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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, individually, and on behalf of all those similarly situated, Plaintiff-Below, Appellant, v. ERNST VOLGENAU, JOHN W. BARTER, LARRY R. ELLIS, MILES R. GILBURNE, W. ROBERT GRAFTON, WILLIAM T. KEEVAN, MICHAEL R. KLEIN, STANTON D. SLOANE, GAIL R. WILENSKY, SRA INTERNATIONAL, INC., PROVIDENCE EQUITY PARTNERS LLC, STERLING PARENT INC., STERLING MERGER INC. AND STERLING HOLDCO INC., Defendants-Below, Appellees.	No. 461, 2013 On appeal from the Court of Chancery of The State of Delaware in C.A. No. 6354-VCN

ANSWERING BRIEF OF THE SRA DEFENDANTS, APPELLEES

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Dated: November 21, 2013

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NATURE OF PROCEEDINGS

Plaintiff-below, Appellant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), appeals from an August 5, 2013 Order and Memorandum Opinion ("SJ Op.") of the Court of Chancery granting Defendants' motions for summary judgment, as well as an August 31, 2012 Order and Letter Opinion granting in part Defendants' motion for judgment on the pleadings. SEPTA alleged that Defendants breached their fiduciary duties in approving a merger (the "Merger") whereby Providence Equity Partners ("Providence") acquired SRA International, Inc. ("SRA"). The Court of Chancery determined there was no triable issue of material fact as to whether the SRA directors breached their fiduciary duties. (B1087.) The Court of Chancery previously granted in part the SRA defendants' motion for judgment on the pleadings on Count IV of the Second Amended Complaint, finding that 8 *Del. C.* § 124 precludes SEPTA's claim that the Merger was invalid because it contravened the equal per share payment or dividend clause in SRA's certificate of incorporation. (B0697.)

SEPTA filed its Notice of Appeal on August 30, 2013, and its Opening Brief on October 14, 2013. This is the Answering Brief of the SRA Defendants,[1] Appellees.

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[1] The "SRA Defendants" are SRA, John W. Barter, Larry R. Ellis, Miles R. Gilburne, W. Robert Grafton, William T. Keevan, Michael R. Klein, Dr. Stanton D. Sloane, and Dr. Gail R. Wilensky.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly applied the business judgment standard of review to the SRA Board's approval of the Merger. Under that standard, this Court should affirm the Court of Chancery's summary judgment decision. ***First***, Delaware law affords a board of directors business judgment rule review if, as here, the transaction was subject to the procedural protections of a majority of the minority vote and the recommendation of an independent and disinterested special committee. *Frank v. Elgamal*, 2012 WL 1096090 (Del. Ch.); *In re John Q. Hammons Hotels, Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch.). SEPTA falls well short of rebutting the business judgment rule's application because (i) Dr. Volgenau did not stand on both sides of the transaction; (ii) SEPTA's attacks on the Special Committee's independence and disinterestedness are without merit; (iii) the Merger was approved by a fully informed vote of SRA's minority stockholders; and (iv) even assuming *arguendo* Dr. Volgenau somehow stood on both sides (which he did not), under *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), the Merger still should be reviewed under the business judgment rule.

Second, the SRA Defendants did not breach fiduciary duties by approving Dr. Volgenau's equity rollover supposedly in violation of the equal per share payments or distributions clause in SRA's charter. The terms of the Merger did

not violate that clause, and, regardless, SEPTA fails to identify a triable issue that precludes the SRA Defendants from being exculpated pursuant to SRA's charter and 8 *Del. C.* § 102(b)(7).

2. Denied. The Court of Chancery correctly granted the Defendants' motion for judgment on the pleadings on SEPTA's claim that the Merger was invalid because SRA lacked the power or capacity to enter into a transaction where Dr. Volgenau received consideration in a different form than that paid to the minority stockholders. The plain language of 8 *Del. C.* § 124 prohibits such a claim, and SEPTA did not and could not satisfy any of that provision's exceptions. Furthermore, even if Count IV had survived in the form of a contract claim, it would nonetheless be subject to dismissal because the Merger did not violate SRA's Certificate of Incorporation, and because, as counsel acknowledged at oral argument, SEPTA could not prove any damages.

STATEMENT OF FACTS

A. The Parties.

Plaintiff-below, SEPTA, was a stockholder of SRA.

SRA is a leading federal government contractor for technology and strategic consulting services, incorporated under the laws of Delaware and headquartered in Fairfax, Virginia. (A45.) SRA was a publicly-traded corporation until the Merger closed on July 20, 2011. (B0591-B0600.)

Dr. Ernst Volgenau founded SRA and serves as the chairman of the Board. (A43; A45-A46.) Before the Merger, Dr. Volgenau beneficially owned about 20% of the shares outstanding and about 71% of the aggregate voting rights of SRA. (A43.) Before the Merger, Dr. Stanton D. Sloane was SRA's chief executive officer. (A48.) The Board consisted of Dr. Volgenau, Dr. Sloane, Michael Klein, Miles Gilburne, W. Robert Grafton, John Barter, General Larry Ellis, William Keevan, and Dr. Gail Wilensky. (A45-A48.) Messrs. Klein, Gilburne, Grafton, Barter and Ellis comprised the Special Committee. (A62-A63.)

Providence is a global private equity firm. (B0472-B0473.) Sterling Holdco Inc., Sterling Parent Inc., and Sterling Merger Inc. were formed by Providence for the purpose of structuring an acquisition of SRA. (B0188.)

B. SRA's Board Evaluates The Strategic Landscape In Early 2010.

Beginning in early 2010, SRA faced increasing commoditization and decreasing profit margins in the government services industry. (B0672-B0673;

B0679-B0680.) With the declining market, Dr. Volgenau became more receptive to exploring a sale of his controlling stake in SRA. (B0700-B0762; A1425-A1427; B0001-B0002; B0413-B0414.) On May 3, 2010, the Board formed a strategic alternatives study team consisting of Dr. Volgenau and Messrs. Klein, Gilburne and Grafton (the "Study Team"). (B0003-B0004.) Dr. Volgenau, Dr. Sloane, and Rick Nadeau (SRA's CFO) engaged in preliminary discussions with Providence and provided financial information subject to a confidentiality agreement. (A1425-A1427; B0005-B0010; B0499; B0427.) The SRA directors were aware of and encouraged these preliminary meetings. (B0670-B0671; B0610-B0611, B0612.)

During the summer and fall of 2010, the Study Team focused on acquiring Lockheed Martin's Enterprise Integration Group ("EIG"), while encouraging Dr. Volgenau and management to continue preliminary talks with Providence as a potential backup. (A1559-A1562.) SRA's Board and management understood that if SRA acquired EIG, the acquisition would indefinitely postpone a sale of the Company. (B0103-B0104.) After SRA lost the bid for EIG to Veritas Capital, the Study Team determined that "the sale of the company was probably the best" strategic alternative for SRA to pursue. (B0613-B0614.) As the Court below observed, "[f]rom a historical perspective," the Board was "fairly prescient" in pursuing "cashing out while the cashing out was as good as it was going to be"

given the "overall picture [of] where SRA was and ... the future of government contracting." (A3016.)

C. The Board Forms A Special Committee, And The Committee Receives And Rejects Overtures To Negotiate Exclusively.

On October 27, 2010, Providence presented to the Study Team a preliminary expression of interest to acquire SRA in the $28 per share price range. (B0131-B0132; A1681.) The Board then determined to appoint a special committee comprised of Messrs. Klein, Gilburne, Grafton, Ellis, and Barter. (A2642.) The Committee was charged with evaluating, eliciting third-party interest in, and negotiating potential strategic transactions. (*Id.*) The Special Committee retained Houlihan Lokey Capital, Inc. ("Houlihan") as financial advisor and Kirkland & Ellis LLP ("Kirkland") as legal counsel. (A1686; B0119-B0121, B0122; B0668-B0669; B0683.) At the outset, Dr. Volgenau was instructed that he should not have "any further discussions with Providence or any bidder except as may be approved and coordinated by the Committee" and that he "could not interfere in the special committee process." (A1684-A1687; B0448.)

On November 22, 2010, Houlihan and Mr. Klein met with Providence. At the meeting, Mr. Klein explained that Providence's $28 per share expression of interest was insufficient to begin formal discussions. (B0192; B0017-B0018.) The Special Committee denied Providence's initial request (as well as multiple future requests) to negotiate exclusively with SRA. (B0021-B0022; B0128.) On

December 1, 2010, Serco plc ("Serco"), a British government contractor, offered an unsolicited indication of interest in acquiring SRA for $29-$31 per share, contingent on several conditions. (B0019-B0020; B0130-B0131.) On December 9, 2010, Mr. Klein, in consultation with the Special Committee, sent a response "designed ... to hold [Serco] in place but not chase them away, while we prepared ourselves to engage in this process" (B0130-B0131; B0023-B0024), and informed Providence that SRA had received an indication of interest — without identifying the bidder — to encourage Providence "to start with a $30-plus offer." (B0130-B0132.) Providence indicated on December 29, 2010 that it would offer $27.25 per share. (B0025-B0026.) The Special Committee determined that Providence's "pricing levels were not sufficient to warrant commencing a negotiation process," and that it was appropriate to explore additional third-party interest in a strategic transaction. (B0027-B0029). The government services industry continued to decline, impacting SRA's revenue growth. (B0615, B0616; B0013-B0014.)

D. In Early 2011, Ten Different Strategic And Financial Bidders Conduct Substantial Due Diligence To Determine Whether To Submit Formal Bids To Acquire SRA.

In early 2011, the Special Committee launched a robust multi-round, multi-bidder sales process, which SEPTA's recitation of the facts essentially ignores. (B1023-B1039.) Beginning on January 6, 2011, the Special Committee contacted Serco and five financial sponsors: Veritas Capital ("Veritas"), The Carlyle Group

("Carlyle"), TPG Capital ("TPG"), Kohlberg Kravis & Roberts ("KKR"), and Bain Capital ("Bain"); a sixth financial sponsor, Hellman & Friedman, later was added. (B0027-B0029; B0374-B0376; B0031.)

In early January 2011, SRA's stock price began rising steadily on reports that the Company was being shopped. (B0030.) SRA's January 25, 2011 press release confirmed that it was entertaining acquisition offers, noting that "after a series of inquiries regarding the company's willingness to consider offers, Houlihan Lokey ha[d] been retained to provide advice." (B0032.)

The Special Committee then determined to expand the group of potential bidders. (A1830-A1832.) Dr. Volgenau agreed, and on February 4, 2011, Houlihan contacted three additional strategic bidders: The Boeing Company ("Boeing"), CGI Group, Inc. ("CGI"), and Hewlett Packard ("HP"), and an additional financial sponsor: GTCR LLC ("GTCR"). (B0033-B0037.) On February 22, 2011, another strategic bidder, L-3 Communications Holding, Inc. ("L-3"), contacted Houlihan. (B0041.) Four strategic bidders and six financial sponsors signed confidentiality agreements and commenced diligence.[2] Except for Providence and Veritas, all of the potential bidders withdrew because they thought

[2] B0193. For example, as part of an extensive diligence process, Boeing had 16 diligence calls, 7 diligence meetings, and 341 diligence requests, and had 119 employees and advisors access SRA's dataroom. (B0054-B0060.)

the price SRA expected to receive would be too high, and for other internal business reasons. For example:

- Boeing withdrew because "a combination of factors impacted Boeing's financial assessment and its confidence in its ability to generate an attractive return .... Specifically, Boeing had concerns about risks in the government services industry." (B0766.)

- CGI withdrew because: (1) it would be difficult for CGI to obtain financing, (2) it would not be prudent to attempt to integrate SRA while still in the process of integrating another recent acquisition, (3) an acquisition of SRA would be subject to burdensome regulatory approvals because CGI is a foreign company, and (4) acquiring SRA would cause CGI's portfolio to be too heavily concentrated in the government services sector. (B0703-B0704.)

- GTCR withdrew because they were not "buyers at a premium to where the market [was]" and because they did not "see getting to the 'growth' multiples likely to win the day ...." (B0038.)

E. Providence And Veritas Engage In A Multi-Round Bidding War Yielding A $31.25 Per Share Offer — The Highest And Best Price.

The Special Committee set March 18, 2011 as the bid deadline. On that date, only Providence submitted a bid, offering $30 per share. Veritas did not bid, and advised the Special Committee that it was withdrawing from the auction. In order to generate a competitive sales process, the Special Committee asked Veritas to reconsider and granted Veritas a two-day extension to submit its bid; Veritas then bid $30 per share. (B0197; B0043-B0053.) After the bidders requested it, Dr.

Volgenau agreed to roll over $100 million, then (at Veritas' request) $150 million, of his equity in SRA. (B0061-B0062, B0063-B0066.)[3]

After intense negotiations, on March 30, 2011, Veritas and Providence raised their bids to $31 and $30.50 per share, respectively. (B0067-B0071.) Later that day, Providence offered (1) to maintain its current bid but also include in the consideration to stockholders the proceeds from contingent sales of two of SRA's subsidiaries, which might yield an effective sale price of about $31 per share or more; or (2) to increase its bid price to $31 per share if Dr. Volgenau agreed to convert his $150 million rollover commitment to $120 million in equity and a $30 million nonrecourse loan which Providence would pay back only if the subsidiary sales yielded sufficient proceeds. (B0070.) Even though it was "a rotten deal" with "no upside and all downside" for him, Dr. Volgenau agreed to the $30 million nonrecourse loan so that Providence would raise its bid. (B0464-B0466; B0152.)

Houlihan contacted Veritas later that night "in an effort to secure a higher purchase price and certain improved contractual terms." (B0198.) Veritas increased its bid price to $31.25 per share, and asked for exclusivity in negotiations, which the Special Committee granted until 3:00 p.m. on March 31. (B0072-B0075.) SRA and Veritas were unable to reach a deal during the exclusivity period, and the Special Committee had concerns that Veritas did not have the necessary financing

[3] Mr. Klein encouraged Dr. Volgenau to increase his rollover commitment in order to keep both suitors active in the bidding. (B0150, B0152; B0467.)

and partnership approvals in place to consummate the transaction. (B0159-B0161; B0076-B0078.) A short time later, Providence increased its bid to $31.25. (B0076-B0078.) With both bidders at $31.25, the Special Committee informed Providence and Veritas that each should submit its last, best offer by 5:00 p.m.; Houlihan conveyed to Veritas the Special Committee's concerns about the partnership consents for signing an agreement. (*Id.*) Veritas then withdrew its $31.25 bid and declined to make an additional offer. (*Id.*) Providence's bid was the last bid standing, at $31.25 per share.

F. The Special Committee And The Board Recommend The Proposed Merger At The Highest Price Offered By Any Bidder, And No Competing Proposal Emerges During The Go-Shop.

On March 31, 2011, the Special Committee unanimously recommended the proposed Merger with Providence. (B0076-B0078.) Houlihan offered its fairness opinion and Kirkland summarized the terms of the proposed Merger. (B0079-B0086; B0329-B0332; B0342.)[4] After that, SRA's full Board met, voting unanimously (with Dr. Volgenau abstaining) to sign the Merger Agreement and to recommend the Merger to SRA's stockholders. (B0079-B0086.) During the Go-Shop, Houlihan contacted 29 strategic bidders and 21 financial sponsors. (B0377-B0378; B0087-B088.) No bidder made an offer during the Go-Shop. (B0089.)

[4] While the Merger Agreement contained breakup fees of 1.5% of deal value during the Go-Shop or 2.5% after the Go-Shop, which SRA would have had to pay Providence to terminate the deal, it contained a much higher reverse breakup fee of 6% of deal value, which Providence would have had to pay to SRA to terminate the deal. (B0329-B0332, B0342.)

G. The Special Committee Does Not Award Additional Charitable Contributions That Mr. Klein Sought.

On March 31, 2011, the members of the Board not on the Special Committee determined to pay each member of the Special Committee a one-time fee of $75,000 for his service. (B0081.) In addition, those members "determined that SRA would make charitable contributions in the aggregate amount of $150,000 to two charitable organizations" Mr. Klein was known to support. (A2816; B0232.) On June 8, 2011, Mr. Klein requested that SRA consider additional charitable donations in light of his nearly nine months of work as chairman of the Special Committee. (A1992-A1995.) His request was not granted. (A2816.)

H. Disinterested Stockholders Overwhelmingly Approve the Merger.

The Merger was subject to the nonwaivable approval of "the holders of a majority of the outstanding shares of Class A Common Stock entitled to vote on such matter (excluding all shares of Class A Common Stock beneficially owned, whether directly or indirectly, by Volgenau)." (B0328, B0337.) After two rounds of review, the SEC approved a definitive proxy statement (the "Proxy").[5] SEPTA claimed that the Proxy contained material omissions with respect to Dr. Volgenau's meetings and Houlihan's relationship with Providence. Without

[5] Third party analysts (*e.g.*, Glass Lewis & Co., LLC) recommended the Merger, finding that stockholders were being offered "reasonable consideration and a large premium over the unaffected stock price" and that "the board took adequate steps to ensure a fair process was conducted." (B0570-B0578.)

conceding the materiality of such information, SRA made supplemental disclosures. (B0559-B0563.)

On July 15, 2011, SRA's minority stockholders overwhelmingly approved the Merger. (B0579-B0580; B0564-B0569.) Specifically, 94.7% of the total outstanding shares, including 81.3% of the total outstanding minority shares (99.7% of the voting minority shares), were voted in favor. (*Id.*) The Merger closed on July 20, 2011, entitling SRA's stockholders to $31.25 per share, a 52.8% premium over the unaffected SRA stock price. (B0585-B0590.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY RULED THAT SEPTA'S CLAIMS ARE REVIEWED UNDER THE BUSINESS JUDGMENT RULE, AND UNDER THAT STANDARD, THE SRA DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT.

A. Questions Presented

Did the Court of Chancery correctly conclude that the SRA Defendants were entitled to summary judgment on SEPTA's fiduciary duty claims, because:

1. SEPTA's claims are reviewed under the business judgment rule, because the Merger was (i) negotiated and approved by a special committee of independent and disinterested SRA directors, and (ii) conditioned on and approved by a nonwaivable, informed vote of the majority of the minority SRA stockholders;

2. The SRA Defendants did not breach any fiduciary duties in contravention of the SRA charter's equal per share payments or dividends provision, because, if anything, Dr. Volgenau received less value per share than other SRA stockholders, the SRA Defendants reasonably and in good faith believed that Dr. Volgenau was not receiving a superior deal than that which the minority SRA stockholders received in the Merger, and therefore their conduct is exculpated pursuant to SRA's charter and 8 *Del. C.* § 102(b)(7)?

B. Scope of Review

While it reviews the Court of Chancery's summary judgment decision *de novo*, *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994),

this Court defers to the Court of Chancery's factual findings that "***are the product of an orderly and logical reasoning process***" and "***does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong and justice so requires***," *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006) (citations omitted) (emphasis added).

C. Merits of Argument

1. The Business Judgment Rule Is The Proper Standard For SEPTA's Challenge To The Merger.

Where "a corporation with a controlling stockholder merges with an unaffiliated company, the minority stockholders of the controlled corporation are cashed-out, and the controlling stockholder ... does not 'stand on both sides' of the merger," the transaction is subject to review under the business judgment rule if certain procedural protections are present. *Frank*, 2012 WL 1096090, at *7 (citing *Hammons*, 2009 WL 3165613, at *10). Under *Frank* and *Hammons*, a third-party transaction involving a controlling stockholder qualifies for review under the business judgment rule if: (1) the transaction is recommended by a disinterested and independent special committee, (2) which has "sufficient authority and opportunity to bargain on behalf of minority stockholders," including the "ability to hire independent legal and financial advisors[;]" (3) the transaction is approved by stockholders in a nonwaivable majority of the minority vote; and (4) the

stockholders are informed and free of any coercion. *Hammons*, 2009 WL 3165613, at *12 n.38. The challenging party bears the burden of "alleg[ing] facts that rebut the presumption that a board's decision is entitled to the protection of the business judgment rule." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1033 (Del. Ch. 2012) (citation omitted). Here, because the Merger had the procedural protections *Frank* and *Hammons* specify, and because SEPTA failed to rebut the operation of those protections, the Court of Chancery properly applied the business judgment standard of review.

a. *Dr. Volgenau Did Not Stand On Both Sides Of The Transaction.*

Dr. Volgenau plainly did not stand on both sides of the Merger because he "did not make the offer to the minority stockholders," rather, "an unrelated third party did." *Hammons*, 2009 WL 3165613, at *10. As below, SEPTA fails to identify any material evidence that Dr. Volgenau acted as the buyer. The bare allegation that Dr. Volgenau had a prior affiliation with Providence is not supported by the record, but, even if true, it would not make him the buyer. In fact, Dr. Volgenau and Providence had no relationship whatsoever prior to the spring of 2010. (B0414; B0478.) That Dr. Volgenau supposedly "negotiated separately" with Providence — in early, exploratory conversations — does not transform the "sale' [into a] 'joint venture of some sort ....'" *Hammons*, 2009 WL 3165613, at *10. To the contrary, as a holder of a substantial equity interest in

SRA, Dr. Volgenau's financial incentives were aligned with those of SRA's other stockholders — to have a buyer pay the highest per share price reasonably available.

SEPTA also fails to show a conflict based on the fact Dr. Volgenau was interested in SRA maintaining its culture and values. (Op. Br. 6-7, 12-13.) Such an interest is permissible under Delaware law and cannot raise SEPTA's allegations above speculation.[6] In fact, Dr. Volgenau met with competing bidders and even agreed to accept an illiquid $150 million rollover equity stake to allow Veritas to submit a competing bid. (B0150.) SEPTA's conclusory allegations fail to satisfy its burden of "alleg[ing] facts that rebut the presumption that a board's decision is entitled to the protection of the business judgment rule." *In re Synthes*, 50 A.3d at 1033 (citation omitted).

SEPTA's reliance on *Americas Mining Corporation v. Theriault* is misplaced. In that case, the controlling stockholder attempted to have Americas Mining buy more than 99% of another company that he also controlled, and no party contested entire fairness as the governing review standard. 51 A.3d 1213, 1219, 1239 (Del. 2012). Those are simply not the facts here. As the Court of Chancery concluded, "Volgenau is not a buyer in this transaction" (B1044) and "the buyer was an arms' length bidder" (B1020). The Court of Chancery's

[6] *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (concluding that corporate culture may promote stockholder value and warrant protection).

determination was unquestionably the result of "an orderly and logical reasoning process" and SEPTA falls well short of establishing that the lower court's finding was "clearly wrong." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 48. (citation omitted). Because Delaware courts review such mergers with unaffiliated third parties under the business judgment rule,[7] the Court of Chancery correctly evaluated SEPTA's claims under this standard.

b. *SRA's Special Committee Was Independent And Disinterested.*

There is no dispute of material fact that the Merger was recommended by a fully-functioning, independent, and disinterested special committee.

i. Mr. Klein Did Not Have A Material Self-Interest In The Sale Of SRA To Providence.

SEPTA challenges Mr. Klein's independence by arguing that he (1) as "Volgenau's confidant, ... encouraged Volgenau to force the sale of SRA"; (2) had an "expectation[]" of receiving an award for his work on the Special Committee; and (3) negotiated payments terms with the Special Committee's advisors, who were "from his Washington, D.C. social circle." (Op. Br. 14-20, 27-28.) SEPTA's allegations ignore the undisputed record in this case.

First, although SEPTA labels Mr. Klein as Dr. Volgenau's "confidant," it is undisputed that Mr. Klein had no relationship with Dr. Volgenau prior to joining

[7] *See, e.g.*, *In re Budget Rent A Car Corp. S'holders Litig.*, 1991 WL 36472, at *5 (Del. Ch.) (applying business judgment rule to the sale of a company to a third party where controlling stockholder received stock in the acquiring company).

SRA's Board. (B0091.) The page SEPTA cites from Dr. Volgenau's draft book on SRA's history does not support its contention; the narrative simply describes issues with Dr. Sloane's performance as CEO and Dr. Volgenau's view that Dr. Sloane should be offered another chance at the job. (A1040, *cited in* Op. Br. 14.) The fact that Mr. Klein on this occasion was supportive of Dr. Volgenau's view "either way" by no means suggests that Mr. Klein was dominated by Dr. Volgenau. Similarly, SEPTA's contention that "Klein encouraged [Dr. Volgenau] to exploit his control of SRA to achieve his personal goals" is another mischaracterization. (Op. Br. 10.) Instead, the narrative explains how the Special Committee, not Dr. Volgenau, would control the SRA sales process and notes that Mr. Klein "tri[ed] to do the right thing for the shareholders and for me" in chairing the Special Committee. (A1056.) As the Court below held, "Klein was clearly independent of Volgenau. There is no evidence that Klein was beholden to, or controlled by, Volgenau or that they had any personal or business relationships outside of, or prior to, their interaction on the SRA Board." (B1052.)

Second, SEPTA distorts the record in suggesting that Mr. Klein made a "demand for a 'reward'" for his work on the Special Committee. (Op. Br. 15.) The evidence shows that Mr. Klein made a single, post-signing request for increasing the amount of the donations to be made to charity in recognition of his work as chairman of the Special Committee — a request that was not granted.

(A1992-A1995; A2816.) Mr. Klein's after-the-fact request does not retroactively constitute a material self-interest in the Merger. As the Court of Chancery observed, "Klein's request that the bonus be paid to charity, rather than to himself, strongly suggests that the monetary payment was not material to him." (B1058.) And there is no evidence in the record indicating that Mr. Klein would have received a non-monetary "social" or "reputational" benefit from the requested charitable donation, much less a material one. (Op. Br. 28; B1057-B1058.) Moreover, Mr. Klein's own substantial holdings and options in SRA stock aligned his financial interests with those of SRA's other stockholders, incentivizing him to obtain the highest price reasonably available for SRA shares.[8] Again, SEPTA does not come close to showing that the lower court's factual determination was "clearly wrong." 906 A.2d at 48.

Third, SEPTA's theory that the Special Committee's advisors were not independent or disinterested because Mr. Klein "selected" them "from his Washington, D.C. social circle and structured their compensation with incentives to deliver a deal acceptable to Volgenau" (Op. Br. 19) is yet another distortion of the record. To the contrary, it is undisputed that the Special Committee as a whole selected Houlihan as its financial advisor and Kirkland as its legal advisor

[8] Mr. Klein had SRA stock options and restricted SRA stock awards which were cashed out for $1.58 million, at the same $31.25 per share Merger consideration received by SRA's other stockholders. (B0601-B0608.) As SEPTA speculates, if another buyer might have purchased SRA for $43 per share (B0971), ***Mr. Klein could have personally received more than $2.17 million*** — substantially more what he requested SRA consider donating to charity.

"because of their location, competence, and lack of any prior relationship to SRA." (B1059; *see supra* Statement of Facts § C.) As to their compensation, contingent fees in mergers are "routine," align the interest of the advisors with those of the stockholders, and repeatedly have been "upheld by Delaware courts."[9] Here, the facts that Houlihan's fee had a contingent component, and the Special Committee negotiated a rate freeze and discount with Kirkland in exchange for consideration of a discretionary bonus (B0674, B0684), are "undoubtedly routine." *In re Atheros*, 2011 WL 864928, at *8. And Mr. "Klein's effort to compensate Kirkland for a job well done was not inconsistent with his fiduciary duties, especially because Kirkland's discretionary bonus was contemplated by the terms of Kirkland's engagement." (B1059.) Although SEPTA makes much of the fact that Mr. Klein and representatives of the Special Committee's advisors serve on the board of an arts society, these relationships are insufficient "to raise a question of material fact as to whether Klein was willing to risk his reputation to enrich other individuals with whom he sat" on that board. (B1059-B1060.)[10]

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[9] *See In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch.); *see also In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8 (Del. Ch.), *vacated on other grounds*, 2011 WL 885931 (Del. Ch.) (TRIAL ORDER) ("Contingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome."); B1059.

[10] *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004) (finding involvement in same social circles and pre-existing business relationship insufficient to rebut presumption of independence;"[t]o create a reasonable doubt about an outside director's independence," there must be evidence "that would support the inference that … the non-interested director would be more willing to risk his or her reputation than risk the

Fourth, there is no evidence that Mr. Klein's purported expectation of a bonus was tied to a deal with Providence, or that Mr. Klein sought to facilitate a Merger with Providence. As SEPTA's counsel acknowledged, "I don't really think that Mr. Klein probably cares one way or the other about Providence versus Veritas or whatever." (A3026.) The undisputed evidence bears this out: after Veritas had missed the bid deadline and had withdrawn from the auction, the Special Committee — led by Mr. Klein — invited Veritas back to the process and granted Veritas an extension to bid. SEPTA identifies no motive for Mr. Klein to tarnish his substantial professional reputation and to incur significant personal liability simply to "deliver[] a deal acceptable to Volgenau." (Op. Br. 14.) Instead, Mr. Klein's equity interest in SRA "aligned him economically with the public shareholders," and incentivized him to obtain the highest price for SRA shares. *In re W. Nat'l S'holders Litig.*, 2000 WL 710192, at *12 (Del. Ch.). The Court's finding that Mr. Klein had no material self-interest in the Merger was undoubtedly "orderly and logical" and correct, not "clearly wrong." 906 A.2d 27, 48.

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relationship with the interested director"); *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013) ("Our law is clear that mere allegations that directors are friendly with, travel in the same social circles, or have past business relationships with the proponent of a transaction … are not enough to rebut the presumption of independence."); *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch.) (concluding personal friendship and business relationship insufficient to raise reasonable doubt about director's independence).

ii. The Special Committee Was Not Dominated By Michael Klein Or Dr. Volgenau.

First, SEPTA cites no evidence creating a triable issue that Mr. Klein dominated the Special Committee, functioning as a "de facto one man committee." (Op. Br. 18); *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *25 (Del. Ch.). "It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to the Chairman." *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *10 (Del. Ch.).

Here, the Special Committee was comprised of experienced, savvy leaders with distinguished careers in business and the military. Each Committee member actively participated in evaluating and selecting the advisors (B0674-B0675, B0677; B0662-B0664) and negotiating with Kirkland regarding its compensation (A1781-A1783; B0684-B0685; B0676), and regularly received reports from Mr. Klein and the advisors and provided substantive input and direction in response to such reports. (B0678; B1015-B1016.) Finally, Mr. Klein's request for increased charitable contributions ***was not granted***. (A2816.)

Second, SEPTA cannot point to a triable issue to support its claim that Dr. Volgenau dominated the Special Committee. As controlling stockholder, Dr. Volgenau could vote his shares as he chose, *see Hammons*, 2009 WL 3165613, at *14, and have a preference among bidders. An independent special committee

may certainly consider a controlling stockholder's preference and permit that stockholder to meet alone with potential bidders.[11]

But the indisputable evidence is that, while the Special Committee appropriately took Dr. Volgenau's views into account, the Special Committee ran the sales process independently from Dr. Volgenau, and he did not interfere with the Special Committee's authority. The affidavits submitted by Boeing and CGI demonstrate that Dr. Volgenau treated strategic bidders fairly and did not dissuade them from bidding on SRA. The Court of Chancery aptly found that

> [i]n contrast to the immaterial evidence and unsupported assertions proffered by the Plaintiff, the record has ample substantive evidence that Volgenau did not dominate the Special Committee to force a transaction with Providence. [The Special Committee] bargained hard against Providence, forcing it to increase its bid from $27.25 per share to $31.25 per share. Moreover, the Special Committee repeatedly rejected Providence's requests for exclusivity and even granted exclusivity to Veritas. It solicited a plethora of other financial and strategic sponsors to participate in the bidding process, even though Volgenau had initially expressed concerns about strategic buyers.

(B1063.) In sum, the Court below correctly concluded that there was no triable issue as to the Special Committee's independence and disinterestedness.

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[11] *See In re John Q. Hammons Hotels, Inc. S'holder Litig.*, 2011 WL 227634, at *8 (Del. Ch.) (finding no unfairness in controlling stockholder's unmonitored meetings with potential bidders described in *Hammons*, 2009 WL 3165613); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1141-44 (Del. Ch. 1994), *aff'd* 663 A.2d 1156 (Del. 1995) (chairman and largest stockholder's unmonitored meetings were not found to evince unfairness).

c. *The Merger Was Conditioned On, And Approved By, A Nonwaivable And Informed Vote Of The Majority Of Minority SRA Stockholders.*

Noticeably absent from SEPTA's opening brief is the fact that the overwhelming majority of minority SRA stockholders — 81.3%, representing 99.7% of the voting minority shares — approved the Merger by a nonwaivable vote. SEPTA contends that this vote was not fully informed because the Proxy omitted minute details concerning: (1) the Special Committee and its advisors' compensation; (2) the Study Team's financial advisor; (3) early meetings between Dr. Volgenau and SRA management with Providence; and (4) Dr. Volgenau's rollover. SEPTA cannot carry its burden of showing a "substantial likelihood" that the alleged omissions "significantly altered the 'total mix' of information made available," *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), or that the omitted information would have "differed materially from what the stockholders actually received," *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 927 (Del. Ch. 1999). What is more, SEPTA's conduct evidences that its quibbles with the Proxy are immaterial — even though SEPTA had received substantial document discovery and had deposed Dr. Volgenau, Mr. Klein, Anita Antenucci of Houlihan, and Ms. Richardson before the stockholder vote, SEPTA withdrew its motion for a preliminary injunction, abandoning its effort to stop the vote.

i. Information About The Special Committee And Its Advisors' Compensation Was Fully Disclosed Or Immaterial.

SEPTA conjures up two alleged omissions in the Proxy regarding compensation, neither of which would be material to a stockholder in deciding how to vote. (Op. Br. 29-30.) ***First***, Mr. Klein's "expectation" of increased charitable donations is immaterial to the reasonable stockholder. As the Court of Chancery held, "Klein's wishful thinking is not likely to alter significantly the total mix of information available to shareholders." (B1068.) Moreover, the Proxy "fully and accurately discloses the compensation that Klein actually received and notes that it was not contingent upon completion of the Merger." (*Id.*) Nothing more is required. *See In re Lukens, Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999) (proxy statement need not disclose why a course of action was not taken), *aff'd sub nom.*, *Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE).

Second, SEPTA also theorizes that "[t]he contingent interest" of the Special Committee's legal advisor, Kirkland, is material and should be treated as "analogous to contingent banker compensation." (Op. Br. 30.) SEPTA cites no authority for its claim that contingent fees are inappropriate for ***legal*** advisors to a Special Committee. But in any event, no aspect of Kirkland's fees was contingent. Instead, the Special Committee had the discretion to pay Kirkland a routine bonus in light of Kirkland's agreement to freeze and discount its billing rates. (B0665.) And unlike Houlihan, which offered a fairness opinion presented to SRA

stockholders in the Proxy, Kirkland made no independent statements to the stockholders regarding the transaction's appropriateness. Per the Court below, "failure to disclose Kirkland's bonus did not deprive shareholders of a material fact." (B1069.)

ii. Information Concerning The Study Team's Financial Advisor Is An Insufficient Basis For A Disclosure Claim.

Also unavailing is SEPTA's contention that the Proxy should have disclosed that the Study Team's financial advisor, Citigroup, previously advised the Study Team prior to consulting Providence. (B1066.) Such communications between Citigroup and the Study Team occurred before the auction process began. The Special Committee chose a separate financial advisor, Houlihan, for the auction. Delaware law does not require that companies "bury the shareholders in an avalanche of trivial information[,] a result that is hardly conducive to informed decisionmaking." *TSC Indus.,* 426 U.S. at 448-49. The Court below was rightly "not persuaded that this relationship poses a conflict of interest or would be of particular importance to a reasonable shareholder in deciding how to vote on the proposed transaction." (B1071.)

iii. SEPTA's Quibbles Regarding Dr. Volgenau And SRA Management's Meetings With Providence Are Immaterial.

SEPTA incorrectly claims that the Proxy made "partial and misleading disclosures regarding Volgenau's and SRA management's meetings with

Providence throughout 2010." (Op. Br. 31.) As an initial matter, SEPTA had already deposed Dr. Volgenau and learned the factual basis for this so-called disclosure violation ***before*** deciding to abandon its motion for preliminary injunction. And the Proxy does disclose meetings Dr. Volgenau and management had with Providence as well as other potential bidders during a months-long auction. (B0190-B0191.) SEPTA argues more information was needed, asserting the Court of Chancery reached an "erroneous conclusion" that "Volgenau had no prior relationship with Providence and Providence was unaffiliated third-party." (Op. Br. 31.) But as explained above (*see supra* § C.1.a), SEPTA's theory that Dr. Volgenau was an affiliated party is untenable, and more details about Dr. Volgenau and Providence's preliminary meetings are just the sort of "play-by-play description[s]" of a sales process that Delaware law does not require. *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 511-12 (Del. Ch. 2010); (B1067-B1068.)

iv. "Whether" and "How" The Special Committee Evaluated Dr. Volgenau's Rollover In Light Of The Equal Treatment Provision Of The Charter Is Not A Material Fact.

Finally, SEPTA argues that "the Proxy's silence as to ***whether*** and ***how*** the Equal Treatment Requirement was considered is of utmost materiality given the Requirement's bargained-for importance to fair treatment of SRA minority stockholders." (Op. Br. 31 (emphasis added).) But as held by the Court below, "'it is not enough simply to pose questions not answered in the proxy statement.'"

(B1071 (quoting *In re Lukens Inc.*, 757 A.2d at 736).) As opposed to addressing hypothetical legal theories, all that a corporation is required to do is disclose material facts. There is no dispute that SRA disclosed the facts: that Dr. Volgenau contributed $150 million in SRA stock in exchange for non-cash consideration ***also valued at $150 million***. (B0229.)

The alleged disclosure violations here result from no more than SEPTA's own "characterization of the special committee process," which is not required to be disclosed under Delaware law. *See Hammons*, 2009 WL 3165613, at *15. SRA stockholders were fully informed in overwhelmingly approving the Merger, and SEPTA's depiction of the auction process cannot change that.

d. *Even If This Court Concludes The Merger Was A Controlled Transaction, The Merger Still Warrants Business Judgment Rule Review Under* In re MFW Shareholders.

As the Court of Chancery found and this brief underscores, there simply is no basis for SEPTA's contention that Dr. Volgenau stood on both sides of the transaction. But even assuming *arguendo* SEPTA's position, the Merger still should be reviewed under the business judgment rule. In *In re MFW Shareholders Litigation*, the Court of Chancery held that "when a controlling stockholder merger has, from the time of the controller's first overture, been subject to (i) negotiation and approval by a special committee of independent directors fully empowered to say no, and (ii) approval by an uncoerced, fully informed vote of a majority of the

minority investors, the business judgment rule standard of review applies." 67 A.3d at 502. Here, as in *MFW*, the record evidence shows (i) the controlling stockholder agreed up front that the Special Committee would run the sales process, (ii) the Merger was negotiated and approved by an independent special committee that hired its own advisors and oversaw a months-long and multi-bidder sale process, and (iii) the transaction was approved by an uncoerced, fully informed majority of the minority vote.

* * *

Since there is no material factual dispute that the Merger was negotiated by an independent and disinterested Special Committee, and subject to and approved by an informed, uncoerced majority of the minority stockholder vote, the SRA Defendants' conduct should be reviewed under the business judgment rule, with its presumption that, in making a business decision, corporate directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citation omitted), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).[12]

[12] Under this rule, the Court "gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute [its] views for those of the board if the latter's decision can be attributed to any rational business purpose." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 n.17 (Del. 1994) (internal quotation marks and citation omitted).

The Court of Chancery granted summary judgment on Counts I and II, finding that the "merger-related decisions of the [SRA Defendants] were attributable to a rational business purpose and that the buyer was an arm's length bidder" and that "there is no dispute of material fact that the former directors did not act in bad faith ...." (B1020.) Because SEPTA cannot rebut the business judgment rule's application, this Court should affirm the Court of Chancery.

2. The SRA Defendants Did Not Breach Any Fiduciary Duties In Contravention Of The SRA Charter's Equal Per Share Payments Or Dividends Provision By Agreeing That Dr. Volgenau Could Receive, In Part, Non-Cash Consideration.

The Court of Chancery also properly granted summary judgment on SEPTA's claim that Dr. Volgenau's equity rollover "violates the equal treatment provisions of the Company's Amended and Restated Certificate of Incorporation" (A44-A45, A85-A86.) As set forth in the Answering Brief of Dr. Volgenau, which is incorporated herein, summary judgment was warranted because the SRA Defendants complied with the equal treatment clause and their fiduciary duties.

Additionally, SRA's exculpatory charter provision bars SEPTA from recovering on its alleged charter violation fiduciary duty claims. "It is well established Delaware law that an exculpatory provision in a certificate of incorporation that is authorized by 8 *Del. C.* § 102(b)(7) shields the corporation's directors against a judgment for money damages except for judgments arising out of breaches of duty of loyalty, claims for acts constituting bad faith, and claims for

the receipt of improper benefits." *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 2000 WL 130630, at *6 n.12 (Del. Ch.) *aff'd sub nom. Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001).[13] The individual SRA Defendants and Dr. Volgenau are therefore entitled to summary judgment on SEPTA's charter claim because SEPTA has failed to raise an issue of material fact that the defendants acted in "bad faith" or were "otherwise disloyal." *McMillan*, 768 A.2d at 502. The Court of Chancery concluded that the Special Committee acted in the good faith belief that Dr. Volgenau's willingness to agree to a rollover of part of his equity stake in SRA would permit other SRA stockholders to obtain a higher merger transaction price. (B0148-B1052, B1057.) What is more, there is no genuine dispute that the Special Committee lacked independence, and under Delaware law "[t]he presence of an unconflicted board majority undercuts any inference that the decisions of the [SRA Special Committee] can be attributed to disloyalty." *McMillan*, 768 A.2d at 503. Because SEPTA raises no triable issue of fact that the individual SRA Defendants acted in bad faith or disloyally to SRA, the exculpatory provision in SRA's charter should be "the end of the case" for SEPTA's fiduciary duty claim. *Malpiede*, 780 A.2d at 1079, 1095.

[13] *See* 8 *Del. C.* § 102(b)(7); *In re Dataproducts Corp. S'holder Litig.*, 1991 WL 165301, at *5 (Del. Ch.); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502 (Del. Ch. 2000).

II. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT SECTION 124 OF THE DELAWARE GENERAL CORPORATION LAW BARS COUNT IV.

A. Question Presented

Did the Court of Chancery correctly conclude that the SRA Defendants were entitled to judgment on Count IV, as 8 *Del. C.* § 124 precludes SEPTA's claim that the Merger was invalid because it purportedly violated the SRA charter's equal per share payments or dividends provision?

B. Scope of Review

"The Court of Chancery's grant of a motion for judgment on the pleadings ... involves a question of law which this Court reviews *de novo*." *Brooks-McCollum v. Emerald Ridge Bd. of Dirs.*, 29 A.3d 245 (Del. 2011) (TABLE) (affirming Court of Chancery's grant of a motion for judgment on the pleadings).

C. Merits of Argument

1. Section 124 Governs SEPTA's Claim That The Merger Was Invalid Under SRA's Charter.

As set forth in the Answering Brief of Dr. Volgenau, which is incorporated by reference, the Court of Chancery properly rejected SEPTA's claim that "the Merger [was] invalid under the Company's Certificate of Incorporation" pled in Count IV of the Second Amended Complaint, because that claim is foreclosed by the plain language of 8 *Del. C.* § 124.

2. No Damages Resulted From The Alleged Violation Of The Equal Treatment Charter Provision.

SEPTA's claims in Count IV fail for the additional reason that SEPTA can prove no damages flowing from the supposed charter violation. During oral argument, SEPTA's counsel effectively admitted that $31.25 was a fair price:

> **THE COURT:** … If Veritas had gotten this for $31.25, you'd have no case.
>
> **MR. NAYLOR:** That's probably right, but they didn't. …
>
> **THE COURT:** It's not really about value.
>
> **MR. NAYLOR:** It's a quirky circumstance. …
>
> **THE COURT:** If $31.25 were the correct price, would there be a problem under the charter provision?
>
> **MR. NAYLOR:** Probably not a problem that would have damages. …

(A3014-A3015; A3038.) SEPTA's admissions prove that it could not establish damages as to Count IV; thus, judgment for defendants was proper.

CONCLUSION

For the reasons set forth herein, this Court should affirm the Court of Chancery's (1) August 5, 2013 Order and Memorandum Opinion granting Defendants' motions for summary judgment on all counts, and (2) August 31, 2012 Order and Letter Opinion granting in part Defendants' motion for judgment on the pleadings.

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