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APPENDIX A

**United States Court of Appeals
for the First Circuit**

Nos. 17-1821, 17-1904

IN RE: PHC, INC. SHAREHOLDER LITIGATION

MAZ PARTNERS LP, on behalf of itself and
all others similarly situated,

Plaintiff, Appellee/Cross-Appellant,

v.

BRUCE A. SHEAR,

Defendant, Appellant/Cross-Appellee.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Patti B. Saris, *U.S. District Judge*]

Before

Torruella, Selya and Lynch,
Circuit Judges.

James H. Hulme, with whom *Matthew Wright, Nadia A. Patel, Arent Fox LLP, Richard M. Zielinski, Leonard H. Freiman,* and *Goulston & Storrs*, were on brief, for defendant.

Chet B. Waldman, with whom *Jeffrey W. Chambers*, *Patricia I. Avery*, *Adam J. Blander*, *Wolf Popper LLP*, *Norman Berman*, *Nathaniel L. Orenstein*, and *Berman Tabacco* were on brief, for plaintiff.

July 2, 2018

SELYA, Circuit Judge. The briefs in this case read like a law school examination covering a curriculum that ranges from corporate law to the law of equitable remedies. The questions presented are intricate, entangled, and in some instances novel. The most important of them implicate Massachusetts law and include whether a non-majority shareholder who also serves as a director can, under certain circumstances, be deemed a controlling shareholder; what effect, if any, shareholder ratification may have with respect to a self-interested transaction; and whether — in the absence of economic loss — equitable disgorgement can be ordered as a remedy for a breach of fiduciary duty. Concluding, as we do, that the able district judge handled the profusion of issues appropriately, we leave the parties where we found them, affirming both the district court's multi-million-dollar disgorgement order in favor of the plaintiff class and the jury's take-nothing verdict in the favor of the defendant. The tale follows.

I. BACKGROUND

We limn the facts and travel of the case, reserving some details for our subsequent discussions of specific issues. For efficiency's sake, we assume the reader's familiarity with our opinion regarding an earlier phase of this litigation. *See In re PHC, Inc. S'holder Litig. (MAZ I)*, 762 F.3d 138 (1st Cir. 2014).

Until the fall of 2011, PHC, Inc. (PHC) functioned as a publicly traded corporation focusing on behavioral healthcare. Defendant Bruce A. Shear was a co-founder of PHC, serving as its board chairman and chief executive officer. The company was organized under the laws of Massachusetts, and its capital structure featured two classes of stock: Class A shares and Class B shares. Class A shares were publicly traded and were entitled to one vote per share. Those shares, collectively, had the right to elect two out of six board members. Class B shares were not publicly traded and were entitled to five votes per share. Those shares, collectively, had the right to elect the remaining four board members. At the times relevant hereto, Shear held approximately 8% of the Class A shares and approximately 93% of the Class B shares. Given the proportion of Class B shares owned by Shear, he had the power, practically speaking, to name a majority of the board of directors (four out of six board members).

After PHC's stock price remained relatively flat for a protracted period of time, the PHC board grew restless and began to mull a variety of strategic transactions designed to enhance shareholder equity. To this end, Shear initiated discussions about a possible merger with Acadia Healthcare, Inc. (Acadia) in early 2011. Based on conversations with Shear — who was acting as the de facto lead negotiator on behalf of PHC — Acadia's chief executive officer transmitted a letter of intent, dated March 22, 2011, to the PHC board. The letter delineated the material terms of a proposed merger.

The merger proposal contemplated that Acadia would be the surviving company. PHC shareholders would own 22.5% of the merged entity and Acadia shareholders would own the remainder. To achieve this ratio, holders of both Class A and Class B shares of PHC would receive one-quarter share of the stock of the merged entity in exchange for each PHC share, and the difference between the two classes of PHC stock would evaporate. In order to compensate Class B shareholders for relinquishing their enhanced voting rights, they would receive an additional $5,000,000 as a premium. Shear's ownership of approximately 93% of the Class B shares put him in line to receive most of this premium — roughly $4,700,000.

The letter of intent spelled out a variety of other salient features of the proposed transaction (including Acadia's plan to pay a special dividend to its own shareholders so as to achieve the desired equity split). Under another provision of the letter of intent, Shear would get to select two directors of the merged entity — and those two directors would be the PHC shareholders' sole designees to the new Acadia board. Finally, the letter of intent contained a prohibition against shopping Acadia's offer to other potential merger partners and specified that a termination fee would be payable if PHC backed out of the merger.

Following receipt of Acadia's letter of intent, Shear asked William Grieco (a PHC director) to serve as the PHC shareholders' principal merger negotiator. Despite naming Grieco as the point man, Shear continued to play a leading role in negotiations.

Shear's choice of Grieco was not mere happenstance. The two men had enjoyed a lengthy professional relationship, and Shear had previously named Grieco to the PHC board. Moreover, Shear had arranged that, once the merger was consummated, he and Grieco would be the two PHC designees on the new Acadia board.

As part of his new role as principal negotiator, Grieco assumed responsibility for selecting a financial advisor to analyze the merger and to handle stockholder communications. To that end, the PHC board retained Stout Risius Ross, Inc. (SRR) — a firm that proceeded to evaluate the proposed merger and provide a fairness opinion. SRR reported that the aggregate consideration offered to Class A and Class B shareholders, as a combined group, was fair. Separately, it concluded that the consideration offered to the Class A shareholders was fair. SRR was not asked to analyze (and did not analyze) whether the $5,000,000 Class B premium was fair to the Class A shareholders. The PHC board considered the transaction in light of SRR's truncated fairness opinion and voted — with Shear abstaining — to recommend the proposed merger to PHC's shareholders. None of the five directors who voted for this recommendation owned any Class B shares.

On May 23, 2011, Acadia and PHC signed a merger agreement, contingent upon shareholder approval. In anticipation of a shareholder vote, PHC disseminated a proxy statement chronicling the details of the anticipated merger. Among other things, the proxy statement disclosed the $5,000,000 premium to be paid to the Class B shareholders, noting that Shear would receive the bulk of that payment. It also disclosed that the PHC board had opted not to form an independent committee to evaluate the merger proposal. Finally, it disclosed that Shear and Grieco would serve as directors of Acadia following the merger. SRR's fairness opinion was distributed to the shareholders along with the proxy statement.

For the merger to be approved, at least a two-thirds majority of Class A shares, a two-thirds majority of Class B shares, and a two-thirds majority of Class A and Class B shares combined had to vote in favor. On October 26, 2011, PHC shareholders approved the merger: 88.7% of the Class A shares and 99.9% of the Class B shares voted in the affirmative. MAZ Partners LP (MAZ), the owner of over 100,000 Class A shares, voted its shares against the proposed merger. On November 1, the merger was consummated, resulting in the conversion of all PHC stock into Acadia stock. The market reacted favorably to the merger: Acadia stock began a long upward climb. The per-share price of Acadia stock rose from $8 at the time of the merger to over $80 in less than four years. MAZ did not stay aboard but, rather, sold all of its Acadia stock in January of 2012 (at a profit).

Well before the merger took effect, MAZ repaired to a Massachusetts state court and sued the PHC directors, seeking to block the merger. Invoking diversity jurisdiction, the defendants removed the action to the federal district court. *See* 28 U.S.C. §§ 1332(a), 1441(b). MAZ was unsuccessful in attempting to halt the transaction: the district court refused to enjoin the merger. Nevertheless, MAZ continued to press its breach-of-fiduciary-duty claims, seeking both a remedy at law (money damages) and equitable relief.

In due course, the district court (O'Toole, J.) granted summary judgment in favor of the defendants. MAZ appealed and succeeded in snatching a partial victory from the jaws of defeat: it persuaded a panel of this court to vacate the summary judgment. *See MAZ I*, 762 F.3d at 145. On remand, the case was reassigned to Chief Judge Saris. *See* D. Mass. R. 40.1(k). After some further skirmishing, the district court certified a class of former Class A shareholders who had voted against the merger, abstained from voting, or failed to vote. MAZ was designated as the class representative and alleged that the PHC directors, jointly and severally, had breached their fiduciary duties by orchestrating the merger transaction through an unfair process and, of particular pertinence here, by facilitating the payment of the (allegedly inflated) $5,000,000 premium to the Class B shareholders.

The legal claims were tried to a jury (the parties reserving the resolution of the equitable claims). During the course of the trial, the Massachusetts Supreme Judicial Court (SJC) decided *International Brotherhood of Electrical Workers Local No. 129 Benefit Fund* v. *Tucci*, 70 N.E.3d 918 (Mass. 2017). Premised on their reading of this decision, the defendants moved for judgment as a matter of law, see Fed. R. Civ. P. 50(a), arguing, inter alia, that MAZ should have brought its claims derivatively. The district court granted this motion in part and entered judgment in favor of all the directors save Shear. As to the latter, the court refused to enter judgment as a matter of law, ruling that there was a jury question as to whether Shear was a controlling shareholder and, thus, came within one of the *Tucci* exceptions. Accordingly, the court submitted the case to the jury on the legal claims asserted against Shear.

The jury made a series of special findings. *See* Fed. R. Civ. P. 49. It found, inter alia, that Shear controlled the board's decision to enter into the merger and that the process undertaken to negotiate the merger was not entirely fair to the Class A shareholders. The jury went on to find, though, that the proof was insufficient to establish that the Class A shareholders had suffered any economic loss. Predicated on this finding, the jury determined that the plaintiff class was not entitled to money damages and returned a take-nothing verdict.

After the jury returned its verdict, MAZ (on behalf of the plaintiff class) moved for equitable relief. Specifically, MAZ sought disgorgement of the Class B premium based largely on the jury's findings that Shear was not only a director but also a controlling shareholder, that he therefore owed the shareholders a fiduciary duty, and that he had breached that duty by arranging the merger through a process that was not entirely fair to the Class A shareholders. Following a hearing, the district court agreed with MAZ, adopted the relevant jury findings, ruled that Shear had breached his fiduciary duty, and determined that the class was entitled to equitable relief. *See MAZ Partners LP* v. *Shear (MAZ II)*, 265 F. Supp. 3d 109, 118-21 (D. Mass. 2017).

Concluding that disgorgement was an available and appropriate equitable remedy, the court proceeded to make a series of calculations. First, it determined that $1,820,000 of the $5,000,000 Class B premium represented fair compensation for the enhanced voting rights carried by the Class B shares. *See id.* at 119. The remainder of the Class B premium ($3,180,000), the court stated, was unjustified. *See id.* Next, the court determined that — based on Shear's percentage ownership of the Class B shares — "Shear's pro rata portion of the unjustified portion of the Class B premium" was "93.22% of $3.18 million, or $2,964,396." *Id.* at 120. Finally, the court ordered that Shear disgorge this amount, and it awarded those funds to the plaintiff class, together with interest. *See id.*

On a parallel track, MAZ challenged the jury verdict and moved for a new trial with respect to the class's legal claims. In support, MAZ contended that the district court had permitted the introduction of unduly prejudicial evidence during the trial. The district court denied this motion. *See id.* at 121-22. These timely appeals ensued: Shear appeals the disgorgement order, and MAZ appeals the denial of its motion for a new trial.

II. SHEAR'S APPEAL

Shear attacks the disgorgement order on several fronts. His threshold argument is that MAZ's suit is infirm because it should have been brought derivatively, not directly. Next, he argues that the district court applied the wrong standards in adjudicating MAZ's claim. Finally, he argues that the disgorgement order was beyond the district court's authority and, even if it was not, comprised an abuse of discretion. We deal with these arguments sequentially.[1].

A. *Direct and Derivative Actions.*

The first skirmish centers on Shear's asseveration that this suit should have been brought derivatively, not directly. The distinction is critically important: shareholders can bring a direct claim for their own benefit, but a derivative claim belongs to the corporation. *See Tucci*, 70 N.E.3d at 923. This distinction holds even though the law "permits an individual shareholder to bring 'suit to enforce a corporate cause of action against officers, directors, and third parties'" in the form of a derivative action. *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (emphasis omitted) (quoting *Ross* v. *Bernhard*, 396 U.S. 531, 534 (1970)). Derivative suits are subject to special procedural guardrails designed to balance the legitimate exercise of business judgment by corporate decisionmakers, on the one hand, with the oversight function of corporate shareholders, on the other hand. A claim that is brought directly when it should have been brought derivatively is not a claim at all and, hence, is subject to dismissal. *See Tucci*, 70 N.E.3d at 927.

In diversity jurisdiction, state law supplies the substantive rules of decision. *See Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Questions of corporate law — including whether a claim is properly

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[1] Shear has taken a blunderbuss approach and proffered a host of other arguments. We have considered these other arguments, but reject them out of hand as patently meritless, insufficiently developed, or both

classified as derivative or direct — are generally substantive and, thus, governed by state law. *See Gasperini* v. *Ctr. for Humanities,* 518 U.S. 415, 427 (1996); *Kamen*, 500 U.S. at 99. Consistent with PHC's status as a Massachusetts corporation, the parties agree that Massachusetts law controls in this case.

The starting point for our inquiry is, of course, *Tucci*. There, the SJC clearly articulated, for the first time, the framework for determining which causes of action must be brought derivatively and which can be brought directly.[2] The crux of the inquiry is "whether the harm [that shareholders] claim to have suffered resulted from a breach of duty owed directly to them, or whether the harm claimed was derivative of a breach of duty owed to the corporation." *Tucci*, 70 N.E.3d at 923. Because a director's fiduciary duties are generally owed only to the corporation, any suit to enforce those duties ordinarily must be brought as a derivative action. *See id.* at 925-27.

We say "ordinarily" because the *Tucci* court identified at least two situations in which a director's fiduciary duties are owed to shareholders and can be enforced directly, rather than derivatively. The first of these exceptions involves close corporations, *see id.* at 926, and is plainly inapposite (PHC stock, after all, was publicly traded, and PHC can by no stretch of even the most lively imagination be considered a close corporation). The second exception hits closer to home:

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[2] MAZ argues that *Tucci* does not apply since the injury it alleges is unique to a particular class of shareholders. We do not reach this argument because — as we explain below — MAZprevails on a less exotic ground.

it involves situations in which a "controlling shareholder who also is a director proposes and implements a self-interested transaction that is to the detriment of minority shareholders." *Id.* The case at hand requires us to explore the parameters of this exception and decide whether Shear fits within it.

To begin, Shear does not contest the self-interested nature of the corporate transaction that gave rise to the Class B premium. Nor can he gainsay that the jury made a special finding of detriment: the merger was not entirely fair to the Class A shareholders. The question, then, reduces to whether the district court supportably determined that Shear possessed a sufficient degree of control to be considered a controlling shareholder.[3]

Answering this question requires us to delve into matters of first impression: *Tucci* did not elaborate on the attributes that are necessary to distinguish a controlling shareholder from a non-controlling shareholder. Faced with terra incognito, we must "endeavor to predict how [the state's highest] court would likely decide the question." *Butler* v. *Balolia*, 736 F.3d 609, 612-13 (1st Cir. 2013). We are mindful that, when making such an informed prophecy, "[a] federal court should consult the types of sources that the state's highest court would be apt to consult, including analogous opinions of that court, decisions of lower courts in the state, precedents and trends in

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[3] Unless otherwise specifically indicated or when describing Delaware cases, we use the term "controlling shareholder" throughout this opinion to mean a controlling shareholder who is also a director.

other jurisdictions, learned treatises, and considerations of sound public policy." *Id.* at 613.

At the outset, we reject out of hand Shear's insistence upon a bright-line rule that only majority shareholders can be controlling shareholders under Massachusetts law. He offers little to support such a proposition. And while Shear is correct that the SJC sometimes uses terminology reminiscent of the majority shareholder/minority shareholder dichotomy, it has done so only in the abstract or in cases in which those terms accurately describe the relationship between the relevant parties. *See, e.g., Tucci*, 70 N.E.3d at 923-27; *Coggins* v. *New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1119 (Mass. 1986). The SJC has given no meaningful indication that the employment of such language was meant to be a guiding principle for determining "controller" status in the mine-run of future cases.

A contrary hypothesis is more compelling. The SJC's use of the adjective "controlling" to modify "shareholder" strongly suggests a desire to encompass a category of shareholders broader than majority shareholders. If "controlling shareholder" meant no more than "majority shareholder," there would be no reason at all for the SJC to resort to the "controlling shareholder" parlance. *Cf. United States* v. *Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (explaining that a court's obvious choice to use one phrase over another in authoring a decision should be given interpretive weight in applying that decision).

Another clue points in the same direction. Although the SJC has not opined as to who might qualify as a controlling non-majority shareholder, it has expressed a concern for the protection of minority shareholders when a director "is dominating in influence or in character." *Coggins*, 492 N.E.2d at 1118 (quoting *Lazenby* v. *Henderson*, 135 N.E. 302, 304 (Mass. 1922)). Such a concern would not be palliated by restricting controlling shareholder status to majority shareholders.

The sockdolager, we think, is that Massachusetts courts often look to Delaware law in analyzing corporate issues. *See, e.g., Brigade Leveraged Capital Structures Fund Ltd.* v. *PIMCO Income Strategy Fund*, 995 N.E.2d 64, 72 (Mass. 2013); *Billings* v. *GTFM*, LLC, 867 N.E.2d 714, 722 & n.24 (Mass. 2007); *Piemonte* v. *New Bos. Garden Corp.*, 387 N.E.2d 1145, 1150 (Mass. 1979). Delaware law has long been hospitable to interpretations of the term "controlling shareholder" that include non-majority shareholders. In what is generally regarded as a landmark case in the area of corporate governance, the Delaware Supreme Court recognized that although a non-majority shareholder usually will not be deemed a controlling shareholder, there are exceptions. *See Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994). Such a status can be established by showing, say, "domination [of the corporation] by a minority shareholder through actual control of corporat[e] conduct." *Id.* (quoting *Citron* v. *Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)); *see Weinstein Enters., Inc.* v. *Orloff*, 870 A.2d 499, 507 (Del. 2005). Ultimately, "the analysis of whether a controlling stockholder exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes." *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 553 (Del. Ch. 2003). We conclude that the SJC would follow such a rule and would hold that a non-majority shareholder who dominates a corporation through actual control of corporate conduct may be deemed a controlling shareholder. *Cf. Butler*, 736 F.3d at 612-13 (explaining that "precedents and trends in other jurisdictions" appropriately may be consulted in determining what a state's highest court might rule).

This gets the grease from the goose. The record contains ample evidence to ground the conclusion that Shear dominated PHC and had pervasive control over its affairs. As the co-founder, board chairman, and chief executive officer, Shear was a ubiquitous force within the company. Indeed, PHC itself acknowledged his control in filings submitted to the Securities and Exchange Commission (SEC). For example, in a 2011 filing, PHC stated (under the heading "Management Risks") that "Bruce A. Shear is in control of the Company . . . . [He] can establish, maintain and control business policy and decisions by virtue of his control of the election of the majority of the members of the board of directors." Such representations are entitled to weight in determining whether an individual is a controlling shareholder. *See In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 258 (Del. Ch. 2006).

While the percentage of the corporate stock that an individual owns is surely a relevant integer in the calculus of control, a party who dominates a corporation and has actual control over it should not be allowed to hide behind mere arithmetic. Shear, however, would have us place more weight on raw numbers. He implores us to accord decretory significance to ownership percentages, pointing out that his stock accounted for only 20% or so of the overall voting power. But this is too myopic a view: there is no formulaic rule regarding what percentage of outstanding shares is sufficient to render a shareholder "controlling." Moreover, the case law is hostile to Shear's absolutist position. For instance, Delaware courts have found minority shareholders to be controlling shareholders under particular circumstances. *See, e.g., In re Cysive*, 836 A.2d at 535, 553.

In the end, everything depends on context. Here, the numerical fraction of PHC's voting power conferred by Shear's shares — hardly an insubstantial portion — does not fairly reflect salient facts regarding his domination of the company and his formidable ability to steer fundamental corporate decisions. Control has a distinctly practical dimension and, as a practical matter, Shear had control of PHC. For one thing, Shear's near-complete ownership of, and concomitant voting control over, the Class B stock guaranteed him the power to veto corporate decisions that were not to his liking. The power to block certain corporate paths by veto is the power to direct the corporation to take the route preferred by the veto-wielder. As any motorist knows, when access is denied to road after road, a driver has little choice but to follow the detour signs. The existence of this power, then, is a telltale sign that Shear had significant control over PHC's affairs.

For another thing, Shear had the power to name four of the six directors (a majority of the board). Courts often have found that the power to appoint a substantial portion of the board is a meaningful indicium of control. *See, e.g., Lynch*, 638 A.2d at 1112-13; *see also In re Primedia*, 910 A.2d at 258 (finding number of directors appointed by allegedly controlling shareholder relevant to "control" inquiry).

In addition, "control over the particular transaction at issue" may be sufficient to establish controller status for fiduciary-duty purposes. *In re Primedia*, 910 A.2d at 257. Shear had such control: he was the primary negotiator of the material terms of the PHC-Acadia merger; he remained a leading player in the negotiations even after Acadia's letter of intent was transmitted and he arranged for his ally, Grieco, to be designated (at least nominally) as PHC's principal negotiator; and his suzerainty over the Class B shares allowed him to dictate board voting and to scuttle any merger that was not to his taste. To cinch the matter, the jury found that "Shear controlled a majority of the PHC Board of Directors with regard to the Board's decision to approve the merger." That finding is amply supported by the evidence, and we — like the court below — have no reason to disregard it. *See Jones ex rel. U.S.* v. *Mass. Gen. Hosp.*, 780 F.3d 479, 487 (1st Cir. 2015); *Ira Green, Inc.* v. *Military Sales & Serv. Co.*, 775 F.3d 12, 18 (1st Cir. 2014).

Shear tries twice over to throw sand in the gears of this reasoning. Both attempts hark back to *Tucci*. First, he argues that his control over PHC was less than that of the defendant in *Tucci*. This argument, though, is smoke and mirrors: the defendant in *Tucci* was not sued as a controlling shareholder, see 70 N.E.3d at 923-27, and the SJC had no earthly reason to determine whether he qualified as such.

Shear's second sortie fares no better. He notes that the *Tucci* court spoke of a controlling shareholder's power to "propose[] and implement[]" transactions, *id.* at 926, and says that, by himself, he could not have implemented the merger — he needed the votes of the Class A shareholders. On its own terms, this argument is problematic. The *Tucci* court gave no hint that by using the word "implement," it meant "unilaterally implement." In all events, such an interpretation would be overly rigid because, among other things, it does not account for the degree of a fiduciary's pervasive influence within the company.

That ends this aspect of the matter. As we have indicated, control is a practical concept. It is derived from a combination of elements. *See In re Cysive*, 836 A.2d at 553. Taken in the aggregate, the combination of elements in this case easily supports the district court's determination that Shear dominated PHC and had actual control over its affairs (including the merger transaction). Accordingly, the district court did not err in holding that Shear — as the jury had found — was a controlling shareholder within the *Tucci* taxonomy. It follows inexorably, as night follows day, that MAZ's suit was appropriately brought as a direct suit against Shear. *See Tucci*, 70 N.E.3d at 926.

B. ***Fairness***.

Having found that Shear was a controlling shareholder, the district court proceeded to determine that he had breached his fiduciary duty to the Class A shareholders. *See MAZ II*, 265 F. Supp. 3d at 118-19. In making this determination, the court adopted a finding by the jury: that the process through which Shear had arranged the merger (and, in particular, the payment of the Class B premium) was not "entirely fair" to the Class A shareholders. Shear challenges both the applicability of the "fairness" standard and the court's allocation of the burden of proof on this issue.

We turn first to Shear's argument that the district court painted with too broad a brush in instructing the jury to apply the "fairness" standard and then turn to his argument that, in all events, the plaintiff class should have borne the burden of proof with respect to fairness. Since both of Shear's arguments center on abstract questions of law, our review is de novo. *See San Juan Cable LLC* v. *P.R. Tel. Co.*, 612 F.3d 25, 29 (1st Cir. 2010); *Charlesbank Equity Fund II* v. *Blinds* To Go, Inc., 370 F.3d 151, 158 (1st Cir. 2004).

1. ***Scope of the Inquiry***. Endorsing Delaware's conception of fairness as "closely related to the views expressed in [Massachusetts] decisions," the SJC has explained that "where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." *Coggins*, 492 N.E.2d at 1117 (quoting *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)).[4] *Coggins* thus makes pellucid that

[4] The SJC has made plain its view that fairness extends beyond a simple finding of fair price. *See Coggins*, 492 N.E.2d at 1117,1119 (explaining that fairness inquiry involves examination of totality of circumstances, and noting that Delaware's fairness inquiry, encompassing "fair dealing and fair price," is compatible

fairness is an essential element in judicial examination of intra-corporate claims involving self-dealing.[5] *See id.* at 1117-19; see also *Bos. Children's Heart Found., Inc.* v. *Nadal-Ginard*, 73 F.3d 429, 433 (1st Cir. 1996) (applying Massachusetts law and explaining that "fairness" standard applies to fiduciary's ability to set own salary); *Geller* v. *Allied-Lyons PLC*, 674 N.E.2d 1334, 1338 n.8 (Mass. App. Ct. 1997) (explaining that "fairness" standard applies to contract promising fiduciary finder's fee).

Shear argues that in this instance the fairness standard was misplaced because the majority of Class A shareholders voted to approve the transaction. He argues, in the alternative, that even if some judicial review was warranted, the court should have narrowed its aperture and reviewed the alleged breach not under the "fairness" standard but, rather, under the highly deferential "business judgment" rule. In support of both of these arguments, he points to section 8.31 of the Massachusetts Business Corporation Act (the Act). See Mass. Gen. Laws ch. 156D, § 8.31. That statute,

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with Massachusetts' inquiry (quoting *Weinberger*, 457 A.2d at711)).

[5] In *Houle* v. *Low*, 556 N.E.2d 51 (Mass. 1990), the SJC discussed a standard that did not require a reviewing court to examine fairness. *See id.* at 59. That more generous standard only applies, though, when an *independent* committee has decided not to pursue derivative breach-of-fiduciary-duty claims. *See id.* Even then, the altered standard might not be satisfied if the contested action allowed a "defendant who has control of the corporation to retain a significant improper benefit." *Id.* This case is far removed from any set of facts that might bring the *Houle* standard into play

though, simply will not bear the weight that Shear loads upon it.

In relevant part, section 8.31 states that a "conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if . . . the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction." *Id.* § 8.31(a)(2). Assuming, favorably to Shear, that the merger transaction at issue here is a "conflict of interest" transaction within the purview of section 8.31(a)(2) — a matter on which we take no view — the statute says what it means and means what it says: it simply protects such a transaction from voidability. *See id.* § 8.31 cmt. 1 ("Section 8.31(a) makes any automatic rule of voidability inapplicable to transactions that are fair or that have been approved by directors or shareholders in the manner provided by the balance of § 8.31.").

Critically, section 8.31 is silent as to director liability. This silence is especially telling when section 8.31 is juxtaposed with the immediately preceding section of the Act — section 8.30. In contrast to section 8.31, section 8.30 is explicit about the circumstances in which a director will be shielded from liability. *See id.* § 8.30(c) ("A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section."). When a legislature offers protection to a party under one section of a statute but declines to offer the party the same protection under a closely related section, it is usually fair to presume that the legislature did not intend to afford such protection under the latter section. *See Duncan* v. *Walker*, 533 U.S. 167, 173 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)); *Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338, 346 (1st Cir. 2004) (stating that the "use of differential language in various sections of the same statute is presumed to be intentional and deserves interpretive weight"). So it is here.

Viewed against this backdrop, section 8.31 offers Shear little shelter. Fairly read, the statute sets up shareholder ratification as a potential protection against the voidability of a transaction, but it does not give a controlling shareholder a free pass for a breach of his fiduciary duty qua director. We hold, without serious question, that section 8.31 does not afford a conflicted director a safe harbor for a breach of his fiduciary duty. *See* Mass. Gen. Laws ch. 156D, § 8.31 cmt. 1 ("A director who engages in a transaction with the corporation that is not voidable . . . is not thereby automatically protected against a claim of impropriety on his part.").

If more were needed — and we doubt that it is — section 8.31 offers no support for the notion that the Massachusetts legislature sought to dislodge the "vigorous" level of judicial oversight available for breach-of-fiduciary-duty claims against conflicted directors. *Coggins*, 492 N.E.2d at 1117. Section 8.31 was enacted in 2003 — at a time when Massachusetts common law concerning self-interested fiduciaries was well-developed, and it is a familiar tenet that when a statute addresses issues previously governed by common law, an inquiring court should presume that — except where explicit changes are made — the legislature intended to retain the substance of preexisting law. *See Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013). Shear has identified no principled basis for refusing to honor this presumption here.[6]

As a fallback, Shear invites us to follow a trail blazed by the Delaware courts, which under certain circumstances require less searching judicial scrutiny of transactions that have been ratified by shareholders. *See, e.g., Singh* v. *Attenborough*, 137 A.3d 151, 151 (Del. 2016); *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 309 n.19 (Del. 2015). We conclude, though, that this line of cases does not aid Shear's cause. Hence, we decline his invitation. Even under the Delaware cases, shareholder ratification does not change the scope of judicial review in the context of conflicted transactions engaged in by a controlling fiduciary. *See In re JCC Holding Co.*, 843 A.2d 713, 723-24 (Del. Ch. 2003). This limitation makes eminently good sense inasmuch as the coercion

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[6] The only Massachusetts cases in which shareholder ratification appears to have been given a cleansing effect involve close corporations. *See Demoulas* v. *Demoulas Super Markets, Inc.*,677 N.E.2d 159, 182 (Mass. 1997); *see also In re Mi-Lor Corp.*, 348F.3d 294, 304 (1st Cir. 2003) (applying Massachusetts law). Such cases have no bearing here: shareholders in close corporations have materially different rights and responsibilities than do shareholders in public corporations. *See In re Mi-Lor Corp.*, 348F.3d at 305.

inherent in the relationship between a controlling shareholder and the remaining shareholders "undermine[s] the fairness-guaranteeing effect of a majority-of-the-minority vote condition because coerced fear or a hopeless acceptance of a dominant power's will, rather than rational self-interest, is deemed likely to be the animating force behind the minority's decision to approve the merger." *Id.* at 723. We are confident that the SJC would hue to this limitation and retain the fairness standard for self-interested transactions even in the face of shareholder ratification.

To say more on this point would be supererogatory. Given the self-interested nature of the challenged transaction, we hold that the district court did not err in subjecting the transaction to the "fairness" inquiry elucidated in *Coggins* and its progeny.

2. ***Burden-Shifting.*** Having concluded that the district court properly framed the inquiry in terms of the fairness of the challenged transaction, we turn to Shear's remonstrance that the court erred in assigning him the burden of proof. We start with the general rule that, in Massachusetts, "[a] controlling stockholder who is also a director standing on both sides of the transaction bears the burden of showing that the transaction does not violate fiduciary obligations." *Coggins*, 492 N.E.2d at 1118; *see Geller*, 674 N.E.2d at 1338 n.8. Policy considerations buttress this allocation of the burden of proof. *See Coggins*, 492 N.E.2d at 1118 (noting concern for protection of minority shareholders in presence of controlling fiduciary). At first blush, then, the district court would appear to have been on solid footing in holding that Shear — as a controlling shareholder and self-interested director — bore the burden of proving that the process underlying the merger transaction was fair to the Class A shareholders.

Despite this general rule, Shear contends that the burden of proof should have been shifted to the plaintiff class. In advancing this contention, he asks us to break new ground: the SJC has never addressed what circumstances, if any, might justify shifting the burden from a conflicted fiduciary to complaining shareholders. Shear urges us to hold that shareholder ratification is one such circumstance.

Shear's attempt to give a cleansing effect to shareholder ratification relies in large part on the commentary to section 8.31 of the Act. *See* Mass. Gen. Laws ch. 156D, § 8.31 cmt. 2 (stating that shareholder ratification may shift the burden of proof to the complaining party with respect to "any challenge to the acts for which the requisite vote was obtained"). His reliance is mislaid. As we already have explained, *see supra* Part II(B)(1), the animating purpose of section 8.31 is to curtail the common law rule making conflicted transactions automatically voidable. *See* Mass. Gen. Laws ch. 156D, § 8.31 cmt. 1. There is no issue of voidability in this case and, thus, the commentary upon which Shear relies does not breathe life into his novel contention.

Shear has another shot in his sling. He points to Delaware case law suggesting that certain facts, such as full disclosure to disinterested shareholders who subsequently ratify a transaction, may sometimes justify shifting the burden to the plaintiff to prove that a transaction is unfair. *See, e.g., Ams. Mining Corp.* v.

Theriault, 51 A.3d 1213, 1242 (Del. 2012). This case law simply does not fit. Even in Delaware, such burden-shifting occurs only when a pretrial determination regarding the crucial facts can be made. *See id.* at 1243 (holding that "if the record does not permit a pretrial determination that the defendants are entitled to a burden shift, the burden of persuasion will remain with the defendants throughout the trial to demonstrate the entire fairness of the interested transaction"). No such pretrial determination was possible here: the evidence was inconclusive as to whether the Class A shareholders, prior to ratification, had been sufficiently informed of the material facts of the transaction.

We do not think that the SJC would depart from its settled rule and shift the burden of proof on these facts. No precedent compels (or even strongly suggests) such a result. Massachusetts law has long imposed the burden of proving entire fairness on a director accused of self-dealing, *see Coggins*, 492 N.E.2d at 1117-18, and this rule has special salience where, as here, a case involves a controlling shareholder who is dominating in influence, *see id.* Viewed through this prism, we conclude that the Class A shareholders' approval of the merger package did not constitute the sort of fully informed ratification that might cleanse the transaction of the stench of self-dealing so as to warrant a shifted burden.

C. *Disgorgement.*

Shear next complains that the district court erred in ordering disgorgement of so much of the Class B premium as exceeded what would have been a fair premium for the Class B shares. Disgorgement is an equitable remedy, and we review the award of an equitable remedy "under a bifurcated standard." *State St. Bank & Tr. Co.* v. *Denman Tire Corp.*, 240 F.3d 83, 88 (1st Cir. 2001). The availability of an equitable remedy presents a question of law engendering de novo review, while the decision either to award or to refrain from awarding an available equitable remedy is reviewed for abuse of discretion. *See id.* Shear's plaint implicates both prongs of this bifurcated standard.

1. *Availability.* To begin, Shear asserts that disgorgement was not an equitable remedy available to MAZ. In support, he offers a hodge-podge of theories, all of which draw their essence from a fundamental misunderstanding of breach-of-fiduciary-duty claims: he insists that such claims are essentially legal, not equitable. Shear is wrong.

A claim for breach of fiduciary duty is a claim originating in equity. *See In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985) (Breyer, J.) ("Actions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity' — carrying with them no right to trial by jury."); *see also Coggins*, 492 N.E.2d at 1117 ("The court is justified in exercising its equitable power when a violation of fiduciary duty is claimed."). For decades, Massachusetts courts have recognized that equity empowers them to examine putative breaches of fiduciary duty, particularly when evidence of self-dealing exists. *See, e.g., Coggins*, 492 N.E.2d at 1117; *Winchell* v. *Plywood Corp.,* 85 N.E.2d 313, 316-17 (Mass. 1949)*; Sagalyn* v. *Meekins, Packard & Wheat, Inc.*, 195 N.E. 769, 771 (Mass. 1935). If a breach of fiduciary duty is found, equity allows the court to order appropriate equitable relief. *See Allison* v. *Eriksson*, 98 N.E.3d 143, 154 (Mass. 2018); *Demoulas* v. *Demoulas*, 703 N.E.2d 1149, 1169 (Mass. 1998). This remains true even when a remedy at law is also available. *See Cosmopolitan Tr. Co.* v. *Mitchell*, 136 N.E. 403, 409 (Mass. 1922); see also *Demoulas* v. *Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 178 n.32 (Mass. 1997) (explaining that even though breach of fiduciary duty can, under certain circumstances, form the basis for an action at law for money damages, it generally forms the basis for an equitable cause of action).

The hallmark of equitable relief is its protean nature and — within wide limits — a court sitting in equity may tailor relief to fit the circumstances of a particular case. *See Allison*, 98 N.E.3d at 154; *Demoulas*, 703 N.E.2d at 1169. Within this remedial realm, it is standard fare for a court to fashion remedies that deny a breaching fiduciary undue gain or advantage received by virtue of his position. *See Chelsea Indus., Inc.* v. *Gaffney*, 449 N.E.2d 320, 327 (Mass. 1983); *Sagalyn*, 195 N.E. at 771; *Geller*, 674 N.E.2d at 1337; *see also Haseotes* v. *Cumberland Farms, Inc.* (*In re Cumberland Farms, Inc.*), 284 F.3d 216, 229 (1st Cir. 2002) (applying Massachusetts law).

Examples abound and we invoke one to illustrate this point. In *Sagalyn*, the SJC considered a series of votes by directors who were also corporate officers, which had the effect of raising salaries for one another. *See* 195 N.E. at 771. Finding that the directors had breached their fiduciary duty, the court upheld a decree directing that each of them must refund to the corporation "the excess of salary [received as a result of the vote] beyond the fair value of his services" as determined by a special master. *Id.* at 771-72. The court explained that fiduciaries have a "responsibility to refrain from taking an undue advantage of the corporation" and that a breach of fiduciary duty may lie "even in the absence of moral turpitude." *Id.* at 771.

Viewed against this backdrop, Shear's claim that disgorgement was not an available remedy goes up in smoke. His most loudly bruited argument — that a claim of breach of fiduciary duty requires a showing of damages — runs headlong into a wall of precedent. The case law holds with conspicuous clarity that when a fiduciary has secured an undue advantage by virtue of his position, equitable relief is available even in the absence of direct economic loss to the complaining party.[7] *See Chelsea Indus.*, 449 N.E.2d at 327; *Sagalyn*, 195 N.E. at 771; *see also In re Cumberland Farms*, 284 F.3d at 229.

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[7] Groping for support, Shear directs us to a few cases that list "damages" as an "element" of a claim for breach of fiduciary duty. *See, e.g., Qestec, Inc.* v. *Krummenacker*, 367 F. Supp. 2d89, 97 (D. Mass. 2005); *Hanover Ins. Co.* v. *Sutton*, 705 N.E.2d279, 288 (Mass. App. Ct. 1999). Once again, Shear fails to appreciate that breach-of-fiduciary-duty claims can have both legal and equitable dimensions. In the bargain, he ignores the SJC's repeated affirmation that equitable relief can be provided for such claims. *See, e.g., Allison*, 98 N.E.3d at 154; *Chelsea Indus.*, 449 N.E.2d at 327.

Billings, cited hopefully by Shear, is not to the contrary.867 N.E.2d 714. The language to which Shear adverts is from the court's recitation of the case's procedural history, *see id.* at 719, and *Billings* never considered whether equitable relief could have been available absent a showing of economic harm.

The Massachusetts decisions align comfortably with decisions elsewhere. The better-reasoned view is that harm is required "only for [the legal remedy of] damages, not for the equitable remedy of disgorgement." *Huber* v. *Taylor*, 469 F.3d 67, 77 (3d Cir. 2006). Embracing this principle, the D.C. Circuit has explained that the equitable remedy of forfeiture does not require a showing of injury to a victim because forfeiture is aimed at "deter[ing] . . . misconduct, a goal worth furthering regardless of whether a particular [person] has been harmed. It also fulfills a longstanding and fundamental principle of equity — that fiduciaries should not profit from their disloyalty." *Hendry* v. *Pelland*, 73 F.3d 397, 402 (D.C. Cir. 1996) (internal citations omitted). This reasoning applies four-square to the circumstances at hand. Requiring a controlling shareholder who had breached his fiduciary duty to disgorge the fruits of his misconduct serves a valid societal purpose regardless of whether the innocent shareholders have been injured by his misconduct.

Relatedly, Shear argues that disgorgement is an inappropriate remedy for a breach of fiduciary duty and that its availability should be limited to claims for unjust enrichment. This is much too crabbed a view.

A breach of fiduciary duty is historically an equitable claim, *see In re Evangelist*, 760 F.2d at 29, and a court faced with such a breach has the authority to choose an appropriate remedy from the wide armamentarium of equitable remedies, *see Demoulas*, 703 N.E.2d at 1169. Ordering a fiduciary to relinquish the undue advantage obtained through a breach of his fiduciary duty is an unremarkable exercise of this authority. *See Chelsea Indus.*, 449 N.E.2d at 327; *Sagalyn*, 195 N.E. at 771; *see also Bos. Children's Heart Found.*, 73 F.3d at 433.

Shifting gears, Shear argues that the jury's verdict — specifically, the jury's finding that the plaintiff class suffered no economic loss — foreclosed any equitable remedy. He frames this argument in terms of the Seventh Amendment, which he says forbids a district court from applying equitable doctrines that depend to any degree on factual predicates previously rejected by a jury verdict. We believe that Shear is trying to fit a square peg into a round hole.

In the proceedings below, MAZ sought both legal and equitable relief. The district court tried the legal claims to a jury and reserved ruling on the equitable claims. This bifurcation was not only agreed to by the parties but also tracked generally accepted procedures: when a single issue may be viewed as either legal or equitable (depending upon what relief is forthcoming), the issue should first be tried to a jury even though the court, taking into account the jury's findings, may later have to determine whether to grant equitable relief. *See Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 479 (1962); *Boit* v. *Gar-Tec Prods., Inc.*, 967 F.2d 671, 677 (1st Cir. 1992); *see also* 9 Charles Alan Wright et al., Federal Practice and Procedure § 2306 (3d ed. 2018).

To support his position that disgorgement is unavailable once a jury has found no damages, Shear pins his hopes to the decision in *National Railroad Passenger Corp.* v. *Veolia Transportation Services, Inc.*, 886 F. Supp. 2d 14 (D.D.C. 2012). But there, the court found "[n]o shattered fiduciary relationship between [the parties that] require[d] the court's protection." *Id.*

at 19. Such a finding distinguishes *Veolia* from this case — a differentiating circumstance that is made luminously clear by the *Veolia* court's careful distinguishing of cases permitting disgorgement. *See id.* at 18-19.

We add, moreover, that the district court's disgorgement order was not at odds with the jury's verdict. Contrary to Shear's importunings, the disgorgement order did not contradict the jury's finding that the plaintiff class had sustained no economic loss. Rather, the court accepted that finding and relied on the jury's other findings — particularly its findings that Shear was a controlling shareholder and that the process leading up to the merger had not been entirely fair — to form an acceptable predicate for equitable relief. *See MAZ II*, 265 F. Supp. 3d at 119. This process accorded with the procedure endorsed by the SJC. *See Demoulas*, 703 N.E.2d at 1172-73 (upholding order for equitable relief when jury had made determinations regarding wrongdoing).

The Seventh Amendment figures into Shear's asseverational array in yet another way. He urges us to find that the disgorgement order is an unconstitutional additur. Here, too, Shear is foraging in an empty cupboard.

The prohibition against unconstitutional additurs is rooted in the Seventh Amendment's guaranty of the right to trial by jury. *See Dimick* v. *Schiedt*, 293 U.S. 474, 485 (1935). As such, the prohibition only applies to jury awards on legal claims. *See Haskins* v. *City of Boaz*, 822 F.2d 1014, 1015 (11th Cir. 1987) (per curiam). It follows inexorably that the Seventh Amendment has no application to an equitable remedy (such as a dollars-and-cents disgorgement order) issued to remediate an equitable violation. *See id.*

That ends this aspect of the matter. Exercising de novo review, we conclude that, in the circumstances of this case, the equitable remedy of disgorgement was available in principle.

2. *Appropriateness.* Our holding that disgorgement was an available remedy does not speak to whether the district court's crafting of the disgorgement order was an appropriate exercise of its discretion. We turn next to that question.

The baseline premise is that "[e]quitable remedies are flexible tools to be applied with the focus on fairness and justice." *Demoulas*, 703 N.E.2d at 1169. Acting in accordance with this premise, the district court purposed to fashion a two-step disgorgement order. First, the order stripped Shear of the unfair advantage — his share of the inflated portion of the Class B premium — gained through his breach of fiduciary duty. Second, the order redistributed those gains to the plaintiff class. The court's methodology is not in issue. Based on comparable transactions, the court identified the portion of the $5,000,000 Class B premium that represented fair compensation for the enhanced voting rights carried by the Class B shares ($1,820,000). The remainder of the Class B premium ($3,180,000), the court found, was unjustified. Based on Shear's percentage ownership of the Class B shares, the court calculated that Shear had received $2,964,396 in unjustified compensation. The court ordered that Shear disgorge this amount and, at the same time, awarded those funds to the plaintiff class, together with interest.

Chaffing under this regime, Shear asseverates that disgorgement, even if theoretically available, was wholly inappropriate in this instance and, thus, an abuse of discretion. We reject this asseveration and conclude that, in the circumstances at hand, the disgorgement order was well within the compass of the district court's discretion.

We need not tarry. Given Shear's breach of fiduciary duty, forcing him to disgorge the fruits of his inequitable behavior seems an altogether fitting remedy. Indeed, when a conflicted fiduciary gains an unfair advantage through a breach of his fiduciary duty, it is hard to imagine equitable relief more appropriate than an order compelling him to disgorge the fruits of his breach. It is, therefore, unsurprising that the SJC has approved the use of disgorgement as a remedy in highly analogous circumstances. *See Sagalyn*, 195 N.E. at 771 (upholding order that fiduciaries refund portion of compensation in excess of fair value as determined by special master).

Shear's rejoinder is unavailing. He says that the plaintiff class sustained no loss and, accordingly, did not need disgorgement in order to be made whole. That is true as far as it goes — but it does not take Shear very far. The district court dealt effectively with this argument. It acknowledged that the disgorgement order resulted in something of a windfall for the plaintiff class and that such windfalls should generally be avoided. *See MAZ II*, 265 F. Supp. 3d at 120. Refusing to order disgorgement, though, would have resulted in a windfall to Shear. *See id.* Faced with this quandary, the court reasonably determined that it was more equitable that any windfall accrue to the plaintiff class rather than to the self-dealing fiduciary. *See id.* at 120-21.

We think that this choice was a supportable exercise of the district court's broad discretion. If a windfall is in prospect, time-honored principles of equity favor bestowing the windfall upon the wronged party as opposed to allowing the wrongdoer to retain it. *See Lawton* v. *Nyman*, 327 F.3d 30, 45 (1st Cir. 2003) (explaining that it is "more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them" (quoting *Janigan* v. *Taylor*, 344 F.2d 781, 786 (1st Cir. 1965))); *cf. Law* v. *Griffith*, 930 N.E.2d 126, 132 (Mass. 2010) (stating that, under collateral source rule, "avoiding a windfall to a tortfeasor is preferable even if a plaintiff thereby receives an excessive recovery in some circumstances").

Shear's citation to *Brodie* v. *Jordan*, 857 N.E.2d 1076 (Mass. 2006), for the proposition that a "remedy should neither grant the minority a windfall nor excessively penalize the majority" does not undermine this conclusion. *Id.* at 1080. *Brodie* is inapposite: that case did not involve the disgorgement of a financial benefit improperly gained by a fiduciary through his position.

The short of it is that the disgorgement order was comfortably within the district court's authority and was suitably tailored to redress Shear's inequitable conduct. Consequently, we find the disgorgement order to be an appropriate exercise of the district court's discretion.

D. *Recapitulation.*

To recapitulate, we conclude that this suit was appropriately brought directly against Shear as a "controlling shareholder who also is a director." *Tucci*, 70 N.E.3d at 926. Given Shear's controller status, the district court correctly applied the fairness standard to his course of conduct and quite properly allocated the burden of proving fairness to him. After a supportable finding of breach of fiduciary duty, disgorgement was well within the wide armamentarium of equitable remedies available to the district court. Last but not least, we conclude that the district court did not abuse its discretion in crafting a disgorgement order designed to ensure that Shear would not be allowed to enjoy the fruits of his breach.

III. MAZ'S APPEAL

There is one last leg to our journey. MAZ appeals the district court's denial of its motion for a new trial. In support, MAZ submits that the district court abused its discretion in allowing Shear, during the jury-trial phase of the case, to introduce evidence of Acadia's "more than ten-fold" increase in its stock price post-merger (over the course of nearly four years). MAZ objected to the stock-price evidence below, and this claim of error is preserved for purposes of appeal.

Where, as here, the denial of a motion for new trial hinges on a preserved challenge to an evidentiary ruling, we review the underlying evidentiary ruling for abuse of discretion. *See Ira Green*, 775 F.3d at 18. Even if we find that an abuse of discretion occurred, we will not order a new trial unless we also find that "the error in admitting evidence 'had a substantial and injurious effect or influence upon the jury's verdict.'" *Id.* (quoting *Gomez* v. *Rivera Rodríguez*, 344 F.3d 103, 118 (1st Cir. 2003)). Here, however, we discern no abuse of discretion in the admission of the challenged evidence, so our consideration stops short of any harmless-error inquiry.

To be admissible, evidence must be relevant, that is, it must have a "tendency to make" the existence of any fact that is of consequence to the determination of the action "more or less probable than it would be without the evidence." Fed. R. Evid. 401. Even so, a court may preclude the admission of relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Fed. R. Evid. 403. When the balancing of probative value and unfair prejudice ends in equipoise, Rule 403 tilts the decisional calculus in favor of admissibility. *See United States* v. *Whitney*, 524 F.3d 134, 141 (1st Cir. 2008).

The court below determined that the stock-price evidence was relevant to the issues raised during the trial. This determination was unimpugnable: among other things, the evidence was relevant to the reasonableness of the directors' judgment in pursuing the merger as a means of creating value for shareholders. And as the district court supportably found, this evidence was also relevant because the plaintiff class was challenging both the reasonableness of the stock-for-stock swap and the structure of the merger. Finally, as in *Gonsalves* v. *Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997), the challenged data was relevant to "show that plans in effect at the time of the merger [had] born fruition."

Of course, the finding of relevance gets us only halfway home. Even relevant evidence may be excluded if it is unfairly prejudicial. The emphasis on unfair prejudice (as opposed to prejudice simpliciter) is not an idle formality. After all, "[v]irtually all evidence is meant to be prejudicial, and Rule 403 only guards against unfair prejudice." *United States* v. *Sabean*, 885 F.3d 27, 38 (1st Cir. 2018). And it is no easy task to show unfair prejudice: we have made pellucid that, once a district court overrules a Rule 403 challenge and admits relevant evidence, "[o]nly rarely — and in extraordinarily compelling circumstances — will we, from the vista of a cold appellate record, reverse [the] district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman* v. *Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988).

In the case at hand, MAZ asserts that the admission of the stock-price evidence was unfairly prejudicial because it may have tainted the jury's perception of whether Shear's alleged breach of fiduciary duty caused the plaintiff class to sustain any economic loss. In effect, MAZ suggests that the admission of this evidence allowed Shear to make what amounted to a "no harm, no foul" argument even though the district court explicitly foreclosed such an argument. As MAZ sees it, this enabled Shear to introduce through the back door a line of defense that the district court had forbidden him to introduce through the front door.

There is, however, a clearly visible fly in the ointment: Shear never made a "no harm, no foul" argument to the jury. MAZ suggests, though, that given the stock-price evidence and what it showed about the profit that inured to the shareholders, the "no harm, no foul" argument was the elephant in the room (and, therefore, the jury likely gave it weight).

We do not dismiss MAZ's suggestion lightly. At a minimum, there was some risk that the jury might have thought along "no harm, no foul" lines without any prompting from Shear. The district court concluded, however, that this risk did not substantially outweigh the probative value of the stock-price evidence.

Where Rule 403 is in play, battles over how to strike the balance between probative value and unfairly prejudicial effect are usually won or lost in the district court. This is not a mere fortuity: a trial court is in the best position to evaluate both the force of particular evidence and the likelihood of unfair prejudice. *See Galarneau* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 504 F.3d 189, 206 (1st Cir. 2007) (noting that district court "observ[es] first-hand the nuances of trial" and, thus, merits substantial discretion when balancing probative value and prejudicial effect). In this instance, we do not think that the risk of unfair prejudice loomed so disproportionately large as to warrant second-guessing the district court's on-the-spot balancing of probative worth and prejudicial effect.

This conclusion is fortified by what transpired when the specter of prejudice from the stock-price evidence was brought front and center during a sidebar conference. After hearing from the parties, the district court offered to give the jury a prophylactic instruction, limiting the permissible use of the stock-price evidence to relevant issues. MAZ refused the offer, opting instead for no instruction.

We long have recognized the value of limiting instructions. *See, e.g.*, *Rubert-Torres* v. *Hosp. San Pablo, Inc.*, 205 F.3d 472, 479 (1st Cir. 2000); *Daigle* v. *Me. Med. Ctr., Inc.*, 14 F.3d 684, 690 (1st Cir. 1994). Such instructions, skillfully employed by a district court, often will eliminate — or at least mitigate — a risk of unfair prejudice. *See United States* v. *Mehanna,* 735 F.3d 32, 64 (1st Cir. 2013). When a party who objects to evidence declines the trial court's offer to caution the jury about the limited utility of that evidence, the objecting party is in a perilously poor position to complain, after the fact, that the evidence was unduly prejudicial. *See United States* v. *Walter*, 434 F.3d 30, 35 (1st Cir. 2006); *United States* v. *Cintolo*, 818 F.2d 980, 999 (1st Cir. 1987); *Dente* v. *Riddell, Inc.*, 664 F.2d 1, 6 n.5 (1st Cir. 1981). So it is here.

We add a coda. Common sense suggests that MAZ's claim of prejudice is severely undermined by the jury's finding that the process undertaken by the directors in structuring the merger was not entirely fair. This finding is a telltale sign that, rather than succumbing to an unstated "no harm, no foul" argument, the jury found a foul and called it.

To say more about the challenged evidentiary ruling would be to paint the lily. We conclude that the ruling was not an abuse of the district court's broad discretion. It follows, therefore, that MAZ's attack on the denial of its new-trial motion is without force.

IV. CONCLUSION

We need go no further. For the reasons elucidated above, the judgment of the district court is

Affirmed. Two-thirds costs shall be taxed in favor of the plaintiff.

United States Court of Appeals
For the First Circuit

Nos. 17-1821, 17-1904

IN RE: PHC, INC. SHAREHOLDER LITIGATION

MAZ PARTNERS LP, on behalf of itself and
all others similarly situated,

Plaintiff, Appellee/Cross-Appellant,

v.

BRUCE A. SHEAR,

Defendant, Appellant/Cross-Appellee.

JUDGMENT

Entered: July 2, 2018

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Two-thirds costs shall be taxed in favor of the plaintiff.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Norman Berman
Chet Barry Waldman
Nathaniel L. Orenstein
Patricia I. Avery
Patrick J. Sheehan
Leonard H. Freiman
Richard M. Zielinski
James H. Hulme
Matthew M. Wright
Nadia Abdulhamid Patel

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAZ PARTNERS LP, Individually and
on Behalf of Others Similarly Situated,

Plaintiff,

v.

BRUCE A. SHEAR, et al.,

Defendants.

CIVIL ACTION
NO. 11-11049-PBS

MEMORANDUM AND ORDER

July 13, 2017

Saris, C.J.

The Court held a nine-day jury trial in this shareholder class action arising from a corporate merger. The Court assumes familiarity with the parties' dispute. *See MAZ Partners LP v. Shear*, 204 F. Supp. 3d 365 (D. Mass. 2016) (summary judgment order), *on reconsideration in part*, 218 F. Supp. 3d 132 (D. Mass. 2016).

On March 10, 2017, the jury returned a verdict in favor of Bruce Shear and Acadia Healthcare, Inc. (the "defendants").[1] On the special verdict form, the jury answered:

> 1. Has the plaintiff MAZ proven that Bruce Shear controlled a majority of the PHC Board of Directors with regard to the Board's decision to approve the merger? Yes _X_ No ___
>
> 2. Has the defendant Bruce Shear proven that the merger was entirely fair to the Class A shareholders? Yes ___ No _X_
>
> 3. Has MAZ proven that, at the time of the merger, the class suffered an economic loss caused by Shear's breach of fiduciary duty to the Class A shareholders? Yes ___ No _X_

Docket No. 419. Pursuant to the instructions on the verdict form, the jury stopped after finding no economic loss and did not answer subsequent questions on aiding-and-abetting liability and damages.

Plaintiff MAZ Partners LP ("MAZ") moves for judgment as a matter of law or, in the alternative, for a new trial. MAZ raises a number of issues: (1) alleged inconsistency in the jury verdict, (2) the appropriateness of one of the questions on the special verdict form, (3) the availability of equitable remedies notwithstanding the jury verdict, and (4) evidentiary error at trial. The defendants respond to those issues and also raise three alternative bases for a finding of non-liability.

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[1] The other defendants were dismissed from the case, leaving only Shear and Acadia by the time the case went to the jury. Trial Tr. Day 8 at 52–53.

The Court **ALLOWS** in part the motion for judgment as a matter of law (Docket No. 423). The Court orders that Shear's pro rata share of the $5 million Class B premium be disgorged to the certified class. Otherwise, the Court **DENIES** the motion. The Court **DENIES** the motion for a new trial (Docket No. 426).

DISCUSSION

I. *Alleged Inconsistency of Jury Verdict*

MAZ argues that the jury's answer to Question 3 -- that the class did not suffer an economic loss from Shear's breach of fiduciary duty -- is inconsistent with its determination that Shear was a controlling shareholder and that the merger was not entirely fair to the class. MAZ's objection is untimely, and in any event the jury's verdict was not inconsistent.

A. Waiver

MAZ failed to timely challenge the jury's special verdict as inconsistent. "[W]ith respect to special verdicts, 'the law is perfectly clear that parties waive any claim of internal inconsistency by failing to object after the *verdict is read and before the jury is discharged.*'" *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 59 (1st Cir. 2016) (quoting Trainor *v. HEI Hosp., LLC*, 699 F.3d 19, 34 (1st Cir. 2012)). "This has been an 'iron-clad rule' in our circuit." *Id.* (quoting *Rodriguez–Garcia v. Mun. of Caguas*, 495 F.3d 1, 9 (1st Cir. 2007)); *see also Toucet v. Mar. Overseas Corp.*, 991 F.2d 5, 8 (1st Cir. 1993) ("In this circuit, a 'party waives inconsistency if it fails to object after the verdict is read and before the jury is dismissed.'" (quoting *Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150, 155–56 (1st Cir. 1992))).

MAZ points to an older First Circuit case suggesting that the Court has discretion to disregard an inconsistent special verdict even in the absence of a timely objection. *See Kavanaugh v. Greenlee Tool Co.*, 944 F.2d 7, 10 (1st Cir. 1991) ("The district court possesses 'considerable discretion' when it comes to the disposition of inconsistent special verdicts . . . . Where, as here, the complaining party, whether tacitly or explicitly, accedes to the written instructions on the special verdict form and to the companion directions included in the charge to the jury, and interposes no objection to the jury's inconsistent responses until after the jury has been discharged, the district court may exercise its discretion to reject special verdicts which the court, with the agreement of all parties, correctly instructed the jury not to answer."). But the question in *Kavanaugh* was whether to disregard the jury's answers to certain questions on the special verdict form that both parties agreed should not have been answered given the jury's answers to earlier questions on the form. MAZ is not asking the Court to disregard an answer to a question that the jury was instructed not to answer. MAZ's inconsistency challenge is untimely.

B. Consistency of Verdict

In any event, the jury verdict was not inconsistent. The jury could have concluded that the premium paid to the Class B shareholders for their high-vote stock was too large but that there was no resulting economic loss to the Class A shareholders. That conclusion was supported by testimony of the defendants' expert Andrew Capitman:

> Well, one of the things that I disagree greatly with [plaintiff's expert] Mr. Morris about is simply this idea that if you weren't getting the -- if the Class Bs were not getting the premium, the buyer would have paid more for the Class As, and generally speaking, I don't see any evidence for that. I don't see any facts that would support that. But just as a matter of practicality and sort of how cheap and flinty-eyed anybody is when they're a buyer in one of these big executive positions, they don't have to pay it. They're offering a fair price for A. That's in and of itself enough. That they've got to get the Bs to come along with the deal and they've got to negotiate a deal for that, that's a separate issue. So just like you've got to pay for lawyers and accountants and bankers, this is a cost of the deal, but it's not a valuation issue.

Trial Tr. Day 8 at 94. Capitman reiterated that point in response to a juror question:

> A JUROR: So if the B deal wasn't done -- is this what you're saying – if the B deal was not done, the price of the A shares would not have changed?
>
> THE WITNESS: Yes, that's what I'm saying. What I'm saying is that from the point of view of assessing the fairness of the deal, the question is, were the A shareholders getting paid a fair price for their PHC stock?

> A JUROR: I guess my question is, would the A shares' stock price have changed if the B deal -- is there a potential for that to have happened if the B deal wasn't made?
>
> THE WITNESS: I see no evidence that there was any discussion like that.

Trial Tr. Day 8 at 94–95. There was adequate evidentiary support for the jury's conclusion that even if the $5 million premium for Class B shares was too high (or that no premium should have been paid at all), there was no resulting economic loss to the Class A shareholders because the Class A shareholders would not have gotten a higher price but for the Class B premium.

In fact, the jury was instructed that the entire fairness standard was made up of two components: fair dealing and fair price. Although the Court instructed that the price was the "paramount issue," a sufficiently great finding of unfair process may lead to the conclusion that the merger was not entirely fair to the Class A shareholders even without evidence of unfair price. The relevant part of the jury instructions, which were not objected to, stated:

> The entire fairness standard involves an inquiry into two interrelated concepts: fair dealing and fair price. To determine whether the merger was a product of fair dealing, you may consider when the transaction was timed, how it was initiated, how it was structured, how it was negotiated, how it was disclosed to the directors, and how the approvals of the directors and stock holders were obtained. . . .

> The fair dealing and fair price components are not viewed in isolation. Rather, you should consider both concepts in conjunction to determine whether the merger was entirely fair to PHC's Class A shareholders. The paramount issue, however, is whether the exchange ratio – you've heard about this during the testimony – whether the exchange ratio, the additional consideration to Class B shareholders, and the $90 million pre-merger dividend to Acadia shareholders were fair to the Class A shareholders.

Trial Tr. Day 9 at 26–27; *see also Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *Emerald Partners v. Berlin,* 787 A.2d 85, 97 (Del. 2001)*; In re Crimson Expl. Inc. Stockholder Litig.*, No. CIV.A. 8541-VCP, 2014 WL 5449419, at *9 (Del. Ch. Oct. 24, 2014); *In re TD Banknorth*, 938 A.2d 654, 667 (Del. Ch. 2007) ("[F]air price and fair dealing are not viewed in isolation, but rather in conjunction, and . . . fairness as to one prong will not necessarily sterilize a transaction or immunize a defendant from liability."). The jury verdict can be supported by a finding that Shear negotiated the Class B premium in an unfair way by seeking personal benefit and not involving the other directors in the negotiation, even if that did not result in an unfair price to the Class A shareholders. The jury verdict was not inconsistent.

II ***Question 3 on Verdict Form***

MAZ argues that the Court's inclusion of Question 3 on the verdict form was error because there is no separate causation element necessary to establish a fiduciary duty claim against a controlling shareholder.

MAZ failed to timely object to Question 3, and in any event the inclusion of Question 3 on the verdict form was not error.

A. Waiver

Under Federal Rule of Civil Procedure 51(b)(2), the Court must inform the parties of its proposed instructions and "must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered." A party may make a timely objection by "object[ing] at the opportunity provided under Rule 51(b)(2)." Fed. R. Civ. P. 51(c)(2)(A). If the party was not informed of an instruction before the opportunity provided under Rule 51(b)(2), the party must "object[ ] promptly after learning that the instruction . . . has been given." The First Circuit has adhered to a "strict enforcement of the object-or-forfeit rule." *Booker v. Mass. Dep't of Pub. Health*, 612 F.3d 34, 40–41 (1st Cir. 2010).

On February 14, 2017, the Court distributed an initial draft verdict form to the parties via email. Question 9 on the draft verdict form asked: "Has MAZ proven that the class has suffered an economic loss as a result of the Defendants' breach of fiduciary duties and/or aiding and abetting of breach of fiduciary duties?" At the final pretrial conference the following day, MAZ stated: "Your Honor, we actually thought you understood the law very well. We thought this is a very simple way and simple for the jury. Now, obviously to some degree the devil is in the details of the jury instructions, but we think this makes sense. . . . [W]e don't have any serious opposition to this. We think it's simple, it's the right interpretation of the law, and we don't have any strong objection to it, but, again, it kind of depends on what the jury instructions say." Docket No. 374 at 78–79.

On March 8, 2017, the seventh day of trial, the Court distributed to the parties a revised draft verdict form and draft jury instructions. Trial Tr. Day 7 at 7–8. Although the draft verdict form had been significantly shortened since the February pretrial conference because of the intervening decision in *Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918 (Mass. 2017), the economic loss question remained substantially intact. Question 3 on that draft of the verdict form asked, "Has MAZ proven that the class has suffered an economic loss caused by Shear's breach of fiduciary duty?" That afternoon, the Court held a charge conference during which MAZ did not object to the inclusion of the economic loss question or to the accompanying jury instruction. MAZ did make a minor objection to the wording of the question, and the Court responded: "So how would you word it? I do have to charge on causation." MAZ responded, "I understand," and proposed that the word "has" in "has suffered" be stricken. The Court adopted that one-word edit. Trial Tr. Day 7 at 156.

On March 9, 2017, the eighth day of trial, the Court distributed to the parties a revised draft verdict form and revised draft jury instructions that incorporated the parties' requests from the prior day's charge conference. Trial Tr. Day 8 at 80. Later that day, following the close of evidence, the Court stated: "as far as I'm concerned, the verdict form is set at this point because I can't change it at the last minute, and I will hand that out to the jury beforehand. So if there are any problems with it, you need to shoot me an email by, say, 4:00 o'clock." Trial Tr. Day 8 at 134. The parties raised some issues at the time, but none related to the economic loss question. Trial Tr. Day 8 at 134–40. The parties also emailed the clerk before the 4:00 PM deadline with additional issues related to the jury charge, but none of the emails related to the economic loss question.

On March 10, 2017, the ninth day of trial, the Court handed out the special verdict form to the jury and charged the jury. MAZ did not object to Question 3 or the associated jury instruction. Following the jury charge and the closing arguments, the Court held a final sidebar conference before sending the jury to deliberate. Trial Tr. Day 9 at 108. The Court stated: "If it's just preserving an objection for the record, let me do it after I send the jury back; but if it's something that I misstated or some other such issue, you know, like that one instruction, that kind of thing." Trial Tr. Day 9 at 108. MAZ still did not challenge the question on economic loss.

Only after the jury was excused, MAZ stated: "Your Honor, from the verdict form, we would object to the inclusion of the question with respect to economic loss, which is No. 3. We would also object to the -- and we would on that one ask that the question be removed from the charge." Trial Tr. Day 9 at 110. This was the first time MAZ asked that the economic loss question not be submitted to the jury, and even at that time, MAZ did not state a justification. The Court responded: "Can I just say, this is a little unfair. This was not raised the other day, to my memory. . . . It's, you know, the reason I do charge conferences. Then I allowed you to do emails to me yesterday. This is just a surprise, and I think it's waived. I mean, no one has asked me for anything else. This was almost the standard – I've had this out there now for about four days. So, anyway, you can object, but I don't think it's been fairly preserved." Trial Tr. Day 9 at 110–11.

MAZ did not adequately preserve its objection to Question 3 on the special verdict form by raising it for the first time after the jury commenced deliberation. The Court had given MAZ notice even before the final pretrial conference that the jury was going to be asked about economic loss, and MAZ had many opportunities to object to the question. Even when MAZ did raise the objection for the first time after the jury commenced its deliberation, MAZ did not articulate its reason for seeking to eliminate Question 3.

B. Causation and Breach of Fiduciary Duty

In any event, the Court did not err in asking the jury to determine economic loss. Under Massachusetts law, a plaintiff must prove causation to recover damages for breach of fiduciary duty. *Qestec, Inc. v. Krummenacker*, 367 F. Supp. 2d 89, 97 (D. Mass. 2005) (citing *Hanover Ins. Co. v. Sutton*, 705 N.E.2d 279, 288–89 (Mass. App. Ct. 1999)) (listing four elements for a breach of fiduciary duty claim: duty, breach, damage, and causation); *see also Billings v. GTFM, LLC*, 867 N.E.2d 714, 719 (Mass. 2007) ("On the question whether the defendants had breached their fiduciary duty to [the plaintiff] . . . , the [trial] judge concluded that, even if the defendants had breached their fiduciary duty in this regard, [the plaintiff] had failed adequately to prove his damages. . . . Accordingly, as the burden of proving damage was on [the plaintiff], he could recover nothing on this claim even if there had in fact been a breach of duty."). Even if the jury found breach of fiduciary duty, MAZ was not entitled to a compensatory damage award without a finding of resulting economic loss.

But equitable relief may be available without a showing of causation. Massachusetts courts have recognized the availability of equitable remedies as relief for breach of fiduciary duty. *See Berish v. Bornstein*, 770 N.E.2d 961, 978 (Mass. 2002); *Demoulas v. Demoulas*, 703 N.E.2d 1149, 1169 (Mass. 1998); *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 195 (Mass. 1997). Those equitable remedies may be awarded without a showing of damage and causation. *See Kelley v. CVS Pharmacy, Inc.,* No. CIV.A. 98-0897-BLS2, 2007 WL 2781163, at *13 (Mass. Super. Ct. Aug. 24, 2007) ("[I]f an attorney breached his fiduciary duty by investing funds entrusted to him by a client in the attorney's personal hedge fund rather than a client IOLTA account, doubled the money through this investment, and returned the client's principal to the IOLTA account, the law does not permit the attorney to keep the fruits of his breach of fiduciary duty simply because the client is not ultimately injured. Rather, the attorney would be required to disgorge the profits arising from his fiduciary breach to the client. The essential principle is that the law does not wish a fiduciary to enjoy personal financial gain from his breach of fiduciary duty."); *see also Fid. Mgmt. & Research Co. v. Ostrander*, No. 902142B, 1993 WL 818684, at *4 (Mass. Super. Dec. 9, 1993) ("Since [the defendant] breached the fiduciary duty of undivided loyalty she owed to [the plaintiff], the appropriate remedy is disgorgement of her improper profits. . . . It is of no import whether or not the plaintiffs in this case suffered any measurable monetary damages. The injury to [the plaintiff] is the loss of [the defendant]'s undivided loyalty, and disgorgement of profits is the appropriate remedy to prevent conflicts of interest in the future."), *aff'd*, 662 N.E.2d 699 (Mass. App. Ct. 1996). Indeed, "the well-considered position of every jurisdiction that has considered the issue [of whether claims for breach of fiduciary duty require actual harm] . . . is to require harm only for damages, not for the equitable remedy of disgorgement." *Huber v. Taylor*, 469 F.3d 67, 77 (3d Cir. 2006) (citing *Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P.*, 82 F. App'x 116, 118 (5th Cir. 2003)).

The jury's function was only to determine whether damages should be awarded.[2] Whether equitable relief should be awarded was for the Court to decide, and the Court deferred that question until after the jury trial.

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[2] "Actions for breach of fiduciary duty, historically speaking, are almost uniformly actions 'in equity' – carrying with them no right to trial by jury." *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 215 F.3d 182, 186 (1st Cir. 2000) (quoting *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985)). But that same court went on to say, "We point out that this case does not involve the computation of damages, which is often considered a determination to be made by a jury." *Id.* Indeed, "actual and punitive damages . . . is the traditional form of relief offered in the courts of law," *Curtis v. Loether*, 415 U.S. 189, 196(1974), and the nature of the relief sought is key to determining whether there is a jury right, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). As such, the claim for damages for breach of fiduciary duty was properly submitted to the jury. *See Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir.2005) (finding right to jury trial for claim for compensatory damages for breach of fiduciary duty); *FleetBoston Fin. Corp. v. Alt*, 668 F. Supp. 2d 274, 276 (D. Mass. 2009) (same).

Docket No. 374 at 40 ("As I understand rescission generally, it's an equitable remedy. It's something I decide, not a jury. . . . I'm not going to give the jury this issue. I'm going to decide it afterwards. I'm going to give them the legal damage standard – I'm still not sure what that is – but not the rescissory. I'll listen to the testimony, and I'll make a decision afterwards as to whether or not it's an appropriate remedy."). The parties agreed to this arrangement, which is the appropriate way for a court to handle a situation where both legal and equitable forms of relief are sought for a single claim. 9 Wright & Miller, Federal Practice and Procedure § 2306 (3d ed.) ("[T]he constitutionally required solution in the situations in which a single issue may be either legal or equitable depending upon the remedy awarded is to have a jury present to decide the issue, even though the district court then may have to determine for itself, on the basis of the jury's determination, whether to grant relief of a type that was historically viewed as equitable."). Given that the jury's role was only to determine whether legal damages should be awarded, the jury was correctly instructed that it need go no further if it did not find economic loss caused by the breach of fiduciary duty.

MAZ argues that causation can be presumed in a controlling stockholder case, even for purposes of a legal damages remedy. The case law does not support that position. First, MAZ argues that there is no mention of causation as a separate element to a fiduciary duty claim in two Massachusetts cases discussing the fiduciary duty of a controlling shareholder in a corporate merger: *Coggins v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1112

(Mass. 1986), and *Gut v. MacDonough*, No. CIV.A. 2007-1083-C, 2007 WL 2410131 (Mass. Super. Ct. Aug. 14, 2007). But the remedy sought in *Coggins* was rescission, and the remedy sought in Gut was a preliminary injunction. That neither of those equitable remedies required a showing of damages and causation is not determinative of whether such a showing is necessary for obtaining damages. Second, MAZ cites language from two Delaware cases that it reads as eliminating a causation requirement for obtaining damages for a breach of fiduciary duty by a controlling shareholder. However, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367–71 (Del. 1993), says only that there was no requirement to prove resultant injury in order to show liability for breach of fiduciary duty for purposes of obtaining an equitable remedy. As for *In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 53 (Del. Ch. 2014), MAZ points to a cryptic statement that the Delaware Chancery Court made without citation: "In a controlling stockholder case like this one, those issues are subsumed within the entire fairness test." By "those issues," the court seemed to be referring to "causation and damages," but MAZ misreads the case. The statement comes from a paragraph explaining that in a case concerning a breach of the duty of disclosure in a merger, an injunction requiring corrective disclosures does not require a showing of damages and causation. *Id.* But the same paragraph stated that claims for post-closure money damages do require a showing of damages and causation. *Id.* There is no support in the case law for a rule that damages for breach of fiduciary duty by a controlling shareholder can be obtained without a showing of harm or causation. Question 3 on the special verdict form correctly asked the jury to determine causation.

III. *Equitable Relief*

MAZ seeks two forms of equitable relief: (1) disgorgement of Shear's $4.7 million pro rata portion of the Class B payment, plus prejudgment interest, and (2) rescissory damages as necessary to reform the 22.5%/77.5% equity split in the merger to the split that the Court determines is fair.

Under Massachusetts law, "[e]quitable remedies are flexible tools to be applied with the focus on fairness and justice. A court has the power to grant equitable relief when there has been a violation of fiduciary duty and fraud, and rescission may be ordered to avoid unjust enrichment of the fiduciary at the expense of a beneficiary. A court may also reform an agreement to correct wrongdoing." *Demoulas*, 703 N.E.2d at 1169.

While equitable relief is within the equitable power of the Court, the Court is bound by the jury's determination on any issues the jury decided relating to the legal remedy. *See* Wright & Miller, *supra*, § 2306; *see also Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 735 (7th Cir. 2004) ("Even when a plaintiff is entitled to a jury trial on his legal claims, the district court must nonetheless make an independent judgment as to any equitable issue. This proposition is true even though the jury's determination of factual issues common to both the legal and equitable claims would bind the court."); *Perdoni Bros. v. Concrete Sys., Inc.*, 35 F.3d 1, 5 (1st Cir. 1994) ("[W]hen a party has a right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." (quoting *Lincoln v. Bd. of Regents of Univ. Sys. of Ga.*, 697 F.2d 928, 934 (11th Cir. 1983))).

By answering "yes" to the first question on the special verdict form, the jury determined that Shear was a controlling shareholder. That determination is binding on the Court. Because Shear was a controlling shareholder who engaged in a self-interested transaction that was to the detriment of the disinterested shareholders, he owed a fiduciary duty to the adversely affected shareholders. *See Tucci*, 70 N.E.3d at 926; *Coggins*, 492 N.E.2d at 1118. To determine whether that fiduciary duty was breached, the question is whether Shear could show that the merger was entirely fair to the Class A shareholders. *Coggins*, 492 N.E.2d at 1117.

At trial, MAZ presented two theories as to why the transaction was not entirely fair: first, because the Class B premium was too large, and second, because the equity split for the PHC shareholders was unfair. The jury's answers on the special verdict form are consistent if the jury agreed with the first theory but then determined that the Class A shareholders suffered no injury from the unfairly high Class B premium. There does not seem to be (and the parties do not suggest) a way that the jury verdict can be squared with liability under MAZ's second theory that the Acadia/PHC equity split was also unfair and therefore a breach of fiduciary duty. If Shear had breached his fiduciary duty by obtaining an unfair equity split, then the Class A shareholders must have suffered economic loss because the Class A merger consideration was directly tied to the equity split. The Court would reach this same conclusion independently of the jury verdict. Shear breached his fiduciary duty as a controlling shareholder because the Class B premium was not entirely fair to the Class A shareholders, but MAZ failed to prove that the 22.5% equity share for PHC was also a breach of fiduciary duty.

As a result of the foregoing, there is no basis for rescission to reform the equity split. The facts presented at trial do justify disgorgement of Shear's \$4.7 million pro rata portion of the Class B premium. *See Berish*, 770 N.E.2d at 978 ("The measure of recovery for a wilful breach of fiduciary duty that results in personal financial gain to the trustee may include disgorgement of the amount of the gain."); *see also Demoulas*, 677 N.E.2d at 197 ("Where a corporate fiduciary obtains a gain or advantage through a violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny any profit to the wrongdoer and prevent his unjust enrichment.").

The Court calculates the disgorgement remedy as follows. The Class B shareholders received a \$5 million premium. While that premium was too high, the payment of a premium was not altogether wrongful. Matthew Morris, the expert for MAZ, testified about a report that Evercore wrote for Xerox about premiums for high-vote share classes. Trial Tr. Day 7 at 95. The Evercore report found thirty transactions in which a company with two classes of shares was acquired. *Id.* at 96. In twenty-three of those transactions, zero premium was paid to the high-vote shares. *Id.* In the seven transactions in which a premium was paid, the premium ranged from 1.1 to 5.2 percent of the equity value of the company before the transaction, with an average of around 3.2 percent. *Id.* at 97. Morris calculated that 3.2 percent of PHC's market capitalization at the time of the merger was about $1.82 million. *Id.* at 98. In other words, MAZ's own expert suggested that a $1.82 million Class B premium may have been defensible. The difference between that and $5 million – $3.18 million – was unjustified. According to the final proxy statement, Shear owned 721,259 shares of Class B common stock. Docket No. 187-1 at 183. As of the record date, there were 773,717 shares of Class B common stock outstanding. Docket No. 187-1 at 12. That means Shear held 93.22% of the Class B common stock. Shear's pro rata portion of the unjustified portion of the Class B premium, which is the sum that should be disgorged, is 93.22% of $3.18 million, or $2,964,396.

There remains an additional question: to whom that sum is disgorged. Disgorgement of that sum to MAZ and the class it represents would be a windfall, since Shear breached his fiduciary duty to all of the Class A shareholders but MAZ represents only 29.2%[3] of the public Class A shareholders. Docket No. 326 at 11. But to only disgorge 29.2% of Shear's ill-gotten gains would be insufficient to deprive Shear of the

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[3] MAZ represents "all Class A shareholders who voted against the merger or abstained," Docket No. 234 at 3, which includes both Class A shareholders that affirmatively abstained and those who did not vote at all, Docket Nos. 325, 367, 374 at 62. Those voters constituted 29.2% of the Class A shareholders. Trial Ex. 18 (SEC Form 8-K reporting shareholder vote)

fruits of his wrongdoing and to deter future wrongdoing. The First Circuit has recognized the equitable principle that it is "more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them." *Lawton v. Nyman*, 327 F.3d 30, 45 (1st Cir. 2003) (quoting *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965)). That principle applies more broadly than the fraud context, as the Restatement (Third) of Restitution and Unjust Enrichment has recognized the same principle:

> When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed both (i) the measurable injury to the claimant, and (ii) the reasonable value ofa license authorizing the defendant's conduct. Restitution from a conscious wrongdoer may therefore yield a recovery that is profitable to the claimant --a result that is generally not permitted when the restitution claim is against an innocent recipient. Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior.

Restatement (Third) of Restitution and Unjust Enrichment § 3 cmt. c (2011). The Restatement expressly recognizes that principle as a remedy for the breach of fiduciary duty. *See id.* § 43 cmt. c ("Gain resulting from breach of fiduciary duty is a prime example of the unjust enrichment that the law of restitution condemns, and one function of the rule of this section is to exclude the possibility of profit from this kind of wrongdoing. An equally fundamental goal of liability under § 43, and one which may be stated without reference to unjust enrichment, is to enforce by prophylaxis the special duties of the fiduciary. Restitution offers a further safeguard, beyond the fiduciary's liability to make good any injury, protecting the reliance of the beneficiary on the fiduciary's disinterested conduct. To this end, a liability in restitution by the rule of this section does not depend on proof either that the claimant has sustained quantifiable economic injury or that the defendant has earned a net profit from the transaction."). In short, there have been other cases in which disgorgement would result in greater recovery to the plaintiff than the amount of injury that it actually suffered. That in itself is not an extraordinary situation that makes disgorgement inequitable.[4]

To be fair, the windfall concern in this case is slightly different from that of an ordinary case of disgorgement. The windfall arises not simply from the fact that the wrongdoer's profit was higher than the amount of the loss, but that the wrongdoer's profit is being disgorged to only a portion of the persons who

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[4] Disgorgement may be inequitable in some cases where the plaintiff seeks "unduly remote" profits derived from a wrong. Restatement (Third) of Restitution and Unjust Enrichment§ 51(5)(a), 53(3) (2011). The classic example is if valuable artwork were painted on stolen canvas using stolen paint – disgorgement of the full value of the artwork may be considered inequitable. There is no such concern here.

were wronged. The parties do not cite a case addressing this situation. However, since the certified class of Class A shareholders who voted against or abstained from voting on the merger did the work in proving the breach of fiduciary duty, it is not unjust to disgorge to them the wrongful gain. *See* The Little Red Hen, https://en.wikipedia.org/wiki/The_Little_Red_Hen. The Court finds that in this situation, it would be equitable to order the disgorgement of $2,964,396 to MAZ and the certified class that it represents.

MAZ asks for interest on the disgorgement amount. In determining the equitable remedy, the Court is not bound by the state statutory interest rate for tort damage awards in Mass. Gen. Laws ch. 231, § 6B. The Court finds that it would be equitable to award interest at the one-year Treasury bill rate, compounded annually, running from the date of the merger to the date of this order.

Finally, awarding equitable relief is not unconstitutional additur, as the defendants claim. "[T]he Seventh Amendment flatly prohibits federal courts from augmenting jury verdicts by additur." *Campos-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999). But awarding equitable relief based on the facts as found by the jury does not implicate the Seventh Amendment.

IV. *Prejudicial Evidence Concerning Post-Merger Stock Performance*

MAZ argues, in the alternative, that a new trial is warranted on the basis of prejudicial evidence and argument concerning Acadia's post-merger stock performance.

Under Federal Rule of Civil Procedure 61, "Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." *See Granfield v. CSX Transp., Inc.*, 597 F.3d 474, 488 (1st Cir. 2010) (citing *Soto Lebr v. Fed. Express Corp.*, 538 F.3d 45, 65 (1st Cir. 2008)).

MAZ filed a motion in limine to exclude any reference to Acadia's post-merger stock price performance. Docket No. 315. The Court allowed in part and denied in part the motion in limine. The Court ruled that evidence of post-merger stock price performance is admissible to the extent that the evidence demonstrates why the PHC board opted to negotiate for a larger percentage of the equity in the resulting company. But the Court ruled that the defendants could not make a "no harm, no foul" argument that MAZ did not suffer an injury because of the rise in the stock price. Docket No. 374 at 68–70.

MAZ's argument for a new trial can be parsed into two parts. First, MAZ argues that the Court's ruling on the motion in limine was erroneous. Second, MAZ argues that at trial, the defendants did not comply with the Court's ruling that they could not make a "no harm, no foul" argument.

MAZ's first argument is adequately preserved. "When a court makes a definitive ruling on a motion in limine, a party need not renew the objection at the time the evidence is offered." *United States v. Carpenter*, 494 F.3d 13, 18 (1st Cir. 2007). But there was no error. Post-merger financial data can be admissible "to show that plans in effect at the time of the merger have born fruition." *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997); *see also Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 499 & n.91 (Del. 2000). Post-merger stock performance is relevant to showing the reasonableness of the PHC directors' beliefs and actions in approving the merger, which counters the claim for breach of fiduciary duty. While the probative value of the evidence must be discounted given its post-merger nature, the evidence had particular relevance because MAZ was not only challenging the wisdom of the stock-for-stock merger, but also the structure of the merger. The evidence at trial showed that PHC was a small public company that had not achieved significant growth in many years. In the merger negotiations, the PHC board sought to structure the transaction in a way that maximized the PHC shareholders' equity stake in the combined company, by agreeing to a $90 million pre-merger dividend to the Acadia shareholders. The post-merger stock performance had some probative value in showing the reasonableness of the PHC directors' decision to negotiate for more equity. To the extent that evidence of post-merger stock performance had prejudicial potential, the Court's ruling on the motion in limine alleviated the concern by preventing the defendants from arguing that there was "no harm, no foul" to MAZ because of the post-merger increase in the stock price.

MAZ's second argument is not adequately preserved. MAZ did not make any contemporaneous objections at trial when, it now alleges, the defendants did not comply with the line the Court drew. In any event, the Court finds that the defendants complied with the line by avoiding any "no harm, no foul" argument. No limiting instruction was necessary, and none was requested – in fact, when the Court offered to bring the jury back for a limiting instruction, MAZ declined. Trial Tr. Day 9 at 116–18.

V. *Defendants' Alternative Arguments*

The defendants raise three alternative arguments supporting a verdict in their favor: the *Tucci* decision from the Supreme Judicial Court, insufficiency of evidence on control of a majority of directors, and statutory ratification. None have merit, but they are adequately preserved for appeal.

A. *Tucci*

The defendants argue that judgment should have been entered as a matter of law based on *International Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918 (2017), a case that the Supreme Judicial Court decided in the midst of trial. *Tucci* held that merger challenges are necessarily derivative, with "at least two exceptions" – one of which allowed direct shareholder merger challenges "where a controlling shareholder who also is a director proposes and implements a self-interested transaction that is to the detriment of minority shareholders." 476 Mass. at 562.

The defendants argue that the exception applies only to majority controlling shareholders and that because there was no majority controlling shareholder in this case, this action had to be brought derivatively. While the *Tucci* decision used language referring to director-majority shareholders, the decision should not be read as defining controlling shareholders as only those that hold majority shares. Delaware law has consistently recognized that actions by a controlling or dominating shareholder can be subject to the same level of scrutiny as those of a majority shareholder. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (citing *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1344 (1987)). Even though Massachusetts corporate law is not the same as Delaware corporate law in important respects, *see, e.g., Tucci*, 476 Mass. at 563 n.14, the Court does not read *Tucci* or *Coggins* as restricting controlling shareholders in Massachusetts to those that own majority shares. The parties agree that no Massachusetts case has decided whether minority shareholders that dominate or control a majority of the board can be considered controlling shareholders, and the Supreme Judicial Court may one day depart from the Delaware courts and decide the answer is "no." In the absence of any such indication from the Massachusetts courts, the better approach is to follow Delaware's rule that domination or control can create a fiduciary duty as a controlling shareholder. *See Piemonte v. New Boston Garden Corp.*, 387 N.E.2d 1145, 1150 (Mass. 1979) (describing Delaware corporate law as "instructive but not binding").

B. Sufficiency of Evidence on Control

The defendants argue that there was insufficient evidence of Shear's control of a majority of the board of directors. They point out, correctly, that Shear's power to appoint a majority of the directors does not, without more, establish control. *See In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 258 (Del. Ch. 2006); *Williamson v. Cox Commc'ns, Inc.*, No. CIV.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006). But the defendants incorrectly argue that there is no evidence of "more" control necessary to establish liability. In particular, the defendants point out that there was little evidence directly referring to many of the individual defendants.

There was sufficient evidence of control. Even without evidence pertaining specifically to each individual director, MAZ presented evidence that Shear was intimately involved in the operations of the company from its very beginning. The various emails to and from Shear during the course of the merger negotiations showed that Shear controlled the entire negotiation process, with little involvement from most of the other members of the board. *See MAZ*, 204 F. Supp. 3d at 376.

C. Shareholder Ratification

The defendants argue for shareholder ratification under Mass. Gen. Laws. ch. 156D, § 8.31. The Court previously held, in its order on the defendants' motion for partial reconsideration of the summary judgment order, that the statute does not apply. Docket No. 302 at 16–21.

As the Court stated, § 8.31 applies to "conflict of interest transactions." A conflict of interest transaction is defined as "a transaction with the corporation in which a director of the corporation has a material direct or indirect interest." Mass. Gen. Laws ch. 156D, § 8.31(a).

A director has an indirect interest in a transaction if either "another entity in which he has a material financial interest or in which he is a general partner is a party to the transaction" or "another entity of which he is a director, officer, or trustee or in which he holds another position is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation." *Id.* § 8.31(b). Although the statute does not define a direct interest, it can be inferred from the definition of indirect interest that a direct interest is where the director himself or herself is a party to the transaction. None of the directors in this case had a direct or indirect interest in this transaction because they were not, in any way, on the other side of the transaction from PHC.

ORDER

The Court **ALLOWS** in part the motion for judgment as a matter of law (Docket No. 423) to the extent that $2,964,396 plus interest is disgorged from Shear to the certified class. The Court otherwise **DENIES** the motion. The Court **DENIES** the motion for a new trial (Docket No. 426).

The parties shall submit a proposed form of judgment within fourteen days.

/s/ PATTI B. SARIS

Patti B. Saris
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAZ PARTNERS LP, Individually and
on Behalf of Others Similarly Situated,

Plaintiff,

v.

BRUCE SHEAR, et al.,

Defendants.

CIVIL ACTION
NO. 11-11049-PBS

VERDICT FORM

Saris, C.J.

A. ***Breach of Fiduciary Duty (Bruce Shear)***

1. Has the plaintiff MAZ proven that Bruce Shear controlled a majority of the PHC Board of Directors with regard to the Board's decision to approve the merger?

   Yes __X__ No ___

[If you answer "no" to Q. 1, go to the end of the verdict slip and sign it. If you answer "yes" to Q. 1, continue to Q. 2.]

2. Has the defendant Bruce Shear proven that the merger was entirely fair to the Class A shareholders?

   Yes ___ No _X_

[If you answer "yes" to Q. 2, go to the end of the verdict slip and sign it. If you answer "no" to Q. 2, continue to Q. 3.]

3. Has MAZ proven that, at the time of the merger, the class suffered an economic loss caused by Shear's breach of fiduciary duty to the Class A shareholders?

   Yes ___ No _X_

[If you answer "no" to Q. 3, go to the end of the verdict slip and sign it. If you answer "yes" to Q. 3, continue to Q. 4.]

B. ***Aiding and Abetting (Acadia)***

4. Has MAZ proven that the defendant Acadia aided and abetted a breach of fiduciary duty to the Class A shareholders by Shear?

   Yes ___ No ___

[If you answer "no" to Q. 4, skip Q. 5 and continue to Q. 6 and 7. If you answer "yes" to Q. 4, continue to Q. 5, 6, and 7.]

5. Has MAZ proven that, at the time of the merger, the class suffered an economic loss caused by Acadia aiding and abetting a breach of fiduciary duty by Shear?

   Yes ___ No ___

C. *Damages*

6. How much merger consideration, if any, should Class B shareholders have received to compensate them for the enhanced rights that they surrendered in the merger with Acadia?

   __________________ dollars

7. What percent of the newly merged corporation's stock should PHC shareholders have received?

   __________________ percent

I certify that the answers to all of the questions are unanimous.

Dated: 3/10/17

/s/ Christopher S. Spero
Christopher S. Spero
Foreperson

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAZ Partners LP

Plaintiff

v.

PHC Inc. et al

Defendant

CIVIL ACTION NO. 11-11049-PBS

JUDGMENT IN A CIVIL CASE

SARIS, D.J. Chief.

XX **Jury Verdict**. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

______ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Judgment is hereby entered for the Defendants.

ROBERT M. FARRELL
CLERK OF COURT

/s/ Maryellen Molloy
Deputy Clerk

Dated: 3/15/17

[jgm.]

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

IN RE:
PHC, INC. SHAREHOLDER LITIGATION

C.A. No. 11-11049-PBS

AMENDED JUDGMENT

Saris, C.J.

On March 15, 2017, judgment was entered in favor of Defendants. (Dkt. 422). On July 13, 2017, the Court entered a Memorandum and Order denying Plaintiff's motion for a new trial and denying in part and allowing in part Plaintiff's motion for judgment as a matter of law. (Dkt. 450).

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED:

1. The judgment previously entered in favor of Defendants (Dkt.422) is hereby amended. Judgment is entered in favor of the Plaintiff and the certified class and against defendant Bruce Shear on Count II in the amount of $2,964,396, together with accrued interest at the one-year Treasury bill rate, compounded annually, running from the date of the merger

(November 1, 2011) to July 13, 2017, in the amount of $57,553, for a total of $3,021,949.[1]

2. Judgment shall enter in favor of the Defendants on Counts I and III.

Dated: 7/27/17

/s/ Patti B. Saris
Hon. Patti B. Saris
United States District Court Judge

[1] *[Defendants calculate interest based on the fluctuating daily rates of one-year Treasury bills published by the United States Treasury from November 1, 2011 through July 13, 2017, compounded annually, equal to $57,553, for a total of $3,021,949. Plaintiff calculates interest based on the one-year Treasury bill rate published by the United States Treasury on July 13, 2017, applying that rate from November 1, 2011 through July 13, 2017, compounded annually, equal to $213,933.13, for a total of $3,178,329.13.]*

APPENDIX F

United States Court of Appeals
For the First Circuit

Nos. 17-1821
17-1904

IN RE: PHC, INC. SHAREHOLDER LITIGATION

MAZ PARTNERS LP, on behalf of itself
and all others similarly situated

Plaintiff - Appellee/Cross-Appellant

PETER BLAKESLEE, individually and
on behalf of all others similarly situated

Plaintiff

v.

BRUCE A. SHEAR

Defendant - Appellant/Cross-Appellee

DONALD E. ROBAR; DOUGLAS J. SMITH;
HOWARD W. PHILLIPS; WILLIAM F.
GRIECO; DAVID E. DANGERFIELD; ACADIA
HEALTHCARE COMPANY, INC.;
ACADIA MERGER SUB, LLC; PHC, INC.

Defendants

Before

Howard, *Chief Judge*,
Torruella, Lynch, Thompson and Kayatta,

Circuit Judges.

ORDER OF COURT

Entered: July 31, 2018

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

/s/ Margaret Carter, Clerk

cc:
Norman Berman
Chet Barry Waldman
Nathaniel L. Orenstein
Patricia I. Avery
Patrick J. Sheehan
Leonard H. Freiman
Richard M. Zielinski
James H. Hulme
Matthew M. Wright
Nadia Abdulhamid Patel