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On August 27, 2012, the Delaware Supreme Court affirmed Chancellor Leo Strine's stunning trial court decision in the *Southern Peru Copper* case[1] through its opinion in *Americas Mining Corp. v. Theriault*.[2] *Theriault* involved an overly generous deal price in an acquisition with a single controlling shareholder in charge of both parties.[3] The defendants, a purchasing company and its affiliated directors, were liable to their shareholders for a whopping $1.347 billion.[4]

The plaintiff's attorneys were awarded an equally eye popping $285 million in fees.[5] The inside directors were included among those liable.[6] The outside, independent directors, including those on the Special Negotiating Committee were not; they had been dropped out on an earlier summary judgment motion.[7]

The case was a typical application of the "entire fairness" standard.[8] One shareholder, Grupo Mexico, owned 55% of the buyer, Southern Peru, and 99% of

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1. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761 (Del. Ch. 2011).
2. 51 A.3d 1213 (Del. 2012).
3. *Id.* at 1219.
4. *Id.* at 1250.
5. *Id.* at 1262–63. The award was the approximate hourly rate for plaintiff's counsel of $35,000 an hour for 8,597 hours of work. *See id.* at 1252, 1257. There have been only three higher total fee awards—for the attorneys in Enron ($688 million), Tyco ($492 million) and World Com ($335 million). *See* Joe Palazzolo, *How Much is $300 Million in Attorneys' Fees?*, WALL ST. J. L. BLOG (Dec. 28, 2011, 12:21 PM), http://blogs.wsj.com/law/2011/12/28/how-much-is-300-million-in-attorneys-fees/ ("Only plaintiffs' attorneys' fees in class actions against Enron ($688 million), Tyco ($492 million), and WorldCom ($336 million) were larger.").
6. *Theriault*, 51 A.3d at 1235. The court dismissed a claim for rescissory damages on the grounds of delay (laches) and enforced the judgment by ordering the controlling shareholder to remit the buyer company's shares. *Id.* at 1249–50.
7. *Id.* at 1235. The holding is based on a 102(b)(7) liability waiver in the certificate of incorporation. The poor conduct of the Special Committee was the basis of the case, however. The Special Committee's conduct led the trial court to refuse to shift the burden of proof to the plaintiff's under the *Lynch* case. *Id.* at 1242.
8. *See, e.g.*, Jennifer Johnson, *What's Good for the Goose? A Critical Essay on "Best Practices" for Private Firms*, 2 J. BUS. & TECH. L. 251, 258 (2007) (explaining that the "entire fairness test" queries whether the defendant carried its burden of demonstrating that the transaction was fair to the corporation).

the seller, Minera Mexico.[9] Grupo wanted Southern Peru to purchase Minera using Southern Peru stock as consideration.[10] Since an excessive price for Minera obviously benefits Grupo at the expense of the minority shareholders of Southern Peru, Southern Peru knew at least one minority shareholder would bring a derivative action to ask a Delaware court to revisit the fairness of the price.

To protect itself from judicial oversight, Southern Peru, following a now customary practice, formed a special committee of outside directors, all able professionals, and the committee hired top-flight legal and financial advisors.[11] The financial advisor, Goldman Sachs, threw a wrench in the gears of the deal early on when it opined that Minera was worth only around 60% of the pending offering price ($3.15 billion in Southern Peru shares).[12] The Special Committee asked Goldman to go back to the drawing board to see if they could "make the deal happen."[13]

Goldman did what it was asked to do, primarily by revaluing the Southern Peru stock being used as consideration for Minera.[14] Goldman found that Southern Peru's stock was not worth its then-current trading price.[15] Add a minor concession in the number of buyer shares used as consideration, some finesse in the valuing of Minera, and two shareholder voting agreements between the controlling shareholder and two large minority shareholders of Southern Peru and the deal closed at a tad under the original bid with the assent of the Special Committee (with a conflicted Committee director abstaining at the last minute).[16]

Chancellor Strine did not buy Goldman Sach's revaluation and his math on the amount of liability was simple: the bid price ($3.7 billion plus) minus the value of the seller, drawing heavily on the original Goldman Sachs valuation of the seller ($2.4 billion or so), equals a judgment of $1.34 billion in damages.[17] The Court ordered the controlling shareholder, Grupo Mexico, to return to the buyer shares equal to the award and to pay attorney's fees out of the award equal to 15% of the amount.[18]

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9. *Theriault*, 51 A.3d at 1219.
10. *Id.*
11. *Id.* at 1221–22.
12. *Id.* at 1223.
13. *See id.* at 1224–25.
14. *Id.* at 1224.
15. *Id.*
16. *Id.* at 1228, 1232.
17. *Id.* at 1218.
18. *Id.*

There is much to say about this case. One could chew on the Special Committee authorization resolution,[19] the summary judgment for the independent directors, the problematic shareholder agreements,[20] the compensation of plaintiff's attorneys,[21] the refusal to redress the fiasco that is the *Lynch* case,[22] or the corporate governance provisions that "topped up" the value of the seller.[23] Of these, the most notable is the incongruity of the purported legal innocence of the members of the Special Committee, given that the Committee's actions were deplorable and subjected the company and the other directors, including those not on the Committee and whose acts were not in issue, to massive liability.

However, I am intrigued by something else Vice Chancellor Travis Laster's speech in justification of the holding before the Society of Corporate Secretaries & Governance Professionals National Conference in July of 2012.[24] Vice Chancellor Laster struggled with how a Special Committee composed of "experience, competent and . . . [with the exception of the abstaining conflicted director] clearly independent directors" retaining "top-tier advisors" could "[blow] it."[25] His answer? The board was captured by "cognitive biases."[26]

Vice Chancellor Laster gave a thoughtful discussion of four cognitive biases evident in the Special Committee's decision-making: anchoring (estimates based on a known starting value), framing (the effect of framing alternatives as gains rather than losses, for example), confirmation (seeking out information that validates

19. The Special Committee did not have the absolute authority to approve the deal. *Id.* at 1221–22.

20. The Special Committee dropped the majority-of-minority vote demand and agreed to approval of two-thirds of the outstanding common stock. The controlling shareholder needed only the votes of two large block minority shareholders to reach the two thirds threshold. Both large minority shareholders signed side contracts with the controlling shareholder to exchange registration rights (liquidity) for their support on the merger vote. *Id.* at 1228.

21. It was excessive. *Id.* at 1252.

22. The Supreme Court struggled with the mechanics of a "shifting" burden of proof that only shifts at the conclusion of the presentation of the evidence at trial. *Id.* at 1241–42. Moreover, many commentators, including this one, and indeed Delaware Vice Chancellors, view the *Lynch* precedent as a mistake. A valid Special Negotiating Committee procedure should apply a business judgment rule analysis to the Committee not an entire fairness review with a shift in the burden of proof from the defendants to the plaintiffs.

23. *Id.* at 1228.

24. Travis Laster, Del. Vice Chancellor, Cognitive Bias in Director Decision-Making, Address Before the Society of Corporate Secretaries & Governance Professionals National Conference (July 2012), *in* 20 CORPORATE GOVERNANCE ADVISOR, Nov./Dec. 2012, at 1–9.

25. *Id.* at 4.

26. *Id.* A cognitive bias is a pattern of judgments in which illogical behavior prevails over rational behavior. Jim Taylor, *Cognitive Biases v.s.* [sic] *Common Sense*, PSYCHOL. TODAY (July 18, 2011), http://www.psychologytoday.com/blog/the-power-prime/201107/cognitive-biases-vs-common-sense. Cognitive biases lead to inaccurate judgments and other types of irrational behavior. *Id.* The study of cognitive bias is often associated with the path-breaking work of Professors Kahneman and Tversky. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 J. SCI. 1124 (1974). Professor Kahneman was awarded the 2002 Nobel Memorial Prize in Economics for his work. *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, NOBEL MEDIA, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/ (last visited Aug. 31, 2013).

existing views), and groupthink (the desire to promote harmony and avoid dissent).[27] Of the four, he is most critical of the board's groupthink problems.[28]

He could have added another form of bias, equally important and supplemental to the groupthink bias, namely that of misplaced loyalty to authority. Path-breaking work in empirical social psychology by Professor Stanley Milgram in the late 1960s,[29] reinforced by decades of studies, has shown that loyalty is hardwired in human behavior and loyalty to an authority figure can easily suppress even the strongest ethical standards (misplaced loyalty).[30]

Misplaced loyalty to an authority figure is a recurring theme in many disastrous business decisions. [31] Corporate officers and directors, who should have known better, put loyalty to a dynamic leader (i.e. the CEO or controlling shareholder) above duty to shareholders and even, occasionally, obedience to the law. The officers and directors of Enron and Worldcom who were not active in the basic financial frauds but passively approved them easily come to mind.[32]

Groupthink, combined with blindly bowing to authority, is a potent and vile brew for all directors, inside and out, who passively follow the lead of a controlling CEO.

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27. Laster, *supra* note 24, at 4–6. Scholarship over the last forty years in cognitive science, social psychology and behavioral economics has created an evolving list of cognitive biases. S*ee generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., Cambridge Univ. Press 1982) (illustrating numerous types of cognitive biases).

28. "Groupthink is the most important bias for boards of directors to watch for." Laster, *supra* note 24, at 5.

29. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974). Professor Milgram's study has just recently come under scathing attack by Professor Gina Perry. GINA PERRY, BEHIND THE SHOCK MACHINE: THE UNTOLD STORY OF THE NOTORIOUS MILGRAM PSYCHOLOGY EXPERIMENTS 1 (2012). Among other things, she attacks the effect of his experiment on his human subjects, his secret experiments, and his published data. Carol Tavris, *The Experiments that Still Shock*, WALL ST. J., Sept. 7, 2013, at C5.A common review of her book notes that other professionals have replicated Milgram's results multiple times and in a variety of world-wide settings. *Id.*

30. *See, e.g.*, Piero Bocchiaro & Phillip G. Zimbardo, *Defying Unjust Authority: An Exploratory Study*, 29 CURRENT PSYCHOL. 155, 166 (2010); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOL. 1, 9 (2009); Jan De Vos, *Now That You Know, How Do You Feel? The Milgram Experiment and Psychologization*, 7 ANN. REV. CRITICAL PSYCHOL. 223, 246 (2009). The famous Milgram experiment conducted in 1962 illustrates the phenomena. An experimenter was able to demand subjects to deliver a series of increasing electric shocks to a "student," played by an actor. In reality there were no shocks, but the actor played the part, reacting more negatively as subjects delivered, on order, higher levels of current for student "mistakes." Sixty-five percent of the subjects delivered the highest level of current (a massive pretend 450 volt shock) even with the student banging on the wall and complaining about a heart condition. The original Simulated Shock Generator, or shock box, is located in the Archives of the History of American Psychology. Dan Hurley, *Bizarre and Infamous Join Scholarship in an Archive of Psychology*, N.Y. TIMES, Sept. 27, 2005, at F3.

31. *See, e.g.*, Randall Morck, *Behavioral Finance in Corporate Governance: Economics and Ethics of the Devil's Advocate*, 12 J. MGMT. & GOV. 179, 196 (2008).

32. *See* Jim Hopkins, *Report: WorldCom Board Passive*, USA TODAY (June 8, 2003, 11:04 PM), http://usatoday30.usatoday.com/money/industries/telecom/2003-06-09-board_x.htm; William Neikirk, *Enron Board Called Passive, Deferential*, CHIC. TRIB. (May 8, 2002), http://articles.chicagotribune.com/2002-05-08/business/0205080270_1_enron-board-board-members-finance.

A number of writers in different professions have suggested that decision making groups need procedural safeguards against groupthink and/or misplaced loyalty.[33] Inevitably most of the writers tentatively propose, among other things, a devil's advocate procedure. This suggestion is found frequently in papers discussing particularly the decision-making of corporate boards of directors.[34] Vice Chancellor Laster's speech is yet another example.[35]

Some of the writers suggest that the "independent" director requirements for modern publicly-traded company boards or that pressure for "diversity" on boards are but a diluted form of this devil's advocate procedure.[36] We expect (or hope?) independent (or "diverse") directors will act as devil's advocates in important corporate matters.

A "devil's advocate" is someone assigned to take a position opposite the prevailing view to stimulate argument.[37] Of the myriad solutions to misplaced loyalty, the devil's advocate procedure is the most crystalline: it is straightforward to implement and easy to spot. Many of the other solutions are "softer," mushy intentions that are closer to aspirational goals than hard-cut processes.[38] There are also variations: a devil's advocate can be a permanent position in the group, assigned by issue or topic, or fixed by position in the discussion.[39]

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33. *See, e.g.*, David I. Levine, *The Wheels of Washington: Groupthink and Iraq*, S. F. CHRON. (Feb. 5, 2004, 4:00 AM), http://www.sfgate.com/opinion/openforum/article/The-Wheels-of-Washington-Groupthink-and-Iraq-2825247.php; Johnny Kilhefner, *Groupthink Examples in Business*, HOUS. CHRON., http://work.chron.com/groupthink-examples-business-21692.html (last visited Sept. 20, 2013); Geneva Weiglein, *The Surgical Safety Checklist*, 4 ROYAL C. OF SURGEONS IN IR. STUDENT MED. J. 67, 67–69 (2011).

34. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 217 (2005); Morck, *supra* note 31, at 194; Troy Paredes, *Too Much Pay, Too Much Deference: Is CEO Overconfidence the Product of Corporate Governance?* 8 (Wash. U. Sch. of Law Faculty Working Paper Series, Paper No. 04-08-0, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=587162&download=yes.

35. Laster, *supra* note 24, at 6.

36. *See* Eleanor Bloxham, *A Hint of Hope at HP*, CNN MONEY (Nov. 18, 2011, 11:48 AM), http://management.fortune.cnn.com/2011/11/18/a-hint-of-hope-at-hp/; David Margulies, *Communications Expert David Margulies Says Devil's Advocate Could Have Prevented Komen PR Problems*, PR NEWSWIRE (Feb. 7, 2012), http://www.prnewswire.com/news-releases/communications-expert-david-margulies-says-devils-advocate-could-have-prevented-komen-pr-problems-138889649.html.

37. *Devil's Advocate*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/devil's%20 advocate (last visited Sept. 3, 2013). The term originally arose from the canonization process of the Catholic Church, in which a canon lawyer, holding an office called the "Promoter of the Faith" or "Devil's advocate," was tasked with taking a skeptical view of any case being made for the sainthood of any individual. Erica Bonnell, *Playing the Devil's Advocate*, WASH. TIMES COMMUNITIES (Mar. 25, 2011), http://communities. washingtontimes.com/neighborhood/holy-soap-opera/2011/mar/27/playing-devils-advocate. His counterpart was "God's Advocate," who task was to make the argument for canonization. *Id.* In 1983, Pope John Paul II abolished the practice, which had been ongoing since 1587. George Wiegel, *John Paul II's Saints – And Us*, CATHOLIC EDUC. RES. CTR. (2005), http://catholiceducation.org/articles/religion/re0803.html.

38. Examples include recommendations to "examin[e] . . . the accessible components of decision making" and so on. Thomas H. Davenport, *Make Better Decisions*, HARV. BUS. REV., Nov. 2009, at 117, 118.

39. Vice Chancellor Laster recommends appointing a designated devil's advocate and having the appointment rotate. Laster, *supra* note 24, at 6. In the movie World War Z, the Mossad is reputed to make the tenth person who speaks on any issue a devil's advocate. WORLD WAR Z (Plan B Entertainment 2013).

This argument for a devil's advocate bears a very close look. Should boards implement a devil's advocate procedure to help them satisfy an "entire fairness" review? Or even a business judgment (gross negligence) review? Unfortunately, empirical research does not cooperate. Studies show that a devil's advocate is only marginally effective in combating the problem of groupthink.[40] By far the preferred alternative is to have a real, rather than a pretend, dissenter on the board to promote creative problem-solving. So we are back to what we all intuitively know in the first place: you need a "shit on the board" (SOB), someone who asks the tough questions of the CEO. Again, Vice Chancellor Laster agrees.Unfortunately, this is hazardous duty as research shows.[41] Dissenting directors are not rewarded with career boosts; they often lose their board seats and when they do, they do not get rewarded with new board seats elsewhere.[42] So as we often say, and I am paraphrasing: "Dissent must be its own reward."

Or must it?

There are certain, special CEOs who nurture dissent on their boards. They are easy to spot. Consider the column of Lucy Kellaway in the Financial Times. On a airplane, she sat next to a woman who chairs several companies and who declared "I always make sure that there is one shit on each of my boards."[43] Ms. Kellaway continues:

> *The ego has no place on any board, as he is only interested in himself. . . . The argument for Shits on Boards (SOBs) is quite different. An SOB is someone who couldn't care less what others think of him or her, and is therefore low-maintenance, whereas an ego demands endless admiration and attention. An SOB doesn't mind upsetting people, cares nothing for bonding and rather enjoys stirring things up. . . . [T]he SOB serves many functions. They dash in on the attack . . . . Their attack leaves the way open for the nicer, more constructive, board members to come in after them. . . . [They] prevent[] things from getting too cosy round the table, and [it is] harmless for others to gang up against [them]. Indeed, the pro-SOB arguments are so persuasive that there ought to be quotas to ensure every company has a beast in the boardroom. According to my new friend,*

40. NOAH J. GOLDSTEIN, STEVE J. MARTIN & ROBERT B. CIALDINI, YES!: 50 SCIENTIFICALLY PROVEN WAYS TO BE PERSUASIVE 104 (2009).

41. Cassandra D. Marshall, *Are Dissenting Directors Rewarded?* 20 (Aug. 28, 2010) (unpublished working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1668642&download=yes.

42. *See* Juan Ma & Tarun Khanna, *Independent Directors' Dissent on Boards: Evidence from Listed Companies in China* 28 (Harv. Bus. Sch., Working Paper 13-089, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252200 (finding that "dissenters are less likely to continue receiving board seats").

43. Lucy Kellaway, *Everyone Benefits From a Beast in the Boardroom*, FIN. TIMES (Oct. 9. 2011, 4:16 PM), http://www.ft.com/cms/s/0/3bdb9b68-f0cb-11e0-aec8-00144feab49a.html.

> *the ideal number of SOBs around the table is one . . . as more than that means too many clashes.*[44]

Her short piece is worth reading in full as are the online comments. Some commentators make the obvious point that the SOB cannot be the CEO or the Chair, for example.[45] Others remind us that a feuding, squabbling board is a disaster.[46] A board does have serious work to do and a perpetual grump on the board can delay and obscure, drive deals outside the board meeting, and, in extreme cases, engender outright hostility and deadlock.

It is evident that (1) there is a "sweet spot" in terms of degree of board dissent; and more importantly, (2) an overly collegial board subject to groupthink and misguided loyalty is a far more normal state of affairs and a far bigger risk than the occasional dysfunctional, squabbling board. I suggest that many CEO's, reading the extensive literature on cooperation (niceness), have it backwards; they should take care to nurture dissent not collegiality. Collegiality and obedience to authority come easy to boards. Disagreement comes hard and the CEO must encourage and support it.

Unfortunately the tricks of structured role playing that are the stock in trade of class room psychologists are probably of limited usefulness. In the end, the openness to dissent ought not to take the form of artificial devil's advocate procedures, nor the form of appointing dyed in the wool grumps or cynics. It should consist of an atmosphere or culture in which capable, thoughtful people are encouraged to speak their mind whenever they disagree with or are otherwise hesitant to follow the CEO's recommended course of action, in which those same people are thanked rather than penalized for their candor, and in which people who do not actively participate in adding serious thought to a discussion on difficult decisions are not welcome on the board.

Small groups that operate with a healthy respect for dissent are not hard to spot. A moment's observation by a savvy, experienced outsider can distinguish, for example, a law faculty that defers passively to the dean's recommendations from one that respects a dean's request but deliberates thoughtfully on its consequences. I have no doubt that boards of directors could be similarly judged.

In any event, could judges take evidence on board dynamics in their analysis of board decisions? If a judge can spot the biases, surely experts could testify on board procedure as well. This suggestion would no doubt cause Vice Chancellor Laster to recoil in horror: "I am not advocating that!" He was merely explaining how a good

44. *Id.*

45. *E.g.*, Franjo, Comment to *Everyone Benefits From a Beast in the Boardroom*, FIN. TIMES (Oct. 10, 2011, 7:55 AM), http://www.ft.com/intl/cms/s/0/3bdb9b68-f0cb-11e0-aec8-00144feab49a.html.

46. *E.g.*, Claudius, Comment to *Everyone Benefits From a Beast in the Boardroom*, FIN. TIMES (Oct. 10, 2011, 5:00 AM), http://www.ft.com/intl/cms/s/0/3bdb9b68-f0cb-11e0-aec8-00144feab49a.html.

committee with top-flight advisors could and did err.[47] As he would likely recognize, opening the door to judicial analysis of board dynamics would significantly encumber fact finding in what are already very complicated cases.

But consider the logical extension of his remarks. A breach of fiduciary duty analysis could include an analysis of whether the CEO has put in place an overly compliant board or nurtured a board whose members are welcome to disagree and dissent.[48] A judge could decide that a new wrinkle on fiduciary duty is for those at the top to encourage healthy dissent. The Vice Chancellor applied the analysis in an "entire fairness" test[49] and, by extension, could logically support the same analysis, although with a higher substantive standard of misbehavior for liability, in a standard business judgment rule situation. Is it gross negligence for a CEO to, at some level of extremism, brow-beat a board into submission rather than encourage board members to voice their disagreements?

47. *See* Laster, *supra* note 24, at 4.

48. This would be analogous to the so called "Caremark duty" of a board to put in place adequate systems of information reporting and internal controls, systems that enable a board to oversee and monitor a firm's operations. *See* Wood v. Baum, 953 A.2d 136, 139 (Del. 2008).

49. *Id.* at 7; *see also* Johnson, *supra* note 8, at 258 (explaining the "entire fairness" test).