IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re DaimlerChrysler Securities Litigation	)	**CONFIDENTIAL**
	)	**FILED UNDER SEAL**
	)	
	)	Master File No. 00-0993 (JJF)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE DAIMLER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Vincent R. Cappucci
Andrew J. Entwistle
Johnston de F. Whitman, Jr.
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 14th Floor
New York, NY 10171
(212) 894-7200

Jay W. Eisenhofer (Del. Bar No. 2864)
Abbott A. Leban (Del. Bar No. 3751)
Richard M. Donaldson (admitted in PA and NJ only, admission to DE pending)
GRANT & EISENHOFER, P.A.
1201 N. Market Street, Suite 2100
Wilmington, DE 19801
(302) 622-7000

Jeffrey A. Klafter
Darnley D. Stewart
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 544-1400

Jeffrey W. Golan
Jeffrey A. Barrack
David E. Robinson
BARRACK RODOS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600

Counsel for Lead Plaintiffs The Florida State Board of Administration, Municipal Employees Annuity and Benefit Fund of Chicago, Denver Employees Retirement Plan, and Policemen's Annuity and Benefit Fund of Chicago

Dated: March 7, 2003

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STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS

Lead Plaintiffs Florida State Board of Administration, Denver Employees Retirement Plan, Policemen's Annuity and Benefit Fund of Chicago, and Municipal Employees Annuity and Benefit Fund of Chicago (the "Lead Plaintiffs") submit this memorandum of law in opposition to the DaimlerChrysler Defendants' (the "Daimler Defendants") Motion for Summary Judgment Against the Claims of the Class Plaintiffs (D.I. 532). The Lead Plaintiffs' Second Amended Complaint asserts essentially two types of claims under the federal securities laws: one on behalf of Chrysler shareholders who were induced by the Daimler Defendants' fraudulent representations concerning the purported merger of equals to exchange their Chrysler shares for DaimlerChrysler shares in accordance with the exchange ratio set forth in the Proxy/Prospectus[1] and thus did not receive a control premium for those shares, the other on behalf of investors (referred to in this litigation as the "open market purchasers") who purchased DaimlerChrysler shares at inflated prices because the Daimler Defendants misrepresented the post-Merger role of Chrysler and its former management.

The Daimler Defendants assert a statute of limitations defense that can be boiled down to: we tricked you into thinking that this was a merger of equals not an acquisition, but you should have detected our fraud sooner. This defense fails because until DaimlerChrysler CEO Jürgen Schrempp's ("Schrempp") extraordinary confession in October 2000, plaintiffs could not possibly have known that Schrempp had a secret plan to take control of the merged company so that Daimler-Benz could avoid paying a control premium. In fact, the defendants repeatedly touted the transaction as a merger of equals and derided any of the isolated claims to the contrary that defendants now present to the Court out of context.

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[1] "Proxy/Prospectus" refers to the registration statement filed with the Securities & Exchange Commission ("SEC") on or about August 6, 1998 under the Securities Act of 1933 on Form F-4 listing the registrant as "DAIMLERCHRYSLER AG as successor corporation to DAIMLER BENZ AKTIENGESELLSCHAFT," and the proxy statement, prospectus and other addenda made a part thereof.

SUMMARY OF ARGUMENT

1. None of the claims asserted by the Lead Plaintiffs are barred by the applicable statute of limitations because plaintiffs did not have inquiry notice of the Daimler Defendants' fraud until Schrempp revealed his secret plan in October, 2000.

2. The Lead Plaintiffs have demonstrated loss causation since Schrempp has admitted to loss causation and the evidence shows that Daimler fraudulently avoided paying a takeover premium.

3. As this Court already has determined, and as discovery has shown, the merger of equals concept is not limited to the terms of the Business Combination Agreement.

COUNTERSTATEMENT OF FACTS

Chrysler Corporation Prior to the 1998 Business Combination:

An American Success Story

By the end of 1997, Chrysler was an American success story. After being saved from bankruptcy in the early 1980's by federal loan guarantees from American taxpayers, Chrysler was the smallest but possibly the most successful of the Big Three automakers. Under the celebrated leadership of Lee Iacocca (and later, former head of GM Europe Robert Eaton ("Eaton")), Chrysler became a symbol of America's economic resurgence.

In 1996, Chrysler was named "Company of the Year" by Forbes magazine and "Best Performing Auto Stock" by Morgan Stanley (Ex. 1[2] (DCX 0020638); Ex. 2 (T015238-44)) after posting $6.1 billion in profits. Ex. 3 (SS0010328). In 1997, Chrysler's U.S. market share hit an all-time high of 16 percent and its sales revenues reached $61.1 billion, with profits totaling $4.7 billion. Ex. 4 (DCX 21382); Ex. 5 (DCX 21384).

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[2] Citations to "Ex.___" are to documents attached as exhibits to the Volumes submitted with the Declaration of Richard M. Donaldson, Esq., dated March 7, 2003 (the "Donaldson Declaration"). Citations to the "Compendium" refer to the Compendium of individually tabbed articles, press releases, speeches, and public representations submitted with Volumes I-III. Citations to "[Name] Tr., at ___" are to deposition transcripts. Those transcripts are organized in alphabetical order in Volume IV of the Donaldson Declaration. Citations to "[Name] Expert Report at ___" are to expert reports organized in alphabetical order by expert name in Volume V of the Donaldson Declaration.

Despite this success, Chrysler stock traded at only $39 in 1995. Ex. 6 (DCX 0186522-186608, at 186582).[3] That year, Kirk Kerkorian announced a plan to acquire Chrysler for $22.8 billion, or $55 a share – a 40% premium over Chrysler's then market price. York Tr., 27-28; Ex. 7 (T036915-21). Chrysler management aggressively opposed the ultimately unsuccessful bid as insufficient, taking the position that an acquisition of Chrysler would require at least a 50-55% premium. Ex. 8 (T030229-30).[4]

Kerkorian was not the only one who was planning a pursuit of the undervalued Chrysler.

"Project Blitz": Daimler-Benz Prepares to Acquire Chrysler

In late summer-early fall of 1995, Schrempp and Dr. Eckhard Cordes ("Cordes," Daimler-Benz's head of corporate development with responsibility for mergers and acquisitions) retained Goldman Sachs to explore an acquisition of Chrysler. Dibelius Tr., 84-85. In a study ominously code-named "Project Blitz," Goldman Sachs analyzed an acquisition of Chrysler at different premiums above Chrysler's market price, evaluated Chrysler shareholders' willingness to accept "Daimler-Benz shares as acquisition currency," and assessed Chrysler's acquisition defense profile. Dibelius Tr., 89-90; Ex. 9 (DCX0186522-550, at 549). Among other things, the 1995 Project Blitz analysis concluded that "[a] Chrysler acquisition [would be] big, but financially feasible," and that it would be "significantly accretive to Daimler shareholders" especially in view of "the low valuation of Chrysler's stock relative to that of Daimler-Benz." Id. Goldman Sachs concluded that Daimler-Benz could complete an accretive acquisition of Chrysler even paying an acquisition premium of 45.5% over Chrysler's then stock price.

In the spring of 1997, TransAtlantic Consulting, Inc. ("TransAtlantic," a U.S. corporation) likewise analyzed a potential acquisition of Chrysler for Daimler.

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[3] Like other U.S. automobile manufacturers, however, its stock traded at a low price/earnings ("P/E") multiple. By contrast, Daimler-Benz was typical of other European automobile makers in that its stock traded at a considerably higher P/E. See Dibelius Tr., 254-55.

[4] Not insignificantly, Kerkorian promised to replace Chrysler management. York Tr., 33.

TransAtlantic concluded: "Dutch Boy [Daimler-Benz] has the opportunity to offer Christian [Chrysler] shareholders a sizable premium to the current Christian share price and still complete a transaction which is highly additive to Dutch Boy's per share earnings." Ex. 10 (DCX 0183023). Significantly, this analysis assumed a premium as high as 62% above Chrysler's per share market price. Id.

TransAtlantic's findings were thereafter evaluated by Goldman Sachs (Schrempp Tr., 9-10; Cordes Tr., 21-23), whose retention agreement made clear that it had been retained to aid in the acquisition of Chrysler. Ex. 11 (GS0009698-703) (translation attached); Cordes Tr., 178. Goldman Sachs prepared an updated Project Blitz analysis (Cordes Tr., 29-31), which again concluded that an acquisition of Chrysler would be accretive to Daimler-Benz even at a significant premium because of Chrysler's strong earnings. Goldman also noted that the feasibility of such an acquisition would be facilitated by a recent change in German law – specifically, a July 23, 1997 decision of Germany's Highest Court, the BGH, which gave "German companies substantial new flexibility to use their shares to acquire other companies." Ex. 12, Declaration of Dr. Alexander Dibelius ("Debelius Decl.") ¶ 7; Dibelius Tr., 145-148. See also Cordes Tr., 48-52 (Goldman Sachs faxed Cordes a newspaper article discussing the BGH decision).[5]

Separately, also in 1997, Schrempp met with bankers at Lehman Brothers in Munich to discuss a possible Chrysler acquisition. Schrempp Tr., 13-23; Ex. 13 (DCX 0183133-139). Lehman Brothers opined that a Daimler-Benz acquisition of Chrysler would be "highly accretive," even if Daimler-Benz paid a 45% premium above Chrysler's per share market price. Id. (at DCX 0183135-36).

Thus, Schrempp was informed by at least three consultants that a Chrysler acquisition would require a premium in the range of 45-65% over Chrysler's stock price.

Schrempp then met with Jon Corzine, the co-chairman of Goldman Sachs, in New York. Schrempp Tr., 26. During this meeting it was agreed that the acquisition of

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[5] See also Ex. 13 (DCX0183144) (certified translation attached).

Chrysler – an American success story revived with American tax dollars – had to be accomplished under the guise of a friendly merger. Schrempp Tr., 29. An outright takeover of the American icon by a German company would create a political uproar and would never garner shareholder support in the United States. Id. Schrempp also knew that cloaking the transaction as a merger - particularly a merger of equals - could significantly reduce its cost, by eliminating the need to pay a control premium. See Schrempp. Tr., 74 (acknowledging that a transaction involving a transfer of control requires the payment of a premium).

Daimler-Benz Approaches Chrysler

Schrempp and Eaton, Chrysler's CEO, negotiated the transaction from January 1998 through the first week of May, 1998. See generally Schrempp Tr., 34-97; Ex. 14 (at DCX0019435-437). Eaton testified that he was not negotiating a change of control transaction and that he understood that as a fiduciary, had it been a change of control transaction, he would have been required to obtain a control premium. Eaton Tr., 251.

Chrysler was advised by investment bankers at Credit Suisse First Boston ("CSFB"). One of CSFB's initial analyses dated March 11, 1998 showed a stand-alone value of Chrysler of $55 to $60 per share and a $75 to $90 per share value with synergies. Ex. 15 (CSFB-DC 003095-003156, at 003137). CSFB emphasized that this valuation was on the low side because it was based on a more conservative forecast than Chrysler's own business plan which would have produced even higher per share values. Ex. 16 (DCX 0161551).

Even as of March 13, 1998, Goldman Sachs' internal documents referred to the planned transaction with Chrysler as "Project Blitz," and stated that "[t]he Project Blitz team in Frankfurt has indicated that this is the first buy side transaction with Denver and the target is a U.S. public company. Ex. 17 (GS0001704) (emphasis added). Unbeknownst to Chrysler, Goldman Sachs also had concluded that Chrysler was substantially undervalued by the market, and that its actual value ranged from $72.27 to

$109.92 (compared to the closing price of Chrysler stock on April 29, 1998 of $40.56 per share). Ex. 18 (GS 0011918).

The terms ultimately agreed upon included a stock-for-stock exchange with Chrysler stockholders receiving .6235 of a DaimlerChrysler share for each share of Chrysler. Ex. 19 (DCX0019382-621, at 389). It had been agreed that the trading date on which Chrysler's stock price would govern the exchange ratio for the Merger was April 15, 1998, when the stock closed at $44.875 on the New York Stock Exchange. Gentz Tr., 207. The per share deal was $57.50, or 28% above Chrysler's stock price. Id.

The 28% was not a control premium. See Eaton Tr., 247-54; Koch Tr., 30-32. Indeed, Schrempp explained that he initially expected that there would be no premium paid to Chrysler shareholders because the transaction was being negotiated as a merger of equals, but that it later was made clear to him that an "adjustment" would need to be made to take into account the difference in the companies' respective P/E ratios. See Schrempp Tr., 72-75. As Schrempp testified:

> Q: Was it your understanding at the time that in a business transaction, if one company is going to take over another company, then there is generally a premium paid to acquire control of the other company?
>
> * * *
>
> A: Yes, I am aware of that.

Schrempp Tr., 74. Indeed, Schrempp was well aware of this principle when he negotiated the transaction, telling Eaton: "[l]ook, if I were acquiring you, I could understand giving that kind of premium. But this isn't an acquisition. It is a merger. Therefore we shouldn't be looking anywhere near that kind of premium." *Taken For a Ride* at 7.[6]

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[6] Plaintiffs have a pending motion to compel the authors of the book in which this quote is reported to produce documents relating to this statement. Nonetheless, this cumulative evidence is capable of being admissible at trial and can be considered on this motion. See Petruzzi's IGA Supermarkets, Inc. v. Darling-

Similarly, Eaton confirmed that an offer for change of control would have had to have been for "a lot more money" for the Chrysler board to consider such an offer. Eaton Tr., 248-249.

The financial advisors involved in the transaction agreed, stating that a control premium is generally not paid in a merger of equals, whereas acquisitions generally involve substantial premiums. Alexander Dibelius, from Goldman Sachs, testified that control premiums are generally not paid in merger of equals transactions. See Dibelius Tr., 215; Ex. 20 (GS0003836-886) ("generally, the more dominant a party to the merger . . ., the more premium such party will pay"). Steve Koch, of CSFB, Chrysler's financial advisor, characterized premiums paid in merger of equals transactions as "relatively small, if any," (Koch Tr., 31), and testified that "the majority of transactions that are characterized by the popular media to be so-called mergers-of equals would have – would tend to have lower premiums." Id. at 142; see also Ex. 21 ((CSFB-DC002006-48 (a merger of equals is likely to result in a small premium whereas an acquisition is likely to result in a "substantial one")). Investment banking expert Wilbur L. Ross, Jr., Plaintiffs' expert, similarly reports, "In my experience, premiums are significantly higher in acquisitions than in 'mergers-of-equals.'" Ross Report at 5. See also Zmijewski Report at 21-23 (plaintiffs' valuation expert stating that the premiums in merer of equals transactions are significantly less on average than those in acquisitions).

All of the witnesses who participated in the negotiation and consummation of the merger agreed in discovery that in fact no acquisition premium was paid to the Chrysler shareholders. See Cordes Tr., 143-146; Gentz Tr., 209-210; Dibelius Tr., 253, 254-255; Eaton Tr., 251-252; Koch Tr., 165-166:23; Schrempp Tr., 74-78; Valade Tr., 90.

As Gentz, Daimler's CFO, testified:

Delaware Co., 998 F.2d 1224, 1235 n.9 (3d Cir. 1993) (stating that a hearsay statement "can be considered on a motion for summary judgment because it is capable of being admissible at trial").

A: . . . I already said – well, I would like to state that ***we did not pay a premium***. The task was to find an exchange rate between the old and new shares. And as I said yesterday, a multiple had to be used for Daimler-Benz and for Chrysler which was different for both. And the multiple – the multiplier is one method which is used by investment bankers. ***In the U.S., multipliers are accepted in the automotive industry because these are – where these multiples are lower than in Europe. So we needed to move these closer together. And the premium of 28 percent was ultimately but not solely based upon multiples.***

Gentz Tr., 209-211.

Following negotiation of the $57.50 price, CSFB revised its stand-alone valuation downward to a range of $45 to $63 per share. They expressly conditioned this valuation on the transaction being a merger of equals, not an acquisition. Ex. 22 (CSFB 00214-1237 at 1217). See also Ex. 19, Proxy/Prospectus, (DCX0019382-621, at 445); Koch Tr., 210-212. The Chrysler Board approved the transaction by unanimous vote on May 6, 1998 based specifically on the fact that it was to be a merger of equals and based also on CSFB's fairness opinion, which likewise was expressly based on the "merger of equals" nature of the transaction.[7] Ex. 23 (DCX 0013038-40) (listing the "material factors" upon which the Chrysler Board's approval was based).

[7] DCX 0013045 (*"CSFB analyzed the transactions as a strategic business combination not involving the sale or control or Chrysler . . ."*). The Court noted the focus of CSFB's analysis in its March 22 Memorandum Opinion (D.I. 108) in rejecting defendants' argument that the term "merger of equals" was defined exclusively by the provisions of the Business Combination Agreement. Id. at 59-60.

The Business Combination is Announced as a "Merger of Equals"

To win management, labor and ultimately shareholder support for the deal, the public relations groups of both companies as well as outside consultants participated in what was formally denominated the "Corporate Communications Program." See Harris Tr., 18-20, 25, 29-31, and 33; Ex. 24 (GS0008402-42).[8] The merger of equals message was a vital component of the Program. See Harris Tr., 19, 25, and 29-32.[9]

The Merger of Equals Message Pre-Merger

On May 7, 1998, Schrempp and Eaton appeared together in London to formally announce the "merger of equals." The press release issued that day began: "Stuttgart, Germany/Auburn Hills, Michigan, USA - Two of the world's most profitable car manufacturers, Daimler-Benz AG (NYSE: DAI), and Chrysler Corporation (NYSE: C), have agreed to combine their businesses in a ***merger of equals***." Compendium, Tab 13.[10] The next day, readers of The Wall Street Journal in the United States read: "The transaction is structured as a '***merger of equals,' in which both sides share management and leadership***." Id., Tab 35. The Wall Street Journal European edition similarly reported: ". . . Mr. Eaton said Thursday that he saw a unique opportunity in Mr. Schrempp's overture. 'We had the ability to choose our favorite partners,' he said Thursday. ***'It would be a merger of equals.'***" Id., Tab 38.

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[8] The target audience for this program included shareholders, investment managers and analysts, bankers, financial media, automotive media, leading politicians and ministries, regulators, regional and local politicians, business community peer groups, leading business academics, local community leaders, pressure groups, trade unions, management, and Chrysler staff and their families. Ex. 24 (GS0008402-41, at 407-08). A host of PR firms and lobbyists were employed, including AGG, Kekst and Company, Arnold & Porter, Jack Quinn and Bell Pottinger International. Ex. 38 (DCX0084481-95).

[9] See also Ex. 25 (DCX0007674-7676); Ex. 26 (DCX023560-610); Ex. 27 (DCX0019872-19939); Ex. 28 (DCX3295-311); Ex. 29 (DCX44822); Ex. 30 (DCX16950-54); Ex. 31 (DCX29180); Ex. 32 (DCX84604); Ex. 33 (DCX21143-44); Ex. 34 (DCX35770-77); Ex. 35 (DCX37136-52); Ex. 36 (DCX30680-81); Ex. 37 (DCX63509-21).

[10] Citations to the "Compendium" refer to the Compendium of individually tabbed articles, press releases, speeches, and public representations submitted herewith with the declaration of Richard M. Donaldson as Volumes I-III.

Likewise, on May 11, 1998, Eaton appeared at Chrysler headquarters for his first post-Merger announcement in the United States and stated: ***"This is a merger of equals. . . . It will be run as a merger of equals."*** Ex. 39 (DCX0001755). Later that month, the Denver Post carried an article quoting Eaton: ***"'This is not a sale, this is a merger of two companies into a third company."'*** Compendium, Tab 79. The theme resonated within industry publications such as the July 1, 1998 issue of Automotive Manufacturing & Production: "Chrysler and Daimler-Benz have made great efforts to assure people that this is ***not an acquisition***, but truly a merger between two strong companies. A review of the agreement suggests that this may in fact be a ***fairly equitable merger. . .***" Ex. 40 (DCX0111434-35). The terms that were touted from the outset were equal representation of former Chrysler and former Daimler persons on the Board of Management, equality on the Supervisory Board, dual headquarters in Germany and the U.S., the creation of a Shareholder Committee with equal representation, and Schrempp and Eaton to act as Co-Chairman for three years until Eaton was to retire. Compendium, Tabs 1, 4, 12, 13, 19, 35.[11]

The Meaning of "Merger of Equals"

For reasons that are obvious, the Daimler Defendants have in this litigation attempted to suggest that the meaning of merger of equals was limited to the specific terms of the BCA. See D.I. 533, 41-44. The Court already has rejected this contention

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[11] When the transaction was announced, a few skeptics among the media questioned whether it was appropriately characterized as a "merger of equals." However, this skepticism was denounced by the defendants themselves and through their PR machine. "There were endless presentations and discussions, internally and externally, where myself and my colleagues kept pointing out that this was a merger of equals." Schrempp Tr., 124. "[A]gain and again, we explained that it was a merger of equals, and why, and Bob Eaton very often wrote to me and called me and said, we have to make sure that the message gets across that this is a merger of equals and that we should talk about nothing else, because it is important that people understand this concept and accept it." Schrempp Tr., 125. Further, Schrempp testified that the mistaken media speculation "was exactly the reason why we joined the thought of engaging the PR expert." Schrempp Tr., 125. When Schrempp was asked whether he disputed post-announcement press reports that the transaction was a takeover, he stated: "It was not that I probably would have. I actually did." Schrempp Tr., 344. Schrempp also testified that after the transaction closed on November 13, 1998, he and Eaton "pointed out – and our colleagues pointed out through numerous interviews and speeches that it was, in fact, a merger of equals." Schrempp Tr., 345.

which has now been thoroughly discredited by discovery.[12] Indeed, the day after the merger announcement, Schrempp told Chrysler shareholders to "forget" the BCA, as it was only the means to an end:

> Q: Is this really a takeover rather than a merger?
>
> Schrempp: No. I think what is very important is that this is a merger of equals. ***Let's forget the technical transaction, how to get there.*** But we have made sure that we have equal representation on management, we have equal representation on the supervisory board.

Compendium, Tab 43 (emphasis added).

The witnesses – including the Daimler Defendants' own witnesses – have consistently articulated the meaning of "merger of equals" in their testimony and otherwise:

Jürgen Schrempp

- the union of "***two equal partners***" such as to create a "new corporation" that is under "***equal control***" Schrempp Tr., 60-61 (emphasis added);
- the merger partners have "***equal rights.***" Id. at 61 (emphasis added);

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[12] As the Court stated:

> Defendants contend that because the term "merger of equals" was defined in the corporate governance provisions of the Combination Agreement and Plaintiffs do not allege a breach of the Combination Agreement, Plaintiffs cannot allege that the representations in the Proxy/Prospectus were false. The Court finds this argument unpersuasive for several reasons.
>
> * * *
>
> The Proxy/Prospectus employs the term "merger of equals" (i) to broadly describe a business combination between companies of roughly equal financial strength, under joint leadership with post-deal equity split about evenly; (ii) as a short-hand for the specific post-Merger governance structure of DaimlerChrysler; (iii) as a short-hand for the post-Merger governance structure, incorporating a brief description of the Chrysler Board's view of its role and that of Chrysler's senior management in helping to realize the goals of the Merger; and (iv) to describe a category of comparable transactions used by [Credit Suisse] in its analysis of the fairness of the deal price to Chrysler shareholders.

DaimlerChrysler, 197 F. Supp.2d at 59.

- the future governance then would ensure that the new firm was also governed under the principle of ***equal governance.*** Id. at 67-68 (emphasis added); and

- "this is not a buyout. This is not a takeover. This is a merger of equals." Compendium, Tab 124.

Eckhard Cordes (Daimler-Benz's head of mergers and acquisitions)

- "50-50 partnership, in which ***one partner does not dominate the other partner.***" Cordes Tr., 106 (emphasis added);

- with regard to the board of management, ***50 percent would come from Chrysler***, from the Chrysler management at that time, ***and 50 percent would come from the Daimler management*** at that time. Id. at 108 (emphasis added);

- with regard to the shareholder representatives on the supervisory board that ***half would come from Chrysler and half would come from Daimler-Benz.*** These two examples are the most important cornerstones in all this, in what a merger of equals is all about. But there is many more. Id. at 106-108 (emphasis added);

- that the overall spirit of the negotiations are marked by basically ***two equal partners*** being involved. Id. at 191 (emphasis added);

- that at least ***one candidate from each company would be considered for "important" management positions*** below the Board of Management. Id. (emphasis added);

- that decisions regarding the assignment of management positions would be based on a "***philosophy of balance.***" Id. at 192 (emphasis added); and

- that the post-merger company would be operated from ***dual headquarters.*** Id. (emphasis added).

Alexander Dibelius (managing director of Goldman Sachs, investment banker for Daimler-Benz)

- meaning of merger of equals in the context of investment banking: ". . . it has a meaning that you would combine two entities and ***you would mainly share control as equals going forward.***" Dibelius Tr., 225 (emphasis added).

Thomas Stallkamp (President of DaimlerChrysler Corporation)

- "will break new ground in terms of 'jointness.' . . . ***co-chairman, dual headquarters, a senior management team that's comprised of an equal number of Chrysler and Daimler people . . . the official language is English.***" Compendium, Tab 111 (emphasis added).

Steven Koch (managing director of CSFB, investment banker for Chrysler)

- "the governance structure of the company after the combination would have a true combination of management and boards of directors such that it would not be evident to a probably casual observer that one company were – was the surviving entity as opposed to the other." Koch Tr., 54.

Schrempp and Eaton

- "***Neither company would dominate now or in the future.***" Compendium, Tab 23 (emphasis added).

Gary Valade (CFO of Chrysler, Head of Global Purchasing at DaimlerChrysler)

- There will be "dual headquarters. The proposal was to have dual headquarters with equal importance and responsibility." Valade Tr., 92-93.

Robert Eaton

- Q: Will Chrysler employees have the same opportunities as Daimler employees?

  By design a merger of equals was pursued to ensure that all employees had equal opportunities in the new company. The merger creates a strong global company that will be very competitive and has opportunities to grow on many fronts. We believe that all of the employees will have many opportunities going forward in the company. Ex. 41 (DCX0163117-24, at 163119).

- "I expect that (President) Tom Stallkamp or one of the people (at Chrysler) will take over after Juergen Schrempp. We have some very

talented people here. ***From the very, very first day, Juergen and I both said that everybody had an equal opportunity. Everybody's got a totally equal opportunity, and ultimately these (Chrysler) guys and gals will shine."*** Ex. 42 (DCX0214188-99, at 214199).

- It will be a new company. It will have a culture that's different from each of the parent companies. And, obviously, it will go on and ***the best people will in fact ultimately run this company. And I expect to see some of the management of the Chrysler Corporation ultimately becoming chairmen of this company after both I and Juergen retire.*** Compendium, Tab 115 (at DCX 0023230).[13]

Thus, the picture presented to the public was of two strong companies coming together to form a new entity in a transaction that did not involve a change of control to be managed jointly and equally by former Daimler-Benz and former Chrysler personnel, all of whom would have an equal opportunity to advance in the new company. Repeatedly, it was emphasized that the transaction was not a takeover or a change in control. See, e.g., Compendium, Tabs 62, 124, 127 and 141.[14] This was a far cry from

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[13] Eaton was the sole witness who testified that merger of equals was defined exclusively by the BCA. Eaton Tr., 42-43. His testimony is hopelessly at odds with his statements at the time. For example, Eaton conceded at his deposition that part of the MOE message was that there would be equality of opportunity in the new combined company but, he admitted that this is not a term of the BCA. Id. at 163 (confirming that one of the messages communicated in connection with the transaction was that Chrysler employees would have an equal opportunity to succeed in the post-merger company).

[14] Likewise, during a question and answer session conducted during the September 18, 1998 Special Meeting of Chrysler Shareholders in connection with the merger vote, Eaton made unequivocally clear that there would be no transfer of Chrysler control:

> MR. HAGMANN. Well, that still leaves the issue of Daimler acquiring Chrysler.
>
> THE CHAIRMAN. ***Daimler is not acquiring Chrysler.*** Under any way you look at it, ***Daimler is not acquiring Chrysler.*** This is in fact a merger of two companies into a new company.
>
> MR. HAGMANN. Well, I have to think –
>
> THE CHAIRMAN. If Daimler-Benz goes away, obviously Chrysler goes away. Nobody is acquiring anybody.
>
> MR. HAGMANN. Well, after three years it's my understanding they will have effective control of the entire organization.
>
> THE CHAIRMAN. ***That is absolutely not the case. They will continue to have their***

the reality of Daimler's undisclosed Project Blitz and Schrempp's plan for Daimler to acquire Chrysler and its earnings stream for Daimler's benefit.

A July 15, 1998 memo to Jürgen Schrempp from the Securities and Exchange Commission referring to a draft of the Proxy/Prospectus requested: "Please clarify the meaning of merger of equals. It is unclear whether the company means the control between the two parties will be shared equally or that it is a merger of two companies of equal financial size." Compendium, Tab 83 (DCX0076402-410, at 402). Daimler-Benz's attorneys answered this inquiry by referring the SEC "to the second paragraph in Chrysler's letter to shareholders which [had] been revised in response to the staff's comment." Compendium, Tab 87 (T002452). The cited portion of the letter (which was from Eaton and which was included as the introduction to the Proxy/Prospectus) provided in pertinent part that in the anticipated "'merger of equals' transaction. . . . DaimlerChrysler will bring together two companies with equal financial strength under the joint leadership of both management groups. . ." Compendium, Tab 96 (DCX 0019379). See also Harris Tr., 46-50. As Eaton testified, this was a representation that there would be joint management at the corporate level of the combined company. Eaton Tr., 28.

Likewise, a submission to the S&P 500 Index Committee in support of the pre-merger companies' efforts to have DaimlerChrysler listed on the Index represented without equivocation that "DaimlerChrysler is effectively a U.S. Company," and that DaimlerChrysler "will be a company of distinctly U.S. character." Ex. 43 (DCX 0030917 and 30918). That same document explained that the merged company was being formed under German law for tax reasons. Id. (at DCX0030918). Similar claims were made to

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> ***representatives from the parent companies on the shareholder board, just as we will start off.*** They will continue to have representation on the management board. The fact that I believed then and believe strongly now that ultimately a company cannot operate with co-CEOs or two chairmen, given my age, I agreed to step down. ***But that does not have anything to do with who is in control.***

Compendium, Tab 115 (DCX0023184-290, at 229) (emphasis added).

the New York Stock Exchange. See Compendium, Tab 120 (DCX 0081764-65) (indicating that the transaction will be a "merger of equals," will have headquarters in Germany and the U.S., that automotive senior management will be split 50/50 between the two companies, and that the Management Board would be split 50/50 as to the core automotive business).

From the May 7, 1998 Announcement Through the November 13, 1998 Closing, The Defendants Consistently Represented that the Transaction was a Merger of Equals

On or about August 6, 1998, defendants filed the Proxy/Prospectus that was putatively intended to provide Class members with the information necessary to evaluate the proposed Transaction and to decide how to vote their Chrysler shares. In the Proxy/Prospectus, the defendants concealed their secret plan to acquire Chrysler without paying a control premium by describing the Transaction as a "merger of equals" more than twenty times. See Ex. 19. Contrary to defendants' self-serving attempt to limit the definition of the "merger of equals" to the terms of the BCA (D.I. 533 at 10, 41-44), the Proxy/Prospectus reinforced the meaning of "merger of equals" that the defendants had been repeating for the three months prior to the Proxy. See DaimlerChrysler, 197 F. Supp.2d at 59 ("the Proxy/Prospectus does not define the term "merger of equals" solely in relation to the Combination Agreement").

The Proxy/Prospectus informed Chrysler shareholders that a critical goal of the transaction was to create a management organization for the combined company that achieves a meaningful sharing of management roles consistent with the parties conception of the Transaction as a "merger of equals." Ex. 19 (DCX0019436); id. (at DCX0019445) ("CSFB analyzed the transactions as a strategic business combination not involving a sale of control...").[15]

[15] The defendants relentless repetition of the merger of equals characterization of the transaction in the Proxy/Prospectus renders impotent their reliance upon the boilerplate statement that the BCA "contains no provision that would bar governance changes after the transactions have been consummated." See, e.g., D.I. 108 at 11, 41-42. Because the Proxy/Prospectus consistently represented that Daimler-Benz and Chrysler were combining as equals, there was absolutely no reason for Chrysler shareholders to suspect that

The Proxy/Prospectus also referenced the specific items that the defendants had been touting: equality on the Board of Management; equality on the Supervisory Board; dual headquarters; the official language of the Company was to be English; Co-Chairmen; and a Shareholders Committee. Id. (at DCX19439, 453-54, 482-83). The integration team overseeing the merger also was to be split 50-50. Id. (at 0019553). The Proxy/Prospectus also contained an organizational chart for DaimlerChrysler's Board of Management that showed an equal division of power between Chrysler and Daimler. Id. (at DCX0019455).

The Proxy/Prospectus also stated:

- "The [BCA] contemplates that following the [Merger], DaimlerChrysler AG will have a corporate governance structure reflecting that the Transactions contemplate a "Merger-of-Equals" Ex. 19 (DCX0019382-621, at 45).

- "Transactions would be the best means to accomplish the parties' objectives for a business combination transaction, including implementing a merger of equals [and] combining both companies' businesses." Id. (at DCX0019437) (emphasis added).

- "DaimlerChrysler AG shall have a corporate governance structure reflecting that the transactions contemplated herein are a merger of equals." Id. (at DCX00 19552).

- Under "Composition of DaimlerChrysler AG Management Board (Vorstand)" the BCA states that "The Management Board (Vorstand) of DaimlerChrysler AG shall consist of eighteen members. In general, fifty percent of such members shall be those designated by Daimler Benz, and there will be two additional members with responsibility for Daimler Benz's non-automotive businesses..." Id. (at DCX0019552).

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any future changes would be deliberately implemented to the Chrysler constituency's detriment. Instead, the defendants' characterization of the transaction entitled Chrysler shareholders to reasonably anticipate that any future governance changes, or variations from the "initial designations," would be implemented consistent with the merger of equals message that inexorably served as the basis for their votes in favor of the transaction. In fact, the BCA itself states that it is a means to implement the merger of equals, not that it defines the concept. Ex. 44 (DCX0013153) Moreover, this boilerplate statement does not detract from the fraudulent nature of the Daimler Defendants' plan to subvert the merger of equals.

In addition to the statements set forth in the Proxy/Prospectus, the parties continued to flood the marketplace with representations that the transaction would be a "merger of equals" to condition the September 18, 1998 shareholder vote on the transaction. See generally Compendium. Such representations included, but were not limited to: (i) Chrysler Corporation President, Tom Stallkamp, informing Chrysler employees that the Transaction was "not a buy-out" on July 14, 1998 (Id., Tab 81); (ii) statements to the S&P 500 Index Committee on July 21, 1998 that the Company has been structured as a true "merger of equals" (Id., Tab 85); August 5, 1998 statements by Tom Stallkamp to the University of Michigan Automotive Management Briefing Seminar that "a lot of the press have been mistakenly depicting [the Transaction] as a buy-out" (Id., Tab 108); and a September 1, 1998 letter to All Chrysler Employees from Tom Stallkamp stating that "Jurgen Schrempp reaffirmed the need to communicate to everyone, -- ***internally and externally*** -- that this truly is a merger of equals." Id., Tab 108 (emphasis added).

On September 18, 1998, at the shareholder meeting, Eaton affirmed to Chrysler shareholders that "this is a merger of equals . . . that will not have control by either one of the previous companies." Id., Tab 115. Eaton said "[I]t is a merger of equals. It will be run that way." Id. (at DCX 0023204-05). Based upon the parties' deliberate campaign to convince internal and external constituencies that the transaction was a merger of equals (Schrempp Tr., 124 - 125), 97.5% of Chrysler shareholders voted to exchange their shares of Chrysler stock for shares in the merged entity.

Following the shareholder vote, the parties continued their aggressive efforts to promote the transaction as a merger of equals. For example, on November 3, 1998, Schrempp and Eaton reportedly commented that "the new organizational structure also reflects the thinking and philosophy of the combination being a merger of equals. We have said from the beginning that this is a merger of equals." Compendium, Tab 121. Time after time, the defendants repeated the merger of equals message. In fact, between

May 7, 1998 and the transaction's closing on November 18, 1998, there were more than 125 reports touting the combination as a merger of equals. See Compendium.

The company's efforts to squelch the public debate over whether the transaction was a merger of equals or a takeover proved successful. Internal documents reveal that, by the time the transaction was consummated in November 1998, the debate had ceased to be an issue in the press. See, e.g., Compendium, Tab 102 (DCX0056333) (indicating that potential obstacles regarding whether the transaction is a merger or a takeover have been "largely cleared").

Consummation and the Aftermath

Unbeknownst to the public, from day one following the merger, Schrempp implemented the plan he had begun in 1995 with Project Blitz to seize control of Chrysler. Outside of the public eye, he took a series of actions to subvert the merger of equals he was touting publicly.

The organizational chart contained in the Proxy/Prospectus affirmatively represented that each of the sixteen automotive Board of Management members were positionally equal, and each reported directly to both of the Co-Chairmen. See Ex. 45 (DCX0013055). *The real world inside the company was far different.* A November 2, 1998 organizational chart produced this week in discovery by Order of the Special Master shows that, contrary to what was depicted in the Proxy/Prospectus organizational chart, five of the seven Chrysler Board Members reported to the President of Chrysler or, in the case of Thomas Sidlik, to the head of Global Procurement and Supply, Chrysler's Gary Valade. Ex. 46 (DCX 0242807). By contrast, every single one of the Daimler-Benz Board members reported directly to Co-Chairmen Schrempp and Eaton. Id. See also Grube Tr., 187-90 (noting that each Daimler-Benz Executive Vice President reported directly to Eaton and Schrempp, but only two of the seven Chrysler Executive Vice Presidents reported directly to Eaton and Schrempp). Grube also testified that historically

all members of the Board of Management had reported directly to the Chairman. Grube Tr., 187.

The true organizational chart – in contrast to that presented in the Proxy/Prospectus – reflect the defendants' plan to exclude former Chrysler managers from management at the corporate level of the combined company from day one, contrary to representations made to the public and to the SEC.

Worse, documents produced in discovery reveal the defendants' affirmative efforts to conceal this disparity in the balance of power. Tony Cervone expressed concern to Roland Klein that: "[w]e need to be sensitive that only former Chrysler members report to another Management Board member, while all former Daimler-Benz Management Board members continue to report to the CEOs." See Ex. 47 (DCX0107290-292). Klein directed that, should such concerns arise, the official answer should be that although the Americans do not report to the CEOs, they are "full members of the management board." See Ex. 47 (DCX0107291.) This was a thinly veiled attempt to hide the truth about the organizational structure.

Discovery has shown that the positions within the organization that related to corporate level management went, unbeknownst to the public, to the German members of the Board of Management. The finance, corporate development, corporate strategy, and a mergers & acquisitions functions at the executive level were filled such that former Daimler-Benz executives would be in firm control of the corporate governance of DaimlerChrysler. Ex. 48 (DCX 0159877-0159880). This strategy effectively eliminated the Americans from management of the combined company at the corporate level, thereby furthering Schrempp's ultimate objective to dominate the old Chrysler corporation and make it a division of Daimler which he revealed during his October 27, 2000 Financial Times interview. See Ex. 49 (DCX0010470). None of the former Chrysler managers, except Valade, had any corporate level responsibility. They all were given authority over only the operations of the former Chrysler, now designated DaimlerChrysler Corporation (as opposed to the parent - DaimlerChrysler AG). Thus, the

heralded equality of power, influence and opportunity was, unbeknownst to the public, a ruse from day one.

The joint headquarters representation was a fraud as well. Grube testified "no" when he was asked if Auburn Hills was in control of fifty percent of the operations of DaimlerChrysler. Grube Tr., 177, 17-20. When pressed further he admitted that the company's corporate controlling, corporate finance, internal audit, corporate communications, and corporate development functions are all located in Stuttgart, Germany, and that none are operated by former Chrysler employees. Grube Tr., 56, 178-181. Nonetheless, the public was told that the Company had dual headquarters of equal importance. Compendium, Tabs 12, 25, 46, 95, and 96.

Not only were former Chrysler executives excluded from positions of corporate-level management, unbeknownst to the public, they were mere figureheads on the Board of Management. Plaintiffs learned in discovery that the Chrysler executives quickly found that the Board of Management meetings were carefully orchestrated to ratify decisions already made privately by the German members. Stallkamp Tr., 66. The Germans arrived at the meetings having been briefed extensively on all of the issues on the agenda by their staffs and having reviewed extensive analyses not provided to the Americans. Id. As a result, Stallkamp developed a team of persons in Auburn Hills to prepare Chrysler-side Board of Management members for upcoming Board of Management meetings. Id.[16] Schrempp was furious when he discovered this initiative, accusing Stallkamp of organizing "block voting" by the Chrysler contingent. Id. Stallkamp tried to stand up to Schrempp (Id.; 69-74), but ultimately Eaton stepped in and did Schrempp's dirty work for him, firing Stallkamp in the Fall of 1999 even though Stallkamp was widely acknowledged as one of the principal architects of Chrysler's pre-

[16] Holden also testified that he and other Chrysler executives had no input into management of parts of DaimlerChrysler other than the Chrysler Group. Holden Tr., 217-18

merger success. Eaton Tr., 201. Stallkamp's firing, however, was announced to the public as a "resignation." Ex. 50 (DCX0113769).

Eaton also did Schrempp's bidding by failing to replace Dennis Pawley on the Board of Management, thereby giving the Germans a majority for the first time when Pawley retired in December, 1998. Ex. 51 (DCX0076188). Eaton did this despite Daimler's promise, pre-merger, that Pawley would be replaced by an American when his planned retirement took place. See Schrempp Tr., 129-30. Stallkamp and others had urged Eaton to push Senior Vice President of Human Resources, Kathy Oswald, for the position but Eaton refused. Ex. 52 (DCX0027477); Eaton Tr., 216-18.[17]

The German domination of DaimlerChrysler was felt even at the lower levels of the corporate structure. For example, Jay Cooney, from the communications department testified (in unrelated proceedings) that he left DaimlerChrysler in to work at General Motors because he did not want to work at an American subsidiary of a German company. Cooney Tr., at 27-28.

In fact, Schrempp even had his own spy at Chrysler, Cornelius Bronder. In an extraordinary e-mail uncovered in discovery, Bronder reports to Schrempp: "I assume that it is in your interest that I do not write a job description for my role in Auburn Hills (how would one describe 'spy' in bureaucratic terms??)." Ex. 53 (DCX 0196767-71).

Chrysler Executives Depart And Are Otherwise Excluded from DaimlerChrysler Corporation Management, But The Merger of Equals Message Continues

From November 1998 to October 30, 2000, the date of Schrempp's startling admission, numerous former Chrysler executives left the merged company. Uniformly, these departures were publicly reported as "resignations." Yet, time after time, the truth was different. Besides Stallkamp, who was unquestionably fired, numerous other

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[17] Eaton received approximately $200 million as a result of the transaction. See Ex. 61 (DCX 0024923) (the merger gave Eaton $218.9 million, including options on $149 million, nearly $70 million in stock grants, $3.7 million in cash, on top of a pension ranging from $14 to 17 million). He agreed to a transaction with a 28% premium when two years earlier he had resisted Kerkorian's offer of a 40% premium as inadequate.

departing executives claimed to have been constructively terminated by virtue of a reduction in their responsibilities. See, e.g., Harris Tr., 60-85; Ex. 54 (DCX0237231-32); Ex. 55 (DCX0094657); Ex. 56 (DCX0094658). They asserted, unbeknownst to the public, that they had been reduced from corporate level executives to divisional level management.

Notwithstanding the truth about these departures, DaimlerChrysler continued to represent that the Transaction was a merger of equals. The message was repeated multiple times in DaimlerChrysler's 1998 Annual Report. Ex. 57 (DCX 0019235-376 at DCX0019239 and DCX0019290). Defendant Schrempp reiterated that "this is a merger of equals" at the auto show in Detroit in January, 1999. Compendium, Tab 127 (DCX 0032947-72 at 952-53). In a March 26, 1999 article that appeared in USA Today, Bob Eaton is quoted as saying: "the merger is a merger of equals – and that perceptions that Germans dominate are untrue." Compendium, Tab 136 (DCX 0051753-55).

In response to the fall 1999 restructuring and Stallkamp's departure, the defendants repeated the merger of equals message by issuing public statements in which they "steadfastly refused to describe the arrangement as a takeover." See Compendium, Tab 147 (DCX 0103244-45). Eaton, in particular, refused to indulge media speculation regarding the meaning of Stallkamp's departure. Instead, Eaton announced that the restructuring was "not a power shift towards one side of the Atlantic." Eaton stated that "[t]his isn't a German or American thing ... this is one company striving to be the number one automotive transportation company in the world." Compendium, Tab 148 (DCX 0103163-65). Even Stallkamp was quoted after his departure as saying "should we have agreed it was an acquisition? I don't think so. I still think the merger was right at the time, and it's still right now." Compendium, Tab 159 (DCX 0100576-78). (See also Compendium for additional examples).[18]

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[18] Defendants emphasize the restructuring because it reduced the Chrysler presence on the Board of Management from eight out of eighteen to one of eighteen. Detroit News, February 1, 2003. In fact, at the close of January this year, DaimlerChrysler announced from Stuttgart that Gary Valade's position on the

This message continued at least until Eaton's March 31, 2000 resignation. When Eaton announced his retirement at a DaimlerChrysler Senior Management Meeting on January 26, 2000, he informed the Chrysler employees yet again that the Transaction was a "merger of equals." Ex. 58 (DCX0127229). Eaton testified that he repeatedly pressed the merger of equals message and agreed that press reports from September of 1999 were typical of his comments. (Eaton additionally refused to describe the transaction as a takeover). Eaton Tr., 333 and 338.

Jürgen Schrempp Admits That the "Merger of Equals" Was a Ruse

On October 30, 2000, the Financial Times published an article entitled "The Schrempp Gambit," following a "wide-ranging" interview of Schrempp. See the Financial Times article, attached as Ex. 59, at 1. That article for the first time laid bare defendants' plan to obtain Chrysler shareholder approval of the transaction through intentional deception. In the article, Mr. Schrempp admitted that "Chrysler had been relegated to a standalone division," and even more importantly, that that had been his design all along:

> Now that most of Chrysler's old management board has resigned or retired, Mr. Schrempp sees no reason to maintain the fiction. ***"Me being a chess player, I don't normally talk about the second or third move. The structure we have now with Chrysler (as a standalone division) was always the structure I wanted," he says. "We had to go a roundabout way but it had to be done for psychological reasons. If I had gone and said Chrysler would be a division, everybody on their side would have said: 'There is no way we'll do a deal.'"*** [¶] ***"But it's precisely what I wanted to do. From the start structure, we have moved to what we have today."*** [¶] What DaimlerChrysler has today is a US division where vehicle design, procurement, production and marketing are being overhauled. ***Mr. Schrempp maintains this was always the plan following the initial post-merger integration, which generated about $1.4bn in savings.***

Id. (emphasis added).

Board of Management was being eliminated, leaving from Sidlik the sole Chrysler representative on the Board. But this restructuring was explained as the natural outgrowth of the merger process. Compendium, Tab 155. Nothing about it or the press reports at the time suggest that the restructuring was part of a plan to subvert the equality of opportunity touted by defendants.

As if intending to erase any question of whether or not he meant what he said, just a week later, on November 6, 2000, Schrempp again stated in an interview with Barron's Jay Palmer: "We said in spirit it was a merger of equals, but in our minds we knew how we wanted to structure the company, and today I have it. I have Daimler, and I have divisions." Ex. 60.[19]

Schrempp's remarks caused a firestorm of controversy. Cervone Tr., 184-187; Holden Tr., 106-107; Eaton Tr., 227, 235; Oswald Tr., 171-172. Cervone contacted Walther because Cervone thought Schrempp must have been misquoted. Cervone Tr., 185. Walther refused to retract the statements. Id. In fact, to this day, Schrempp has refused to retract, deny or correct the statements (Schrempp Tr., 187-189, 208) even though he admitted at his deposition that he read the Financial Times article and discussed it with the Board of Management. Schrempp Tr., 186-187. Schrempp never even contacted Eaton to explain, let alone deny, the remarks. Eaton Tr., 233.

Following Schrempp's admission, the defendants wasted no time tightening their control over DaimlerChrysler. Schrempp fired Chrysler President Jim Holden, citing his failure to achieve unattainable financial results. Schrempp Tr., 250-253. In fact, Schrempp fired Holden during a meeting in Germany in November 2000, but then

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[19] Defendants have obstructed plaintiffs' efforts to verify these statements at every opportunity. The defendants have refused to concede that they were accurate but have repeatedly tried to block discovery of them. As Master Yoxall of the High Court of England, Queen's Bench Division, wrote in a Judgment Opinion last week:

> . . . The report of the interview [referring to Schrempp's October 27, 2000 interview in which he admitted defrauding Chrysler shareholders] and the transcript has been put in issue by Mr. Schrempp. In the circumstances, the [plaintiffs] must prove the accuracy of the published interview transcript. That can best be done by the production of the tape and the evidence of Mr. Burt [the interviewer]. Mr. Schrempp could readily consent to the production of the tape . . . so that the accuracy of the interview can be tested. He has declined to give such consent. [footnote omitted] In my view, ***it is repugnant that he should put the accuracy of the report of the interview in issue while at the same time declining to give consent to the production of the tape – the means by which the accuracy can be tested.***

Judgment Delivered on 27th February 2003, Ex. 61 (emphasis added).

misrepresented that Holden was dismissed a full week later by the Supervisory Board. See Holden Tr., 215-216 and Schrempp Tr., 249-253.

On November 17, 2000, Schrempp fired Oswald, Cervone, and Management Board Member Theodor Cunningham. Schrempp Tr., 271. He replaced Holden and these other executives with former Daimler-Benz executives. See Holden Tr., 8. Thus, Schrempp had asserted complete control at the corporate level and now had taken direct control even at the divisional level. As of November 20, 2000, the composition of the Board of Management (excluding non-automotive members) was: sixteen members, only two of which were former Chrysler. The touted equality of power and opportunity had been exposed as a fraud.

ARGUMENT

I. None Of The Claims Asserted By The Lead Plaintiffs Are Barred By The Applicable Statute Of Limitations.

A. Applicable Legal Standard

Defendants' primary argument for summary judgment against the Lead Plaintiffs is not even merits-based, but rather is that plaintiffs' claims are time-barred. The Lead plaintiffs' claims were filed on November 27, 2000.[20] The statute of limitations applicable to Lead Plaintiffs' securities claims provides that such claims must be brought within one year of the date of discovery of the facts that comprise the violation and within three years of the date of the actual violation.[21] See 15 U.S.C. § 77m; DaimlerChrysler, 197 F. Supp. 2d 42, at 55. The one-year limitations period applicable to plaintiffs' claims begins to run when plaintiffs were on inquiry notice of the basis for their claims against the defendants. See In re NAHC , Inc. Sec. Litig., 306 F.3d 1314, 1325 (3d Cir. 2002)

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[20] Defendants concede that November 27, 2000 is the operative date for their statute of limitations defense. Defs'. Mem. at 25, 28.

[21] Lead Plaintiffs' claims arise from misrepresentations contained within the August 6, 1998 Proxy/Prospectus. Defendants, therefore, do not contend that Lead Plaintiffs failed to file their claims within three years of the date of the actual violation. Defs.' Mem. at 26.

(citation omitted). Thus, the statute can only have run if plaintiffs should have discovered the basis for their claims prior to November 27, 1999. Because it would have been impossible for plaintiffs to file their claims prior to October 30, 2000 – the date of Schrempp's first admission – the claims are not time-barred.

As at least one court in this Circuit has noted, "it is only in *extreme circumstances* that summary judgment is appropriate when defendants assert that the action was untimely commenced because inquiry notice was triggered more than a year before the action was brought by the plaintiff." Blatt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 916 F. Supp. 1343, 1356 (D.N.J. 1996) (emphasis added) (quoting In re Integrated Res. Real Estate Ltd. P'ship Sec. Litig., 81 F. Supp. 620, 638 (S.D.N.Y. 1993)). The facts that give rise to inquiry notice must be sufficiently advanced and substantiated to enable the plaintiff to "tie up any loose ends" before filing a timely suit. In re MobileMedia Sec. Litig., 28 F. Supp.2d 901, 941 (D.N.J. 1998) (quoting Fujisawa Pharm. v. Kapoor, 115 F.3d 1332, 1333 (7th Cir. 1997)) (inquiry notice "require[s] more than merely suspicious circumstances – to require that the suspicious circumstances place the potential plaintiff in possession of, or with ready access to, the essential facts that he needs in order to be able to sue").

Additionally, the issue of inquiry notice is typically a fact question. Hill v. Equitable Bank, Nat' Assn, 655 F. Supp. 631, 641 (D. Del. 1987), aff'd, 851 F.2d 691 (3d Cir. 1988) (denying summary judgment based upon statute of limitations defense because plaintiffs presented reasonable inference that an investor would not be on inquiry notice of fraud). As the Hill court stated, "the question of what a reasonable investor should have known is particularly suited to jury determination." Id. at 641. See also In re Ames Dept. Stores, Inc. Note Litig., 991 F.2d 968, 970 (2d Cir. 1993) (reversing summary judgment on statute of limitations grounds because plaintiffs "have raised at least a factual question that they were not on notice of their claims ... ."); Young v. Lepone, 305 F.3d 1, 9 (1st Cir. 2002) ("it is for the fact finder to determine whether a particular collection of data was sufficiently aposematic to place an investor on inquiry notice").

Moreover, a claim of inquiry notice is inappropriate when the defendants' own statements affirmatively denied the basis for the claims. As the Second Circuit recently recognized, "[t]here are occasions when, despite the presence of some ominous indicators, investors may not be considered to have been placed on inquiry notice because the warning signs are accompanied by reliable words of comfort from management." LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148, 155 (2d Cir. 2003) (citing Milman v. Box Hill Cable Sys. Corp., 72 F. Supp. 2d 220, 229 (S.D.N.Y. 1999) (courts "reluctant to find that public disclosures provided inquiry notice where those disclosures were tempered with positive statements")); see also Matthews v. Kidder Peabody & Co., Inc., 260 F.3d 239, 252 (3d. Cir. 2001) ("mix of information" relevant to determination of inquiry notice); National Rural Elec. Coop. Ass'n v. Breen Capital Servs. Corp., No. 00-722 (WGB), 2001 WL 294086 (D.N.J. Mar. 28, 2001) (based upon reassurances by defendant, court accepts plaintiff's statement that it did not suspect fraud) (Ex. 62).

B. Lead Plaintiffs Were Not on Inquiry Notice of Their Claims Until October 30, 2000

1. Plaintiffs Did Not Know of Defendants' "Plan" Until October 2000

In straining to make their statute of limitations argument, defendants are forced to mischaracterize plaintiffs' claims. Defendants wrongly assert that plaintiffs' claims are simply that Daimler dominated and took control of the post-merger company and that Chrysler gradually lost its position of equality on the Board of Management. See, e.g., D.I. 533 at 28 and 30. However, as this Court has already recognized, plaintiffs' claim is that Daimler had a secret plan to take over Chrysler under the guise of a merger of equals, which it went to great lengths to hide until October 30, 2000. DaimlerChrysler, 197 F. Supp. 2d at 57 ("the Court observes that Plaintiffs have pled that Defendants acted in a surreptitious manner to replace Chrysler executives and breach the Combination Agreement so as to mask their true intentions and avoid alerting shareholders to their alleged fraud."); see also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588, 596-97 (2001) (plaintiff's claim is not simply that defendant failed to carry out a

promise . . . it is a claim that defendant sold plaintiff an option "while secretly intending from the beginning not to honor the option").

This plan was concealed from investors and the public at large. Even now, defendants claim that their dominance in the post-merger company is merely a result of fair competition and the best people being rewarded with the best positions. Continuing Directors Decl. ¶16. The truth is far different: Daimler's dominance is the result of a calculated but undisclosed plan to exclude former Chrysler personnel from management at the corporate level of the combined company contrary to public representations about "shared power" and "equal opportunity." The "merger of equals" was actually a covert execution of the acquisition contemplated by Project Blitz, without the control premium that should have been paid.[22]

The isolated press reports cited by the defendants – in addition to having been vigorously denied by the defendants themselves – relate to who would be the dominant party, post-merger, not to whether one side had a secret plan to take control. Wharf (Holdings) Ltd., 532 U.S. at 596-97 (differentiating an apparent failure to honor a promise from never intending to honor a promise). None of the isolated press speculation cited by defendants references a secret plan to subvert the equal opportunity that was trumpeted to investors.

But according to Schrempp and the facts, as revealed through hard-fought discovery, there was such a secret plan and there was no equal opportunity. The covert

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[22] Defendants' argument that "plaintiffs did not need to know whether the defendants acted knowingly before being on notice of their claims" is a red herring. D.I. 533, at 32. This Court held that the pleading requirements of Fed. R. Civ. P. 9(b) apply to plaintiffs' claims under §§ 11 and 12(a)(2) of the Securities Act and under § 14(a) of the Exchange Act. Daimler Chrysler, 197 F. Supp.2d at 54. "Rule 9(b) requires a plaintiff to plead: (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity..." Shapiro v. UJB Fin. Corp., 964 F. 2d 272, 284 (3d Cir. 1992). Thus, under the pleading standard that this Court applies, notice of defendants' plan to subvert the merger of equals was necessary for Lead Plaintiffs to comply with Rule 9(b). Id.; see also Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363, 369 (7th Cir. 1997) (plaintiffs "risk Rule 11 sanctions or a violation of Rule 9(b) by filing a complaint listing the 'bad blood' or 'storm warnings' and no other particularized evidence of fraud[]". See also Matthews, 260 F.3d at 253 (acknowledging dangers of "adopting too broad an interpretation of inquiry notice") (citing Fujisawa, 115 F.3d at 1335) ("Inquiry notice...must not be construed so broadly that the Statute of Limitations starts running too soon for the victim of the fraud to be able to bring suit").

effort began as early as 1995 with "Project Blitz", a secret plan to acquire Chrysler. Dibelius Tr., 89-90, 92-93, 104-15; Ex. 63 (DCX0186522-550); Schrempp Tr., 38-39, 311-9. It continued in 1997 with further plans to acquire Chrysler – plans that were hidden from plaintiffs in discovery (Cordes Tr., 29-31; Dibelius Tr., 140-15; Ex. 64 (DCX0183147-3211)) – and the retention of Goldman-Sachs to advise on the "acquisition" of Chrysler. Id. All of these plans were secret.[23] None of them are disclosed in the Proxy/Prospectus. See Ex. 14 (At DCX0019435-38)

Following the merger, with great fanfare, the defendants proclaimed a company with shared governance and equal opportunity. See Compendium, Tab 96 (DCX0059481); Valade Tr., 92-93. The reality within the company was far different. As described above, Chrysler personnel were placed in figurehead positions that looked significant on paper but which were nothing more than division-level management of the former Chrysler. The Proxy/Prospectus did not disclose that Daimler immediately implemented its plan to concentrate the management of the combined company at the corporate level in Stuttgart. What the public saw were charts and statements about an equal division of responsibility and dual headquarters. The public was not informed that the Chrysler members of upper management were responsible only for the former Chrysler, all reporting to Stallkamp while the former Daimler members of the Board of Management reported to Schrempp and were responsible for the entire corporation. The public did not know that Chrysler members of the Board of Management were excluded from true, corporate-level decision-making. Stallkamp Tr., 73, 79; Holden Tr., 217. The public did not know that the dual headquarters was an outright fraud and virtually all

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[23] Shortly after the transaction was announced, Ernst Stoeckl, President of TransAtlantic and former Member of the Daimler-Benz Management Board, wrote to Schrempp and Cordes to obtain a "finder's fee" for TransAtlantic and investment banker Ralph J. Bachenheimer for identifying Chrysler as an acquisition target. Bachenheimer ultimately filed suit against Schrempp, Cordes, and DaimlerChrysler AG on October 26, 1999 in the United States District Court for the District of Columbia, Case No. 1:99CV02834 (Friedman, J.). The defendants had the claim dismissed, arguing that the 1998 combination in fact was the upshot of the 1995 Project Blitz acquisition analysis. The Daimler Defendants did not produce documents relating to the Bachenheimer litigation here (though they ultimately were ordered to do so by the Special Master on February 12, 2003), until plaintiffs independently discovered the existence of the case.

corporate activity was centered in Stuttgart. See Grube Tr., 177, 178-181. The public was not told that departing executives were not resigning, but rather were being fired. See Ex. 65 DCX0202039 (e-mail from Roland Klein to Rudiger Grube stating that concerns over "resignations of senior executives" can be eliminated by "covering them up with other themes.").

Indeed, even Chrysler communications executive Cervone testified that he did not "recall that he made a connection" between Stallkamp's departure and a change in control at the company. Cervone Tr., 155. Despite the defendants' reliance on a few articles proclaiming the Germans in control when Stallkamp left, none of those articles hint at a secret plan or suggest that the equal opportunity fundamental to the "merger of equals" never existed. In fact, the defendants even refused to acknowledge that Stallkamp had been fired. See Ex. 66 (DCX 0103244-45); Ex. 67 (DCX 0103163-65); and Ex. 68 (DCX 0036616-65). There was nothing about the restructuring or Chrysler's position as a division that revealed Schrempp's undisclosed plan. The fraud was not in making Chrysler a division, it was in excluding former Chrysler persons from management at the corporate level overseeing those divisions, thereby denying them both equal power and opportunity.

At most, observers might have concluded that Daimler was gradually gaining more power and influence in the merged company. But no observer looking at the events from outside the Company could possibly have uncovered that this was pursuant to a secret, illicit plan that had deprived Chrysler executives of the equal opportunity that was promised and promoted. DaimlerChrysler, 197 F. Supp. 2d at 57. Even Chrysler executives participating in the company's day-to-day affairs were unable to discern Schrempp's secret intent. As Cervone said:

> A: It's difficult to answer because in mergers there's the merger process and the day that it happens kind of thing, and after that point you expect that a lot of change is going to happen, the company's going to go through an evolution. I don't know that I can - I don't know that there's a point in the merger process where I said this is a takeover, this is not a merger of equals. But by August of 2000, you know, it was clear that Juergen

> Schrempp was running the show and management board, there were fewer seats that were there before, but I don't think I ever equated that and said that means that two years ago it was a takeover kind of thing.[24]

Cervone Tr., 160-161.

2. Defendants' Systematic and Continuing Representations That the Transaction Was a Merger of Equals Prevented Plaintiffs From Being On Inquiry Notice

Not only did the Daimler Defendants hide their illicit plan from the public, from the May 7, 1998 announcement through October 30, 2000, the defendants repeatedly misrepresented to investors that the Transaction was a merger of equals. Defendants' brief cites 35 articles (seventeen of which contain statements by the defendants *affirming* the merger of equals and/or *denying* a takeover). See Compairson of Public Representations Regarding Merger vs. Takeover 5/7/98 - 3/31/00, attached hereto as Ex. 69. Of those, 11 eleven were in the two days following the announcement of the deal, before the defendants' PR machine ever got rolling. Only one of the other articles predates the shareholder vote on September 18, 1998. Defendants' Exhibit 49. In contrast, there were 96 public reports prior to the closing that touted the MOE message. See Compendium, Tabs 1-122. [25]

As described above, defendants unleashed a finely tuned Corporate Communications Program simultaneously with the announcement of the transaction to promote the merger of equals message. The defendants' contention that the negative media speculation immediately surrounding the transaction announcement should have alerted plaintiffs to their potential claims makes no sense. See D.I. 533, 7-9, 28-29. First,

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[24] Antonio Cervone testified that Eaton told him that the problems that he was experiencing in communications were isolated and weren't "indicative of the overall governance of the company." Cervone Tr., 100, 101.

[25] In one of their most desperate ploys, the Daimler Defendants actually claim that shareholders should have known the merger was a takeover because Evelyn Davis, a shareholder described by Eaton as a "gadfly," characterized it that way. Defendants ignore that Eaton sternly rebuked Ms. Davis for not understanding the deal before the other Chrysler shareholders at the September 18, 1998 Special Meeting. Eaton Tr., 284.

this speculation – limited as it was – predates the communications program. Second, it predates the August 6, 1998 Proxy/Prospectus upon which plaintiffs' claims are based. Defendants' position actually seems to be that the statute of limitations on plaintiffs' claim that the Proxy was false and misleading began to run with a series of articles on May 7 and 8 that were published before the Proxy was even issued.

As noted above, the August 6, 1998 Proxy/Prospectus characterized the Transaction as a "merger of equals" more than twenty (20) times. In addition, CSFB's fairness opinion was expressly qualified as to the transaction being a merger of equals, not a takeover.[26] Ex. 14 (at DCX0019445). See also Koch Tr., 210-212 ("any opinion we rendered is specific to the facts that are embodied in that opinion"; and that "[a]s a general matter, we don't usually take into account the state of mind of one of the participants in the transaction.")

As the defendants have acknowledged, their communications campaign strategy worked. By the time the transaction closed, the takeover issue was not even on the list of issues being cited most frequently in the press. Ex. 70 (DCX0106426-34, with accompanying English translation).

The defendants claimed that all who called the deal a takeover failed to understand its structure. See, e.g., Compendium, Tab 93 (DCX0082445-256, at 447); Compendium, Tab 142 (DCX0001953-956, at 956). And as Eaton testified, Chrysler shareholders were entitled to rely upon the statements of management. Eaton Tr., 289. Eaton also testified that right up until his departure in March 2000 he was telling the press and the public that the transaction was a merger of equals. See Id. at 321-338; Eaton Decl. ¶8; Schrempp Tr., 134-135. Schrempp was doing the same. Schrempp Tr., 134-135.

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[26] Institutional Shareholder Services ("ISS"), which analyzes proxies and issues voting recommendations to institutional investors worldwide (see http://www.issproxy.com) recommended that its clients vote in favor of the merger in view of the fact that, as a merger of equals, the transaction price was fair to Chrysler shareholders. Ex. 71 (FSBA00005-15, at 00007 and 00009); see also McCauley Tr., 139.

Given the size of the transaction, the small minority of the U.S. press which expressed concern that the deal would make Daimler the dominant party[27] (the Daimler Defendants cite but 35 articles in their brief compared to the 165 articles and public reports calling the transaction a merger of equals as well as the defendants' repeated denials cited by plaintiffs) hardly registers a blip on the radar screen. Indeed, a similar minority of the German press was concerned that Daimler was to be "Americanized." Compendium, Tab 106 (DCX 0056328-30). Both concerns were repeatedly and effectively denied by the defendants. As they told the S&P 500 committee: "DaimlerChrysler is effectively a U.S. Company." (Compendium, Tab 119 at DCX 0011171).

In fact, the defendants to this day persist in representing the combination as a "merger of equals" rather than a takeover. See *http://www.daimlerchrysler.com/index_e.htm* (last visited 03/03/2003) ("the DaimlerChrysler union is a merger of equals, prompted not by necessity but by opportunity"); Ex. 72. See also Grube Tr., 170, 172, 177; Cordes Tr., 190, 111; Dibelius Tr., 290; Schrempp Tr., 124. Since the defendants cannot even today agree among themselves that there has been a takeover, it is clearly unreasonable to charge plaintiffs with knowledge four years ago that there was one.

Even the defendants' own expert, Richard A. Wines (the "Wines Report"), conceded that the investment community did not give credence to the speculation that defendants now characterize as "storm warnings." In fact, Mr. Wines states that "a search of dozens of articles" from September 24, 1999 through early 2000 reveals that:

> "there were many instances in which investors expressed concerns about the outcome of the merger of Chrysler and Daimler-Benz – and for that matter, about the outcome of most of the other major mergers of the late 1990's. Generally, these comments focused on the failure of expected synergies to materialize and the difficulties in meshing different management teams. Far more often, however, analysts simply focused on the prospect of continued weakness in earnings due to slumping sales and

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[27] The defendants themselves, in contrast to their lawyers, deny that the Proxy/Prospectus indicated that Daimler would dominate the post-merger company. See, e.g., Eaton Tr., 261.

> increased incentive costs. Never did they focus on what plaintiffs allege to have been the failure of the company to implement a true 'merger of equals' or express concerns that the merger was in fact a German takeover."

Wines Report at 11-12.[28]

Given these continued representations, what investors did or did not have inquiry notice of is, at a minimum, a question of fact. Hersh v. Allen Prods Co., Inc., 789 F.2d 230, 235 (3d Cir. 1986) (conflicting inferences from the factual record renders district court's grant of summary judgment inappropriate); Vogel v. Trahan, No. 78-2724, 1980 WL 1378 (E.D. Pa. Jan. 11, 1980) (contrary conclusions concerning extent to which suspicions allayed by defendants indicates "genuine issues of material fact remain, and the court cannot substitute its judgment for that of the jury") (Ex. 73).

II. THE LEAD PLAINTIFFS HAVE DEMONSTRATED LOSS CAUSATION

A. Lead Plaintiffs Have Established Loss Causation By Showing That The Proxy/Prospectus Was An "Essential Link" In The Consummation The The Defendants' Deception

In light of Schrempp's own admissions, it is inconceivable that the defendants can dispute causation of all issues, yet they seek to do just that. As Schrempp stated, he misrepresented his plan knowing that had he told the truth, the deal would not have been approved by Chrysler shareholders. Ex. 49 (DCX0010470-72, at 470.) In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970), the Supreme Court set forth the standard for establishing causation pursuant to Section 14(a):

> Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.

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[28] At his deposition, Wines testified that he was comfortable basing the above-referenced observation upon his review of articles from The Wall Street Journal during the time period because he "had no reason to think that The Wall Street Journal was hiding something that was reported elsewhere. Generally what happens is if there is a significant article in another paper, The Wall Street Journal will report on it." Wines Tr. at 234. As defendants note, the Lead Plaintiffs reviewed the same material that led Wines to conclude that analysts did not express concerns that the merger was a German takeover. D.I. 533, 9 n 2.

> This objective test will avoid the impracticalities of determining how many votes were affected, and by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that shareholders are able to make an informed choice when they are consulted on corporate transactions.

Id. at 384. See also Wilson v. Great American Indus., Inc., 979 F.2d 924, 931 (2d Cir. 1992) ("loss causation may be established when a proxy statement prompts a shareholder to accept an unfair exchange ratio for his shares rather than recoup a greater value through share appraisal.").[29] Here, the fraudulent proxy statement prompted plaintiffs to accept an exchange ratio premised on a merger of equals transactions which deprived them of the control premium to which they were entitled. Thus, loss causation has been established. See Bank America Corp. Sec. Litig., 78 F. Supp. 2d 976, 999-1000 (E.D. Mo. 1999) (sustaining securities fraud claim alleging that, if stockholders had known defendants never intended to enter into a merger-of-equals, they would not have approved the merger without payment of an additional control premium).

B. The Daimler Defendants' Loss Causation Argument Is Predicated On A Mischaracterization Of Lead Plaintiffs' Damage Claim

Lead Plaintiffs contend that by virtue of defendants' fraudulent portrayal of the DaimlerChrylser Merger as a merger of equals, Daimler-Benz acquired Chrysler without paying the control premium to which Chrysler shareholders were entitled. See D.I. 156, ¶ 164 (Plaintiffs "were deceived into foregoing the 'acquisition premium' that they should have received for the sale or exchange of their Chrysler shares in connection with a change in control or complete acquisition of Chrysler."). In their motion, defendants erect a straw man by arguing that Lead Plaintiffs must establish that Daimler-Benz – or some other acquiror – would have paid more in a deal that never happened. To prevail on their claims, however, Lead Plaintiffs need not establish that they "lost an opportunity" to negotiate a higher price in this or any other transaction. Rather, Plaintiffs

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[29] Although Wilson involved a case where minority shareholders were deprived of appraisal rights by virtue of fraud, the Wilson court made clear that its ruling "applies with as much force when appraisal rights are fraudulently forfeited as it does when a merger is fraudulently effectuated. Id. at 932.

must establish only that as a proximate result of defendants' false characterization of the transaction as a merger of equals, Daimler-Benz avoided paying a control premium for Chrysler. See Virginia Bankshares, Inc. v. Sandberg, 891 F.2d 1112, 1117 (4th Cir. 1989) rev'd on other grounds, 501 U.S. 1083 (1991) (damages as measured by difference between value and price paid). See also Wilson v. Great Am. Indus., Inc., 979 F.2d 924, 932 (2d Cir. 1992) (recognizing benefit of the bargain as an appropriate measure of damages).

As the Mills Court held, "upon finding a violation, the courts are 'to be alert to providing such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief." Mills, 396 U.S. at 386. In selecting the remedy, courts should exercise "the sound discretion which guides the determinations of courts of equity, keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing claims.'" Id. See also McMahan & Co. v. Wherehouse Entertainment, Inc., 65 F.3d 1044, 1049 (2d Cir. 1995) ("The statute does not prescribe a particular method of calculating damages."). As such, Lead Plaintiffs should be entitled to any number of remedies for their loss.

As this Court stated in its opinion on defendants' motions to dismiss, "Plaintiffs are not relying on 'a bargain whose terms must be supplied by hypothesis,' but on the transaction that actually occurred. Plaintiffs' allegation is that the transaction that occurred was billed as something other than what it actually was to conceal its true nature. In other words, the transaction was a "'wolf in sheep's clothing.'" DaimlerChrysler, 197 F. Supp. 2d at 68 n.12.

In Wilson, a case involving a stock-for-stock merger transaction induced by a fraudulent proxy in violation of Section 14(a), the Second Circuit first discussed the benefit-of-the-bargain rule, recognizing its applicability in the context of 14(a) cases. Wilson, 979 F.2d at 932. The court then set forth the purpose of these damages, which is to place the plaintiffs "in substantially the same position they would have occupied absent

the fraud." Id. In order to accomplish that goal, the court stated, plaintiffs should be entitled to the profits attributable to the extra stock they would have received had the proxy provided a fair exchange ratio. Id. at 932-33. Accordingly, the court agreed that the measure of damages should be "the difference between what the minority shareholders actually received and what they would have received had Chenango and Great American been properly valued." Id. at 933. Although Wilson involved a case where minority shareholders were deprived of appraisal rights by virtue of fraud, the Wilson court made clear that its ruling "applies with as much force when appraisal rights are fraudulently forfeited as it does when a merger is fraudulently effectuated. Id. at 932. See also Mills, 396 U.S. at 388 ("where the defect in the proxy solicitation relates to the specific terms of the merger, the district court might appropriately order an accounting to ensure that the shareholders receive the value that was represented as coming to them); BankAmerica Corp. Sec. Litig., 78 F. Supp. 2d 976, 999-1000 (E.D. Mo. 1999) (sustaining securities fraud claim alleging that, if stockholders had known defendants never intended to enter into a merger-of-equals, they would not have approved the merger without payment of an additional control premium).

In addition, defendants' argument conveniently overlooks that plaintiffs' may be entitled to unjust enrichment, rescission or restitution damage measures. Hayworth v. Blinder, Robinson & Co., 903 F.2d 186, 203 n.25 (3d Cir. 1990) (stating that under Rule 10b-5, a defrauded seller is entitled to the greater of his out-of-pocket loss or disgorgement of defendants' gain); Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 651 F.2d 615, 621 (9th Cir. 1981) ("it is within the discretion of the judge in appropriate circumstances to apply a rescissory measure"); Glick v. Campagna, 613 F.2d 31, 37 (3d Cir. 1979) (the court "may award rescissory damages to place the plaintiff in the same financial position he would have been were it possible to return the stock"); Nelson v. Nerwold, 576 F.2d 1332, 1339 n.4 (9th Cir. 1979) (applying a restitutionary

measure of damage which values the benefits improperly obtained by defendants and treats such benefits as plaintiffs' damages). [30]

As explained in the statement of facts, witness after witness has conceded that transactions involving a sale of control entitle selling shareholders to a premium, that this transaction was not supposed to involve a change of control and that no such premium was paid here. Schrempp Tr., 74-78; Cordes Tr., 143-146; Valade Tr., 90; Dibelius Tr., 253, 254-255; Eaton Tr., 251-252; Gentz Tr., 209-210; Koch Tr., 30-32, 165-167. Even absent Schrempp's admission, this would establish the requisite causal link.[31] Thus, Daimler-Benz fraudulently implemented Project Blitz and acquired control of Chrysler while only paying for a merger of equals.

Defendants argue that the sole measure of damages in a proxy case is "lost opportunity" damages. They are incorrect. In fact, the very case cited by defendants – Tse v. Ventana Med. Sys., Inc., 297 F.3d 210 (3d Cir. 2002), affirms that once plaintiffs establish the *fact* of loss – which Lead Plaintiffs have done here – "the risk of uncertainty as to amount of damages is cast on the wrongdoer and it is the duty of the fact finder to determine the amount of the damages as best he can from all the evidence in the case." Tse, 297 F.3d at 220.

Tse involved the speculative impact of disclosure of compensation arrangements on a vote, id. at 221, and the Court refused to speculate as to whether plaintiffs would have held out for a higher price, given the dire financial condition of Biotek. Thus, in Tse, defendants' sole theory of damages was the lost opportunity to negotiate. Id. at 219.[32] That claim is not present here. There was no allegation in Tse that plaintiffs sold

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[30] In this case, rescissory damages would constitute the value of that which the Daimler Defendants received – control over Chrysler – and which they cannot now return. Nelson, 576 F.2d at 1339.

[31] Schrempp and Eaton all testified that the transaction would not have happened had it been represented as a change in control. Schrempp Tr., 33-34; Eaton Tr., 251.

[32] While Lead Plaintiffs did rely on the District Court decision in Tse at the motion to dismiss stage of the case, they also argued, as here, that "the premium Chrysler shareholders received was substantially less than the premium they would have received if the Merger had been truthfully denominated as an 'acquisition.'"

control of the company without receiving a control premium. Here, the deal did occur and Daimler acquired control of Chrysler while paying only for a merger of equals.[33] Virginia Bankshares v. Sandberg, 891 F.2d 1112, 1117 (4th Cir. 1989), rev'd on other grounds, 501 U.S. 1083 (1991) (damages equal to difference between that paid and true value). Indeed, permitting the defendants to escape without paying the control premium they fraudulently avoided would reward them for their wrongdoing. It simply makes no sense for a fraudulent wrongdoer to avoid liability by claiming that it would not have completed the transaction had its fraud been unsuccessful.[34]

C. The Acquirors Have Established Loss Causation

Defendants also challenge loss causation with respect to Lead Plaintiffs' claims on behalf of open-market purchasers of DaimlerChrysler stock during the class period. Defendants' argument is premised on the modest increase in DaimlerChrysler stock immediately following Schrempp's October 30, 2000 admission to the Financial Times that a merger of equals was never intended. As defendants are well aware, however, Lead Plaintiffs contend that the full scope of defendants' scheme was not made clear until November 17, 2000, when DaimlerChrysler issued a press release announcing Schrempp's "reorganization plan" that included the appointment of two German executives as Chrysler's President/CEO and COO. D.I. 156, ¶ 108. This announcement caused the price of DaimlerChrysler stock to fall a full $4 a share by the close of the market on November 21, 2000. Id. ¶ 114. Lead Plaintiffs have substantiated this

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D.I. 71 at 50.

[33] Moreover, there is extensive evidence that Daimler's own advisors acknowledged that Chrysler had a true value of up to $102.00 per share and that an acquisition of Chrysler would have made sense for Daimler, even at premiums of 45% to 60%. See discussion at supra pgs. 3 - 5. Therefore, it is also a fact question whether Daimler would have paid more, meeting the lost opportunity requirement of Tse even though that requirement should not apply.

[34] A rule requiring defrauded sellers to prove that their buyers would have paid more would make no sense, would punish the victim and reward the wrongdoer, and would turn the law of fraud on its head. See, e.g., Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965) (it "is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.")

contention through the Expert Report of R. Alan Miller ("Miller Report"), who opines that DaimlerChrysler stock experienced price drops from November 16, 2000 through November 21 directly attributable to the defendants' false portrayal of the Daimler Chrysler transaction as a "merger-of-equals" (Miller Report at ¶ 14). While defendants may dispute this evidence, as was the case at the motion to dismiss stage of this Action, there remains a factual issue as to whether loss causation can be established for the Acquirers. See DaimlerChrysler, 197 F. Supp.2d at 67-68; In re Regal Communications Corp. Sec. Litig., No. 94-179, 1996 WL 411654, at *3 (E.D. Pa. July 17, 1996) (Ex. 74).

Moreover, with respect to Lead Plaintiff's Section 11 and Section 12 claims, "[t]he burden of establishing the absence of loss causation as an affirmative defense rests on the defendant." DaimlerChrysler, 197 F. Supp.2d at 66. Defendants have not met this burden.

III. The Merger of Equals Is Not Exclusively Defined by the BCA

Precisely as they did in their motion to dismiss, the Daimler Defendants argue that they did not commit fraud upon Chrysler shareholders because the DaimlerChrysler Transaction was "carried out entirely in accordance with the BCA." D.I. 533 at 41. The crux of the Daimler Defendants' position is that "the BCA embodied all of the terms of the 'merger of equals,'" changes in management were not prohibited by the BCA, and it was disclosed in the Proxy/Prospectus that changes might occur in the future. Id. at 42. The problem with the Daimler Defendants' position is that it is directly contrary to the facts and the law - including the law of this case.

As this Court recognized in rejecting defendants' motions to dismiss, the issue is not whether there has been a contractual breach of the BCA; the issue is that defendants "represented that the transaction would be a merger of equals, yet Defendants never intended to comply with that concept and ultimately did not comply with that concept." DaimlerChrysler, 197 F. Supp. 2d at 60 (citing Wharf Holdings Ltd., 532 U.S. at 596-97). This holding is fatal to the defendants' argument here just as it was to their motion to dismiss.

Not only do the defendants' arguments conflict with the law of this case, they conflict with the unequivocal statements and testimony of the defendants themselves. Schrempp's statements the day after the merger made clear that, in fact, the BCA was merely a means to an end:

> Q: Is this really a takeover rather than a merger?
>
> Schrempp: No. I think what is very important is that this is a merger of equals. ***Let's not forget the technical transaction, how to get there.*** But we have made sure that we have equal representation on management, we have equal representation on the supervisory board.

Compendium, Tab 43 (emphasis added).

Likewise, the deposition testimony of the Daimler Defendants' own witnesses contradicts the position taken by the Daimler Defendants in their brief, namely that the merger of equals was limited to the literal provisions of the BCA. See, e.g., Grube Tr., 29; Schrempp Tr., 221-222; Dibelius Tr., 225; 229; Cordes Tr., 135, 136, 170-171, 191-192. All of these witnesses (and others) gave their understanding of the term and none of them testified that the meaning of "merger of equals" was limited to the BCA.[35] See In re DaimlerChrysler, 197 F. Supp. 2d at 59 (recognizing that the Proxy/Prospectus uses the term merger of equals to describe four different concepts, this Court stated "the Proxy/Prospectus does not define the term 'merger of equals' solely in relation to the Combination Agreement").

The assertion that there was no limitation at all on future changes in structure is legally irrelevant but is also contradicted by Eaton's own words.

Moreover, as this Court already has held, even if it was permissible as a matter of contract law to change the merger of equals structure, defendants' undisclosed plan to subvert that structure would still not be permissible. DaimlerChrysler, 197 F. Supp2d at 61 (noting that under the Wharf decision, making a promise with no intent to honor the

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[35] Only Eaton testified to the contrary and as explained earlier, Eaton's testimony contradicts the definition contained in his own letter to Chrysler shareholders, included in the Proxy/Prospectus as well as many of his other statements.

promise is itself an actionable misrepresentation, independant of the contract). The evidence here is that the Daimler Defendants embarked on a secret plan to acquire Chrysler, that they misrepresented repeatedly that the transaction would not involve a change of control and would include joint corporate management while intending the precise opposite, that they used the merger of equals message to underpay for Chrysler and that following closing, they covertly implemented a plan to exclude Chrysler managers from corporate-level management while telling the world they were doing the exact opposite.[36]

> Q: Mr. Eaton, what happens when after the three years – Chrysler's interest in the new company?
>
> EATON: Nothing whatsoever. Nothing whatsoever. We'll continue to have the seats on the supervisory board, on the management board, on the shareholder committee. I don't think anything will happen at all.

(DCX156513) (March 9, 1998 Eaton press conference audiotape, at approx. 00:10:40 - 00:11:10).

[36] The Daimler Defendants have proffered a number of self-serving affidavits by former and current Chrysler Board members and representatives on the Daimler-Chrysler Board of Management. For the reasons explained in the Declaration of Dmitry Pilips filed herewith, those affidavits are irrelevant and should be disregarded. To the extent the Court disagrees, Lead Plaintiffs request an opportunity to depose the affiants and supplement the record - an opportunity that was effectively denied plaintiffs during discovery. See Pilipis Decl., ¶7.

III. CONCLUSION

For the reasons above, the Daimler Defendants' motion for summary judgment should be denied on each and every ground.

Respectfully submitted,

Dated: March 7, 2003

Jay W. Eisenhofer (Del. Bar No. 2864)
Abbott A. Lohan (Del. Bar No. 3751)
Richard M. Donaldson (admitted in PA and NJ only; admission to DE pending)
GRANT & EISENHOFER, P.A.
1201 N. Market Street, Suite 2100
Wilmington, DE 19801
(302) 622-7000

Vincent R. Cappucci
Andrew J. Entwistle
Johnston de F. Whitman, Jr.
ENTWISTLE & CAPPUCCI LLP
299 Park Avenue, 14th Floor
New York, NY 10171
(212) 894-7200
Jeffrey A. Klafter
Darnley D. Stewart
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 544-1400

Jeffrey W. Golan
Jeffrey A. Barrack
David E. Robinson
BARRACK RODOS & BACINE
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600
Counsel for Co-Lead Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2003, I caused two copies of the foregoing Lead Plaintiffs' Memorandum of Law In Opposition to the Daimler Defendants' Motion for Summary Judgment, the Compendium of Public Representations Regarding Merger of Equals cited in Lead Plaintiffs' Memorandum of Law In Opposition to the Daimler Defendants' Motion for Summary Judgment, the Declaration of Dmitry Pilipis, and the Declaration of Richard M. Donaldson to be served on the following counsel of record via hand delivery on this date:

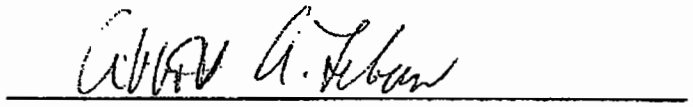
Carmella P. Keener
ROSENTHAL, MONHAIT, GROSS & GODDESS
919 Market Street, Suite 1401
Wilmington, DE 19801

Alan J. Stone
Jessica Zeldin
MORRIS NICHOLS ARSHT & TUNNELL
1201 North Market Street
Wilmington, DE 19801

Peter J. Walsh, Jr.
POTTER, ANDERSON & CORROON LLP
Hercules Plaza
1313 North Market Street
Wilmington, DE 19801

Robert S. Saunders
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
One Rodney Square
Wilmington, DE 19801

Lea Haber-Kuck
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036



Abbott A. Leban