigar Holdings Inc."

knowing violation of law, (iii) pursuant to Section 174 of the DGCL or (iv) for any transaction from which the director derived an improper personal benefit.¹³¹

This provision shields the members of the General Cigar Board **from** personal monetary liability for a breach of their duty of care to the Company.

Contrary to **Orman's** suggestion, disclosure claims do not always involve a breach of the duty of loyalty. He incorrectly cites two decisions of this Court, *O'Reilly v. Transworld Healthcare, Inc.*¹³² and *Chaffin v. GNI Group, Inc.*¹³³ as supporting his argument that “[s]o long as the complaint *pleads* a violation of other aspects of the fiduciary duty, such as bad faith or breach of the duty of loyalty, it cannot be dismissed pursuant to § 102(b)(7).”¹³⁴ **Orman's** argument is that merely alleging a violation of the duty of loyalty-whether conclusory in nature or otherwise inadequately pleaded-would preclude dismissal based on an exculpatory charter provision. Neither *O'Reilly* nor *Chaffin* support anything close to **Orman's** sweeping interpretation of these cases. *O'Reilly* stated that exculpatory provisions adopted pursuant to § 102(b)(7) cannot be the basis for dismissal “where a complaint alleges or pleads facts *sufficient* to support the inference that the disclosure violation . . . implicates *the* duty of loyalty.”¹³⁵ *Chaffin* found that

¹³¹ **Defs.’** Opening Br., Ex. C at 10 (Certificate of Incorporation).

¹³² Del. Ch., 745 **A.2d** 902 (1999).

¹³³ Del. Ch., **C.A. No. 16211-NC**, mem. op., Jacobs, V.C. (Sept. 3, 1999).

¹³⁴ **Pl.’s** Br. in Opposition at 21 (emphasis added).

¹³⁵ *O'Reilly*, 745 **A.2d** at 915 (emphasis added).

dismissal based on an exculpatory provision was not possible there because “the Court has previously determined that the Complaint **does** state cognizable claims for breach of the duty of **loyalty**.”¹³⁶ Put simply, if a complaint **properly** pleads a non-exculpated claim, that claim at least survives a motion to dismiss.

The fiduciary duty to disclose material facts does not solely implicate the duty of loyalty, a breach of which results in liability that cannot be avoided by an exculpatory provision. Rather, “[t]he duty of directors to observe proper disclosure requirements derives **from** the combination of the fiduciary duties of care, loyalty and good **faith**.”¹³⁷ *The Malpiede Court* recently observed that a “board’s fiduciary duty of disclosure . . . [is] not [an] independent dut[y] but the application in a specific context of the board’s fiduciary duties of care, good faith, and **loyalty**.”¹³⁸ A claim for breach of the duty of disclosure may implicate **only** the duty of care “when the misstatement or omission was made as a result of the directors’ good faith, but ‘erroneous judgment’ concerning the proper scope and content of the disclosure.”¹³⁹ Furthermore, in *Arnold v. Society for Savings Bancorp, Inc.*, our Supreme Court held that a disclosure claim could be dismissed pursuant to a

¹³⁶ *Chaffin*, mem. op. at 15-16 (emphasis added).

¹³⁷ *Malone v. Brincat*, Del. Supr., 722 A.2d 5, 11 (1998); see also *Crescent/Mach I Partners, L.P. v. Turner*, Del. Ch., C.A. No. 17455, mem. op. at 43, Steele, V.C. (by designation) (Sept. 29, 2000) (“The fiduciary duty of disclosure arises as a subset of a director’s fiduciary duties of **loyalty** and care.” (citing *Malone*, 722 A.2d at 11)).

¹³⁸ *Malpiede*, 780 A.2d at 1086.

¹³⁹ *Crescent/Mach I*, mem. op. at 43 (quoting *O’Reilly v. Transworld Healthcare, Inc.*, Del. Ch., 745 A.2d 902,915 (1999)).

§ 102(b)(7) exculpatory provision when the Court determined that there was no breach of the duty of loyalty and that the disclosure violation there was consistent with a good faith omission.¹⁴⁰

Unfortunately for the defendants, however, because Orman has pled facts which make it reasonable to question the independence and disinterest of a majority of the Board that decided what information to include in the Proxy Statement, I cannot say, as a matter of law, that the complaint unambiguously states only a duty of care claim. Therefore, consideration of the effect of General Cigar's exculpatory provision on Orman's ability to recover damages, at this point, is premature.

In addition, because I conclude that it is impossible to say, as a matter of law, that information concerning the fair market value of the Company's headquarters building is immaterial, I cannot currently accept defendants' contention that a fully informed vote of a majority of the Company's Unaffiliated Shareholders ratified any possible breaches of fiduciary duties in connection with the Board's consideration of the challenged merger. If it were later determined that this omission was not material, however, shareholder ratification might become an important issue.

¹⁴⁰ Del. Supr., 650 A.2d 1270, 1287-88 & n.36 (1994).

Finally, the pleadings (and reasonable inferences drawn therefrom) are insufficient for me to make a determination with respect to the possible cleansing effect resulting from the actions of General Cigar's Special Committee. The complaint provides no bases upon which I can draw conclusions confidently as to whether or not the Special Committee's negotiations with Swedish Match were indeed arms-length and indicative of a properly functioning and properly motivated committee. It is also unclear to me at the moment what legal effect, if any, the Company's exculpatory provision would have on the liability of particular defendant directors, if I were to find (at a later stage of this lawsuit) that the Special Committee did, in fact, operate as an independent and properly motivated negotiating body such that any breaches of fiduciary duty by it implicated only the duty of care. These issues must await another day.““

¹⁴¹ In light of the fact that **Orman's** complaint alleged that there was a “no-talk” provision associated with the merger agreement, and even though the issue was not raised in the complaint, I asked counsel to address the question whether either *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*, Del. Supr., 506 A.2d 173 (1986), or *McMullin v. Beran*, Del. Supr., 765 A.2d 910 (2000), were implicated by the facts of this case. I am satisfied that neither of these cases is implicated here. This conclusion rests on the fact that General Cigar was neither being broken up nor was control being transferred or sold via the challenged merger. Also, the challenged merger was not merely a step in a series of transactions that have the ultimate result of a change in control or the break up of the company. See Defs.' Opening Br., Ex. A at 25 (Proxy Statement) (stating that “[e]xcept as described in this proxy statement, none of the [Cullman Croup], Swedish Match, SM Merger Corp. or the Company has any present plans or proposals involving the Company or its subsidiaries which relate to or would result in an extraordinary

IV. CONCLUSION

For the reasons stated above, I deny defendants' motion to dismiss the fiduciary duty claims in connection with the merger of General Cigar and Swedish Match. I grant in part and deny in part defendants' motion to dismiss the disclosure claims.

An Order accompanies this Opinion.

corporate transaction such as a merger, reorganization, liquidation, sale or transfer of a material amount of assets, or any material change in the Company's corporate structure or business").

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

JOSEPH ORMAN,)	
)	
Plaintiff,)	
)	
v.)	
)	
EDGAR M. CULLMAN, SR.,)	Civil Action No. 18039
EDGAR M. CULLMAN, JR.,)	
SUSAN R. CULLMAN, JOHN L.)	
ERNST, PETER J. SOLOMON,)	
BRUCE A. BARNET, JOHN L.)	
BERNBACH, THOMAS C. ISRAEL,)	
DAN W. LUFKIN, GRAHAM V.)	
SHERREN, FRANCES T.)	
VINCENT, JR. and GENERAL)	
CIGAR HOLDINGS, INC.,)	
)	
Defendants.)	

ORDER

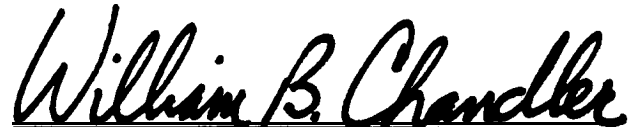
For the reasons assigned in this Court's Opinion entered in this case on this date, it is

ORDERED:

(1) Defendants' motion to dismiss the fiduciary duty claims asserted in plaintiffs complaint is DENIED; and

(2) Defendants' motion to dismiss the disclosure claims asserted in plaintiff's complaint is GRANTED with respect to all such disclosure claims

EXCEPT the claimed omission of the fair market value of defendant General Cigar Holdings, Inc.'s corporate headquarters building in New York City, NY.


Chancellor

DATED: February 26, 2002