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Case No. 758-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE JOHN Q. HAMMONS HOTELS	)	Civil Action No. 758-CC
INC. SHAREHOLDER LITIGATION	)	

MEMORANDUM OPINION

Date Submitted: September 2, 2010
Date Decided: January 14, 2011

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CHANDLER, Chancellor

In September of 2005, John Q. Hammons Hotels, Inc. ("JQH" or the "Company") merged with and into an acquisition vehicle indirectly owned by Jonathan Eilian (the "Merger"). Pursuant to the merger, holders of JQH Class A common stock received $24 per share in cash. Mr. John Q. Hammons ("Hammons") received a 2% interest in the preferred equity of the surviving limited partnership, as well as various other contractual rights and interests.[1] Plaintiffs in this purported class action seek damages for the allegedly inadequate price paid for the publicly-held Class A shares.[2] Plaintiffs contend that Hammons, JQH's controlling stockholder, used his control position to negotiate an array of private benefits for himself that were not shared with the minority stockholders. Eilian, a third-party with no previous relationship with Hammons or JQH, negotiated with Hammons and the special committee (which was formed to represent and negotiate on behalf of the minority stockholders) regarding the proposed terms of the transaction. The result of these negotiations was that the Class A stockholders received $24 cash for their shares, and Hammons, in exchange for his Class B stock and interest in a limited partnership controlled by JQH, received a small equity interest in the surviving limited partnership, a

[1] For a full description of the consideration that Hammons received in the Merger, see this Court's earlier summary judgment decision in this matter. *In re John Q. Hammons Hotels, Inc. S'holder Litig*., 2009 WL 3165613 (Del. Ch. Oct. 2, 2009), at *7 (text accompanying notes 7, 8 & 9).

[2] Plaintiffs Jolly Roger Fund LP, Jolly Rogers Off Shore Fund, Ltd. and Lemon Bay Partners were holders of JQH Class A stock on the merger date and filed class action complaints on behalf of the unaffiliated Class A stockholders.

preferred interest with a large liquidation preference, and various other contractual rights and obligations.

Plaintiffs contend that Hammons breached his fiduciary duties as a controlling stockholder by negotiating benefits for himself that were not shared with the minority stockholders. Plaintiffs also contend that the JQH directors breached their fiduciary duties by allowing the Merger to be negotiated through an allegedly deficient process, and by voting to approve the Merger. Plaintiffs also assert claims for aiding and abetting the breaches of fiduciary duty against the acquisition vehicles used to complete the Merger. Finally, plaintiffs assert three disclosure claims based on alleged misstatements and omissions in the Company's proxy statement.

On cross-motions for summary judgment, I concluded that *Kahn v. Lynch Communication Systems, Inc.*[3] does not mandate application of the entire fairness standard of review in this transaction, notwithstanding any procedural protections that may have been used. Rather, the use of sufficient procedural protections for the minority stockholders *could* have resulted in application of the business judgment standard of review in this case. The procedures used here (for reasons explained in my earlier opinion), however, were not sufficient to invoke business

[3] 638 A.2d 1110 (Del. 1994).

judgment review. As a result, I concluded that the appropriate standard of review is entire fairness.

The trial took place between June 8 and June 11, 2010. The principal issue at trial was whether any of the former directors of JQH breached their fiduciary duties under Delaware law when they approved a merger between JQH and an unaffiliated third-party acquirer where the undisputed factual record shows that the Merger: (1) was negotiated and approved by a special committee of independent and disinterested directors; (2) resulted from a competitive bidding process that lasted nine months; (3) was supported by the overwhelming majority of the unaffiliated JQH stockholders; (4) was based on full and accurate disclosures to the minority stockholders; and (5) paid the unaffiliated stockholders more on a relative basis then JQH's controlling stockholder received for his controlling interest. After the conclusion of the trial, plaintiffs notified the Court of their intention to dismiss all claims against all of the former JQH directors except Hammons. Thus, the only issues that remain to be decided are (1) whether Hammons breached any fiduciary duty in connection with the Merger and (2) whether the third-party acquirers (JQH Acquisition, LLC and JQH Merger Corp.) aided and abetted any breach of fiduciary duty.

I have carefully reviewed the parties' post-trial findings of fact and conclusions of law, and during trial I assessed the strength and credibility of the testimony offered by the various witnesses. And, as has become common in cases of this nature, the valuation issue became a battle of the experts. Ultimately, this decision turns on the fact that defendants' expert's proffered opinion was far more credible and persuasive than plaintiffs'. For the reasons more fully explained below, I find in favor of defendants. I conclude that the merger price of $24 per share was entirely fair. In addition, as described later, I find that the process that led to the transaction was fair, Hammons breached no fiduciary duty, and that plaintiffs failed to support their claim for aiding and abetting against the third-party acquirers.

I will not repeat the extensive (and identical) factual background of the case, which has been thoroughly documented in my October 2, 2009 summary judgment Memorandum Opinion.[4] All of the factual details recited in my earlier opinion are fully adopted here. For clarity, I have provided a brief outline of the procedural posture of the dispute above, and I will address briefly the testimonies of expert witnesses in the entire fairness review. With that said, I next proceed to the standard of review applicable to this case.

[4] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009).

I. ANALYSIS

A. The Entire Fairness of the Merger

In my earlier summary judgment Memorandum Opinion, I held that entire fairness would be the standard of review applicable to the Merger.[5] The dual prongs of entire fairness—fair dealing and fair price—must both be satisfied.[6] I acknowledge that "the initial burden of establishing entire fairness rests upon the party who stands on both sides of the transaction."[7] Here, however, plaintiffs bear the ultimate burden to show the transaction was unfair given the undisputed evidence that the transaction was approved by an independent and disinterested special committee of directors.[8] I begin my analysis by examining briefly the issue of fair dealing and then turn to the related issue of fair price.

1. Fair Dealing

Along with the board's composition and independence, "fair dealing addresses the timing and structure of negotiations as well as the method of

[5] *Id.* My earlier decision to apply entire fairness to the Merger was based on plaintiffs' allegation that Hammons used his controlling position to divert merger consideration disproportionately to himself. No evidence at trial supported this assertion, and plaintiffs essentially abandoned the contention. While the JQH board (a majority of whom are concededly independent and disinterested) may actually have been entitled to business judgment rule protection, I have nonetheless applied the more exacting entire fairness standard of review because defendants easily satisfy it.

[6] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

[7] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (citing *Weinberger,* 457 A.2d at 710-11).

[8] *Id.* ("[A]n approval of the transaction by an independent committee of directors or an informed majority of minority shareholders *shifts the burden of proof* on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff.") (emphasis added).

approval of the transaction."[9] Considering theses factors, I find that the transaction was entirely fair. First, the Special Committee that negotiated and approved the transaction satisfied the threshold requirements for independence. Here, plaintiffs conceded at trial that the Special Committee was independent and disinterested and that JQH's board acted in the best interests of JQH's minority stockholders.[10] Second, members of the Special Committee were highly qualified and had extensive experience in the hotel industry. Third, members of the Special Committee understood their authority and duty to reject any offer that was not fair to the unaffiliated stockholders as evidenced by their rejection of the initial Barceló offer. Fourth, evidence at trial demonstrated that the members of the Special Committee were thorough, deliberate, and negotiated at arm's length with both Barceló and Eilian's group over a nine month period to achieve the best deal available for the minority stockholders. Thus, the extensive arm's length negotiation with two active bidders for the period of nine months and the timing of the Merger demonstrates that the process was entirely fair.

Plaintiffs do not argue about the independence, disinterestedness, qualifications or diligence of the Special Committee. Instead, plaintiffs contend

[9] *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995).

[10] For example, Messrs. Dempsey and Sullivan (Special Committee members) worked in the hotel industry for over twenty-five years and served as officers and directors of large, publicly-traded hospitality companies. They retained independent and skilled legal and financial advisors, held thirty-six meetings over a nine-month period, and requested (and received) authority to negotiate with any interested party a transaction in which Class A stockholders ultimately received $24 per share, an 85% increase over the initial $13 offer from Barceló.

that the Special Committee was "coerced" into accepting Eilian's offer to avoid "worse outcomes" that the minority stockholders might face. This contention is without merit. As I held in my earlier summary judgment Opinion[11] and as I reconfirm now, a claim of coercion cannot be premised on the threat of simply maintaining the status quo. For example, although Hammons (because of his controlling position) was able to veto any transaction, there is no requirement that Hammons sell his shares—let alone a requirement that Hammons sell his shares to any particular buyer or for any particular consideration. As I stated in my earlier Opinion, "the mere possibility that the situation would return to the status quo, something Hammons could have chosen to do by never considering selling his shares, is not, standing alone, sufficient 'coercion' to render a special committee ineffective for purposes of evaluating fair dealing."[12] Moreover, it is important to note that the status quo that plaintiffs allege to have threatened the Special Committee and the minority stockholders is the same status quo that has existed since the formation of the Company and was fully disclosed to potential investors. The evidence at trial demonstrated that the fact that Hammons would own a majority of the voting interests in JQH and have potentially conflicting interests with the minority stockholders was fully disclosed to stockholders in JQH's initial public offering in 1994 and in its ensuing financial disclosures. I find that the pre-

[11] 2009 WL 3165613, at *14.
[12] *Id.*

existing ownership structure of JQH cannot support plaintiffs' claim of coercion. Finally, no credible evidence was introduced at trial demonstrating improper self-dealing by Hammons or illicit "strong-arming" type conduct that would have coerced the Special Committee or the stockholders into supporting the Merger. As I have stated above, JQH's board was independent, highly qualified, and attentive in acting for the best interests of the Company and its minority stockholders. As a result, I conclude that plaintiffs have not come close to showing the Merger resulted from an unfair process.

2. Fair Price

For purposes of fair value, I will briefly review the various methodologies employed in the parties' determination of the Company's value at the time of the Merger. On the basis of that analysis I assess which methodologies are most appropriate under Delaware law and in light of the particular circumstances of this case. I then determine the fair value of the Company at the time of the Merger. As is generally the case in this type of hybrid action (or any valuation proceeding), the key evidence is presented to the Court by way of competing valuation expert testimony. Usually, the dueling experts rely on similar methodologies. At trial, defendants presented the expert testimony of Kenneth Lehn, Professor of Finance at the University of Pittsburgh. He used a discounted cash flow ("DCF") analysis to value JQH as of September 16, 2005, determining the value of the Company's

Class A Common shares to be between $14.97 and $18.71 per share. Lehn also valued various aspects of the Hammons consideration in the Merger, concluding that Hammons received less than $15.80 per share.

Plaintiffs presented the expert testimony of Dr. Samuel A. Kursh, who also relied on a DCF analysis, as well as a comparable companies analysis, and a comparable transactions analysis. Kursh concluded that the value of JQH's class A shares at the time of the Merger was $49 per share—more than twice the $24 merger price. Kursh did not perform an analysis of the value of the consideration Hammons received in the Merger. Importantly, Kursh did not challenge Lehman's (the Special Committee's financial advisor) or Lehn's calculations of Hammons's consideration. In short, defendants' evidence of fair value was more convincing, more persuasive and more thorough, and plaintiffs' evidence was comparatively weak. Consequently, the outcome of this case is not in doubt.

Plaintiffs have failed to demonstrate that the $24 per share cash consideration received by the minority stockholders was unfair. The fairness of the $24 Merger consideration is also (and independently) supported by the fact that an unaffiliated third party, Eilian, was willing to pay the $24 after an arm's-length negotiation.[13] The most credible expert testimony further supports the fairness of the $24 per share price.

a. Lehn's Analysis

Lehn performed a DCF analysis, and this Court has recognized that "the DCF valuation has featured prominently in this Court because it is the approach that merits the greatest confidence within the financial community."[14] Lehn determined that a comparable companies analysis was not a reliable basis for estimating the value of JQH because of a lack of comparable companies. Both Lehn and Kursh agree that 7.5% is a reasonable estimation of the Company's weighted average cost of capital,[15] and I find that 7.5% is the appropriate discount rate to use in a discounted cash flow analysis of JQH. Lehn relied on the "management-approved" projections used by Lehman in performing his DCF analysis. It is important to note that in calculating terminal value, the model used by Lehn, often called the "Convergence Model,"[16] is recognized by leading

[13] The $24 price (which represented a more than 300% premium to the unaffected stock price) was the result of a competitive nine-month process in which the Special Committee negotiated between two bidders (Barceló and Eilian) and pushed the bids from $13 up to $24 per share. In fact, over 24% of the minority stockholders entered into voting agreements to support the Merger at $24 per share before the offer at that price was even formally made.

[14] *Cede & Co. v. JRC Acquisition Corp.*, 2004 WL 286963, at *2 (Del. Ch. Feb. 10, 2004).

[15] Trial Tr. 219-20.

[16] The Convergence Model is a reflection of the widely-accepted assumption that for companies in highly competitive industries with no competitive advantages, value-creating investment opportunities will be exhausted over a discrete forecast period, and beyond that point, any additional growth will be value-neutral. *See* JTX 3 at 9-10; JTX 4 at 25-26; JTX 463. As a result, return on new investment in perpetuity will converge to the company's cost of capital. *Id.*

authorities on valuation—authorities whom Kursh cited extensively in his rebuttal report and who explicitly reject the notion that the formula assumes zero growth.

Lehn also performed a DCF analysis using a capital cash flow approach. The capital cash flow approach is particularly appropriate for valuing companies like JQH where the leverage ratios are expected to change over time. Based on Lehn's capital cash flow DCF approach, the value of JQH's Class A shares at the time of the Merger was $14.97 per share.

b. Kursh's Analysis

Kursh also relied on management's projections in performing his DCF analysis. Generally, management projections made in the ordinary course of business are considered to be reliable.[17] In this case, however, testimony at trial established that management's projections were not created in the ordinary course of business.[18] Kursh, nonetheless, performed no independent analysis of the assumptions underlying management's projections and did nothing to determine whether those projections were prepared by management in the ordinary course of

In this case, it is undisputed that JQH operated in a very competitive industry—the hotel business. JQH had no competitive advantages, such as brand names or proprietary technology. Worse still, a large portion of its portfolio is located in secondary and tertiary markets, which have lower barriers to entry than primary markets. Hotels in secondary and tertiary markets face significant competition because of the lower barriers to entry. *See* Trial Tr. 33-34 (Dempsey). And JQH's hotels were even subject to competition from their own franchisors in many of the markets where JQH operated. Dr. Kursh's expert report failed to take into account some of these factors affecting JQH, and his report is significantly impaired as a result.

[17] *See In re Emerging Commc'n, Inc. S'holders Litig.*, 2004 WL 1305745, at *15 (Del. Ch. June 4, 2004).

[18] *See* Trial Tr. 29 (Dempsey); Trial Tr. 807 (Muellner).

business. Management projections were, in fact, based on numerous overly optimistic assumptions. For example, management's projections assumed the future payment of management fees to the Company by Hammons for the management of his personal hotel portfolio. Management's projections also failed to account for the sale of three properties by JQH after the projections were prepared.

Kursh's terminal value calculation was equally flawed. Rather than using the last year of management's projections, Kursh created his own projections for 2011 by extrapolating from the overly-optimistic 2010 numbers. Here, Kursh's reliance on his own, litigation–driven projections resulted in an estimation of growth that is unrealistically high. Accordingly, I reject Kursh's calculation. Importantly, Kursh testified at trial that after writing his reports he learned that these conclusions were based on faulty data.[19] He admitted on cross examination that his comparison of JQH's capital expenditures to his comparable companies "would all change" depending on what the actual numbers were.[20]

Throughout trial, in addition to using unrealistic assumptions, Kursh applied a faulty methodology in implementing his DCF analysis. Although he purports to

[19] Trial Tr. 97, 98.

[20] Trial Tr. 142.

apply the Gordon Growth Model,[21] aside from being inconsistent with the Company's historical performance, the enormous improvement Kursh assumes beyond the forecast period is actually inconsistent with the Gordon Growth Model. The Gordon Growth Model assumes a constant level of growth in the terminal period. But Kursh's method of purporting to separate out the effects of depreciation by performing a separate analysis based on a set of projections wholly fabricated by him, in addition to being theoretically misguided, produces an erratic pattern of growth in the terminal period.[22]

In a comparable companies approach, to be a reliable indicator of value, the companies selected must be comparable to the company being valued.[23] Here, the companies selected by Kursh as comparables differ drastically from JQH. In fact, evidence showed that there are substantial differences between JQH and Kursh's comparable companies, including differences in growth prospects, investment strategy, leverage, and corporate structure. Similarly, with the comparable transactions analysis, the transactions must actually be "comparable" to the transaction at issue.[24] Here, Kursh failed to take into account important differences

[21] The Gordon Growth Model, named after Myron J. Gordon, is a model for determining intrinsic value of a stock or company and is based on a future series of dividends that grow at a constant rate.

[22] *See* Trial Tr. 228-29 (Lehn).

[23] *See In Re Appraisal of Metromedia Int'l Group, Inc.*, 971 A.2d 893, 899 (Del. Ch. 2009) (noting that the comparable company analysis is "dependent on the . . . similarities between the companies").

[24] *Id.*

between JQH and the comparable transactions relevant to value, including growth prospects, investment strategy, and business mix. Kursh's selection process appeared arbitrary, in that he omitted certain transactions with characteristics similar to those he ultimately selected. In addition, Kursh's comparable transactions analysis was based on a set of only five transactions, which is too small a sample set in the circumstances of this case to draw meaningful conclusions.

Finally, as for Hammons's consideration, Lehn analyzed certain aspects of the consideration received by Hammons based on assumptions taken from the various agreements and concluded that the total value of the consideration received by Hammons was less than $15.80 per share. In contrast, plaintiffs offered no analysis of the value of the consideration that Hammons received. In the absence of any evidence offered by plaintiffs, I accept Lehn's conclusion that Hammons received less for his interest than the minority stockholders.

In sum, because Kursh's opinion is based on numerous flawed assumptions and comparisons, I find that Kursh's expert opinion has no relevance to the issue of whether the $24 per share merger price was fair to the minority stockholders.

3. Overwhelming Vote of the Unaffiliated Stockholders

The unaffiliated Class A stockholders overwhelmingly supported the transaction—an undisputed fact that further supports the fairness of the Merger.[25] Plaintiffs' only contention at trial regarding the minority stockholders' overwhelming support for the Merger was to allege that the minority stockholders were not fully informed because the Proxy Statement contained three omissions. To prevail on a disclosure claim, the burden rests on the plaintiff, who must prove that "facts are missing from the [proxy] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury."[26] I find that plaintiffs have failed to satisfy their burden to establish that any of the alleged omissions were material to the stockholder vote or that the alleged omissions were the result of a breach of fiduciary duty by the directors.

First, plaintiffs contend that the directors were required to disclose that an employee of the Special Committee's financial advisor, Lehman, had contacted Eilian "about the possibility of underwriting the nearly $700 million commercial

[25] Of the 5,253,262 issued and outstanding shares of Class A stock, 3,821,000 (over 72%) were voted in favor of the Merger. Only 438,204 Class A shares, almost all of which were owned by plaintiff Jolly Roger, were voted against the Merger. In total, over 89% of the Class A shares actually voting on the Merger voted in favor of it. The overwhelming support for the transaction by the unaffiliated Class A stockholders further supports the fairness of the Merger. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1176 (Del. 1995) (holding that "the Court of Chancery properly found the tender by an overwhelming majority of Technicolor's stockholders to be tacit approval and, therefore, constituted substantial evidence of fairness"); *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1182 (Del. Ch. 1999).

[26] *See Skeen v. JoAnn Stores, Inc.*, 750 A.2d 1170, 1173 (Del. 2000) (quoting *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997).

mortgage-backed security offering planned by Eilian after the completion of the Merger."[27] At trial, however, the evidence demonstrated that the employee of Lehman's real estate finance group that contacted Eilian never actually received "the numbers" regarding the hotels Eilian intended to refinance, never submitted a written bid or term sheet for the business, and never got any business from Eilian.[28] In addition, the Lehman representatives that advised the Special Committee never actually spoke with the Lehman representative who contacted Eilian. Furthermore, none of the directors (including Hammons) were even aware that Eilian was contacted by any employee of Lehman; nor is there any basis to suggest that they should have been aware of the contact.[29] Under Delaware law, directors do not owe a duty to disclose facts that they are not aware of. Moreover, plaintiffs offered no evidence regarding how Lehman's alleged conflict actually affected the advice it provided to the Special Committee. This disclosure claim fails because there is no evidence to support it. None.

Second, plaintiffs allege that defendants were required to disclose the fact that the Special Committee's legal advisor, Katten Muchin, also represented iStar Financial, Inc. ("iStar") (the entity providing financing for Eilian) with respect to the drafting and negotiation of the line of credit provided to Hammons. I find,

[27] 2009 WL 3165613, at *16.

[28] Trial Tr. 516-17.

[29] Trial Tr. 56 (Dempsey), 607 (Moore), 754 (Hart); Sullivan Trial Dep. at 34 (JTX 22).

however, that this fact would not be material to the unaffiliated stockholders of JQH in deciding how to vote on the Merger. At trial, plaintiffs presented no evidence that Katten Muchin's representation of iStar had any affect on Katten Muchin's advice to the Special Committee or had any affect on the Special Committee's decision to approve the Merger which was a nine month process that resulted in the Special Committee's selection of the highest offer made for the minority. Thus, I conclude that this alleged conflict was not material and did not need to be disclosed.

Finally, plaintiffs insist that defendants should have disclosed the substance of a November 2004 presentation by Eilian to the Special Committee. At this presentation, Eilian estimated that JQH could be worth $35.37 to $43.01 per share.[30] This presentation, however, assumed a hypothetical transaction structure, and the Special Committee understood that it was not an available option. Thus, I find that it was not necessary to disclose Eilian's presentation because it was premised on a hypothetical scenario. In sum, I conclude that each of plaintiffs' alleged disclosure claims involved facts or circumstances immaterial to the stockholders' decision to vote on the Merger and was not required to be disclosed under Delaware law.

[30] 2009 WL 3165613, at *17.

For all the foregoing reasons, I find that plaintiffs have failed to prove that the transaction was unfair. Even if the burden of proof had not shifted to the plaintiffs, I would find that defendants had demonstrated the fairness of both the process and the price.

B. Breach of Fiduciary Duty Claim against Hammons

Based on the evidence adduced at trial and well-settled Delaware law, the breach of fiduciary duty claim against Hammons was not difficult to decide. I find that Hammons breached no duty to the minority stockholders. First, Hammons did not participate in the approval of the Merger as a director of JQH,[31] and he did not participate in the Special Committee process. Second, Hammons was not on both sides of the Merger. Third, Hammons did not make an offer as a controlling stockholder. Fourth, Hammons did not engage in any conduct that adversely affected the merger consideration obtained by JQH's minority stockholders.[32] Having carefully weighed all the evidence, I find no legal or factual basis for concluding that Hammons coerced the Special Committee or the minority stockholders into voting in favor of (or recommending) the Merger. There was also no credible evidence of improper self-dealing on the part of Hammons. Nor

[31] *See In re Tri-Star Pictures, Inc. Litig.*, 1995 WL 106520, at *2-3 (Del. Ch. Mar. 9, 1995) ("[A] director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve that transaction was wrongful.").

[32] The evidence at trial did not support any finding that Hammons used his influence to "divert" any of the merger consideration from the minority stockholders to himself.

was there evidence suggesting that Hammons engaged in any conduct that adversely affected the price obtained by the minority stockholders. Finally, it is undisputed that the individual merger consideration Hammons received was worth less per share than the merger consideration JQH's minority stockholders received. Lehn opined that Hammons' individual consideration was less than $15.80 per share.[33] Plaintiffs and their expert, Kursh, on the other hand, did not dispute or even analyze Hammons' individual consideration in the Merger. Therefore, for all the foregoing reasons, I conclude that Hammons breached no fiduciary duty to JQH's minority stockholders.

C. Aiding and Abetting a Breach of Fiduciary Duty Claim Against Third Party Acquirers

Having found that neither Hammons nor the JQH board members breached a fiduciary duty, plaintiffs' aiding and abetting theory cannot succeed. Nonetheless, in the interest of completeness, I will address it. Plaintiffs do not dispute that JQH Acquisition and JQH Merger Corp. had no relationship with JQH or any of its directors or stockholders before the Merger. Plaintiffs' aiding and abetting claim is primarily premised on the assertion that Eilian provided greater benefits to Hammons than to the minority stockholders. As the record shows and as I have mentioned numerous times above, Hammons received less on a relative basis for

[33] Lehman also opined that Hammons' individual consideration was between $11.95 and $14.74 per shares.

his majority interest than the minority stockholders. Further, the evidence at trial convinced me that the negotiations between Hammons and Eilian and between the Special Committee and Eilian were at arm's length and that Eilian believed he was paying Hammons less per share than the $24 per share received by the minority stockholders.[34] No evidence supports plaintiffs' contention that JQH Acquisition and JQH Merger Corp. are liable for aiding and abetting because Hammons engaged in alleged improper self-dealing that depressed JQH's stock price and coerced the independent and disinterested JQH board to approve an unfair transaction. In sum, no factual or legal basis exists to support plaintiffs' theory that the third party acquirers knowingly participated (aided and abetted) in a breach of fiduciary duty by Hammons.

II. CONCLUSION

Based on the evidence presented at trial and for the reasons noted above, I find in favor of the defendants and conclude that the fair value of JQH at the time of the Merger was $24 per share. Furthermore, I find that Hammons did not breach any fiduciary duty and that the third party acquirers are not liable for aiding and abetting a (nonexistent) fiduciary duty breach.

An Order consistent with this Memorandum Opinion has been entered.

[34] Trial Tr. 478-80 (Eilian).