IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH ORMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
EDGAR M. CULLMAN, SR., 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.,	)	Civil Action No. 18039
	)	
Defendants.	)	

O P I N I O N

Date Submitted: May 28, 2004
Date Decided: October 20, 2004

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CHANDLER, Chancellor

This case is about a merger transaction in which one tobacco company, Swedish Match AB, purchased an equity stake in another tobacco company, General Cigar Holdings, Inc. Members of the Cullman family are the controlling shareholders of General Cigar. Swedish Match did not purchase control of General Cigar, as it wanted the Cullmans to continue managing the company after the merger.

Although Swedish Match paid a significant premium above the market price for the public shares in General Cigar, plaintiff Joseph Orman sued the General Cigar board of directors for breach of their fiduciary duties in negotiating the merger terms. In earlier stages of this lawsuit, the Court has dismissed certain claims and has permitted others to go forward. After an extended period of discovery, defendants have renewed their motion for summary judgment on the remaining breach of fiduciary duty claim. Defendants contend that a fully informed vote of a majority of the public shareholders in favor of the merger operates to extinguish plaintiff's claim. This contention raises the following question: Were the General Cigar public shareholders impermissibly coerced to vote for the merger because of a lock-up provision required by Swedish Match as part of the transaction?

The answer to this question, in my opinion, is no. The undisputed facts demonstrate that the lock-up did not coerce the public shareholders to approve the

merger for reasons unrelated to its merits. Public shareholders of General Cigar retained full authority to veto the transaction, the board had negotiated an effective fiduciary out, and any interested third party was free to purchase the publicly owned shares of General Cigar. For these and other reasons set forth later in this Opinion, I will enter summary judgment in favor of defendants and against the plaintiff.

I. BACKGROUND

General Cigar Holdings, Inc. was founded in 1906 by the Cullman family. General Cigar became a public company through an IPO in February 1997 at an IPO price of $18.00 per share. The prospectus issued in connection with the IPO informed potential investors that certain members of the Cullman and Ernst families (the "Cullmans") would "have substantial control over the Company and may have the power . . . to approve any action requiring stockholder approval, including . . . approving mergers."[1] The Cullmans' control over General Cigar was by virtue of their exclusive power over the Company's Class B common stock, which is entitled to ten votes per share.[2] Following the IPO, the Company's stock

[1] Affidavit of Becky A. Hartshorn ("Hartshorn Aff."), Ex. A at 15 ("IPO Prospectus").
[2] *Id*.

traded as high as $33.25 per share.[3] Throughout 1998 and 1999, however, the stock traded as low as $5.50 per share.[4]

At the end of April 1999, General Cigar sold part of its business to Swedish Match AB.[5] Later that year, Swedish Match contacted the Company to discuss "acquiring a significant stake" in General Cigar's business.[6] In November 1999, the Company's board authorized management to pursue discussions with Swedish Match.[7] On December 2, 1999, Edgar Cullman Sr., General Cigar's chairman, informed the board that he and Edgar Cullman Jr., the Company's CEO, were meeting with a representative of Swedish Match in London to discuss an acquisition.[8] At the early December meeting in London, Swedish Match expressed a high level of interest in making an equity investment in General Cigar.[9] Swedish Match also indicated that "they wanted Edgar M. Cullman, Sr. and Edgar M. Cullman, Jr. to maintain management responsibility and day-to-day control of General Cigar."[10] Swedish Match's interest, and desire to have the Cullmans remain in control of General Cigar, was reaffirmed at meetings in New York from

[3] General Cigar Amended Form 10-K/A filed March 24, 2000 at 12 ("2000 10-K").
[4] *Id*.
[5] *Id*.
[6] Affidavit of Edgar Cullman, Jr. ("Cullman Aff.") ¶ 2.
[7] *Id*.; Hartshorn Aff., Ex. B at 9-10 ("Proxy Statement").
[8] Affidavit of Carmella P. Keener ("Keener Aff."), Ex. 3 ("Dec. 2, 1999 Board Minutes).
[9] Proxy Statement at 10.
[10] *Id*.

December 19-21, 1999.[11] At these meetings, General Cigar made their management available in order to permit Swedish Match to begin their due diligence process.[12]

Given the continuing interest of Swedish Match, General Cigar's board created a special committee to advise and make recommendations to the full board concerning any transaction with Swedish Match.[13] The special committee consisted of Dan Lufkin, Thomas Israel, and Francis Vincent, Jr.[14] The chairman of the special committee, Lufkin, believed it was the committee's responsibility to ensure that the public shareholders[15] were "fairly represented."[16] Although the special committee was charged with advising the board regarding any transaction with Swedish Match, it was not authorized to solicit offers by third parties.[17] The special committee also did not negotiate directly with Swedish Match.[18] Instead, the negotiations were conducted primarily by Peter J. Solomon Company Limited, an investment company owned by a member of the Company's board, Peter

[11] *Id*. Dan Lufkin, a member of the General Cigar board, testified that Swedish Match had "no interest in buying this company without the Cullmans." Deposition of Dan W. Lufkin ("Lufkin Dep.") at 75. The Cullmans also indicated their desire to retain the majority of their equity in the Company and to continue controlling day-to-day operations. Proxy Statement at 10; Cullman Aff. ¶ 4.
[12] Proxy Statement at 10.
[13] Cullman Aff. ¶ 3; Proxy Statement at 10.
[14] Cullman Aff. ¶ 3.
[15] I use the phrase "public shareholders" to refer to those shareholders unaffiliated with the Cullmans or General Cigar. Although not a "minority," the public shareholders did not exercise voting control due to the Cullmans' control over the Company's Class B Common Stock.
[16] Lufkin Dep. at 27.
[17] Proxy Statement at 10.
[18] *Id*.

Solomon.[19] The special committee retained Wachtell, Lipton, Rosen & Katz ("Wachtell") to serve as legal counsel to the committee.[20] The special committee also retained Deutsche Bank Securities Inc. ("Deutsche Bank") to render a fairness opinion on any proposals made by Swedish Match.[21]

During the negotiations that led to the merger, Swedish Match required that the Cullmans enter into a stockholders' voting agreement.[22] "Under that agreement, the Cullmans agreed not to sell their shares, and to vote their shares against any alternative acquisition proposal for a specified period following any termination of the merger between Swedish Match and General Cigar."[23] According to Swedish Match's CFO:

> A central purpose of the voting agreement was to protect Swedish Match against the risk that the Cullmans or General Cigar would "shop" Swedish Match's offer to other potential bidders. Because the Cullmans held a controlling interest in General Cigar, the voting agreement would prevent an alternative bidder from acquiring control of General Cigar during the specified period if the merger did not go forward. This protection was particularly important to Swedish Match because the merger agreement did not contain a termination fee or expense reimbursement provision.[24]

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[19] Lufkin Dep. at 21.
[20] Lufkin Dep. at 23; Proxy Statement at 11.
[21] Lufkin Dep. at 61; Proxy Statement at 11.
[22] Declaration of Sven Hindrikes ("Hindrikes Dec.") ¶ 2. *See also* Cullman Aff. ¶ 4 ("Swedish Match insisted upon some form of deal protection"); Lufkin Dep. at 84 ("there would have been no merger without lockup").
[23] Hindrikes Dec. ¶ 2.
[24] *Id*. ¶ 3.

Swedish Match originally asked that the Cullmans agree to a restricted period of three years. This was rejected.[25] The restricted period was later negotiated down to one year.[26]

Drafts of the merger agreement and the voting agreement were sent to the Cullmans and the special committee on January 18, 2000.[27] These drafts reflected a potential transaction structure in which the Cullmans would sell approximately one third of their equity interest to Swedish Match at a price of $15.00 per share followed by a merger into a Swedish Match subsidiary in which public shareholders would also receive $15.00 per share.[28] The voting agreement circulated on January 18 contained a requirement that the Cullmans not sell their shares, and to vote their shares against any alternative acquisition proposal, for one year following any termination of the merger agreement between Swedish Match and General Cigar.[29] Following the merger, General Cigar would be owned 64% by Swedish Match and 36% by the Cullmans.[30] The Cullmans, specifically Edgar

[25] *Id*. ¶¶ 4-5
[26] *Id*. ¶ 6.
[27] *Id*.
[28] *Id*.; Proxy Statement at 11; Keener Aff., Ex. 8 ("Jan. 19, 2000 Spec. Comm. Mins.").
[29] *Id*. The transaction also contained put and call arrangements whereby the Cullmans would be able to sell and Swedish Match would be able to buy General Cigar stock after a period of years for prices above $15.00 per share, depending upon sales of the Company. Lufkin Dep. at 28.
[30] Proxy Statement at 1.

Cullman Sr. and Edgar Cullman Jr., however, would remain in control of the Company.[31]

The special committee met on January 19, 2000.[32] Wachtell and Deutsche Bank attended the meeting. At this meeting, Lufkin informed the full committee that Swedish Match agreed to increase the price paid to the public shareholders to $15.25 per share.[33] In exchange for this slightly higher offer, Swedish Match required the Cullmans to increase the restricted period under the voting agreement from twelve to eighteen months.[34] Deutsche Bank made a presentation at the meeting and opined that from a financial point of view the offer price of $15.25 per share was fair to the public shareholders.[35] After Deutsche Bank's presentation, discussion ensued, and the special committee voted unanimously to recommend

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[31] Proxy Statement at 23-24. This Court has already determined that the transaction did not involve a sale of control. *Orman v. Cullman*, 794 A.2d 5, 42 n.1441 (Del. Ch. 2002).

[32] Jan. 19, 2000 Spec. Comm. Mins. The committee previously met on December 29, 1999. *Id*.

[33] *Id*. The chairman of the special committee, Lufkin, testified that he was "totally satisfied" with the $15.00 per share offer, but asked for another $0.25 because the committee felt it "had to earn [its] keep." Lufkin Dep. at 76.

[34] Jan. 19, 2000 Spec. Comm. Mins. Plaintiff argues that it is an issue of fact whether or not the extra $0.25 was a trade off for the extra six months of lock-up because Lufkin did not recall the connection in his deposition. *See* Lufkin Dep. at 72. Actually, Lufkin's testimony was that he did not recall the connection "as being a significant issue." *Id*. Moreover, a failure to remember an event is not a specific denial that an event occurred for purposes of summary judgment. *Hideout Records & Distribs. v. El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984). Regardless, the record reflects that the extra $0.25 and the extra six months were connected. *See* Cullman Aff. ¶ 6 ("In return for the increased payment to the unaffiliated shareholders, Swedish Match required that the Cullman family agree to increase the restricted period under the voting agreement from 12 to 18 months."); Hindrikes Dec. ¶ 7 ("Swedish Match agreed [to the increased payment], but in exchange required that the Cullman family agree to increase the restricted period under the voting agreement from 12 months to 18 months."); Proxy Statement at 11 ("[I]n connection [with the increased payment], the Family agreed to increase from twelve to eighteen months the period they would be prohibited from pursuing other transactions.").

[35] Jan. 19 2000 Spec. Comm. Mins.

that the full board approve the merger.[36] After the special committee's meeting, the full board met, approved the merger, and the relevant documents were signed by all parties on the evening of January 19, 2000.[37] A public announcement was made the following day.[38]

As noted earlier, the voting agreement between the Cullmans and Swedish Match required that the Cullmans vote their Class B shares, constituting a majority of the voting power of the Company, in favor of the merger and against any alternative acquisition of the Company for eighteen months after termination of the merger agreement.[39] The voting agreement, however, reveals that the Cullmans were bound only in their capacities as shareholders and that nothing in the voting agreement limits or affects their actions as officers or directors of General Cigar.[40] Moreover, the merger agreement permitted General Cigar's board to entertain unsolicited acquisition proposals from potential acquirors if the board, upon recommendation by the special committee, concluded that such a proposal was *bona fide* and would be more favorable to the pubic shareholders than the proposed merger with Swedish Match.[41] The agreement also permitted the board to withdraw its recommendation of the merger with Swedish Match if the board

[36] *Id*. Proxy Statement at 8-11 (discussing merger background).
[37] Proxy Statement at 11.
[38] *Id*.
[39] Proxy Statement, Ex. D ("Voting Agreement") at 1.
[40] *Id*. at 4; Cullman Aff. ¶ 5.
[41] Proxy Statement, Annex A ("Merger Agreement") § 6.4; Cullman Aff. ¶ 5.

concluded, upon consultation with outside counsel, that its fiduciary duties so required.[42]

On April 10, 2000, almost three months after the public announcement of the Swedish Match transaction, General Cigar filed the proxy statement relating to the shareholder vote on the proposed merger. As expected, the proxy statement attached the merger agreement, the voting agreement, and contained the background relating to the proposed merger. The proxy statement also revealed (1) that the merger could not occur without the approval of the merger by the Class A shareholders and (2) that the Cullmans agreed to vote their shares of Class A common stock held by them pro rata in accordance with the vote of the Class A public shareholders.[43] In other words, the merger could not proceed without approval by a "majority of the minority."[44] The shareholder meeting was held on May 8, 2000. The public shareholders, *i.e.*, a majority of the minority, overwhelmingly approved the merger.[45]

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[42] Merger Agreement § 6.4; Cullman Aff. ¶ 5.
[43] Proxy Statement at 2.
[44] As noted earlier, the public shareholders were a "minority" in terms of voting power. But the provision in the agreement requiring the Cullmans to vote their Class A shares *pro rata* in accordance with the public shareholders effectively gave the public shareholders a "veto" power over the proposed transaction.
[45] Affidavit of Joseph Aird, Ex. F (submitted in connection with defendants' original summary judgment motion, D.I. No. 36). The public shareholders approved the transaction by a vote of 10,009,994 shares in favor to 24,686 against, with 9,353 abstaining. *Id*.

II. ANALYSIS

A. Summary Judgment Standard

Defendants are entitled to summary judgment if the evidence, viewed in the light most favorable to plaintiff, shows that there are no genuine issues as to any material fact and that defendants are entitled to judgment as a matter of law.[46] The Court "may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record."[47] Here, there are no material factual disputes. The only issue is whether on this record plaintiff has a viable claim.

B. Defendant's Basis for Summary Judgment

In my March 2002 Opinion in this case, I held that all but one of plaintiff's disclosure claims failed to state a claim under Court of Chancery Rule 12(b)(6).[48] Defendants thereafter moved for summary judgment as to that disclosure claim, arguing that the evidence did not support plaintiff's remaining disclosure claim and that plaintiff's breach of fiduciary duty claims should be dismissed based on the public shareholders' informed approval of the merger. Plaintiff withdrew his remaining disclosure claim and did not contend (then or now) that the proxy statement issued in connection with the merger contained material

[46] Court of Chancery Rule 56(c); *Cerberus Int'l v. Apollo Management, L.P.*, 794 A.2d 1141, 1150 (Del. 2002).
[47] *Cerberus Int'l*, 794 A.2d at 1150.
[48] *Orman*, 794 A.2d at 42. The disclosure claim that survived dismissal related to the purported omission from the proxy statement of the fair market value of General Cigar's corporate headquarters building in New York. *Id*.

misrepresentations or omissions. Therefore, at that time, the only issue was whether the public shareholders' fully-informed approval of the merger was legally sufficient to dispose of plaintiff's fiduciary duty claims.[49]

In opposition to defendants' summary judgment motion, however, plaintiff raised the argument that the deal protection devices present here were unreasonably coercive of the shareholder vote and, hence, the vote, although fully-informed, could not extinguish plaintiff's fiduciary duty claims. In my August 2002 Opinion, I denied defendants' motion for summary judgment and stated:

> The record at this point reveals little about the purpose of [the 18 month restricted period] or about how it came to be a term of the merger proposal. It is certainly possible that further discovery could show this provision to be a deal protection measure for Swedish Match designed to prevent the Cullman group and General Cigar from shopping Swedish Match's offer. It is also possible, however, that the facts could be less benign. The existence of this factual ambiguity leaves me no choice but to deny this motion.[50]

After the parties engaged in additional discovery and developed the record more fully, defendants renewed their summary judgment motion. Accordingly, "the only issue left is whether the vote of the Class A shareholders of General Cigar was tainted by improper coercion."[51]

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[49] *See Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987) ("approval by fully-informed . . . disinterested stockholders . . . permits invocation of the business judgment rule and limits judicial review to issues of gift or waste").

[50] *Orman v. Cullman*, C.A. No. 18039, slip op. at 3 (Del. Ch. Aug. 16, 2002).

[51] Pl.'s Answering Brief ("AB") at 9 (*citing Orman*, C.A. No. 18039, slip op. at 2). As noted, there is no validly pleaded disclosure claim.

C. Plaintiff's Arguments

Although plaintiff has stated that the only issue is whether the shareholder vote was tainted by improper coercion, he (somewhat predictably) has raised two arguments ancillary to that issue that must be addressed. I will discuss these two ancillary arguments first, and then turn my attention to the coercion issue.

1. The Special Committee

Plaintiff argues that the special committee provided no protection to the Company's public shareholders because (1) the special committee members "had personal motivations . . . unlike the motivation of the average stockholder"[52] and (2) the committee had a "lackadaisical attitude."[53] Both of these points are not well taken.

The Court's March 2002 Opinion concluded that plaintiff had not alleged adequately that the special committee members were interested or lacked independence.[54] Even if I had not so ruled, "[t]he settled rule in Delaware is that 'where a majority of fully informed stockholders ratify action of even interested

[52] AB at 12.
[53] *Id*. at 13.
[54] *Orman*, 794 A.2d at 26-28. The fact that Lufkin was a shareholder and profited from the merger is not an indictment. On the contrary, it shows that his interests were aligned with the public shareholders. Nor is it sufficient for plaintiff to attack Lufkin's role because of his "friendship" with the Cullmans. Nothing in this record suggests that Lufkin could not exercise judgment in accordance with his fiduciary duties in connection with his membership on the special committee. *See Orman*, 794 A.2d at 27.

directors, an attack on the ratified transaction normally must fail.'"[55] In addition, the functioning of the special committee, even assuming it operated less than ideally, does not prevent the fully-informed decision by a majority of the Company's public shareholders, in the absence of gift or waste, from invoking the business judgment rule.[56] The plaintiff does not argue the merger amounted to gift or waste (because the record, quite obviously, would not support such an argument).

2. The Voting Agreement

Apart from the coercion issue, plaintiff also argues that members of the Cullman and Ernst families on General Cigar's board breached their fiduciary duties "by entering into the voting agreement."[57] Plaintiff's argument, which rests on a misapplication of *Paramount Communications, Inc. v. QVC Network, Inc.*[58] and *Omnicare, Inc. v. NCS Healthcare Inc.*,[59] is without merit.

In *Paramount*, the Supreme Court noted that "[t]o the extent that a contract, or a provision thereof, purports to require a board to act in such a fashion as to

[55] *Michelson v. Duncan*, 407 A.2d 211, 220 (Del. 1979) (quoting *Gerlach v. Gillam*, 139 A.2d 591, 593 (Del. Ch. 1958).
[56] *Marciano*, 535 A.2d at 405 n.3. As described herein, however, the special committee comported itself well, retaining skilled advisors and negotiating for an additional $0.25 on behalf of the Company's public shareholders.
[57] AB at 10. Edgar Cullman, Sr., Edgar Cullman, Jr., John L. Ernst, and Susan R. Cullman were on the General Cigar board and entered into the voting agreement.
[58] 637 A.2d 34 (Del. 1994).
[59] 818 A.2d 914 (Del. 2003).

limit the exercise of fiduciary duties, it is invalid and unenforceable."[60] In *Omnicare*, the Supreme Court made a similar observation.[61] I do not question the general validity of these statements, but they have no application here because in both cases the challenged action was the directors' entering into a contract in their capacity *as directors*. The Cullmans entered into the voting agreement *as shareholders*. Nothing in the voting agreement prevented the Cullmans from exercising their duties *as officers and directors*. For example, the Cullmans could have voted, as directors, to withdraw their recommendation that the public shareholders approve the merger. This factual distinction from *Paramount* and *Omnicare* is meaningful.

In *Bershad v. Curtiss-Wright Corporation*,[62] the Supreme Court held that "a majority stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."[63] This principle of Delaware law was more recently recognized in *Peter Schoenfeld Asset Management, LLC v. Shaw*,[64] where this Court observed:

> A majority shareholder has discretion as to when to sell his stock and to whom, a discretion that comes from the majority shareholder's rights *qua* shareholder. This is true even when a

[60] *Paramount*, 637 A.2d at 51.
[61] Contract provisions "cannot limit or circumscribe the directors' fiduciary duties." *Omnicare*, 818 A.2d at 938.
[62] 535 A.2d 840 (Del. 1987).
[63] *Id*. at 845.
[64] 2003 Del. Ch. LEXIS 79 (Del. Ch. July 10, 2003), *aff'd*, 2003 Del. LEXIS 624 (Del. Dec. 17, 2003) (ORDER).

> proposed transaction would result in the minority sharing in a control premium.[65]

Nothing in *Paramount* or *Omnicare* displaces this longstanding principle. In fact, *Omnicare* found that "[t]he stockholders with majority voting power . . . had an *absolute right* to sell or exchange their shares with a third party at any price."[66]

Plaintiff's challenge both to the voting and merger agreement's deal protection mechanisms are more properly analyzed *vis-a-vis* the board's decision to recommend that the Company's public shareholders approve the merger and whether the shareholders' ensuing vote was improperly coerced. This is the task to which I now turn.

3. The Deal Protection Mechanisms

Although the parties have framed the Court's inquiry as relating only to the issue whether the deal protection mechanisms "coerced" the shareholder vote, plaintiff suggests that *Omnicare* requires a more taxing process of judicial review. Whether the deal protection devices were "coercive" now appears to be but one part of a larger analytical framework.

In *Omnicare*, the board of directors of NCS Healthcare, Inc. approved a merger with Genesis Health Ventures, Inc. The deal was "protected" with a three-part defense that included: (1) the inclusion of a Section 251(c) provision in the

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[65] *Id*. at *9 (internal punctuation and citations omitted).
[66] 818 A.2d at 938 (emphasis added). *Omnicare* did not address the "general validity" of stockholder voting agreements. *Id*. at 939.

merger agreement;[67] (2) the absence of any effective fiduciary out clause; and (3) a voting agreement between two shareholders and Genesis which ensured that a majority of shareholders voted in favor of the transaction. After the merger was approved by the board another suitor, Omnicare, Inc., forwarded a superior proposal. The NCS board then reversed course, recommending that the NCS shareholders vote against the Genesis merger. The NCS board's change of heart had no practical effect, however, because the three deal protection mechanisms, working in tandem, "guaranteed . . . that the transaction proposed by Genesis would obtain NCS stockholder's approval."[68] "Because of the structural defenses approved by the NCS board," the Genesis merger was "a *fait accompli*."[69]

A bare majority of the Supreme Court found that the tripartite deal protection mechanism was invalid. The majority concluded that deal protection devices, even when those devices protect a proposed merger that does not result in a change of control, require enhanced scrutiny.[70] Specifically, the *Omnicare* majority applied the two-stage analysis of *Unocal Corp. v. Mesa Petroleum Co.*[71] The first stage of the *Unocal* analysis requires a board to demonstrate "that they

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[67] Such a provision requires that a merger agreement be placed before a corporation's stockholders for a vote, even if the corporation's board of directors no longer recommends it. 8 *Del. C.* § 251(c).
[68] 818 A.2d at 918.
[69] *Id*. at 936.
[70] *Id*. at 930.
[71] 493 A.2d 946 (Del. 1985). The dissents in *Omnicare* by former Chief Justice Veasey and current Chief Justice Steele argue that *Unocal* should not have applied, but rather the business judgment rule. 818 A.2d at 943 (Veasey, C.J.), at 947 (Steele, J.).

have reasonable grounds for believing that a danger to corporate policy and effectiveness existed" without such measures.[72] The second stage of *Unocal* proceeds in two steps: the board must establish that the deal protection devices are (1) not coercive or preclusive and (2) within a range of reasonable responses to the danger to corporate policy and effectiveness.[73] The analysis is disjunctive—if the deal protection devices are coercive or preclusive they are not within a range of reasonable responses, but those devices may be outside the range of reasonable responses even if not coercive or preclusive.[74]

In *Omnicare*, the majority found that the NCS board's reasonable grounds for believing there was a danger to corporate policy and effectiveness were "the possibility of losing the Genesis offer and being left with no comparable alternative transaction."[75] Nevertheless, the majority held that the deal protection devices were coercive and preclusive because they accomplished a *fait accompli*, *i.e.*, they "made it 'mathematically impossible' and 'realistically unattainable' for . . . any other proposal to succeed, no matter how superior the proposal."[76] The *Unocal* inquiry ended there. But the *Omnicare* majority held "alternatively" that the NCS board was required to negotiate a fiduciary out clause into the merger

[72] *Id*. at 935 (quoting *Unocal*, 493 A.2d at 955).
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*. at 936.

agreement because the voting agreement and the Section 251(c) provision, in the absence of a fiduciary out clause, resulted in an absolute lock-up of the Genesis transaction.[77] The Court reasoned that even though a majority of shareholders (via the voting agreement) had agreed to support the merger, the NCS board was nonetheless continually obligated to "exercise its continuing fiduciary responsibilities to the minority stockholders."[78]

Applying the first stage of the *Unocal* analysis is simple in this case. During the negotiations that led to the merger, Swedish Match "required" some form of deal protection.[79] If the special committee and full board had not approved the inclusion of the deal protection devices, they risked losing the Swedish Match transaction and being left with no comparable alternative transaction. As in *Omnicare* itself, this is reasonable grounds for believing that a danger to corporate policy and effectiveness existed.

Applying the second stage of the *Unocal* analysis is also straightforward. *Williams v. Geier*[80] provides the standard for determining if deal protection measures are coercive.[81] The measures are improper if they "have the effect of

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[77] *Id*.
[78] *Id*.
[79] Declaration of Sven Hindrikes ("Hindrikes Dec.") ¶ 2. *See also* Cullman Aff. ¶ 4 ("Swedish Match insisted upon some form of deal protection"); Lufkin Dep. at 84 ("there would have been no merger without the lockup").
[80] 671 A.2d 1368 (Del. 1995).
[81] Plaintiff does not argue that the deal protection measures were "preclusive" under *Unocal*; only "coercion" is at issue.

causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of that transaction."[82] An example of such impermissible coercion was found in *Lacos Land Company v. Arden Group, Inc.*[83] In *Lacos Land*, Arden's principal shareholder and CEO made "an explicit threat . . . that unless [certain] proposed amendments were approved, he would use his power (and not simply his power *qua* shareholder) to block transactions that may be in the best interests of [Arden]."[84] The threat to block transactions in the best interest of Arden was unrelated to the merits of the proposed amendments under consideration by the shareholders and constituted impermissible coercion. The basic teaching of *Lacos Land*, as discussed in *Williams*, is that fiduciaries cannot threaten stockholders so as to cause the vote to turn on factors extrinsic to the merits of the transaction.[85]

Now, compare *Lacos Land* with *Brazen v. Bell Atlantic Corporation*.[86] In *Brazen*, Bell Atlantic and NYNEX Corporation negotiated a merger agreement with a $550 million termination fee provision that could be triggered if Bell

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[82] *Williams v. Geier*, 671 A.2d at 1382-83 (citations omitted).
[83] 517 A.2d 271 (Del. Ch. 1986).
[84] *Id*. at 276.
[85] *See Williams*, 671 A.2d at 1383 (explaining and distinguishing *Lacos Land*). In *Williams*, the Supreme Court found that a shareholder vote was not impermissibly coerced where the shareholders were informed (accurately) that failure to vote for a transaction could lead to the corporation's stock being de-listed from the NYSE. *Id*.
[86] 695 A.2d 43 (Del. 1997).

Atlantic's shareholders voted not to approve merger.[87] The Supreme Court found that the termination fee was "an integral part of the merits of the transaction."[88] The Court further stated "although the termination fee provision may have influenced the stockholder vote, there were 'no structurally or situationally coercive factors' that made an otherwise valid fee provision impermissibly coercive in this setting."[89]

Here, like *Brazen*, the deal would not have occurred without the inclusion of deal protection mechanisms, *i.e.*, the deal protection mechanisms were "an integral part of the merits of the transaction."[90] But the circumstances here are distinguishable from *Lacos Land* because General Cigar's public shareholders were not encouraged to vote in favor of the Swedish Match transaction for reasons unrelated to the transaction's merits. Instead, the "lock-up" negotiated in this case is similar to the termination fee found permissible by the Supreme Court in *Brazen*.[91] That is, nothing in this record suggests that the lock-up had the effect of

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[87] *Id*. at 46.
[88] *Id*. at 50.
[89] *Id*. (quoting *Brazen v. Bell Atlantic Corp.*, 1997 Del. Ch. LEXIS 44 (Del. Ch. Mar. 19, 1997) (Chandler, C.)).
[90] *Id*.
[91] Plaintiff also appears to argue that the board breached its fiduciary duty by failing to negotiate for a break-up fee in lieu of the voting agreement lock-up. First, voting agreements, of course, are perfectly legal. And nothing in the record indicated that Swedish Match would have agreed to a different provision, such as a break-up fee. Second, there is no preference in the law for one form of deal protection device over another. And third, how would a board determine, in advance, that one particular form of defensive device, would be the "least coercive" of any array of devices? Ultimately, this argument, in my opinion, leads nowhere.

causing General Cigar's stockholders to vote in favor of the proposed transaction for some reason other than the merits of that transaction. Furthermore, unlike the situation in *Omnicare*, the deal protection mechanisms at issue in this case were not tantamount to "*a fait accompli*." The public shareholders were free to reject the proposed deal, even though, permissibly, their vote may have been influenced by the existence of the deal protection measures.[92] Because General Cigar's public shareholders retained the power to reject the proposed transaction with Swedish Match, the fiduciary out negotiated by General Cigar's board was a meaningful and effective one—it gave the General Cigar board power to recommend that the shareholders veto the Swedish Match deal. That is to say, had the board determined that it needed to recommend that General Cigar's shareholders reject the transaction, the shareholders were fully empowered to act upon that recommendation because the public shareholders (those not "locked-up" in the voting agreement) retained the power to reject the proposed merger.[93] For these

[92] Plaintiff never addresses the deeper question of how it is fair to say that a minority was coerced by a voting and ownership structure that was fully disclosed to the minority before they bought into a corporation whose capital structure was so organized. In fact, the coercion of which plaintiff complains is more properly understood as the coercion resulting from the fact that the Cullmans owned a controlling interest. Surely it cannot be the case that whenever a controlling stockholder can vote against a sale the out voted minority can assert a coercion claim.

[93] Moreover, there was nothing in either the merger agreement or the voting agreement to prevent a third party from making a tender offer for the publicly-held shares that Swedish Match sought to acquire.

reasons, I conclude as a matter of law that the deal protection mechanisms present here were not impermissibly coercive.[94]

The last step of the *Unocal* analysis is a determination of whether the deal protection devices were within a range of reasonable responses to the danger to corporate policy and effectiveness.[95] As mentioned, the danger in this case was the risk of losing the Swedish Match transaction and being left with no comparable alternative transaction. In fact, without the deal protection mechanisms "there would have been no merger."[96] General Cigar's shareholders could have lost the significant premium that Swedish Match's offer carried, no small concern given the uncertain future of the tobacco business.[97] In addition, "[t]he latitude a board will have in either maintaining or using the defensive devices it has adopted to protect the merger it approved will vary according to the degree of benefit or detriment to the stockholders' interests that is presented by the value or terms of the subsequent competing transaction."[98] Notably, there was no competing bid for General Cigar;

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[94] The relevant question "is not whether a [proposal] is coercive, but whether it is actionably coercive." *Weiss v. Samsonite Corp.*, 741 A.2d 366, 372 (Del. Ch.), *aff'd*, 746 A.2d 277 (Del. 1999) (TABLE). "For the word [coercion] to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept ('inappropriately coercive' or 'wrongfully coercive,' etc.)." *Lacos Land*, 517 A.2d at 277. The line between "coercion" and "actionable coercion" is whether the vote to approve turned on factors extrinsic to the merits of the transaction.

[95] *Omnicare* at 935 (quoting *Unocal* at 955).

[96] Lufkin Dep. at 83-84.

[97] *Id*.

[98] *Omnicare*, 818 A.2d at 933. I pass over the practical difficulty implied by this balancing test: how can a board know, at the time of adopting defensive devices, the terms of a transaction that

no alternative transaction was available to its shareholders. General Cigar's board should therefore be afforded the maximum latitude regarding its decision to recommend the Swedish Match merger.

In sum, the argument that *Omnicare* applies in the circumstances here is misplaced. The General Cigar board retained a fiduciary out, allowing it to consider superior proposals and recommend against the Swedish Match deal. Importantly, a majority of the nonaffiliated public shareholders could have rejected the deal on its merits. Unlike *Omnicare*, nothing in the merger or stockholder agreements made it "mathematically certain" that the transaction would be approved. If the shareholders believed $15.25 per share (a 75% premium over the market price) did not reflect General Cigar's intrinsic value (and the market also misunderstood that value), they could have said, "no thanks, I would rather make an investment bet on the long term prospects of this company." These shareholders were fully informed about the offer. They knew that no other offer or potential buyer had appeared, although nothing prevented it. They knew that no termination fee would be paid if they rejected the proposal. It is true, as plaintiffs repeatedly point out, that the Cullman vote against any future, hypothetical deal was "locked-

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emerges at a later time? As formulated, the test would appear to result in judicial invalidation of negotiated contractual provisions based on the advantages of hindsight.

up" for 18 months. It was this deal or nothing, at least for that period of time.[99] Again, however, no other suitor was waiting in the wings. And, assuming a shareholder believed that General Cigar's long term intrinsic value was greater than $15.25 per share, was an 18 month delay a meaningful "cost" that could be said realistically to "coerce" the shareholders' vote? The Cullman lock-up hardly seems unreasonable, given the absence of other deal protection devices in this particular transaction and given the buyer's understandable concern about transaction costs and market uncertainties. Unless being in a voting minority automatically means that the shareholder is coerced (because the minority shareholder's investment views or hopes have been precluded by a majority), plaintiff's concept of coercion is far more expansive than *Omnicare* or any other decisional authority brought to my attention. As a matter of law, therefore, the approval of the Swedish Match proposal by a fully informed majority of the minority public shareholders was not impermissibly coerced. As a result of that ratifying vote, plaintiff's remaining fiduciary duty claim is extinguished.

III. CONCLUSION

The vote of General Cigar's shareholders to approve the transaction with Swedish Match was fully informed and not actionably coerced. Given that there

[99] A third party could nonetheless have made a tender offer for the public shares. In addition, the Cullman's could have waited out the 18 month delay, or the Cullmans could have breached and put Swedish Match in the position of proving its non-speculative damages from a breach of the no-sale clause.

are no allegations of gift or waste, the fully informed, ratifying vote of the General Cigar shareholders disposes of plaintiff's fiduciary duty claims. Summary judgment is entered in favor of defendants and against the plaintiff.

IT IS SO ORDERED.