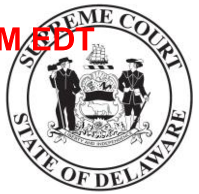
EFiled: Jul 02 2015 02:57PM EDT
Filing ID 57490472
Case Number 180,2015



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOANNA SWOMLEY and	)	
LAWRENCE BROCCHINI	)	
	)	No. 180,2015
Plaintiffs Below, Appellants,	)	
	)	
v.	)	On Appeal from
	)	C.A. No. 9355-VCL in the
MARTIN SCHLECHT, JOSEPH	)	Court of Chancery of the
MARTIN, KENNETH BRADLEY,	)	State of Delaware
and SYNQOR HOLDINGS, LLC,	)	
	)	
Defendants Below, Appellees	)	

APPELLEES' ANSWERING BRIEF

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Dated: July 2, 2015

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NATURE OF PROCEEDINGS

This appeal arises from the dismissal of plaintiffs' Amended Class Action Complaint (the "Complaint") under the standard established in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW II*"). *MFW II* established a procedure under which the business judgment rule applies to controlling-stockholder transactions if the board of directors and the acquiror employ specific procedural protections. Because plaintiffs failed to plead a reasonably conceivable set of facts that any of the procedural protections were lacking in the underlying transaction, the Court of Chancery properly applied the business judgment rule and dismissed the Complaint.

Despite all the procedural protections employed in the merger (the "Merger") of SynQor, Inc. ("SynQor" or the "Company") into a subsidiary of SynQor Holdings, LLC ("Holdings"), many of which plaintiffs do not seriously challenge, plaintiffs continue to contest the fairness of the merger price. But when a complaint and the documents it incorporates show that the protective elements of *MFW II* are satisfied, thereby replicating an arm's-length transaction, a plaintiff cannot state a fiduciary duty claim by simply complaining that the price was too low, or that independent directors should have negotiated harder and achieved a better price. If that is the only complaint, the stockholders' remedies are to vote against the transaction or seek appraisal.

Here, on January 27, 2014, after an eight-month process including 20 meetings and extensive negotiations, an independent and fully-empowered special committee (the "Committee") of the board of directors (the "Board") of SynQor recommended approval of the Merger of SynQor into Holdings, an entity formed by SynQor managers and employees owning approximately 46% of the Company's common stock (the "Founder Group").[1] At closing, stockholders who did not dissent became entitled to $1.35 per share on a common stock equivalent basis, plus additional contingent consideration ("Contingent Consideration") from certain ongoing patent litigation. This was the first liquidity available to all SynQor stockholders in its history.

Throughout its consideration and negotiation of the Merger, the Committee performed laudably in negotiating for multiple price increases from the Founder Group, while creating and maintaining safeguards to ensure procedural and substantive fairness to protect SynQor's unaffiliated stockholders who held approximately 54% of SynQor's outstanding stock. The Merger was conditioned from the outset on approval by the Committee and a vote of a majority of the unaffiliated stockholders. A014. On March 10, 2014, after receiving a detailed public company-style Proxy Statement (A033) ("Proxy") attaching five years of

[1] As of January 27, 2014, the Founder Group collectively owned 28,575,317 shares of SynQor common stock, approximately 46% of all outstanding shares. A260 ¶ 18; A028. On a fully-diluted basis, Dr. Schlecht (SynQor's Chairman, President, and CEO) directly or indirectly owned approximately 43% of all outstanding shares. A259 ¶ 17; A028.

financial statements audited by Ernst & Young LLP, a fairness opinion from an independent financial advisor, the recommendation of the Committee and Board in favor of the Merger, and Supplemental Disclosures proposed by plaintiffs (A238) ("Supplement"), a majority of SynQor's unaffiliated stockholders—61%—approved the Merger. Three stockholders holding fewer than 300,000 shares (representing less than 1% of the unaffiliated stockholders) dissented.

Second-guessing the Committee's judgment and the majority vote of SynQor's unaffiliated stockholders, plaintiffs Joanna Swomley and Lawrence Brocchini ("Plaintiffs") nit-pick the Committee's independent financial advisor's valuation analysis as if this were an appraisal trial. Plaintiffs' unfounded premise is that (a) the Committee breached its duty of care in negotiating against the Founder Group despite its independence, a decade of knowledge of the business and having a fairness opinion, and (b) Plaintiffs have been unfairly deprived of the future speculative value of certain ongoing patent litigation. Plaintiffs assert predictable but meritless allegations that the Committee was not independent, the price was inadequate, and the stockholder vote was uninformed and coerced. But, Plaintiffs' speculation regarding future contingent consideration and quibbles with the Committee's process cannot, as expressed in *MFW II*, trump the Committee's independent judgment and the will of the majority of unaffiliated stockholders who voted for the Merger.

SUMMARY OF ARGUMENT

1. DENIED. The Court of Chancery correctly held that the Complaint failed to allege sufficient facts to demonstrate a reasonably conceivable claim that any of the conditions established by *MFW II* were not satisfied.

2. DENIED. The Committee was composed of two independent directors whom Plaintiffs have not alleged are dependent on or controlled by the Founder Group, received any special benefits or payments for approving the Merger, or were conflicted in any other way. The Committee met 20 times, was fully informed of the reasonably possible transaction alternatives, hired independent financial and legal experts, negotiated with the Founder Group at arm's-length, and secured three price increases resulting in more than a 22% price increase over the initial offer by the Founder Group, as well as more favorable terms. Plaintiffs' allegations challenging the value of the patent portfolio, patent suit, and the valuation by Shields & Co. ("Shields") fail to establish that the Committee violated its duty of care by acting recklessly or with gross negligence when negotiating price. From the first meeting at which the Founder Group proposed the Merger, it was conditioned on approval by the unaffiliated stockholders, a condition to which the Founder Group itself expressly agreed. Finally, Plaintiffs' theory that the unaffiliated stockholders were threatened with dilution is not supported by the underlying documents and appeared nowhere in the Complaint.

COUNTERSTATEMENT OF FACTS

A. Management Explores Providing Liquidity to Stockholders

For some time, SynQor's management ("Management") explored opportunities to provide liquidity to stockholders who had been requesting it for years. A011. In May 2011, following a settlement of certain patent litigation, SynQor received a significant cash award and Management began to consider the appropriate use of that cash. A044. Because of certain constraints on dividends and share repurchases imposed by SynQor's Series B Preferred Stock,[2] the Board determined a repurchase of all Series B Preferred Stock was the best *initial* course of action in an overall strategy to provide liquidity to *all* stockholders.[3] After months of arm's-length negotiation, the Series B Holders, represented on the board by a sophisticated Morgan Stanley nominee, agreed to sell all their SynQor shares at $4.181 per share of Series B, $2.859 per share of Series A, and $0.953 per share of common stock. A045.

On July 26, 2012, Dr. Schlecht informed SynQor's stockholders of the decision to repurchase all Series B Stock, and all shares held by Morgan Stanley, in a broader effort to provide future liquidity to all stockholders. A011-12. Dr.

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[2] *See* A012 (explaining the Series B Preferred Stock "had special rights that would have limited or prevented our ability to provide liquidity to SynQor's remaining shareholders").

[3] *See* A011-12 ("We repurchased the MSDW-affiliated shareholders' stock as the *first step* in our share repurchase/cash dividend liquidity strategy . . . .") (emphasis added); A045 ("Management concluded that the most effective means of providing liquidity to stockholders, *at least initially*, was through stock repurchases.") (emphasis added).

Schlecht also assured stockholders—some of whom had been requesting liquidity after more than ten years of holding SynQor stock—that the repurchase was the beginning of opportunities for liquidity for all stockholders. A011-12. Within six months thereafter, SynQor repurchased more than 550,000 shares of common stock from a stockholder for $0.973 per share and more than 116,000 shares of Series A Preferred Stock from another stockholder for $0.953 per share on a common stock equivalent basis. A045-46.

In May 2013, SynQor again revisited liquidity options following favorable results in the 497 Case (described below). The Founder Group determined that by foregoing a cash dividend (of which it would have received 46%), it could offer to acquire all non-Founder Group shares, thereby paying the unaffiliated stockholders the highest possible level of proceeds from recent successful patent litigation. A046. A merger would also provide these stockholders with certain tax benefits over a cash dividend. Only the gains realized from the Merger would be taxed, whereas a dividend would be taxed based on the full amount of the dividend. A044. By foregoing a dividend, the Founder Group returned more cash to the unaffiliated stockholders.

B. The Founder Group Presents Its Proposal

The Founder Group first proposed the Merger at a Board meeting on

May 29, 2013.[4] A046. SynQor's General Counsel and Founder Group member, Arthur Hofmann, outlined a non-binding proposal whereby non-Founder Group shares would be converted into a right to receive cash ranging from $1.10 to $1.20 per share on a common equivalent basis, plus a right to Contingent Consideration, subject to a $0.04 per share hold-back. *See* A046; *infra* § E. Hofmann distributed a non-binding term sheet stating the proposed transaction was subject to approval of a special committee and a majority vote of unaffiliated stockholders. A021-22.

Plaintiffs argue that the majority vote of unaffiliated stockholders was non-waivable from the outset because the non-binding term sheet stated that "[w]hether this condition can be waived remains to be determined." Appellant's Opening Brief at 32 ("OB"). Plaintiffs, however, do not dispute that the Board definitively resolved, and the Founder Group agreed, the majority vote of unaffiliated stockholders was a non-waivable condition from that day forward, well before negotiations began. A015-16. The May 29 Resolutions, signed by Hofmann and Dr. Schlecht, clearly state "the Board *shall not* consummate a Potential Transaction without the prior affirmative vote of a majority of the Company's stockholders who are unaffiliated with the Founder Group." A016 (emphasis added). The

[4] That same day, the Court of Chancery issued its opinion in *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013) ("*MFW I*").

resolutions also impose the non-waivable condition that any transaction be approved by the Committee. A014-16.

At this meeting, the Board formed the Committee, appointed Martin and Bradley as Committee members, and granted the Committee full authority to: (1) represent SynQor in negotiations with the Founder Group, (2) take "all" "necessary" actions in furtherance of its duties, and (3) retain independent legal and financial advisors. *See* A046; A015-17. Importantly, the Committee was fully empowered to reject the Founder Group's proposals and any decision would remain subject to the approval of a majority of unaffiliated stockholders. A015-16.

C. <u>The Committee Was Disinterested and Independent</u>

Plaintiffs do not seriously challenge the Committee's disinterestedness or independence, nor could they. Martin and Bradley have served as SynQor directors since 2002 and have been annually elected by the written consent of a majority of stockholders. A251 at ¶ 4. The Committee members' qualifications and integrity have been unimpeached. B189-192.

Plaintiffs do not allege Martin or Bradley had any interest in the Merger. The compensation they received for their service consisted solely of a one-time cash payment to each of $50,000, which was paid prior to the commencement of any substantial work and was not contingent. A046; A050; A239. Further, Martin's and Bradley's only SynQor equity were options for 30,000 shares of

common stock each, which were underwater and cancelled without payment in the Merger. *See* A089; A112-13 at § 2.7(i). Lastly, Martin's and Bradley's directorships terminated upon the consummation of the Merger, and neither had any interest in the surviving corporation. A029; A048.

D. The Committee Hired Independent Advisors, Conducted an Extensive Process, and Negotiated Multiple Price Increases

The Committee began by retaining its own independent advisors. First, it retained as counsel Morse, Barnes-Brown & Pendleton, P.C., whose independence and competence Plaintiffs do not challenge. A046. Next, the Committee interviewed three financial advisor candidates and reviewed their qualifications and fees. The Committee retained Shields as its financial advisor based upon its prior experience with the Company and more attractive fee structure. A024-25. Plaintiffs make no challenge to Shields' independence.

On August 16, 2013, after SynQor's 2Q 2013 financials were complete, and the Committee received the Founder Group's valuation analysis, the Founder Group made a definitive offer of $1.10 per common share equivalent, plus Contingent Consideration subject to a hold-back. A046. The Board and the Founder Group had already determined that the majority vote of unaffiliated stockholders was not waivable, and never again revisited the issue. A016; A046-48. The Complaint does not allege otherwise.

After numerous meetings with both SynQor representatives and its own advisors, the Committee met with representatives of the Founder Group on November 4. At that Committee meeting, the Founder Group stated it was prepared to raise its offer from $1.10 per share to $1.25, plus the Contingent Consideration. A047. The Committee rejected the offer because it fell below Shields' preliminary fair value determination: $1.34 to $1.47 per share. *Id.* After further negotiations, the Founder Group raised its offer again to $1.30 per share, plus the Contingent Consideration and hold-back. *Id.* The Committee again rejected that offer and the meeting adjourned without agreement. *Id.*

On November 8, 2013, the Committee again met with Dr. Schlecht and Mr. Hofmann, and advised them that Shields would not reduce its fair value range. *Id.* As negotiations continued, the Committee insisted the Founder Group increase its bid to within Shields' value range. *Id.* Eventually, the Founder Group increased its offer to $1.35 per share and agreed to drop the $0.04 hold-back against the Contingent Consideration. *Id.*

After full deliberation, the Committee concluded that further efforts to extract a higher price might be counterproductive and agreed to accept the $1.35 offer. A047; A050. Even without the Contingent Consideration, the $1.35 Merger price represented (i) a 42% premium above the prices for common stock ($0.973 per share) negotiated at arm's-length with Morgan Stanley in July 2012 and with

another common stock holder six months later, and (ii) a 39% premium over repurchases of Common and Series A stock ($0.953 per share on a common stock equivalent basis) from July 2012 through January 2013. A045-46; A049.

On January 27, 2014, the Committee convened its final meeting at which Shields presented its final fairness opinion based on updated financials. A052. Shields performed three valuations: a comparable companies analysis yielding an implied equity value of $44.7 million, a precedent transactions analysis yielding an implied equity value of $40.3 million, and a discounted cash flow ("DCF") analysis yielding an implied equity value of $38.3 million. A244-46; A055-56. After weighting the implied equity values from the comparable companies and precedent transactions analyses at 25% and the DCF analysis at 50%, tax adjusting the cash award in the 497 Case (*see* § F.1, *infra*), and adjusting the enterprise value for company-specific risks, Shields concluded that a range of $1.32 to $1.45 per share of common stock was fair. A246-47; A056-57.

After considering a host of other positive and negative factors (A049-50; A239-40), the Committee approved the final Merger Agreement and determined that the Merger consideration, and the process to determine that consideration, were fair. A048-49. The Board agreed and recommended the Merger to the unaffiliated stockholders for their vote. A048. SynQor issued a public company-style proxy statement, dated January 28, 2014. A027.

E. Plaintiffs File Suit But Withdraw Their Injunction Application After SynQor Issues Supplemental Disclosures

On February 17, 2014, Plaintiffs filed suit seeking to enjoin the Merger vote scheduled for February 21, 2014 and challenging the fairness of the Merger. OB 1; A027. The purported basis for the injunction was that SynQor allegedly failed to disclose certain information to the stockholders. B120-133. Defendants agreed to postpone the Merger vote and issue supplemental disclosures. A277-78 ¶ 67; A238-248.

On February 26, 2014, after Plaintiffs reviewed and approved the Supplement, SynQor mailed it to its stockholders. A238. Among other things, the Supplement explained in detail the reasons SynQor could not value the early-stage 054 patent litigation. A240-42; *see infra* § F.3. The Supplement also provided additional information regarding Shields' valuation analysis and factors considered by the Committee in approving the Merger. A242-47. Plaintiffs' counsel later accepted a $425,000 mootness fee for their disclosure-based claims, including claims challenging the sufficiency of the description of the 054 Case, and raise no disclosure claims on this appeal. OB Ex. C.

On March 10, 2014, over 61% of the unaffiliated stockholders voted in favor of the Merger. A278 ¶ 68. The Merger closed that day. *Id.* ¶ 69. To demonstrate that all *MFW II* elements had been met, and to encourage Plaintiffs to dismiss their claims, Defendants voluntarily disclosed board minutes and board resolutions.

But, Plaintiffs continued to press the litigation and, on April 17, 2014, filed the Amended Complaint. A005. On May 23, 2014, Defendants filed a motion to dismiss, which the court below granted on September 10, 2014. A006; A008.

In the Merger, SynQor's common and Series A Preferred Stock were converted into rights to receive $1.35 and $4.05 in cash per share, respectively, and the right to receive a pro rata share of the Contingent Consideration from the 444 Case. A073. *See* § F.2, *infra*. As of the Merger, the 444 Case had been tried and fully submitted, but was still awaiting decision. A027.[5]

F. <u>SynQor's Patent Litigation</u>

1. <u>The 497 Case.</u> In November 2007, SynQor filed a patent suit against eleven industry suppliers involving five of SynQor's patents (the "497 Case").[6] A058. In December 2010, a jury upheld the validity of SynQor's patents and found each defendant had infringed at least one of SynQor's patents. *Id.* The court awarded SynQor $116 million, which was reduced after appeals and a partial settlement to $89.7 million which was finally paid in November 2013. *Id.* SynQor applied the after tax proceeds from the 497 Case to fund its liquidity strategy, including the Merger. A045-46; A60; A126. Shields valued the tax-adjusted proceeds from the 497 Case at $0.87 per equivalent share of common stock. A056. Thus, the unaffiliated stockholders received the full value of their pro rata share of

[5] A ruling has since been issued in the 444 Case (B138), which is currently on appeal.

[6] *SynQor, Inc. v. Artesyn Techs., Inc.*, C.A. No. 2:07-cv-497 (E.D. Tex.).

the recovery in the 497 Case, *plus* $0.48 per share for SynQor's value as an operating entity, *plus* the Contingent Consideration. The Founder Group received no consideration.

2. <u>The 444 Case.</u> In July 2013, the 444 Case was tried in a bench trial, but by the time of the Proxy and Merger, the court had not ruled. A058.[7] The Committee determined that even though a final judgment in the 444 Case had not been rendered, the case had been fully tried and all damages arguments had been advanced, so there was sufficient certainty as to the outcome of the action that the Committee determined it could share the value of the 444 Case pro rata with stockholders. A038; A058; A240. On March 31, 2014, the court in the 444 Case awarded SynQor approximately $2.9 million in supplemental damages, plus pre- and post-judgment interest, or approximately $0.028 per share after tax.[8]

3. <u>The 054 Case.</u> In January 2011, customer Cisco Systems, Inc. and competitor Vicor Corporation filed declaratory judgment actions in Delaware and Massachusetts respectively for non-infringement and invalidity of SynQor's patents (the "054 Case").[9] B1; B11; B306-07. Those actions were then transferred

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[7] *SynQor, Inc. v. Artesyn Techs., Inc.*, C.A. No. 2:11-cv-444 (E.D. Tex.) (the "444 Case").

[8] *See SynQor, Inc. v. Artesyn Techs., Inc.*, C.A. No. 2:11-cv-444, Order at 36-37 (E.D. Tex. Mar. 31, 2014). B173-74. This was far below the $6.6 million to $11.9 million that SynQor sought (A240) and SynQor appealed that judgment. That appeal remains pending.

[9] *SynQor, Inc. v. Cisco Systems, Inc.*, C.A. No. 2-11-cv-054 (E.D. Tex.).

to Texas and consolidated in the 054 Case. B22.[10] Although the 054 Case involves many of the same patents as the 444 and 497 Cases, there are important differences: (1) the parties are different (A058-59); (2) many of the products involved are different (A241); (3) the 054 Case involves an additional patent (A059); (4) a confidentiality order prevents Management from reviewing discovery relating to damages calculations (A241); and (5) Vicor counterclaimed for damages against SynQor. *Id.* While SynQor believes it has strong defenses to any claims against it, given the theoretical risk of an adverse ruling and significant, ongoing expenses, the expenses could exceed any recovery.

The Committee and Shields considered valuing the 054 Case, but ultimately determined that, given the early stage of the proceeding, it was far too speculative to include in SynQor's overall valuation. A241-42 ("Shields & Co. did not independently value SynQor's claim for damages in the '054 case because of the inherent uncertainty . . . ."). The Committee's inability to assign an expected damage value to the 054 Case underscores the unpredictability inherent in early stage patent litigation. Even if the Committee had sufficient information to calculate an expected damage value from the 054 Case, a final ruling could be years away and could result in little or no award.

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[10] Plaintiffs wrongly contend "SynQor again filed suit in the Eastern District of Texas over infringement of the IBA Patents, this time against Cisco . . . Vicor . . . and Ericsson." OB 6.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DETERMINED ALL ELEMENTS OF *MFW II* WERE SATISFIED AND PROPERLY DISMISSED THE COMPLAINT

A. Question Presented

Whether the Complaint alleged sufficient facts to demonstrate that any of the conditions established by *MFW II* had not been satisfied. The Court of Chancery properly (i) concluded the Complaint and the documents incorporated by reference therein demonstrated that all *MFW II* elements had been satisfied, (ii) applied the business judgment rule, and (iii) dismissed the Complaint.

B. Scope of Review

Defendants agree that the standard of review is *de novo*.

C. Merits of Argument

The Committee heeded this Court's guidance that "[i]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Committee and a majority of the minority stockholders; (ii) the Committee is independent; (iii) the Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority." *MFW II*, 88 A.3d at 639. The Proxy, Supplement, minutes, resolutions, and materials supplied by Defendants in voluntary discovery and fairly

incorporated in the Complaint establish that all six of these conditions were fully satisfied.

Given these facts, it was Plaintiffs' burden to plead "facts sufficient to call into question the existence of those elements, at least when those elements have been described in a public way suitable for judicial notice . . . as was done here." A443-44. As established by *MFW II*, in controlling stockholder transactions, if boards employ Court-approved procedural protections, the business judgment standard of review should apply and defendant should be able to obtain dismissal at the pleading stage. *MFW II*, 88 A.3d at 645 ("If a plaintiff that can plead a reasonably conceivable set of facts showing that any or all of those enumerated conditions did not exist, that complaint would state a claim for relief that would entitle the plaintiff to proceed and conduct discovery."); *MFW I*, 67 A.3d at 535 ("A plaintiff that can plead facts supporting a rational inference that any of those conditions did not exist could state a claim and go on to receive discovery.")[11]

Plaintiffs are thus wrong when they claim that "Defendants may only restore the protection of business judgment . . . *if they establish*" the presence of the *MFW* conditions. OB 17 (emphasis added). The Court of Chancery framed the issue properly: "[t]he question at this point of the case is whether the plaintiffs have

[11] *See also In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 413 (Del. Ch. 2010) (plaintiffs must "plead particularized facts sufficient to raise a litigable question about the effectiveness of one of the devices" for entire fairness review to apply); *accord In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 606 (Del. Ch. 2005).

called into question whether the requirements were met such that they can proceed beyond the pleading stage." A439.[12]

The rationale for the standard, as explained in *MFW I*, is to incentivize independent directors to adopt appropriate structural protections in controlling stockholder transactions to achieve business judgment review and thereby reduce litigation costs. *MFW I*, 67 A.3d at 526. More importantly, the prospect of a dismissal at the pleading stage encourages value-maximizing behavior by independent directors when negotiating against controlling stockholders.

Plaintiffs also wrongly claim that even where the procedural protections of *MFW II* are established, merely pleading that the merger price was unfair is enough to invoke entire fairness review. OB 18-19. Such an interpretation stands *MFW II* on its head. If Plaintiffs are correct, why would a board ever bother implementing procedural protections if a stockholder can always obtain entire fairness review by complaining about price? Under Plaintiffs' view, all controlling stockholder transactions would be subject to entire fairness review because creative plaintiffs can always challenge some aspect of a valuation analysis.

As explained below, and as the Court of Chancery held, the Complaint fails to allege facts showing any of the *MFW* factors were not satisfied. The Committee

[12] *See Cox Commc'ns*, 879 A.2d at 644 (controlling stockholders and directors "should be able to obtain dismissal of a complaint unless: 1) the plaintiffs plead particularized facts that the special committee was not independent or was not effective . . .; or 2) the approval of the minority stockholders was tainted by misdisclosure, or actual or structural coercion.").

and the Founder Group properly implemented the protections prescribed by *MFW II* and generated an excellent result for the unaffiliated stockholders, notwithstanding Plaintiffs' continuing disagreement regarding price. Dismissal was proper.

1. The Committee Was Independent

Plaintiffs do not allege Martin or Bradley received any unique benefit in the Merger, were beholden to or controlled by the Founder Group, or had any other interests to impugn their disinterestedness or independence under "traditional" criteria. OB 28-29. Plaintiffs concede that Martin and Bradley received no economic benefit in the Merger and did not continue as directors after the Merger. A029; A046; A048; A050; A074; A089; A112-13; A239; A360; *see* § C, *supra*. While Plaintiffs argue it is conceivable Martin and Bradley *might* have lacked independence because they were elected by written consent and did not communicate regularly with stockholders (OB 28-29), Plaintiffs fail to plead any facts supporting their speculation.

First, directors are presumed to be independent even when elected by a controlling stockholder.[13] Second, election of directors by written consent in lieu

[13] *See, e.g.*, *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 588 (Del. Ch. 2007) ("[I]t is well-settled that a director's appointment at the behest of a controlling shareholder does not suffice to establish a lack of independence.") (citations omitted); *see also In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 996 (Del. Ch. 2014) ("It is well-settled Delaware law that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder.").

of an annual meeting is permitted. *See* 8 *Del. C.* § 211(b); OB 28-30.[14] Third, Plaintiffs' generalized criticism that Martin and Bradley were conflicted with respect to the Merger because they did not regularly communicate with SynQor's stockholders fails. As the Court of Chancery explained, "[t]here must be evidence sufficient to permit a finding that the director in fact faced a conflict *in the specific case*." *In re Rural/Metro Corp. S'holders Litig.*, 2014 WL 5280894, at *36 (Del. Ch. Oct. 10, 2014) (emphasis added, citations omitted); *Chen v. Howard-Anderson*, 87 A.3d 648, 671 (Del. Ch. 2014).[15]

2. The Committee Was Empowered to Select its Own Advisors and to Say "No"

Plaintiffs concede the Committee was empowered to hire its own independent legal and financial advisors, that it did so, and that the advisors were independent and well-qualified. A274 ¶ 55; A446. Plaintiffs also admit that the Board resolutions "empowered [the Committee] to terminate negotiations with the

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[14] Plaintiffs rely on *TVI Corp. v. Gallagher*, 2013 WL 5809271, at *14-15 (Del. Ch. Oct. 28, 2013) to argue that electing directors by written consent creates a reasonable inference that the Founder Group controlled Martin and Bradley. OB 29. However, in *TVI Corp.*, the challenged directors were "removed from the Board after voicing concerns about the Founders' financial dealings with the Company and requesting an independent investigation." *TVI Corp.*, 2013 WL 5809271, at *15. Plaintiffs allege no similar facts here.

[15] Plaintiffs also cite no obligation requiring independent directors to communicate with stockholders. Nor would one expect independent directors to communicate with SynQor's stockholders, as if they were Management.

Founder Group or pursue alternatives to the Merger . . . ." OB 29; A014-17.[16]

Plaintiffs' attempt to argue the Committee never exercised its power and "never actually said no" to the Founder Group (OB 30) is clearly incorrect in light of the three price increases the Committee secured, which increased the Merger consideration by more than 22%. A275 ¶ 58; *id.* ¶ 60; A276 ¶ 61. If the Committee never said "no" to the Founder Group, it would have agreed to a Merger at the original offer price of $1.10 per share. *Compare* OB 30.

Plaintiffs also claim the Committee never "considered any alternatives to the Merger offers put forward by the Founder Group . . . ." OB 29-30. But, the Proxy makes clear that the Committee considered the effects of turning down a transaction with the Founder Group and maintaining the status quo (A049-50), that seeking third-party offers would be futile, and that, in any event, the Committee was fully informed as to SynQor's value. A040.

3. The Committee Satisfied Its Duty of Care

Plaintiffs' argument that the Committee failed to meet its duty of care in negotiating a fair price fails because it ignores the high pleading standard for a duty of care claim. Specifically, Plaintiffs argue "if there are non-conclusory allegations that the price achieved by the special committee is unfair—*regardless*

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[16] Plaintiffs' citation to *In re Southern Peru Copper Corp. Shareholders Derivative Litigation*, 52 A.3d 761, 765 (Del. Ch. 2011) (OB 29-30) makes no sense. That committee was empowered only to evaluate the transaction, not to negotiate or explore other alternatives.

of whether that committee was independent or empowered—the unified standard is not met and entire fairness applies." OB 19 (emphasis added). Plaintiffs then repetitively assert their disagreement with the $1.35 per share Merger price and the valuation methods employed by the Committee's independent financial expert.

The question, however, is whether Plaintiffs have alleged non-conclusory facts demonstrating the Committee breached its duty of care in negotiating price. To do so, Plaintiffs must allege that Martin and Bradley took actions that were "grossly negligent." *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). "[G]ross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason." *McPadden v. Sidhu*, 964 A.2d 1262, 1274 (Del. Ch. 2008). Plaintiffs have not come close to alleging that the process followed by the Committee, which spanned 8 months, involved 20 meetings, and included reliance on independent advisors, was even negligent, let alone grossly negligent.

Plaintiffs' disagreement over price and the valuation techniques used by the financial advisor also fails to demonstrate gross negligence. Plaintiffs are correct that "the underlying purpose[] of the dual protection merger structure" established by *MFW II* is to establish a framework that is likely to lead to the best price available in controlling stockholder transactions. OB 19 (citing *MFW II*, 88 A.3d at 644-45). But Plaintiffs twist *MFW II* beyond recognition by claiming that any disagreements about price are sufficient to preclude business judgment review. As

the Court of Chancery explained, there is a difference between "cases that actually raised breach of fiduciary duty claims and those cases that only challenged judgmental factors of valuation." A441. The Court of Chancery drew this distinction from established Delaware case law recognizing that "[a] balance must be struck between sustaining complaints averring faithless acts, which taken as true would constitute breaches of fiduciary duties that are reasonably related to and have a substantial impact upon the price offered, and properly dismissing those allegations questioning judgmental factors of valuation." *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1107-08 (Del. 1985); A441-42.

This distinction exists for important policy reasons. Convincing directors to adopt the *MFW II* structure requires an incentive, and "there is no way to create an incentive for the use of both protections other than to give controllers who grant both protections to the minority the benefit of business judgment rule review." *MFW I*, 67 A.3d at 528. This incentive is eliminated if mere challenges to price will preclude business judgment review. *Id.* Moreover, empirical evidence shows there are no benefits to scrutinizing price in going private transactions that are subject to procedural protections under *MFW*. *Id.* at 534 & n.176. "Indeed, the evidence that the possibility of [entire fairness] review provides real benefits to stockholders even in cases where a special committee is the only procedural

protection is very slim at best, and there is a good case to be made that it is negative overall." *Id*. (citations omitted).

a. The Committee Negotiated with the Founder Group at Arm's-Length and Considered Alternatives

Plaintiffs do not dispute that the Committee had more than ten years of experience at the Company, met 20 times over 8 months (A046), reviewed a fairness opinion from its own independent financial advisor (A047-48), reviewed "substantial information" from SynQor "in response to a detailed due diligence list" (A046), reviewed the Founder Group's valuation report (*id.*), and met several times with its legal and financial advisors to consider this information. A047-48. Nor do Plaintiffs dispute that the Committee's negotiations caused the Founder Group to increase its bid three times, from $1.10 to $1.25 to $1.30 to $1.35 per share, while eliminating a $0.04 per share hold back against the Contingent Consideration. A275 ¶ 58; A275 ¶ 60; A276 ¶ 61; A047. Nor do Plaintiffs dispute that the Merger price fell within the range of fairness determined by the independent financial advisor the Committee decided to retain. A276 ¶ 61.

Nevertheless, Plaintiffs claim "[t]he process appears to have been designed to obtain the lowest possible offer within the cover of Shields' unduly depressed fairness range" (OB 26) and criticize the Committee for disclosing Shields' value

range to the Founder Group. OB 25-26. These mere quibbles with *how* the Committee negotiated with the Founder Group fail to state a duty of care claim.[17]

Where, as here, the Committee "met frequently and was presented with a rich body of financial information relevant to whether and at what price a . . . transaction was advisable," Plaintiffs cannot credibly argue that it was grossly negligent to negotiate as it did. *MFW II*, 88 A.3d at 653. And even if the Committee's choice of tactics was the proper subject of a duty of care claim, Plaintiffs' conclusory attacks on the effectiveness of negotiations are not plausible. The Committee's efficacy is confirmed by the three price increases that increased the Merger consideration by more than 22% to the range of fairness determined by its independent advisor. A275 ¶ 58; A275 ¶ 60; A276 ¶ 61.

Moreover, despite the claim that the Committee never "explore[d] the possibilities of an alternative to the Merger, such as a transaction with a third party or pursuing no transaction at all" (OB 26), the Proxy is clear that "Dr. Schlecht and members of the Founder Group have stated that they have no intention of selling their interests in SynQor in the foreseeable future or pursuing an initial public offering of the Company's stock . . . ." A050. It was the Founder Group's right

[17] *See In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *7 (Del. Ch. Sept. 30, 2009) ("It is well within the business judgment of the Board to determine how merger negotiations will be conducted . . . ."); *see also In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1044 (Del. Ch. 2012) ("[T]hat is a tactical quibble about how the Board and Wyss handled the strategic dynamic of negotiations. . . . [It] would not even support a *Revlon* claim in my view . . . .").

not to sell. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987).[18] The Committee was not grossly negligent for failing to investigate alternatives that had little chance of happening.[19]

The Committee also considered the effects of maintaining the status quo. The Proxy specifically discloses that the Committee weighed "SynQor's business, historical and current financial performance" and "recogni[zed] that the Company is facing significant price and product competition . . ., a curtailment in European sales, that the Company faces significant challenges to its entry into the military and industrial markets and other challenges to the Company's market position and profitability." A049. The Committee also considered that many stockholders had held their stock for more than ten years and that there were limited opportunities for future liquidity. A050. The only immediate source of cash for dividends was proceeds from the 497 Case, which was limited to $0.87 per share—well below the $1.35 Merger price, and a public offering was unrealistic.[20] A056. Further, the Committee realized that returning cash to stockholders through dividends would

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[18] Plaintiffs do not allege that SynQor ever received an offer from a third party.

[19] *See also McMullin v. Beran*, 765 A.2d 910, 919, 920 (Del. 2000) (holding that board "could not effectively seek an alternative to the proposed Lyondell sale by auction or agreement, and had no fiduciary responsibility to engage in either futile exercise"); *In re Digex Inc. S'holders Litig.*, 789 A.2d 1176, 1196 (Del. Ch. 2000) (holding that where "as here, a majority shareholder can block proposed transactions involving a sale of control, the courts will not require a board of directors to engage in a futile exercise").

[20] A small private company with three years of declining revenue in a highly competitive industry is not an attractive candidate for acquisition or an IPO.

mean that 46% of the cash would have gone to the Founder Group (*see* A046) and that there would be increased tax burdens on SynQor's stockholders relative to the proposed Merger consideration. *See* B, *supra*. The Committee thus came to the well-reasoned conclusion, shared by a majority of unaffiliated stockholders, that the Merger was the best outcome available for all stockholders.

b. The Committee Fulfilled Its Duty of Care in Evaluating the 054 Case

Plaintiffs complain that SynQor's unaffiliated stockholders received no value for the 054 Case. OB 20-21. Plaintiffs cannot state a duty of care claim by simply disagreeing with the Committee's conclusion to not include contingent value attributable to the 054 Case. Recognizing the uncertainty of early stage patent litigation, and the length of time to judgment, the Committee appropriately negotiated for certain value now, rather than speculative contingent value later. A240-41. The Committee's approach was entirely reasonable and consistent with the approach Delaware courts have taken when valuing causes of action and other intangible assets.[21] Indeed, as of today, over a year after the Merger, the 054 Case still has not been tried, no one has received any value for it, and expenses continue to mount.

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[21] *See, e.g., Shamrock Holdings, Inc. v. Polaroid Corp.*, 709 F. Supp. 1311, 1320 (D. Del. 1989) ("The potential damages award in a major patent case is an undeniably uncertain amount."); *Lebman v. Nat'l Union Elec. Corp.*, 414 A.2d 824, 826 (Del. Ch. 1980) (no additional value attributed to "long-pending but so far unproductive anti-trust claim").

Moreover, Plaintiffs conveniently want only the upside of the 054 Case without any risk or associated expense, and fail to address several critical questions: If there is a recovery *against* SynQor, are Plaintiffs willing to pay? If the expenses of the 054 Case exceed the recovery, are Plaintiffs willing to contribute to the difference? Are Plaintiffs willing to fund up front the litigation expenses in the 054 Case? *Who* should make these decisions: independent directors and a majority of unaffiliated stockholders, or a minority?

Plaintiffs also ignore that when the Committee was able to value a patent case, it secured value for stockholders. The 444 Case had "been fully tried and submitted to the court, along with the parties' respective damages contentions . . . ." A240. The Committee thus "determined they had sufficient information regarding the claims and the expenses associated with the litigation, including the parties' damages arguments, in order to include Contingent Consideration from the '444 case as a component of the Merger Consideration." *Id.*

The 054 Case was different; it was early in the pretrial stage. A241. A protective order prevented management from reviewing sensitive damages discovery from plaintiffs, including sales volume, revenue, and profits. *Id.* SynQor did not choose to file the 054 Case; it was initiated by Cisco and Vicor.

B306-07; B1; B11.[22] For these reasons and others, the Committee fully disclosed it could not value the 054 Case and no value would be shared through contingent consideration. SynQor stockholders voted in favor of the transaction nonetheless.

The conclusory assertion that "the Special Committee made no inquiry into the value of the '054 Litigation" is belied by the facts. OB 23. Nothing in the Complaint suggests the Committee was "grossly negligent" in its analysis of the 054 Case. As the court below ruled, this was "a matter of strategy and tactics that's debatable and isn't a duty of care violation." A447-48.

c. The Committee Fulfilled Its Duty of Care with Respect to Valuing SynQor's Patent Portfolio

Plaintiffs' argument that "no value was given for the patent portfolio" represents yet another disagreement with the Committee's negotiating strategy and the Shields valuation, not gross negligence or recklessness that support a duty of care claim. OB 21.[23] The argument is also wrong. As the Complaint and the Proxy made clear, the Committee and Shields chose to value SynQor as the sum of its cash flows, plus the $0.87 per share received from the 497 Case, plus contingent value from the 444 Case. *See* A282 ¶ 76; A284 ¶ 82; A293 ¶ 101; A056-57.

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[22] Contrary to Plaintiffs' claims, SynQor did not choose to "invest millions in the '054 Litigation" because of how it valued the case. OB 26. SynQor had to defend itself in litigation initiated by Cisco and Vicor.

[23] Plaintiffs mischaracterize Shields as having "insisted" on valuing the patent portfolio. OB 21. Shields considered such a valuation, but ultimately did not separately value the technology or the portfolio. Instead, it performed a customary valuation of the operating business using a DCF, comparable companies and transactions analyses. A055-56.

Accordingly, it is not necessary to value the patent portfolio separately from the Company's operating business. Indeed, Plaintiffs themselves concede that "[m]uch of SynQor's value lies in its portfolio of patents, inclusive of the projected cash flows from operations, licensing, and litigation." A293 ¶ 101. Furthermore, unaffiliated stockholders who, having been fully informed about how the Committee and Shields valued SynQor, were free to vote against the Merger or seek appraisal.

d. Plaintiffs' Disagreement With the Shields Valuation Does Not Constitute a Violation of the Duty of Care

Plaintiffs further argue the Committee breached its duty of care because they disagree with Shields' valuation analyses. OB 22-23. Plaintiffs' quibbles with Shields' valuation inputs, however, do not state a duty of care claim.[24] Despite using phrases like "facially inaccurate" and "implausible," Plaintiffs do not allege, in more than a conclusory fashion, that relying on Shields was reckless, outside the bounds of reason, or that the Committee believed that Shields was wrong. In any event, the Committee was entitled to rely on the advice of an independent financial advisor. *See* 8 *Del. C.* § 141(e); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 985 (Del. Ch. 2000) (dismissing claims alleging directors breached their

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[24] *See In re 3Com S'holders Litig.,* 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (finding a claim that "simply amounts to a quibble with the manner in which [the advisor] performed its fairness opinion in connection with the Merger and can be remedied by the appraisal remedy" does not state a claim for relief).

duty of care by approving an allegedly defective fairness opinion absent non-conclusory allegations). In fact, "[r]eceipt of a fairness opinion . . . supports an inference that a board satisfied its duty of care." *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (Del. Ch. Oct. 13, 2011).

Even the deficiencies alleged by Plaintiffs demonstrate their inability to plead a duty of care claim.[25] Plaintiffs' claim that Shields' share count was too high (A282-83 ¶¶ 77-79) is simply wrong. Shields correctly took into account SynQor's Series A Preferred Stock and exercisable options on a fully diluted basis. A042; A056. Plaintiffs' criticism of Shields' 20% company-specific discount (OB 22) fails to account for the facts that (a) the discount applied to only the value of the operating business and not the after-tax proceeds from the 497 Case (A056; A246-47) and (b) Delaware courts have accepted specific risk premia in private company valuations.[26] Further, the discount was supported by SynQor's declining revenues for each of the last three fiscal years, limited number of products,

[25] Plaintiffs' citation to *In re El Paso Pipeline Partners, L.P. Derivative Litigation*, 2015 WL 1815846, at *24 (Del. Ch. Apr. 20, 2015) is inapposite. In that case, the Court found a committee acted in bad faith when its financial advisor used significantly different methods to value two comparable transactions in the span of a few months without explanation. *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009) is even less relevant—the standard in that case was entire fairness. And in *Nebel v. Sw. Bancorp., Inc.*, 1999 WL 135259 (Del. Ch. Mar. 9, 1999), the value of the subject company had been adjudicated at more than twice the merger price in an appraisal proceeding.

[26] *See*, *e.g.*, *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 475 (Del. Ch. Feb. 1, 2011); *Onti v. Integra Bank*, 751 A.2d 904, 919-20 (Del. Ch. 1999).

customer concentration risk, and other factors, all of which were fully disclosed in the Proxy and Supplement. A246-47.

With more than a decade of experience at the Company, the Committee was well-qualified to apply its independent judgment to the opinions and analysis offered by an independent financial advisor. A087. Plaintiffs' arguments about DCF inputs, transaction multiples, and risk premiums may be appropriate in an appraisal case, but do not rise to the level of a duty of care claim, even if correct.

4. The Merger Was Conditioned on Approval By a Majority of the Unaffiliated Stockholders *Ab Initio*

Plaintiffs argue "the Merger was not conditioned upon a non-waivable minority of the majority vote *from the outset*." OB 31. But the Board resolutions from the May 29, 2013 meeting state that the Board "***shall not*** consummate a Potential Transaction without the prior affirmative vote of a majority of the Company's stockholders who are unaffiliated with the Founder Group . . . ." A016 (emphasis added). *See also* § B *supra*. Whether the non-binding term sheet hedged on this issue is immaterial. At the very first meeting at which the Merger was proposed, the Founder Group agreed to this condition and the Board (including Dr. Schlecht) resolved that it was a condition to any transaction.[27]

[27] *See MFW II*, 88 A.3d at 644; *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 24 (Del. Ch. 2014); *see* A444 ("It is true that the controller's initial proposal hedged on whether the majority-of-the-minority condition would be waivable or not, but from the first meeting, the

Plaintiffs also never allege that the majority of the minority vote was ever considered waivable after the initial May 29 Board meeting, or that the vote was used as a bargaining chip. The first definitive offer from the Founder Group came August 16, 2013, and negotiations did not start until after that. A275 ¶ 58; A046. The Court of Chancery thus correctly stated, "[a]ll this went down before any negotiations took place, even before anything really started." A445.

5. The Unaffiliated Stockholders Were Not Coerced

Plaintiffs argue the Merger was coercive because the Founder Group threatened "retributive dilution" to increase its stake in the Company if the Merger was not approved. OB 34. Plaintiffs' Complaint, however, never alleges this theory. It was only raised in Plaintiffs' dismissal brief.[28] Of course, a plaintiff may not expand the scope of its complaint in its motion to dismiss briefing. *See Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002).

Nevertheless, Plaintiffs' coercion theory argues the Founder Group threatened to stop "providing liquidity to stockholders through share buybacks and planned dividends." OB 34. The Complaint and the documents it attached acknowledge that prospects for liquidity were uncertain at best before the Merger,

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board resolved that any deal would require both the approval of a special committee and a majority-of-the-minority vote.").

[28] Further, the Proxy discloses that the Founder Group "may seek to increase their stake in the Company . . . ***in order to continuing managing the Company***." A050 (emphasis added). Hardly a threat, the statement was an honest disclosure that the Management might seek to negotiate with the Board for future equity compensation.

and could remain that way if the Merger were not approved. Dividends were never *guaranteed*.[29] Moreover, "a claim of coercion cannot be premised on the threat of simply maintaining the status quo." *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2011 WL 227634, at *3 (Del. Ch. Jan 14, 2011); *see also* A450 (holding "the question for coercion is whether you can return to the status quo."). Plaintiffs allege nothing that would have prevented a return to the status quo if the Merger did not occur.

6. The Unaffiliated Stockholders Were Adequately Informed

Plaintiffs have abandoned any claim that SynQor's unaffiliated stockholders were not adequately informed. Indeed, Plaintiffs' counsel accepted a $425,000 mootness fee for causing SynQor to issue the Supplement. OB, Ex. C at 3. Plaintiffs thus admit that a majority of the unaffiliated stockholders approved the Merger with full knowledge of the process, sufficient valuation information, and other facts necessary to make an informed decision.

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[29] *See* A012 (it was SynQor's "*intention* to *consider* additional offers to repurchase capital stock . . . and/or make cash dividend payments") (emphasis added); *id.* (payment of future dividends "will most likely be triggered by a positive outcome in SynQor's patent lawsuit, *although this is not the only possibility*.") (emphasis added).

CONCLUSION

The Court of Chancery properly dismissed the Complaint upon concluding that Plaintiffs failed to plead a reasonably conceivable set of facts that any of the procedural protections under *MFW II* were not present in the Merger. Accordingly, the Court of Chancery properly applied business judgment review and dismissed the Complaint. The dismissal should be affirmed.

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Dated: July 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2015, my firm served a true and correct copy of the foregoing *Appellees' Answering Brief* and *Appendix to Appellees' Answering Brief*, by File & Serve*Xpress* upon the following counsel of record:

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