University of Illinois College of Law
Examination Cover Sheet

Mergers & Acquisitions
Professor Amitai Aviram
Spring Semester 2019
Number of Pages: 7 (including this page)
Time Allotted: Until 10am on the day following the day you received the exam
Assistant Name: **Clyde Gabriel**; Assistant e-mail: **cgabriel@illinois.edu**

Exam Instructions

1. **Permissible material**: This is an open book exam. You may use any materials you want, whether in hardcopy or electronic format.
2. **Anonymity**: The exams are graded anonymously. Do not put your name or anything else that may identify you (except for your four-digit exam ID number) on the file that contains your answer to the exam.
3. **Receiving and submitting the exam**
   a. Notify my assistant immediately (within 1 hour) if you did not receive by e-mail a copy of the exam by 10am on the day you selected (or on the default date, if you did not select an exam date).
   b. You must submit your response as a .doc/.docx (Microsoft Word) file e-mailed to my assistant no later than 10am on the day after you received the exam. The file name should be your 4-digit exam ID number.
4. **Confidentiality**: Once you receive this exam form, you are not allowed to discuss the exam with anyone until after the last day of the exam period. Students enrolled in this course are not allowed to solicit or receive information about the exam if the source of the information (directly or indirectly) is a person who has seen the exam.
5. **Length limit**: The total length of your answer may not exceed 1,000 words. For every 10 words in excess of the length limit (rounded up), one point will be taken off the exam's raw score.
6. **Answering the exam**: Cite relevant case and statutory authority. Subject to the length limit, answer all relevant issues that arise from the fact pattern, even if your conclusion on one of the issues is dispositive to other issues.
7. **Assumptions**: Unless the exam question specifies otherwise, assume that -
   a. The relevant jurisdiction applies the Restatement (Third) on Agency, Delaware corporate law, UPA, and U.S. securities law.
   b. Each corporation's charter states that: the corporation is a stock corporation, has limited liability and perpetual existence; the corporation may conduct any lawful act or activity; director fiduciary duty is limited to & director/agent right to indemnification is extended to the maximum degree allowed under DGCL §102(b)(7) ; the board may amend the bylaws.
   c. Each corporation's bylaws state that: the chairperson of the board is authorized to call a board meeting; and the board is authorized to call both annual & special shareholder meetings.
   8. **"Fact" patterns are fiction**: The "facts" presented in this exam are not necessarily true in real life.

A start-up in the oil patch: Alan Smith ("Al") is a petroleum engineer who founded Black Forest Fracking, Inc. ("BFF"), a Delaware corporation that uses innovative techniques to extract crude oil that was previously thought to be unreachable. Al fostered in BFF a corporate culture that was unusual for oil companies. He assembled a team of about 500 maverick petroleum engineers and technicians, colloquially known within the company as "The Whiz Kids", who had revolutionary and untested ideas to extract oil from rock formations that were thought uneconomical to drill. Al paid the Whiz Kids below-market salaries, but gave them very generous allocations of shares in BFF – similar to how many high-tech start-ups compensate their talent.

BFF acquired drilling rights in a parcel of land known as the Black Forest Shale. It was able to secure the drilling rights at a very low price, because other oil companies did not believe the oil there was accessible at a viable cost. After a few failures, the Whiz Kids developed drilling techniques that extracted the oil profitably. Almost overnight BFF became a success, because the oil reserves contained in the Shale were very large, and BFF could tap them at a reasonable cost.

BFF conducted an IPO and traded its stock on NASDAQ. BFF had a single class of shares (common shares with one vote each). Because of the large pre-IPO stock allocations to the Whiz Kids, they now each owned slightly more than 0.1% of BFF (to be precise, the total stock owned by all 500 Whiz Kids was 52%). Belleview, a venture capital firm that invested in BFF early on, now owned 5% and was BFF's largest shareholder. Al owned 4% (making him the second-largest shareholder in BFF), and was the CEO and Chairman of BFF's board. Besides Belleview and Al, no shareholder owned more than 0.5% of BFF.

BFF's board consisted of 5 directors: Al, Bianca (the controller and CEO of Belleview), Chelsea (the Chief Financial Officer of a large retailer), Don (a former CEO of an oil company), and Ethan (a retired business consultant with expertise in the oil industry).

Well pressure problem: A few years later, BFF decided to attempt a new innovation: drilling wells much closer to each other than had been done before. As all industry experts knew, drilling more wells results in extracting more oil in the short term, but if the wells are too close to each other, each interferes with adjacent wells, reducing the pressure in the wells and ultimately reducing the amount of oil that can be extracted. The current industry norm for how many wells to drill balanced these factors in an effort to get the most oil over the lifetime of the oil field. The Whiz Kids believed, however, that new drilling techniques they developed could allow for much denser drilling without losing much pressure. In other words, they believed their new technology could drill more wells and extract more oil in the short term, with only a minor long-term drop in the amount of oil that could be extracted.

BFF implemented these new drilling techniques and with more wells, it was able to extract oil much faster. Its oil production exceeded expectations and its stock price soared. However, within a few months workers noticed that oil pressure had begun dropping faster than the engineers' models predicted. The new techniques were not working well.

The Whiz Kids continued to tinker with the drilling techniques, with minor successes and setbacks, but could not stop the decline in pressure. BFF had to revise its estimates, lowering expected future production from the Shale. Its stock price plummeted.

Meanwhile, the Whiz Kids believed they had finally figured out how to fix the well pressure problem, but it would require $2B to implement their solution. They pressed Al to get them the funding to do this. But BFF had very little cash left, and the reputational hit it took would make it difficult to raise this money.

Not BFFs: At that point, Al met with Vicki Johnson ("Vicki"), the CEO of Northern Petroleum Corporation ("NPC"), a publicly-traded Delaware corporation. NPC was a mid-sized company that was threatened by the industry's giants, such as Behemoth Corp. ("Behemoth"). Like Behemoth, NPC used traditional drilling techniques rather than the innovative "fracking" used by BFF. A few years ago, when Vicki was hired as CEO, NPC was unprofitable, deep in debt, and near bankruptcy. Because it was smaller than Behemoth, it lacked economies of scale and so struggled to compete. On the other hand, it lacked technological expertise in fracking, so it could not develop more challenging oil fields like BFF could.

Vicki turned NPC around by implementing very tight cost controls and selling non-essential assets to pay down debt. Doing everything as cheaply as possible, NPC now squeezed a tiny profit despite lacking the scale of Behemoth. But it still didn't have fracking expertise, and Vicki believed that in the long run NPC needed to differentiate itself from the larger rivals by obtaining fracking technology and developing oil fields that large rivals were unable to develop. Acquiring BFF seemed a good way to do that.

Al gave Vicki a chilly reception. He told her that BFF had no interest in being acquired by NPC, because BFF had nothing to gain "chaining itself to a company that can barely survive the competition and has no differentiating technology". Vicki said that if Al didn't think NPC had a bright future, NPC would be willing to buy BFF for cash rather than NPC shares, so NPC's future would be of no concern to BFF's shareholders. Al responded that NPC would not be able to borrow enough money to pay for BFF.

"I'll work out the numbers and send you a formal offer," Vicki said.

"There's no need," Al replied coldly. "We don't want your shares and you can't raise the cash." With that they ended their meeting.

BFFs!: A few days later Al had a meeting that made him happier. Mike Williams ("Mike"), Behemoth's CEO, told Al that Behemoth was interested in acquiring BFF. Behemoth is a publicly-traded Delaware corporation and is one of the world's largest energy companies, with oil and natural gas drilling operations all over the world, as well as refining operations and other energy businesses. Behemoth's shareholding is widely dispersed, with no shareholder owning more than 1% of its shares, and with the top 10 shareholders together owning only 6%. Behemoth decided they needed to acquire fracking technology, and buying BFF seemed to be a sensible way to do it.

"Will you offer to pay with cash or stock?" asked Al.

"Stock."

"Cash would be better."

"Nonetheless, Al, our offer will be to pay with stock. We need to conserve our cash to use it in BFF's operations after we buy them. The entire oil industry knows that you need tons of money now to fix your well pressure problem. We believe your Whiz Kids can solve that problem. But you'll need a lot of cash to get there, and we won't squander that cash buying the company."

Mike's words were music to Al's ears. Behemoth believed in BFF's technology and was going to invest to make it work! He told Mike he thought a stock deal was possible if the price was right, and asked Mike to send a formal offer as soon as possible.

Offers: An offer to acquire BFF arrived the next day. But it was from NPC. Vicki made a formal offer for NPC to buy BFF for $34 billion in cash. Vicki said that she was confident NPC could borrow the money needed for the acquisition.

Later that day Al received a second offer. Behemoth was offering to buy BFF for $30B, paid entirely in Behemoth shares. Al scheduled a BFF board meeting for the following day to discuss the offers.

At the meeting, Al said that as he saw it, there was just one offer on the table. To him, NPC's offer was a non-starter. NPC would not be able to finance its offer, and even if they could, they would then be so deeply in debt that they would not be able to invest the money needed to solve the well pressure problem. Therefore, Al said, the question before the board is whether Behemoth's offer, at $30B, was sufficient. He suggested hiring an investment banker to do a valuation of BFF.

"Chelsea, you know the corporate debt market very well," said Bianca. "What's your assessment? Can NPC raise the $34B?"

"It's a tough call. Normally I would say it is too much, but Vicki has a good reputation for running a tight ship, and creditors may be willing to take a risk with her. I'd say there's a 60% chance NPC manages to raise $34B. But they won't be able to raise any additional money to invest in solving the oil pressure problem."

"So there's a 40% chance that if we let go of Behemoth's offer, we find in a few months that NPC can't raise the money and we're left with nothing," said Don.

"And the other 60%, BFF becomes merged into a zombie company that can't invest in our technology and talent," Al quipped. "I thought we all agreed that what makes BFF different is our innovation. Behemoth will have the resources to invest in that. We just need to make sure that the price they're offering is fair to our SHs."

"I agree that we shouldn't go with NPC," said Ethan, "But why don't we act like we're thinking of accepting their offer to put pressure on Behemoth to match it? I hate to decline the higher offer."

"We can't bluff on this, Ethan," said Al. "Chelsea isn't the only one who can predict that NPC will have trouble financing their offer. If Behemoth calls our bluff and withdraws their offer, we are left with nothing."

"I agree," said Bianca. I do like $34 billion better than $30 billion, but I don't think it's worth a 40% chance of having no offer. And yes, Al, I believe in our ability to innovate and agree that Behemoth would have the resources to fund that, and NPC won't. As for bluffing, it's a tough call in my mind. On one hand, Behemoth wants to buy us. Wouldn't they throw a few more shares our way to match NPC? But given NPC's financial situation, their offer is not very credible. Behemoth might walk away if we force them to bid against NPC. I don't think it's worth taking that risk."

The directors discussed the matter a few more minutes, and unanimously agreed to ignore NPC's offer (and not mention it to Behemoth), and to negotiate with Behemoth.

Reacting to rumors: A few days later the Wall Street Journal reported rumors that Behemoth is considering buying BFF. Vicki asked Al to meet urgently. Al agreed.

"I haven't heard back from your board about my offer," she told Al.

"It's not going to happen, Vicki. You can't raise that much cash. And even if you could, you won't have any left to invest in our technology."

"I can raise the cash!" Vicki protested. "You're right that we won't be able to invest more money into your technology right away, but over time we will get there. Just negotiate with us. What do you have to lose? In the worst case, we give Behemoth some competition and drive your price up. That would be good for your shareholders."

Al said he would inform the board about their conversation, but told Vicki not to get her hopes up. He reported the conversation with Vicki to BBF's board, which agreed to continue with the existing plan of negotiating only with Behemoth and not mentioning to Behemoth the NPC offer.

Meanwhile, the Wall Street Journal article had caused many employees to be concerned. Several employees told Al that they were checking out other job opportunities because they feared an acquisition would destroy BFF's unique culture. Al told Mike about this, and said there was a risk of a "brain drain" if key employees – especially the Whiz Kids, who were BFF's most experienced employees – quit because of the uncertainty.

Mike prepared an agreement to which Behemoth and the 500 Whiz Kids were parties ("the Retention Agreement"). Under the Retention Agreement, the Whiz Kids committed to continuing to work for BFF for a year, and in return, if during that period BFF was acquired by or merged with Behemoth, then Behemoth would pay each of them a cash bonus of $2M. Behemoth and all of the Whiz Kids signed the Retention Agreement.

Deals: BFF's board hired investment bankers and lawyers to help negotiate the deal and to establish the fairness of the deal's terms to BFF's shareholders. They then negotiated with Behemoth (without mentioning NPC's offer), and signed an agreement ("Acquisition Agreement") under which Behemoth would acquire BFF in a long-form merger, paying BFF shareholders $33B worth of Behemoth's stock (because Behemoth was about 50 times larger than BFF, each BFF shareholder would have voting power in Behemoth equal to about $1/50^{th}$ of what they had in BFF). The deal had a "go shop" clause that gave BFF 90 days to seek other buyers. If BFF terminated the agreement within those 90 days, it would not have to pay any termination fee or damages.

In addition to the Acquisition Agreement, BFF and Behemoth signed another agreement ("the Financing Agreement") under which BFF borrowed $2B from Behemoth, to be used immediately to develop the technology to address the well pressure problem. The loan was for 10 years, with no interest paid in the first year, and following that an interest rate equal to the market-rate. The Financing Agreement had covenants stating that until the loan was repaid, BFF could not borrow more money, sell assets or mortgage its property (other than in the ordinary course of its business) without Behemoth's permission. The loan also had a change of control clause stating that should anyone merge with BFF or acquire more than 15% of BFF's shares, the loan would be in default (so Behemoth could demand immediate repayment). [The financing covenants and change of control clause will collectively be called "the Covenants".]

Discontent: When BFF and Behemoth announced the Acquisition Agreement and Financing Agreement, Vicki was furious. NPC announced an unsolicited tender offer for BFF's shares, at a price valuing BFF at $38B. The offer was conditioned on terminating or invalidating the Covenants.

Vicki told journalists about her interactions with Al, including that her earlier offer to Al, at $34B, was already higher than what Behemoth is paying. Nonetheless, not only did BFF refuse to negotiate with NPC, but they signed a Financing Agreement that contained the Covenants, which thwart NPC's plans to finance the acquisition (in part, by selling some of BFF's assets and mortgaging other assets).

Al told journalists that BFF requested the Financing Agreement because it urgently needed money to address the well pressure problem. The Covenants, Al said, protected Behemoth's interests as a creditor and without them Behemoth would not have lent the money to BFF. As for NPC's offer, Al said it was a "non-starter" because there's a significant chance that NPC could not finance its offer, and even if it could, it would have no cash left to invest in addressing the well pressure problem and developing fracking technology, so BFF's future was clearly more promising with Behemoth than with NPC.

Pierre, a BFF shareholder who liked NPC's offer, sued BFF's directors before BFF shareholders voted on the acquisition and before NPC's tender offer expired, asking the court to invalidate the Financing Agreement. Pierre claims the directors breached their fiduciary duty by: (1) accepting Behemoth's offer based on impermissible considerations of the company's prospects <u>after</u> the acquisition; (2) rejecting NPC's offer despite the fact that it offered shareholders' a higher valuation and better composition (cash rather than shares) than Behemoth's offer; (3) failing to negotiate with NPC or even mention NPC's offer to Behemoth, to get Behemoth to match NPC's offer; and (4) signing the Financing Agreement containing the Covenants that thwart NPC's offer.

Pia, also a BFF shareholder, sued the Whiz Kids, claiming that they breached their fiduciary duty as controllers of BFF, by diverting to themselves $1B of the compensation Behemoth was paying for BFF (because Pia and other shareholders only get Behemoth shares in the acquisition, while the Whiz Kids each get Behemoth shares plus $2M in cash). **Discuss both Pierre's and Pia's suits**. You may assume that in both suits, Defendant did not contest Plaintiff's standing (so don't discuss that).

Model answer for the Spring 2019 M&A exam[1]

1. Pierre's suit:

a. As directors, defendants owe BFF a FD. No self-dealing, so entire fairness doesn't apply.

b. *Revlon* doesn't apply. The board has embarked on a transaction, but there's no change of control because following the deal the merged firm wouldn't have a controller (before the merger no Behemoth SH had >1%, and after it the largest BFF SH would have 0.1%),[2] and payment is entirely in shares (*Paramount*). If the Retention Agreement is part of the consideration (see 2b) then *Revlon* may apply under *Smurfit-Stone*, but likely won't (in *Smurfit*, 50% of compensation to all SHs was cash; here, only ~6% cash to only 52% of SHs).

c. Under *Unocal*, enhanced scrutiny applies when the board deploys corporate power against SHs' right to sell to an acquirer. Financing Agreement limits some acquirers' ability to buy BFF, but they can overcome it by paying or refinancing the loan. If this constraint encroaches on SH's right to sell, then any action that reduces BFF's cash or makes it less appealing to an acquirer could trigger *Unocal* – an extreme result. So, *Unocal* probably doesn't apply. Also, *Blasius* required that interfering with the SH's right was the primary purpose. Here, primary purpose was to fund solutions to the well pressure problem. When "poison debt" is a takeover defense, covenants can be waived by debtor's board (a "deactivator"), but here they can be waived by the creditor, suggesting they protect creditor's financial interests, not board's entrenchment interests. But later cases (e.g., *Selectica*) suggest enhanced scrutiny applies whenever the effect is to limit SHs' rights, regardless of purpose.

d. Application – BJR: No self-dealing, negligence or illegality alleged. No corporate waste, because a reasonable person could believe the Covenants are needed for

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[1] The fact pattern is loosely based on the takeover contest between Chevron and Occidental Petroleum over Anadarko. See, e.g., Bradley Olson & Rebecca Elliot, Bid Tops Chevron's Deal for Anadarko, WSJ (4/25/19), p. B1; Bradley Olson, Anadarko CEO's Payout Gets Sweeter, WSJ (4/24/19), p. B1. The retention agreement issue was inspired by: *van der Fluit v. Yates* (Del. Ch. Nov. 30, 2017). This exam is harder than the typical exam, because the facts led to ambiguous outcomes on major issues (e.g., whether *Revlon* & *Unocal* applied, whether there was a control group). This meant that a complete answer required analysis under multiple contingencies.

[2] A common mistake on the exam was a claim that *Revlon* applied because BFF might have had a controller before the deal (but not after). This is a misunderstanding of the case. *Revlon* protects the right of non-controlling SHs to share in the fair value of the firm, including the control premium that is paid when someone acquires control of their firm. One such situation is when the shareholders are cashed out (since they won't be shareholders in the future, the board must only consider the interests that the current shareholders would benefit from). A second situation is when the firm is acquired by someone who will control it (whether or not it had a controller before the deal). In such a case, the only time the non-controlling shareholders can get the control premium would be at the time of the control-changing deal, so the firm must get the best outcome for the shareholder at that time. So *Revlon* asks whether the merged firm would have a controller after the deal. In contrast, even if BFF had a controller before the deal (which is doubtful, see 2a in the exam answer), that would not cause *Revlon* to apply because following the deal there is no controller (so if anyone in the future buys the merged BFF, they would have to pay all shareholders, including BFF's old shareholders, a control premium).

Behemoth to agree to the Financing Agreement, which could benefit shareholders by facilitating solutions to the well pressure problem. Pierre loses. If *Revlon* applied (contra 1b), board's preference for Behemoth based on post-acquisition synergies wouldn't be a legitimate purpose. If NPC was rejected solely due to financing difficulties, Pierre still loses (see 1e), but if post-acquisition synergies motivated, board fails enhanced scrutiny and Pierre wins.[3]

e. If *Unocal* applied (contra 1c), the Covenants would be assessed under enhanced scrutiny. The first prong would be identical to the BJR analysis above (1d), so board would win if the Covenants passed the second prong's reasonability test. They aren't coercive (don't force SH vote),[4] nor preclusive – the board can't deactivate them, but they don't mathematically preclude NPC from acquiring BFF; they only require NPC to refinance the loan. Are they otherwise unreasonable? Probably not, since they're common creditor protections and Financing Agreement wasn't created primarily to thwart NPC – it provides funds BFF doesn't have, to address a significant problem (well pressure). Pierre still loses.

f. Pierre's claims 2/3 fail even if *Revlon* applied, because the board may select the lower-priced offer for reasons affecting current SHs' welfare (here: the board believes NPC has 40% chance of failing to finance their offer). This is similar to rejecting the higher offer in *Dollar Thrifty* due to antitrust concerns. *Dollar Thrifty* also found *Revlon* doesn't require leveraging an undesirable offer to improve a desirable one, so not mentioning NPC's offer to Behemoth doesn't breach FD.

<u>2. Pia's suit</u>:

a. **Duty**: SHs owe FD only if they are controllers. If all 500 Whiz Kids are collectively a control group, they own 52% of BFF and are presumed controllers since they own over 50%. Under *Frank*, they are a control group only if they are connected in a legally meaningful way. The only legal relationship connecting the Whiz Kids is the Retention Agreement, which they all signed. But their obligations there are as employees (remain at work for a year), not as SHs.

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[3] Some students found that *Revlon* applied but considered corporate culture and substantive coercion as legitimate purposes, even though these affect the welfare of post-deal SHs, not current ones. Even when a *Unocal* analysis is done, it cannot include post-deal interests if *Revlon* applies. It is appropriate to consider these interests in the portions of the analysis that hold that *Revlon* did not apply.

[4] Some students analogized the Covenants to a termination fee, but the two are different. In the case of a termination fee (or "family jewels", or other provisions transferring value out of the firm if a deal is not approved), terminating the deal results in a loss of that value to the voting SHs, which may force them to vote in favor of a deal they don't support, if the loss is sufficiently large. But in the case of the covenants, a vote in favor of the deal merely requires paying the creditor immediately – this is not a transfer of value because BFF owes this money to Behemoth. Immediate repayment may be inconvenient for BFF, and even more so for any prospective acquirer who relies on BFF's own assets to fund the acquisition, but BFF could refinance (borrow from someone else the money to pay Behemoth back). The change of control clause merely prevents BFF (and potential acquirers) from using the money Behemoth lent to BFF for financing, if someone else acquired BFF. Therefore, while the Covenants may somewhat deter other potential acquirers enough to apply *Unocal* (but probably not, see 1c), they do not represent a loss of BFF's value that would coerce shareholders to approve Behemoth's acquisition even if they didn't think the price is fair.

There's no obligation to vote their shares in a particular way, though the agreement does create an incentive to vote in favor of Behemoth's acquisition (to get the bonus). Since this is just an incentive and no common legal obligation affects their behavior as shareholders, the Whiz Kids likely don't owe FD, and Pia loses her suit.

b. **SoR**: If nonetheless Whiz Kids are deemed controllers, then entire fairness will probably apply under *Hammons*, because they're receiving something different from the mSHs ($2M cash bonus). If bonus is related to their retention as employees and unrelated to their status as shareholders, then BJR applies under *Sinclair* because they aren't receiving anything to the detriment of mSHs. The agreement is called a Retention Agreement (related to employment) and doesn't address their shareholding. However, bonus is tied to the deal, not work performance & wasn't offered to non-shareholder employees. So likely it's self-dealing.
Entire fairness applies unless deal had "robust procedural protections" (*Hammons*). Here, deal negotiated by a board that's independent of the Whiz Kids,[5] but wasn't conditioned on approval of mSHs.[6] Under *Khan*, when one but not both protections are implemented (as here), BoP of unfairness shifts to plaintiff.

c. **Application**: If there's a duty and entire fairness applies, court applies *Weinberger*'s fairness framework. Somewhat fair process: An independent, fully-empowered board negotiated and approved the deal, but deal can pass without (and isn't conditioned on) majority approval of non-Whiz Kid SHs. To assess fair price, court would examine if Whiz Kids are the type of employees whom reasonable acquirers offer retention bonuses to prevent defection ahead of an acquisition, even if they didn't own shares. If so, "price" is fair if bonus paid isn't higher than the amount such an acquirer would pay.[7] Otherwise, the Retention Agreement is unfair and Whiz Kids breached their FD.
If there's a duty but BJR applies, there's no breach because there's no corporate waste (reasonable person can find that all SHs gain from a retention agreement that keeps key employees, to maintain Target's value to Acquirer).

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[5] The "robust procedural protections" consider negotiation & approval by a board committee (due to the reality that most of the time, at least some directors are conflicted by ties to a controller), but here all directors are independent of the Whiz Kids, so the fact that an independent board negotiated and approved the deal is equivalent to the independent special committee in the typical case.

[6] Under the exam facts, the SH vote was scheduled but didn't take place yet. The fact that the vote didn't happen yet, in itself, might not be enough to find that procedural protections did not exist, since the vote was planned (in a real case, a court may stay the case to allow the SH meeting to take place). The lack of a vote would not demonstrate unfair process under the *Weinberger* fairness test (since the process did call for a vote; it just didn't take place yet). But this doesn't matter in the present case, because absent conditioning the deal on mSH approval, the approval is not deemed a "robust procedural protection". No such conditioning here, so procedural protections aren't sufficiently robust, and entire fairness SoR applies.

[7] Note that the "price" assessed here for fairness is that of the $1B retention bonus, not the $33B Behemoth is paying for BFF. This is because of Pia's particular claim. She does not claim that the controller caused BFF to be sold to Behemoth for an unfairly low price (e.g., because the controller cares for Behemoth's interests), but rather that the controller diverted to itself $1B of the value that Behemoth was willing to pay for BFF. The Whiz Kids counter that the $1B was paid to retain key employees (who only happen to be controllers), so the $1B is not part of the shareholder compensation. The "fair price" inquiry, therefore, examines whether the Whiz Kids are right; if a reasonable acquirer would pay $1B to retain employees such as the Whiz Kids, then the terms are fair to the non-controllers.