

2007

William Borghetti v. System & Computer Technolgy : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

WILLIAM BORGHETTI, et al

Plaintiffs/Appellants,

v.

SYSTEM & COMPUTER TECHNOLOGY,
INC., et al

Defendants/Appellee.

Court of Appeals No. 20070513-SC

REPLY BRIEF OF APPELLANT

**APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT
THE HONORABLE JOHN PAUL KENNEDY**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	-ii-
ARGUMENT AND AUTHORITY	-1-
I. THE AFFIDAVIT OF AVNER KALAY CLEARLY RAISED AN ISSUE OF A MATERIAL FACT. IF THE DENIAL OF THE MOTION TO STRIKE THE AFFIDAVIT WAS NOT AN ABUSE OF DISCRETION, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR TRIAL ON THE MERITS.	-1-
II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY THE DEFENDANTS' MOTION TO STRIKE THE AFFIDAVIT OF AVNER KALAY. THERE WAS A MORE THAN SUFFICIENT SHOWING THAT THE METHODOLOGY IS GENERALLY ACCEPTED AND RELIABLE.	-3-
III. THE PLAINTIFFS CLEARLY RAISED ISSUES OF FACT ON THE BREACH OF FIDUCIARY DUTY CLAIMS.	-12-
IV. THE ATTORNEYS CONTENTION THAT THEY DID NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP IS DISPUTED BY NUMEROUS FACTS	-19-
CONCLUSION	-21-

TABLE OF AUTHORITIES

<u>Weinberger v. UOP, Inc.</u> , 457 A.2d 701 (Del. 1983)	-3-, -7-
<u>Cox v. Berry</u> , 19 Utah 2d 352, 431 P. 2d 575 (1967).	-12-
<u>Bergeson v. Life Insurance Corporation of America</u> , 265 F.2d 227, 232 (10 th Cir. 1959)	-12-
<u>Bingham Consolidation Co. v. Groesbeck</u> 105 P.3d 365 (Ct.App. Utah (2004)	-5-
<u>Blackmore Partners, L.P. v. Link Energy, LLC</u> , 2005 WL 2709639 (Del.Ch. 2005)	-19-
<u>HB Korenvaes Investments, L.P. v. Marriott Corporation</u> , 1993 WL 257422 (Del.Ch. 1993).	-10-
<u>Kilpatrick v. Wiley, Rein & Fielding</u> , 37 P.3d 1130 (Utah 2001)	-20-
<u>LeBeau v. M.G. Corp., Inc.</u> , 1998 Del. Ch. LEXIS 9	-1-
<u>Paskill Corp. v. Alcoma Corp.</u> 747 A.2d 549, 556 (Del. 2000)	-5-
<u>Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.</u> , 506 A. 2d 173 (1985)	-13-
<u>Roderick v. Ricks</u> , 54 P.3d 1119 (Utah 2002)	-20-
<u>Smith v. Van Gorkum</u> , 488 A.2d 858 (Del. 1985)	-15-

STATUTES AND RULES

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ARGUMENT AND AUTHORITY

I. THE AFFIDAVIT OF AVNER KALAY CLEARLY RAISED AN ISSUE OF A MATERIAL FACT. IF THE DENIAL OF THE MOTION TO STRIKE THE AFFIDAVIT WAS NOT AN ABUSE OF DISCRETION, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR TRIAL ON THE MERITS.

Paragraph 14 of Avner Kalay's affidavit states that "the fair value of Mr. Borghetti's shares at the time of the merger was between \$4.2 million and \$6.706 million." (R. 4645).

The Defendants address that by arguing that the only valid approach to arriving at the fair value of a dissenter's shares under Delaware 8 *Del. C.* §262, is to "to value the corporation itself, as distinguished from a fraction of its shares as they may exist in the hands of a particular shareholder." LeBeau v. M.G. Corp., Inc., 1998 Del. Ch. LEXIS 9, 7.

The quote from LeBeau, taken out of context, appears to support the Defendants' position. However, like the many other cases with similar quotes, in context, the meaning of the quote is made clear. In LeBeau, the court was determining whether the expert valuation of Robert Reilly was permissible. The court rule it impermissible on the basis that "Reilly's capital market valuation method is impermissible because it includes a built-in minority discount." Id.

Like all other cases discussing the valuation of the companies in Delaware appraisal actions, the principal expressed is that neither minority interest discounts nor control interest premiums are allowed in the calculation of the fair value of the shares. To interpret the quote in accord with Defendant's position would directly contradict the plain language of the statute which reads "the Court shall determine the fair market value of the shares..." 8 *Del. C.* §262.

Further, it is clear that Dr. Kalay was valuing the entire company via a methodology that determines the value of all of the common shares in the company. "The

value of the common stocks, as described in the fifth column of Table 7 is \$46.64 million and the damages to Mr. Borghetti (including 8% prejudgment interest rate) are \$8.6 million. (R. 3247, Exh. C., at 17). He then checks his calculation by adding the common shares figure he reached to the figure for the preferred shares and arrives at the correct market value.

The Defendants do not assert, nor could they assert, that Dr. Kalay's opinion applied either discounts or premiums to any block of the common shares. The expert report of Avner Kalay (R. 3247, Exh. C), at pages 27 and 28 clearly is valuing 100% of the equity of the common stocks.

Thus, Dr. Kalay was valuing the entire company and from those calculations derived the fair value of Mr. Borghetti's shares. That is precisely the procedure required under the statute. The fact that in his affidavit he reduced the figure down to only Mr. Borghetti's proportional share (including interest) simply carried the analysis to its terminating point: actual damages.

If any of the opinions lack credibility it is both of the Defendants' expert's reports. They both found the fair value of Mr. Borghetti's shares to be zero. It simply is not possible for shares in a going concern with even the slightest possibility of success to be worth nothing.

There can be no question that Mr. Borghetti's shares had a value. But for the improper merger, the company had the potential of continued growth and profits. At the time of the merger the company had \$15.1 million in cash and cash equivalents. (R. 3247, Exh. C., at 7). Even had the company continued to lose money (as technology start up companies often do), it had sufficient capital to continue. Id.

The statutes and the cases recognize the need to protect common shareholders' interests. The statute states that the appraisal is conducted to determine the fair value of the dissenter's shares. The cases state that "fundamentally, a Delaware court must

employ a liberalized approach to valuation embracing “proof of value by any techniques or methods which are generally considered acceptable in the financial community.” *See, i.e. Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

The appeal on the appraisal issue (as to both groups of Defendants) can be summarized into two competing views.

First, Mr. Borghetti’s position that all shares in an ongoing company have some value and if they are cancelled in a merger or liquidation the share holder is entitled to be compensated.

Second, the Defendants’ position that if a discounted cash flow analysis or market analysis shows that the current value of the entire company is less than a preference amount, the company, its directors, and the controlling shareholder may sell the company to the controlling shareholder, receive compensation for their decision, pay the rest to the preferred shareholders (who held two of the three positions on the “independent” committee that approved the merger) and leave the small common shareholders with nothing.

The inequity of the second view, that those in control can take something of clear value without compensation therefor, mandates adoption of the first view. Mr. Borghetti is entitled to some compensation.

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO DENY THE DEFENDANTS’ MOTION TO STRIKE THE AFFIDAVIT OF AVNER KALAY. THERE WAS A MORE THAN SUFFICIENT SHOWING THAT THE METHODOLOGY IS GENERALLY ACCEPTED AND RELIABLE.

This Court reviews the denial of the SCT Defendants’ motion to strike the expert testimony of Avner Kalay for an abuse of discretion. *In re G.B.*, 2002 UT 270, ¶10, 53 P.3d 963.

In *Weinberger v. UOP, Inc.* 457 A.2d 701 (Del. 1983), the Delaware Supreme Court explicitly broadened the interpretation of the Delaware Corporations Code, section 262 on appraisal rights, and adopted a more liberal approach to the valuation process (*Id.* at 704). The Court concluded that an exclusive method for valuation was outmoded and a more liberal approach to stock valuation and appraisal proceedings must include proof of value by *any* techniques or methods which are generally considered acceptable in the financial community (*Id.* at 712). They held that the most popularly employed techniques for valuation no longer exclusively control appraisal and valuation proceedings, and that alternative valuation techniques should be allowed. (*Id.* at 713; See also, *Cede & Co. v. Technicolor Inc.* 684 A.2d 289, 296-297 (Del. 1996)). The Court in *Weinberger* further concluded that when determining the value that the stockholder is entitled to be paid for that which has been taken from him, a number of relevant factors are to be included. The Court stated:

In determining what figure represents [the] true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained . . . This is not only in accord with the realities of present day affairs, but it is thoroughly consonant with the purpose and intent of our statutory law.
(*Id.* at 713).

So not only are the valuation methods that are accepted to be liberally construed by the Courts, but it is the Court's opinion according to Weinberger that all the relevant

factors should be included when determining value as well (See Also, Cede & Co. at 295¹). Market value is simply a factor to be used and in fact the Black-Scholes method used by Kalay utilized market value as a factor.

Utah has also adopted a broad and liberal interpretation of the valuation methods that are allowed. In Bingham Consolidation Co. v. Groesbeck 105 P.3d 365 (Ct.App. Utah (2004)), the Utah Court of Appeals stated that the goal of appraisal is to ascertain the actual worth of that which the dissenter loses . . . there are no fixed methods for valuating the shares, and most courts permit all generally accepted techniques of valuation used in the financial community. (*Id.* at 370, citing Oakridge Energy Inc. v. Clifton 937 P.2d 130, 132 (Utah 1997), See also, Paskill Corp. v. Alcoma Corp. 747 A.2d 549, 556 (Del. 2000)). They concluded that they are in agreement with other jurisdictions that, “a court should make use of all generally accepted techniques of valuation used in the financial community.” (Bingham at 375, See also, Paskill Corp. at 556).

Kalay’s use of the Black-Scholes Model, simply because it is an alternative method, cannot be excluded because it is clearly a generally accepted principle and

¹ The Court in Cede Co. v. Technicolor, Inc. cited and followed Weinberger for the proposition that the Court must broaden the process for determining fair value, and factors that are not the product of speculation may be considered when determining value, including the nature of the enterprise (Cede Co. v. Technicolor, Inc. (1996) 684 A.2d 289, 295).

technique in the financial community. Scholes and Merton shared the 1997 Nobel Prize in economics for their work on the development of this formula. (Brealey, Richard A., and Stuart C. Myers, and Alan J. Marcus. Fundamentals of Corporate Finance, 4th Ed. New York: McGraw Hill Companies, Inc., 2004, page 651, (excerpt attached to R. 5306, Exhibit W). The field of finance has developed a variety of option pricing models with the fundamental ones being the binomial model and the Black-Scholes model option pricing models. Over time, these models and their extensions have been used in a variety of evaluative settings (Benaroch, Michel and Robert Kauffman. (1999) “A Case for Using Real Options Pricing Analysis to Evaluate Information Technology Project Investments.” *Information Systems Research*, Vol. 10, No.1:70-86, (excerpt attached to R. 5306, Exhibit X).

The literature on the Black-Scholes model and its uses in the finance community is overwhelming. It is a formula that has been in use for over 30 years, applicable to a number of evaluations. It has not only been utilized in valuing options, but has been used to value equity and debt in a company. (See generally, Damodaran, Aswath. Investment Valuation: Tools and Techniques for Determining the Value of Any Asset, 2nd Ed. New York: John Wiley & Sons, Inc. 1996, page 828-829).

The Black-Scholes technique is frequently cited and written about as a valuation method for businesses and technologies based on option theory and the method takes into account a number of complexities and nuances that affect the value of a company that

other traditional methods do not. It is a valid method when valuing a firm in distress and also accounts for a firm's flexibility, and has become a very popular approach to valuation. (See, Boer, Peter F. The Real Options Solution: Finding Total Value in a High Risk World, New York, NY. John Wiley & Sons, Inc., 2002, pages vii and 95; See also, Copeland, T., Koller, T., Murrin, J. Valuation: Measuring and Managing the Value of Companies. McKinsey & Company, Inc. New York, NY 1994, page 399; See Also, Damodaran, Aswath. The Cost of Distress: Survival, Truncation Risk and Valuation. January 2006 pages 2, 36).

It is clearly a generally accepted, frequently cited and utilized method of valuation in the financial community. It has achieved status in the financial community as being one of the most seminal and breakthrough formulas of its time. Furthermore, Defendant's expert Grabowski in his expert report of May 31, 2006 pointed out this exact contention. He stated that, "The Black-Scholes option pricing model is widely accepted in the financial community as a methodology to estimate the price of an option, or derivative instrument, and . . . may be used in certain instances to provide the value of the equity of a company under financial distress." (R. 3247, Ex A. Grabowski Report at p. 14).

Pursuant to both Delaware and Utah law those formulas and techniques which are generally accepted in the financial community are now clearly allowed by the Courts. (See, Weinberger at 712 and Bingham Consolidation at 370). Therefore, because the Black-Scholes method is widely accepted and utilized in the financial community, not

only for the valuing of options but as a valuation technique for equity as well, Professor Kalay's testimony utilizing this methodology was clearly admissible and the district court properly denied the Defendants' motion to strike.

The cases relied on by the Defendants in their cross appeal are easily distinguished. Snyder v. Commissioner of Internal Revenue, 93 T.C. 529 (1989) concerns the valuation of a company, "Libbyfam," which was organized as a personal holding company, and its sole asset was 300 shares of common stock in W.L. Gore & Associates, Inc. ('Gore'), a publicly traded corporation. In that case, decided in 1989, the tax court rejected the Black-Scholes model because it was being applied to a personal holding corporation. The shares were wholly owned by the tax payer who then created an irrevocable trust for the benefit of her great-grandchildren and funded it with 1,000 of her 3,951 total shares of common stock in Libbyfam.

Everyone of the articles and books cited by Dr. Kalay in his affidavit to show that the Black-Scholes method for valuing common stock is generally accepted and reliable was published long after the tax court decision. With one exception they were all published at least ten years later.

More importantly, Campus Pipeline had substantially more shareholders than one woman and her great-grandchildren.

In In re Med Diversified, Inc., 334 B.R. 89 (Bankr. E.D.N.Y. 2005), the expert

whose opinion was found impermissible (Mr. Peltz) specifically testified: “I’m not a certified valuation expert, and I don’t issue valuation reports.” Further, as to his opinion applying the Black-Scholes Method for valuing a six and a half month “option” for acquiring 100% of the privately held shares of Addus, the court stated it was “not prepared to embark on a cruise down this unexplored river in the heart of the jungle in order to discover the application of this Method outside the principal context in which it has been customarily applied.” and “The Black-Scholes Method has simply not been shown to provide a reliable measure of the value of an option to purchase 100% of controlled shares in a privately held company and the parties failed to set forth any credible evidence otherwise.”

In this case, the Plaintiffs submitted substantial evidence that the Black-Scholes Method was used to value shares in financially stressed companies like Campus Pipeline. (R. 4645 at 7-15). Unlike Mr. Peltz, Dr. Kalay has extensive credentials.²

²Avner Kalay is a professor at the David Eccles School of Business at the University of Utah where he teaches courses in valuation. He received his B.A. in economics from Tel Aviv University, a Masters in Business Administration from the University of Rochester and a PhD in Business Administration from the University of Rochester. Professor Kalay was a professor of finance at Tel Aviv University and was a member of NYU’s business school faculty and was tenured at NYU in 1985; NYU’s finance department has been consistently ranked among the top 5 in the world. Professor Kalay has published numerous articles in leading finance journals and Kalay formerly worked as a consultant for the SEC. (R. 4645)

The case In re Apple Computer, Inc. Sec. Litig., 243 F.Supp. 2d 1012, 1028 (N.D. Cal. 2002), stands for the sole proposition that a Black-Scholes analysis can not be used to explain the selling patterns of insiders, and thereby show scienter in a securities fraud case. It has no relevance to this litigation. Neither do the cases applying Black-Scholes to child support or the significance of a benefit achieved at settlement for use in setting the size of the attorneys fees awarded.

In Orban v. Field, 1997 WL 153831 (Del.Ch. 1997), the preferred shareholders had a contractual right to vote for a liquidation. Here the preferred shareholders never contracted for such rights. This is critical, since the rights of preferred stock are largely contractual in nature and ordinarily courts should enforce the terms of the contract, not invent new ones for which the parties did not bargain. HB Korenvaes Investments, L.P. v. Marriott Corporation, 1993 WL 257422 (Del.Ch. 1993). In Orban the common shareholder that later objected to the sale (Orban), had agreed that the company needed to either be sold or that it needed to obtain additional capital. Here the company had sufficient money to last years before it would have ever run out of money. In Orban, the board hired an independent investment banking firm to assist it in finding a purchaser or financing. Here, the board hired no one to attempt find another purchaser or additional financing – the interested board members performed all of these tasks themselves. In Orban, there was never any evidence that the fair value was not had and no one claimed that the sale was not in the best interest of the corporation. In Orban, the acts were

approved by a fully informed majority of disinterested directors.

Thus, the Defendants cite to several cases off point to discredit the use of Black-Scholes in this context. In support of Dr. Kalay's opinion, the Plaintiffs' provided over 8 pages of citations supporting of the use of Black-Scholes in this context. The test is general acceptance in the financial field and not general acceptance by other courts in other contexts.

Given the overwhelming evidence submitted of general acceptance and reliability, and the agreement of the Defendants' expert that "The Black-Scholes option pricing model . . . may be used in certain instances to provide the value of the equity of a company under financial distress," (R. 1982, Ex. W, Grabowski Report, p. 14), the district court did not abuse its discretion in denying the SCT Defendants' motion to strike the testimony of Dr. Kalay.

Even if this Court were to strike the affidavit and report of Dr. Kalay, it is clear that the Plaintiffs are still entitled to a trial on all of their claims. The cases the Defendants cite relate primarily to appraisal actions. Even in an appraisal action, the Delaware court specifically stated that "if neither party adduces evidence sufficient to satisfy this burden (proving fair value of the shares), "the court must then use its own independent judgment to determine fair value." Highfields Capital, Ltd. v. AXA Fin., Inc., 2007 Del. Ch. LEXIS 126, 19-20.

On the other causes of action the damages suffered by the Plaintiffs are the value of their shares on the date of the merger, plus interest.

The simple fact that the Plaintiffs owned stock which clearly had a monetary value and that the SCT defendants cancelled that stock shows damages.

III. THE PLAINTIFFS CLEARLY RAISED ISSUES OF FACT ON THE BREACH OF FIDUCIARY DUTY CLAIMS.

In their brief the SCT Defendants assert that they were entitled to summary judgment based upon the entire fairness of the transaction. This issue was extensively briefed below in a 42 page memorandum and 125 pages of contested facts. (R. 4576, R. 4290). The arguments on appeal have not changed.

American corporate law in every state imposes on corporate directors and officers a duty of loyalty and a duty of care. In Delaware, these duties are a matter of common law. As fiduciary for the corporation, the board of directors owes a duty of undivided loyalty to the corporation at all times. Directors and officers must “act loyally and in good faith without assuming any position in conflict with the interests of the corporation.” Bergeson v. Life Insurance Corporation of America, 265 F.2d 227, 232 (10th Cir. 1959). This Court has stated,

“There is no doubt that one who is elected as an officer or director of a corporation accepts a fiduciary responsibility to serve the interests of those who elect him which he must discharge with fidelity and which he should not desert for his own gain.”

Cox v. Berry, 19 Utah 2d 352, 431 P. 2d 575 (1967).

In the context of a proposed sale of the corporation, the content of the duty of loyalty becomes clear and mandatory. In the seminal case, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A. 2d 173 (1985), the Delaware Supreme Court held that when the sale of the company becomes inevitable, the sole duty of the directors is to maximize the value that the shares will receive in the sale transaction.

In their brief the SCT Defendants argue that there was no evidence of an unfair price and no evidence of unfair dealing. The price Mr. Borghetti received, zero, as set forth above was clearly unfair.

As to unfair dealing the record is replete with instances of the unfairness.

The Campus Pipeline directors had extensive economic interests in the transaction that were at odds with those of the corporation and its shares.

The financial interests of the officers and directors in endorsing the transaction, regardless of its merits, are obvious:

- a. Thomas Lewis served as Chairman of the Board of Directors and Chief Executive Officer of CPI. He received an executive retention payment of approximately \$736,550 in addition to a \$787,500 termination fee in connection with the merger.
- b. Darin Gilson served as President, Chief Operating Officer and Director of CPI, and he received a retention bonus of approximately \$834,756 in connection with the merger.
- c. Fred Harman was a director of CPI and a member of the “special committee” that recommended the merger. Harman received compensation in connection with the merger. Harman was also a managing partner at Oak Investment Partners, which was a *preferred* shareholder of Campus Pipeline, with interests in direct conflict to those of the common stock.

- d. David Peterschmidt was a director of CPI and a member of the “special committee” that recommended the merger. Peterschmidt received compensation in connection with the merger. Peterschmidt was also a *preferred* shareholder of Campus Pipeline, with interests in direct conflict to those of the common stock.
- e. David Gardner was a director of CPI and a member of the “special committee” that recommended the merger. Although he was not an employee of Campus Pipeline at the time of the merger, he received retention bonuses of approximately \$137,489 in connection with the merger.
- f. Chad Muir was a director of CPI. Although he was not an employee of Campus Pipeline at the time of the merger, he received retention bonuses of approximately \$137,489 in connection with the merger.
- g. Eric Haskell was a director of CPI and received compensation in connection with the merger.
- h. Michael Chamberlain was a director of CPI and received compensation in connection with the merger.
- i. Allen Friedman was a director of CPI and received compensation in connection with the merger.
- j. Darin Gilson served as President, Chief Operating Officer and Director of CPI, and he received a retention bonus of approximately \$834,756 in connection with the merger.
- k. David Murray served as Vice President and Chief Technology Officer of CPI. Murray received severance payments of approximately \$117,848 in connection with the merger.
- l. Andy Cooley served as Senior Vice President of CPI, and received a retention bonus of approximately \$491,033 in connection with the merger. In addition, Cooley was later employed by SCT following the merger.
- m. Scott Doughman served as Vice President of Strategy and Corporate Development of CPI, and received a retention bonus of approximately

\$491,033 in connection with the merger. In addition, Doughman was later employed by SCT following the merger.

- n. John Dunn served as Vice President of CPI, and received a retention bonus of approximately \$491,033 in connection with the merger.
- o. Tyler Thatcher served as Vice President and Chief Financial Officer of CPI, and received a retention bonus of approximately \$491,033 in connection with the merger.

(R. 4576, p. 14-17)

Given the extensive conflicting interests of the Campus Pipeline directors and officers, they had a special obligation to be fully informed themselves, and to fully inform the common shareholders, as to the merits of the transaction. Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985). This duty they did not meet.

The only “outside” opinion they commissioned was from Thomas Weisel Partners – which was not an outsider at all. Thomas Weisel Partners was a preferred shareholder of Campus Pipeline and therefore had a strong conflict of interest with the Campus Pipeline common stock: As a preferred shareholder, Thomas Weisel Partners stood to lose if Campus Pipeline were to pursue a risky, entrepreneurial course of action and failed, while if Campus Pipeline were to succeed, the bulk of the upside would go to the common stock. (R. 4576 17-18; R. 4290, at ¶491, 492). Moreover, just in case this conflict of interest was not enough to skew Thomas Weisel Partners’ judgment, the Campus Pipeline fiduciaries saw fit to give Thomas Weisel Partners yet another conflict of interest: they made Thomas Weisel Partners’ fee partially contingent on the completion of the merger. (Id.).

Moreover, even if Thomas Weisel Partners could have overcome the inherent conflict of interest in its evaluation of the transaction, the terms of its engagement precluded it from doing so. The directors directed Thomas Weisel Partners to ignore the only relevant question: whether the transaction was fair and advantageous to Campus Pipeline's common stock. The answer to this question is obvious: the transaction provided no benefit to the common stock and therefore could not have been in their interest so long as any shred of hope of continuing the business remained. Thomas Weisel Partners, however, did not consider this issue. Accordingly, its opinion is worthless. (R. 4290, at ¶429-432).

In short, Thomas Weisel Partners' advice to the board was not the result of an independent evaluation (even by a conflicted advisor) but rather was determined entirely by the terms of its assignment.

The deposition testimony of defendants Harman and Doughman, as well as the terms of the assignment to Thomas Weisel Partners, make clear that the directors ignored their duty of loyalty to act solely in the interests of the common stock. Thus, director Harman testified:

- a. "We were working on behalf of the entire shareholder group, not just one class, common or preferred." (R. 3957 at HH, 71).
- b. The board was working to get best value for "the company" rather than the common stock. (R. 3957 at HH, 62)
- c. He had a duty to all stakeholders not only the common stock. (R. 3957 at HH, 168)

- d. He sought to “balance” the interests of different stakeholders, not simply to promote the interests of the common stock. (R. 3957 at HH, 171).

His duty, however, was to work for common shareholders alone. Harman was aware that the proposed transaction would wipe out the value of the common stock. (*Id.*, at pp. 71, 185). In light of the conflict of interest between common stock and other investors, his decision to pursue this transaction because it was in the interests of other stakeholders is a clear, intentional, violation of the Revlon rule.

Had the directors been working in the interests of the common shareholders, they would have considered and adopted alternative courses of action, any of which would have been preferable to common shareholders to sale to SCT, which merely ensured that they would receive the worst possible outcome, a certain payment of zero.

Thus, Harman testified that Campus Pipeline had enough cash to last for another year. (R. 3957 at HH, 68). From the perspective of the common stock, continuing to operate the company would have allowed for search for alternative sources of cash, including increased sale or an alternative investor, thus keeping open the possibility of a return on their investment. Harman, however, testified that the board was not looking for more cash at that time. (R. 3957 at HH, 68, 87). Doughman testified that Campus Pipeline had only to lay off twenty employees to become profitable and that after making those layoffs the company was indeed breaking even. (R. 3572 at CC, 39-40). Moreover, the Campus Pipeline business was on an “upward trajectory”. (R. 3957 at HH, 114-15).

The clear interest of the common stock, then, would have been to continue the business, not to sell for no value.

Similarly, a board interested in pursuing the interests of the common stock would have pursued alternative transactions that might have provided value to the Campus Pipeline common stock. Harman also admits the possibility of an alternative transaction, with Oak Partners, that was not pursued. (R. 3957 at HH, 76).

Revlon and its progeny in Delaware and elsewhere make clear that once a board has decided that the sale of the company is inevitable, its sole duty is to maximize the return to the common shareholders. The facts asserted in opposition to the motions for summary judgment demonstrate that the Campus Pipeline directors and officers viewed their job differently. Harman explicitly stated, and their actions clearly demonstrate, that they viewed their obligations as, at most, to “balance” the interests of different Campus Pipeline constituencies, including its customer SCT and, most importantly, themselves.

In this case, as discussed above, the Plaintiffs asserted facts showing that the directors failed to consider alternative transactions, failed to exercise their business judgment in the interests of the common stock, and specifically instructed their outside consultant, Thomas Weisel Partners, to assume the very result it needed to consider, namely whether the sale of Campus Pipeline to SCT was the best available course of action from the perspective of Campus Pipeline’s common stock. The directors and officers sold Campus Pipeline to SCT in a transaction from which they benefitted but

which gave no value whatsoever to the common stock. It was hardly an arms-length transaction arrived at through fair dealing for a fair price.

The cases cited are easily distinguished. In the unpublished decision of Blackmore Partners, L.P. v. Link Energy, LLC, 2005 WL 2709639 (Del.Ch. 2005), the corporation had just emerged from bankruptcy. Here there is no evidence that the company was anywhere near bankruptcy and had millions of dollars of cash on hand. Link, before selling itself, first sold non strategic assets in order to stay in business. Here, there is no evidence of any attempt to sell assets or obtain financing or do anything else prior to sale, because, of course, Campus Pipeline had millions in the bank at the time of sale. Link hired independent outside advisors to assist it in finding capital. Link's special committee was clearly independent. It was undisputed that Link was insolvent at all relevant times, unlike Campus Pipeline. The Link corporate charter did not entitle the common shareholders (unit holders) to vote on the sale of substantially all of Link's assets – here different voting rules applied. In Link business prospects were declining, but Campus Pipeline's prospects were on the rise. In Link, the board of directors owed a fiduciary duty to the note-holders because of insolvency – no such duty was owed here, indeed, the board's paramount duty was to the common shareholders.

IV. THE ATTORNEYS CONTENTION THAT THEY DID NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP IS DISPUTED BY NUMEROUS FACTS

As was extensively briefed below, (R. 4608-4627) whether Bendinger Crockett and Mr. Borghetti had an attorney client relationship is a question of fact for the jury.

In Kilpatrick v. Wiley, Rein & Fielding, 37 P.3d 1130 (Utah 2001), this Court was faced with whether an implied attorney-client relationship had been established between the members and the counsel for the company. The Court stated:

[T]he proper determination of whether an implied attorney-client relationship exists hinges on whether the party had a *reasonable belief* that it was represented. . . in making the determination of whether an implied attorney-client relationship existed, one factor to consider is the attorney's direct involvement in the party's legal interests

(*Id.* at 1139-1140)

In Roderick v. Ricks, 54 P.3d 1119 (Utah 2002), this Court stated that, “in order for a person to reasonably believe that an attorney represents the person, (1) the person must subjectively believe the attorney represents him or her and (2) this subjective belief must be reasonable under the circumstances.” (*Id.* at 1124, internal citations omitted).

Here, there is no doubt that “advice” and “assistance” were “both sought and received”.

In the Plaintiffs’ Statement of Disputed and Additional Facts (R. 4290), the relationship between Jeffery Williams and Mr. Borghetti is detailed in paragraphs 156-190. In those paragraphs Mr. Borghetti identifies numerous meetings, emails, telephone calls and face to face meetings during which Mr. Williams and Mr. Borghetti discussed the possible claims, including appraisals, the potential for damages, the fee arrangement possibilities, Delaware law, the business judgment rule, and a multitude of other related topics. In addition, Mr. Williams told Mr. Borghetti he wanted to hire an expert to value the claim (167); told Mr. Borghetti to write a letter to SCT demanding appraisal rights for the shares (168); told Mr. Borghetti that the fraud and breach of fiduciary duty claims were better than an appraisal (171); and he requested and received Mr. Borghetti’s original and only copy of the documents necessary to pursue the claims

(178). Mr. Borghetti believed he had an attorney client relationship with Mr. Williams and his firm. (198). Only after the statute of limitations had passed by months did Mr. Williams send Mr. Borghetti a letter stating he was not going to pursue the case. (189).

Despite months of discussions, the hiring of valuation experts, the discussion of fee arrangements, the taking of possession of the only copy of the file and its retention until after the statute of limitations passed, the Bendinger Crockett Defendants assert no attorney client relationship existed. There was clearly an issue of fact for the jury and there is no basis for affirming dismissal on any other ground.

There are facts in dispute as to whether Borghetti had the legal sophistication to understand how to file when to file or perfect his appraisal. In paragraphs 201 through 220 demonstrate that Mr. Borghetti believed that Mr. Williams was his lawyer and that Mr. Williams was staying on top of the entire case including any appraisal action. The facts alleged also dispute the contention that Mr. Borghetti knew he had 120 days to file.

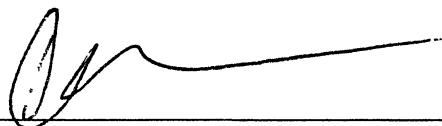
The Defendants' contention that Mr. Parson's told Mr. Borghetti of the deadline does not relieve them of the duty to file. More importantly, the fact is disputed. In paragraph 187, it is clear that Mr. Borghetti was not relying on Mr. Parsons and had ceased seeking attorneys other than Mr. Williams. Further, Mr. Parson's told Borghetti that he was not a litigator, had no litigation experience, and was unfamiliar with Delaware law.

CONCLUSION

The Court below erred in simply looking at Professor Kalay's calculation of market value and holding such figures to be the "end all, be all" in this action. Instead, the Court below should have focused on the "fair value" damage calculation from

Professor Kalay. The denial of the motion to strike the affidavit of Dr. Kalay was not an abuse of discretion. The damages calculation is equally applicable to the other causes of action. That fair value damage calculation clearly and undoubtedly shows that Plaintiffs suffered damages of between \$4.2 million and \$6.706 million. Respectfully, the Appellants request that both Summary Judgment Orders and Judgments be vacated and reversed and the case remanded for trial below.

Dated this 5th day of February, 2008

A handwritten signature in black ink, appearing to read 'C. Wenger', is written over a horizontal line.

Curtis L. Wenger,
Attorney for Plaintiffs/Appellants

PROOF OF SERVICE

I am a citizen of the United States and employed in Salt Lake County, Utah.

I am over the age of eighteen years and not a party to the within-entitled action. My business address is City Centre I, 175 East 400 South, Suite 900, Salt Lake City, Utah 84111. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States' Postal Service, Federal Express and hand delivery. On August 12, 2004, I placed for delivery via U.S. Mail two true and correct copies of the within document, **APPELLANT'S REPLY BRIEF** in a sealed envelope, to the following:

John Pearce
JONES WALDO HOLBROOK & McDONOUGH PC
170 South Main Street Suite 1500
Salt Lake City, Utah 84101

Stuart Schultz
Strong & Hanni
3 Triad Center Suite 500
Salt Lake City, Utah 84180

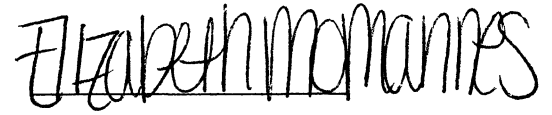
And, one original and nine copies of **APPELLANT'S REPLY BRIEF** were served,

☐ via United States Mail, first-class postage prepaid, to:
☐ via hand delivery

to the Clerk of the Utah Supreme Court

I declare that I am employed in the office of an attorney that has been admitted to this Court at whose direction the service was made.

Executed on February 5, 2008 at Salt Lake City, Utah.

A handwritten signature in black ink, reading "Elizabeth M. Mannes". The signature is written in a cursive style with a horizontal line drawn across the middle of the name.