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Case No. 20213-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN A. GENTILE, VICTORIA S. CASHMAN, BRADLEY T. MARTIN, JOHN KNIGHT, and DYAD PARTNERS, LLC,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 20213-VCN**
PASQUALE DAVID ROSSETTE, DOUGLAS W. BACHELOR,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: June 16, 2009
Date Decided: May 28, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

SinglePoint Financial, Inc. ("SinglePoint" or the "Company") attempted to develop software and was a commercial failure. Founded in 1996, it was part of the technology boom at the turn of the last century. Without the continual, substantial financial support of Defendant P. David Rossette, its majority shareholder, the firm would have ceased to exist on any number of occasions. Because of Rossette's investment of his life savings, SinglePoint lasted long enough to be acquired by Cofiniti, Inc. ("Cofiniti") in a stock-for-stock merger (the "Merger") in the fall of 2000. Although the market for SinglePoint stock was thin—nonexistent might be more accurate—its valuation generally was seen as hovering around $0.50 per share. Cofiniti—depending upon which contemporaneous valuation of its stock one uses—may have paid in effect either roughly $0.91 or $2.46 per share for SinglePoint. Unfortunately, within several months of Cofiniti's acquisition of SinglePoint, reality also caught up with Cofiniti and it filed for bankruptcy. Its shares, including those received by SinglePoint's former shareholders, became worthless.

It is from this background that this case arose. Six months before the Merger—well before Cofiniti was even on the horizon—the SinglePoint board, consisting of Rossette and Defendant Douglas W. Bachelor, decided to improve the Company's balance sheet. Rossette, who was owed substantial sums as the

result of his loans to sustain SinglePoint, converted much of his debt into common stock at a conversion rate of $0.05 per share (the "Debt Conversion"). That number contrasted sharply with a debt conversion price negotiated only several months before of $0.50 per share. As a result of the conversion of debt into equity, Rossette's equity share in SinglePoint increased from 61% to 95%. The Plaintiffs, former minority shareholders of SinglePoint, challenge that transaction as an improper dilution of their voting and economic rights.

In addition, the Plaintiffs challenge an option (the "Put Option") given to Rossette as part of the Merger—an option that was not extended to any other SinglePoint shareholder. In short, Rossette received the right to sell one year after the Merger (or upon the earlier happening of some especially fortuitous event) a portion of the Cofiniti shares that he received in the course of the Merger back to Cofiniti for the effective price at which those shares had been publicly valued for purposes of the Merger (although likely substantially above Cofiniti's reasonable market price at that time). Rossette asserts that this option was offered to him because Cofiniti, at the last moment, changed the terms of the proposed transaction and refused to assume the obligation to pay immediately the substantial debt owed to him by SinglePoint. He took this offer, not because he wanted it, but in order to save the transaction. The Plaintiffs now challenge the special treatment accorded

to Rossette. Of course, with Cofiniti's demise, the challenged option became worthless.

In this post-trial memorandum opinion, the Court determines whether Rossette and Bachelor violated their fiduciary duties to other SinglePoint stockholders by approving the Debt Conversion or the Put Option. Along the way, a characterization of Rossette's conduct—was he greedily excluding minority shareholders because he believed that great success for SinglePoint was just around the corner, or was he himself a victim, misled and perhaps deceived by others who were not pouring most of their personal wealth into that failing company known as SinglePoint—will be considered. Some rumination upon the outcome of the fair price and process dynamic also cannot be avoided. The Plaintiffs can fairly be characterized as asking the Court to engage in alchemy—creating real economic value out of an entity which, with the benefit of hindsight, had little value at any moment in time.

Ultimately, the Court concludes that the Put Option was fair to SinglePoint's shareholders. It was minor consolation for Rossette's loss of what, at the time, appeared to be a material improvement of his chances to be repaid the money that he had lent to SinglePoint—a right upon which he could insist as a creditor. The Debt Conversion, however, must be viewed differently. At the time of the conversion—and without the benefit of hindsight that clearly shows the futility of

the venture—Rossette implemented an unfair process that resulted in a conversion rate that simply cannot be justified. Determining a "proper" conversion rate is a worse than uncertain undertaking. Thus, the Court will use several less-than-ideal inputs to arrive at an approximate fair value.

II. FACTUAL BACKGROUND

A. *Context*

To understand this dispute, one must return to the technology boom of the last century. With the clarity of retrospection, one could conclude that SinglePoint was well-nigh worthless. It represented a pipe dream; it carried the value of a chance; at best, it was a long shot. Those involved with the Company greatly erred in their assessment of its potential. But the conduct of a fiduciary must be assessed in context. That conduct demonstrates that Rossette believed that there was value to be had from SinglePoint and that he acted to maximize that value for himself. Moreover, the market—at least as evidenced by the acts of a third-party acquirer—placed value on SinglePoint. The Court must resist the temptation to dismiss all of this as the product of unfounded speculative fervor and instead consider fair price and process without the benefit of tech bubble hindsight.

B. *The Parties*

Plaintiff John A. Gentile was a founder and former executive and director of the Company.[1] He owned stock in SinglePoint throughout its pertinent history. After the Debt Conversion, the transfers by Gentile of some shares to Plaintiffs Victoria S. Cashman, Bradley T. Martin, John Knight, and Dyad Partners, LLC were recorded on the Company's books.[2]

Rossette became a director of the Company in 1996, a few months after its incorporation. He continued to serve on its board until the Cofiniti acquisition and was its primary—indeed, almost exclusive—source of cash investment. Bachelor served the Company as a director from the beginning and was an employee deeply involved in its software development efforts. From July 26, 1999, until the Merger in October 2000, Rossette and Bachelor were the only directors of SinglePoint.

C. *The Company*

The Company was formed in 1996 to perform technology and computer services.[3] Its early development was not well-focused, but it settled in early 1999

[1] Gentile's service as a director and officer of the Company ended in July 1999.

[2] Although Gentile sold shares to the other Plaintiffs before the Debt Conversion, the transfers were not shown on the records of the Company until June 2000, after the Debt Conversion. Because the Court has not been asked to weigh in on the issue, it will not differentiate among the Plaintiffs based on when they owned stock in the Company or for purposes of calculating any damages.

[3] When formed, the Company's name was New Horizon Technology, Inc.; in late 1996, its name was changed to OpTeamaSoft, Inc.; in 1999, it became SinglePoint.

on a business model through which it would provide enterprise applications to financial services firms, such as Standard & Poor's ("S&P").[4]

Rossette was the Company's sole cash investor because, at the time, he saw financial opportunity in developing and controlling a technology company.[5]

D. *The S&P Project*

The closest that the Company came to sustainable profitability was through a relationship with S&P. The path with S&P was rocky and uneven. There were times of optimism; there was plenty of disappointment. It seems that S&P was never quite as committed to SinglePoint as Rossette (and others at SinglePoint) believed that it was. Although S&P would not abandon SinglePoint, it did not provide the degree of support that SinglePoint ultimately would require if it were to have a chance to succeed.

In late 1998, discussions began that would eventually lead the Company to attempt to develop software that would serve the specific needs of S&P's (and perhaps other financial service firms') customers.

An S&P representative described their shared objectives:

[4] Although the Company performed software work for others, that business did not develop into a reliable source of revenue.

[5] As Rossette put it in August 1999, "If we pull this off in the next 24 months (and we will) you can buy your own golf course and catch up on lost time." JTX 82; Tr. 37.

> We had a relationship with [the Company] to provide software and related services to our advisor network's customers. We were working with them to develop the ability to put our research and our investment advice on that same platform.
>
> And it would link the back office individual customers' accounts and asset information, allow them to then reference our research and go out and market and promote that to advisors, brokers and those networks.[6]

In April 1999, the Company hired Thomas A. Loch to develop the S&P business. Six months later, he was promoted to Company President.

By January 2000, the project with S&P appeared to be progressing. A revenue sharing arrangement and the potential for S&P to invest in the Company were described at the time by an S&P executive:

> [The Company] has developed the Advisor Insight Planning and Portfolio modules that are part of the Advisor Insight Product [an S&P web-based application]. The commercial terms for these components have been negotiated as a revenue sharing agreement whereby we [S&P] retain 70% of the revenue from these modules and [the Company] receives a royalty of 30%. The commercial terms provide us with the software we require for the product, protects our interests in the software, and limits our financial exposure as the payment is based on the success of the product. We did not have to advance funds for development.
>
> The proposal for the equity investment is based on paying $500,000 to [the Company] as an advance on royalty. This payment would give us a right for ninety days to evaluate whether we wish to move forward with an equity investment in the [C]ompany.[7]

[6] JTX E (Johnson Dep.) at 13.
[7] JTX 114.

As late as November 1999, Rossette (and others at the Company) had anticipated a rollout of the Company's primary software product by early 2000. Near the end of January 2000, the Company had again refocused:

> Since the last report to the Board in October, the [C]ompany has changed focus from enterprise applications to packaged sales to the professional financial advisor.[8]

On February 18, 2000, the Company and S&P formalized S&P's option to acquire a 20% stake in SinglePoint.[9] S&P would also advance the Company $500,000 in anticipation of royalties. In March 2000, S&P and the Company entered into a licensing agreement which would allow the Company to supply the software to deliver S&P's content to its customers.[10] S&P, thereafter, persevered with its interest in the Company and in June 2000 agreed to offer to provide "bridge financing" to assist with the Company's financial problems at that time.

Although the evolving S&P relationship may have supported a somewhat optimistic view of the Company's future, there was another side to the story—one

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[8] JTX 120.

[9] JTX 124. S&P acquired the option to purchase a 17.5% interest in the Company for $2 million and to acquire an additional 2.5% interest for $500,000. *Id.* As explained by Rossette in an email to Radebaugh, "Jim, right now [S&P representatives] and S&P have agreed to a price of $2.12/share." JTX 125. There is no reason to believe that S&P would have ever exercised its option without successful development of the software. Thus, the price implied in the S&P option agreement offers little guidance as to fair value. Perhaps it would have been an indication of the fair value of the Company stock after the product had been proven successful or as an indication of value when release of the software was imminent. Those circumstances never occurred.

[10] JTX 130.

that fell well short of satisfying.[11] In late 1999, as no formal contract with S&P appeared immediately forthcoming, the Company asked S&P to reimburse it some $1.5 million for software development costs already incurred. Despite the Company's firm belief that it was entitled to such payment, S&P refused. Rossette (who had not previously been directly involved with executives at S&P) asked to meet with the supervisor of the Company's principal contact at S&P.[12] In meetings with S&P executive Dan Connell in late December 1999 and January 2000, Connell expressed surprise that such money could be owed, and advised Rossette that neither he nor anyone below him had any authority to authorize such a large

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[11] Cofiniti would later struggle with S&P's apparent resistance to a robust commitment to the software development project as well. As a former member of Cofiniti's management put it:

> We could not get Standard & Poor's to commit. We couldn't get them to commit to purchasing our product. We could not get them to commit to purchasing SinglePoint's product. We could not get them to commit to additional development funding with us of any significance. We could not—we could not get them to commit to anything. It—it appeared that they wanted a relationship leveraged on their name with the hope of potential sales with us as it appeared that they had with SinglePoint.

JTX O (Martin Dep.) at 31.

[12] Rossette had left the primary responsibility for interacting with S&P to Loch, who already had preexisting working relationships with S&P employees. Loch's primary role was to make the business relationship with S&P a success. During the summer and fall of 1999, Rossette and Loch touched base frequently on the progress of the S&P relationship. Loch consistently conveyed good news, while reiterating that "[w]e can't push them . . . there's no way to try to exert our influence upon them, but it's going along." Tr. 163. Rossette described these reports as "generally an upbeat, I'm-going-to-have-it-done-shortly kind of a conversation." *Id.* Rossette relied on Loch's positive updates in continuing to fund the Company, fully anticipating that he would be reimbursed once a contract with S&P was signed. In an October 23, 1999, board meeting, Loch promised that, in the subsequent two weeks, the Company would have a signed contract with S&P and that the Company would have its first revenue generating customer; forecasting ultimate sales of $472,500 by the end of the year. JTX 94. Rossette only injected himself into the relationship with S&P some time thereafter after neither promise came to fruition: "[w]e weren't getting any contract, we weren't getting any money, there weren't any sales." Tr. 166.

expenditure and that there was no way that he could retroactively obtain approval of a project of that scope and size.[13] Nevertheless, Connell committed to work with the Company to come up with a means to provide some compensation to the Company for its effort. During this time, proposals involving S&P's taking an equity stake in the Company, loaning the Company money, or advancing the Company monies against future royalties owed, or some combination of these, were raised and discussed. By the end of January, the Company was informed that S&P would neither be making an equity investment nor would it pay the money that the Company thought it was owed.[14]

Concurrently with these discussions, in mid-January 2000, Rossette was finding out from S&P that the original agreement to have S&P host the product in their massive data center was no longer possible and that the Company would have to find some way to host it, at considerable expense. The Company was also told that the product needed to be reviewed by a compliance committee, which ultimately flagged serious regulatory compliance issues that would cost more than $1 million to adjust, and that S&P would not bear that expense. S&P also

[13] After the initial meeting revealed a reality with S&P that materially diverged from that which Loch had optimistically described, Rossette immediately called Loch to tell him that he was very disappointed and that Loch "had some explaining to do." Tr. 172.

[14] Rossette testified that when he sought to collect the monies owed after being informed that S&P would not be making an equity investment in the Company, he was told by S&P executives, "I don't know how you're going to do that. There's not a contract between us. You've got a long road to hoe. I'm sorry you're in the position, but let me help you the best I can." Tr. 199.

objected to its content being presented on a screen alongside third-party content providers, which seriously hampered the product's marketability. Finally, S&P increased its capacity needs ten-fold from the specifications initially provided to the Company; the scaling effort was expected to require a $1 million (or greater) fix.[15]

By the end of January 2000, as a result of these problems materializing, Rossette told Bachelor that he had had enough and wanted to move on.[16] He had run out of money and could no longer meet the Company's considerable cash needs. Ultimately, however, Bachelor convinced him that "there may be something salvageable" and that he should hang in and help the Company get sellable.[17] It was at this point that they began discussing the Debt Conversion.[18]

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[15] *See, e.g.*, Tr. 169-201 (detailing disputes over past-due payments, which party would host the application, scaling, and regulatory compliance issues, as well as disagreement over compatibility with third-party information).

[16] Rossette testified, "I told him that I didn't see, without the S&P investment, given our current overhead, exactly what was going to be the future of the business. I couldn't – I couldn't figure it out. . . . I said, 'I've been filling the gap now for four years and I don't really know how to do it for you going forward.' I didn't have the personal resources myself to do it." Tr. 202.

[17] Tr. 203. Rossette testified, "I was doubtful. I mean, I was no longer a believer. And I think the only thing that helped change my opinion was [Bachelor's] personal appeal and his fighting spirit that we'd come too far, we were too close, if I would just hang in there with him we could get there. . . . He discussed the employees [who] were going to lose everything they had, their jobs, that most of them had stuck around to this point because of my promises. And he just made the appeal, you know, 'Hang in there. Help me get there.'" Tr. 204.

[18] Rossette's conduct was consistently inconsistent. For example, even though he now claims that he recognized this period of SinglePoint's history as dire, he approved (and personally guaranteed) the leasing for a five-year term of substantial additional office space, with a monthly rental of $6,812, in January 2000. JTX 116. His after-the-fact explanation was that the Company had committed to its employees that they would no longer have to work from home after the first of the year and had already been in the process of negotiating a lease for several months. Tr. 180-81. SinglePoint management had also determined not to reveal the Company's

E. *The Debt Conversion*

Throughout this period, the Company had not been profitable. It had rented additional office space in anticipation of growing to meet the S&P market. Software development costs were significant. Revenues were paltry. The Company survived only because of Rossette's continuing financial support.

The Company's balance sheet reflected a staggering (for an entity of its size) amount of debt—virtually all of it owed to Rossette. By perhaps as early as February 2000, Rossette and others contemplated converting that debt to equity. Reducing the debt on the Company's balance sheet would facilitate future business, the possibility of other investment, and, perhaps, even a sale of the entity. Thus, the Company's management concluded that Rossette's debt should be converted to equity. On March 27, 2000, Rossette and the Company entered into the Debt Conversion Agreement.[19] Debt of $2,220,951 was converted into shares of the Company at a price of $0.05 per share. With the Debt Conversion and an accompanying increase in the number of authorized shares of Company stock, Rossette's holdings in the Company increased from 3,612,775 shares (or approximately 61% of the Company's equity) to 48,031,795 shares (or approximately 95% of the Company's equity).

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mounting problems with S&P to rank-and-file employees in an effort to keep morale up. Tr. 205.

[19] JTX 141.

The fairness of the per share rate at which Rossette's debt was converted into shares of SinglePoint stock forms the core of this case. Thus, the Court turns to a brief history of the various prices attributed to the Company stock. The history of the pricing of the shares is important because the Plaintiffs bolster their unfair pricing claims by comparing the price reflected in the Debt Conversion Agreement to the other valuations that Rossette endorsed, both before and after the Debt Conversion. In all comparable instances, the price was substantially more than the Debt Conversion rate.

F. *History of Company Valuation*

In April 1997, the Company adopted a stock option plan, which required that exercise prices be no less than the fair market value of the Company's shares at the time of the grant.[20] In January 1999, the Company's board (with Rossette and Bachelor among its members) set the exercise price at $0.50 per share.[21]

In June 1997, Rossette and the Company entered into a Stock Purchase Agreement which allowed Rossette to convert his debt to equity at a rate of $1.33

[20] Thus, the exercise price itself does not necessarily reflect fair market value of the underlying shares, but it does suggest a ceiling for share value. JTX 11 ¶¶ 3.3(c), 3.3(d) & 6.1.

[21] None of the efforts to set a price was sophisticated. The record does not suggest any detailed study or analysis. Because of the absence of any market for the Company's stock, there was no external indicator—however inefficient—for any guidance, either. In the absence of any better basis, the views of the Company's insiders are generally among the best accessible indicators of value—even though subjective and not backed by any recognized analytical methodology.

of debt per share.[22] In November 1997, the conversion rate was reduced to $0.75 of debt per share;[23] that conversion rate was reaffirmed in a debt conversion agreement in January 1999.[24] In October 1999, Rossette and Bachelor, constituting the Company's board of directors, approved an amended loan agreement which allowed Rossette to convert his debt at $0.50 per share.[25]

On February 17, 2000, James Radebaugh, the Company's secretary, asked Rossette if the option price should be increased. He wrote, "I believe it is time to move this up, the question is how much?"[26] Rossette responded by recommending an option price of $0.75 per share and by observing that "we are being more than fair."[27] Less than a week later, Radebaugh informed the Company's employees of the change: "[T]he price of option shares in SinglePoint [has been] raised from $.50 to $.75. This change reflects [the] positive progress of the [C]ompany and the increase in shareholder value."[28]

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[22] JTX 14. It also required him to purchase 500,000 shares for $1.00 per share and allowed him to purchase an additional 250,000 shares for $0.65 per share.
[23] JTX 16.
[24] JTX 56.
[25] JTX 91. During 1998, Rossette and the Company entered into two stock purchase agreements by which he agreed to buy Company stock at $0.50 per share. JTX 19; JTX 30.
[26] JTX 125.
[27] *Id.*
[28] JTX 128. The adjustment was made retroactive to January 1 and was formally approved by SinglePoint's directors in March 2000. JTX 131. Radebaugh testified that the $0.75 per share price was "not an anticipated future value of the Company. I would say it was a hope." JTX D (Radebaugh Dep.) at 76.

G. *Stock Valuation and the Debt Conversion*

The Debt Conversion that lies at the heart of this litigation was under consideration by early February 2000. Rossette was focused on a nickel per share as a conversion rate.[29] Rossette now says that he was relying upon the advice of counsel and an opinion from The Harman Group Corporate Finance, Inc. (the "Harman Group"), which he had retained.[30] The Harman Group provided a fairness opinion supporting $0.05 as a conversion rate. At the same time as the Debt Conversion, Rossette renegotiated the loan agreement; for the $1,000,000 remaining as unsecured debt (not subject to the Debt Conversion Agreement) and a new $500,000 line of credit, Rossette agreed to convert at $0.50 per share.

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[29] It is unlikely—the evidence is, at best, shaky—that there was any real negotiation of this number. No consistent description of the process by which this number was reached has been forthcoming. In trial testimony, Rossette suggested that Bachelor had "negotiated him up" to $0.05 per share from $0.01 per share. *See infra* note 40.

[30] Rossette understood that the lawyer who represented him also represented the Company. The lawyer did not testify; it is not clear just where the lawyer's loyalty would lie under these circumstances.

The Plaintiffs seek to make much of the engagement letter between Rossette and the Harman Group. The Harman Group's function was defined as "advis[ing] Mr. Rossette on the fairness to Mr. Rossette, from a financial point of view, of the proposed exchange of [Company] . . . Common Stock for [Company] debt . . . ." JTX 123 at 1. The relevant question, of course, is fairness to the Company and its shareholders, not Rossette. Whether the letter is the product of the Harman Group's fundamental misunderstanding of what needed to be done or whether it is simply the product of careless drafting is unclear. Because of this uncertainty, the Court is reluctant to ascribe much weight to the language used in the engagement letter. Rossette appears to have been under the impression that what was fair to him, by definition, would also be fair to the Company and its stockholders. JTX C (Rossette Dep.) at 156-57.

The Plaintiffs also complain that Rossette paid for the Harman Group's fairness opinion. That begs the question of, if not Rossette, then just who was going to pay for it? Would the Plaintiffs have been mollified if Rossette had written his check to the Company which, in turn, had then paid the Harman Group?

H. *The Merger*

By late June 2000, Rossette was discussing a merger of the Company with Cofiniti, a privately-held competitor that was attempting to develop a software platform similar to the one that the Company was creating for S&P. The Merger was consummated in October 2000. In the information statement seeking stockholder approval, the shares of Cofiniti were said to have a value of $5,[31] making the imputed value of a Company share $2.46.[32] Neither Rossette nor Bachelor could reconcile this imputed value with their valuation of the Company for purposes of the Debt Conversion six months earlier.[33] It is difficult to discern

[31] Cofiniti would fail not long after the Merger. It seems unlikely that the $5 per share valuation was reasonable. At the same time, the Cofiniti board was internally valuing Cofiniti stock at approximately $1.86 per share. JTX O (Martin Dep.) at 49 & Ex. 2. In hindsight, this value was also likely overly optimistic.

[32] The information statement expressly reported: "In the merger, each share of [Company] common stock will be exchanged for approximately 0.4921568 shares of Cofiniti common stock. The value to [Company] stockholders is approximately $2.46 per share based on the exchange ratio provided in the merger agreement and a value of $5.00 per share for Cofiniti common stock as negotiated by the parties." JTX 194 at A1522.

[33] Care, however, must be used in any comparison of the Company's share price between the Debt Conversion and the Merger. For example, in order to facilitate the Debt Conversion, the number of authorized and issued shares of the Company needed to be increased. After the Debt Conversion, there was a one-for-ten reverse stock split. It is a mildly interesting exercise to calculate market capitalization under the various scenarios. Although of little help in a valuation effort because of the unreliability of the share price inputs, it does give some sense of how divergent the results of seemingly rational calculations can be. After the Debt Conversion, if $0.05 per share were the market price, the market capitalization of the Company would have been little more than $2.5 million ($0.05 per share x 50,323,586 shares). If the Debt Conversion had been carried out at $0.50 per share and that was the market price, the market capitalization would have been approximately $5.1 million ($0.50 per share x 10,346,468 shares). If $5 is accepted as a fair price for a share of Cofiniti as of the Merger, then one could run numbers that, if believed, would suggest a market capitalization in excess of $14 million ($5 per share x 0.492 exchange ratio x 5,761,789 shares). Or, if one accepts $1.86 per share as the proper value for a Cofiniti share, the effective market capitalization would come to approximately $5.3 million

how the Company's financial condition materially changed between March and September 2000. Bachelor said that it was significantly worse off by that point. Rossette was ambivalent. Despite an occasional rosy communication, it is reasonable to infer that, overall, not much had changed even though the debt levels had been reduced (because of the Debt Conversion Agreement) and costs had been reduced, primarily through layoffs. On the other hand, time—or, more accurately, Rossette's willingness and ability to pay—was running out for SinglePoint. Without the Merger, it is unlikely that the Company would have survived much beyond the fall of 2000.

Thus, unless considered in the context of the Debt Conversion or the Merger, the insiders' recorded view of the value of the Company's stock was generally between $0.50 and something less than $0.75 per share.[34] This, of course, is not a perfect measure, but it plays a role in trying to discern the fair value of Company stock as of the date of the Debt Conversion. Valuation of start-up companies with no real product and no consistent income stream is difficult. The Court will later turn to the expert valuation testimony sponsored by both sides.

Despite what the experts may say, it is significant that Rossette's conduct, except with respect to the Debt Conversion Agreement and the Merger, was

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($1.86 per share x 0.492 exchange ratio x 5,761,789 shares). The salient point, if there is one, is that, there is no easy way to reconcile these numbers.

[34] The Court may not ignore the valuations that management ascribed to the stock, regardless of whether it trusts those numbers. Skepticism about the accuracy of internal valuations goes to the weight which the Court gives such evidence.

consistent with a valuation of approximately $0.50 per share, or perhaps slightly higher. The Merger consideration—especially in the absence of a major improvement leading up to the Merger—perhaps suggests an even higher valuation, but the Court is so skeptical about the Cofiniti value upon which the implicit merger consideration was based that it is reluctant to put much faith in any number derived from what seems to have been Cofiniti's self-appointed value.[35]

III. CONTENTIONS

The Plaintiffs contend that not only were the Debt Conversion and the Put Option unfair to them but also the burden to prove that they were entirely fair should be imposed upon the Defendants. They seek damages measured by the sum of the value of the excess shares issued to Rossette as a result of the unreasonably low conversion rate, plus the value of the Put Option. The Plaintiffs also ask that their attorneys' fees be shifted to Rossette because of what they characterize as his bad faith conduct before and during this litigation.

The Defendants suggest that, without Rossette's unflagging financial assistance, there never would have been a SinglePoint which could have had the Debt Conversion or the Merger with Cofiniti. Furthermore, they observe that fiduciary duties are contextual and care must be taken not to expect too much from

[35] The Cofiniti deal appears to have been the best that Rossette could find. Even if Cofiniti had overvalued itself, the Merger was as good of an opportunity as he was going to get to salvage some shareholder value. Of course, with Cofiniti's demise amidst the bursting of the Internet and technology bubble, the Merger did not work out well for Rossette.

the directors of such a small and financially fragile company. They rely upon the approvals by Bachelor, as a loyal and knowledgeable director, to prevent any shifting of the entire fairness burden to them. They also argue that the Company was in so much trouble by the spring of 2000 that the price and process of the Debt Conversion were, in fact, entirely fair. Moreover, they note that the Put Option left Rossette in a worse financial position than if the Merger had gone through as initially negotiated, which would have entitled Rossette to the immediate repayment of his debt. In short, the events giving rise to the Put Option presented Rossette with a net negative. Finally, they rely upon the Company charter's exculpatory provision, adopted under 8 *Del. C.* § 102(b)(7), to relieve them of any liability for money damages.

IV. ANALYSIS

A. *The Debt Conversion*

1. Rossette as Controlling Shareholder and Entire Fairness

Rossette was the Company's controlling shareholder, both before the Debt Conversion, when he held approximately 61% of the common stock, and after the Debt Conversion, when he held approximately 95% of the common stock. Although the Company's balance sheet improved as a result of the Debt Conversion, Rossette was able to orchestrate the pricing component for his benefit. This is a classic example of self-dealing by a controlling shareholder.

The Defendants offer that it should be the Plaintiffs' burden to prove the unfairness of the Debt Conversion because Bachelor, as one member of a two-person board, was independent and received no benefit from that transaction. They emphasize that SinglePoint was a small company with very limited resources and that expectations must be adjusted to accommodate that reality.[36]

Bachelor had no experience as a director. He was intensely familiar with the Company's technical matters and was aware of its financial difficulties. However, he had no firm basis for determining what a fair conversion price would have been. More importantly, he had no help. He received no independent legal or financial guidance.

A "fairness opinion" that inspired confidence might have bolstered Bachelor's capacity to validate the transaction. Given his technical knowledge, a credible source of valuation assistance, especially within the context of a small entity in financial distress, might have sufficed. Unfortunately, the Harman

[36] A board that is evenly divided between conflicted and non-conflicted members is not considered independent and disinterested. *See Amazon.com, Inc. v. Hoffman*, 2009 WL 2031789, at *3 n.17 (Del. Ch. June 30, 2009); *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 944 (Del. Ch. 2003); *Beneville v. York*, 769 A.2d 80, 82 (Del. Ch. 2000). One member of a board may, in appropriate circumstances and under proper conditions, be designated a special committee for purposes of assessing the propriety of a proposed transaction. Nevertheless, "[t]he court necessarily places more trust in a multiple-member committee than in a committee where a single member works free of the oversight provided by at least one colleague. But, in those rare circumstances when a special committee is comprised of only one director, Delaware courts have required the sole member, 'like Caesar's wife, to be above reproach.'" *Gesoff v. IIC Indus., Inc.*, 906 A.2d 1130, 1146 (Del. Ch. 2006). Here, there is no assertion that Bachelor was ever impaneled as a single-member special committee for purposes of considering either the Debt Conversion or the Merger and Put Option.

Group's analysis adds little to the mix. First, its report was not completed by the time Bachelor was called on to approve the Debt Conversion. A draft report had been provided to him, but that is hardly an effective substitute for the final and complete analysis. Second, the Harman Group did not receive complete and accurate financial records from the Company and, thus, its analysis suffered because of lack of full information. Third, there is no indication that Bachelor ever met with representatives of the Harman Group to review its work. Indeed, no one from the Harman Group even attended the meeting at which the Debt Conversion was approved.[37] In short, the Harman Group's effort did not materially aid Bachelor; certainly, it did not enable him to be an independent counterweight to the objectives of the controlling shareholder.[38]

Thus, under these circumstances, the burden of justifying the Debt Conversion falls upon the Defendants under the entire fairness standard.

> The concept of entire fairness has two components: fair dealing and fair price. Fair dealing "embraces questions of when the transaction

[37] This review of relevant factors does not even address the report's self-defined focus: whether the Debt Conversion was fair to Rossette. It is not for the Court to rewrite the report, but the Court is reluctant to give much weight to what may simply have been a poor choice of words. *See supra* note 30.

[38] In reaching this conclusion, the Court reconfirms a decision that it reached during the summary judgment process. *See Gentile v. Rossette*, 2005 WL 2810683, at *8 (Del. Ch. Oct. 20, 2005), *rev'd on other grounds*, 906 A.2d 91 (Del. 2006).

> was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." In making a determination as to the entire fairness of a transaction, the Court does not focus on one component over the other, but examines all aspects of the issue as a whole.[39]

2. The Process

The process of the Debt Conversion was unfair for the same reasons underpinning the Court's conclusion that Bachelor, as the second director, could not cleanse the taint of Rossette's self-interested conduct. Rossette set the conversion rate with limited or no pushback from Bachelor, who was in no position to bargain effectively on behalf of the minority stockholders. Although the Company's financial condition may have afforded Bachelor little leverage, the lack of any independent assistance—legal or financial—precluded a material effort on behalf of the constituency he represented.[40] Furthermore, as set forth above, the

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[39] *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 898-99 (Del. Ch. 1999) (internal citations omitted).

[40] There is some limited evidence that Rossette initially proposed a penny per share conversion rate and that Bachelor successfully urged Rossette to increase his offer. No documents support that version, and the story only first emerged in the Defendants' Pre-Trial Memorandum, later "confirmed" by Rossette at trial. Defs.' Pre-Trial Mem. at 23; Tr. 70, 205-10. This testimony is at odds with Rossette's earlier deposition testimony, wherein he was asked whether the $0.05 figure was one that was arrived at through negotiations (the questioner raising a hypothetical $0.01 starting point), to which Rossette stated that he did not recall. JTX C (Rossette Dep.) at 129-30. Rossette explained his later recall of the contours of the negotiations as a product of his having spent more time thinking back on the conversations of that period. Tr. 71-72. Even if one accepts the trial testimony that Bachelor induced Rossette to increase the conversion rate, nothing suggests that any serious negotiations ever occurred. Merely pointing out that a penny

so-called fairness opinion obtained by Rossette is not a substitute for a thoughtful and helpful analysis.

3. The Price

From a tainted process, one should not be surprised if a tainted price emerges. The Plaintiffs support their challenge to the reasonableness of the Debt Conversion ratio by relying upon their valuation expert, Rebecca A. Kirk, who initially offered a per share value of $1.30. As this Court has recognized, however, "methods of valuation . . . are only as good as the inputs to the models."[41] Here, the reliability of Kirk's core opinion has been substantially undermined by her use of the Company's books, which, it turns out, were materially inaccurate. She seemed to have accepted the view that the Company's outlook was improving in the early months of 2000. Kirk started with a per share price of $0.75 as of March 10, 2000, when the option price was reset. She then multiplied that by the number of shares outstanding to determine an equity value, subtracted cash equivalents and added total debt to reach an enterprise value of $7,776,000.[42] She determined twelve-months trailing revenue to be $420,000. This led to a revenue multiple of 18.49. She next calculated the Company's twelve-months trailing

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per share conversion rate would not work—for any of several reasons—and then acquiescing in the next number floated by Rossette hardly can be viewed as adequate negotiation within the purview of fair process.

[41] *Neal v. Ala. By-Products Corp.*, 1990 WL 109243, at *9 (Del. Ch. Aug. 1, 1990).

[42] The numbers are rounded.

revenue as of the date of the Debt Conversion seventeen days later to be $787,000. She applied the revenue multiple from the March 10 data to arrive at an enterprise value of $14,500,000 as of March 27. From that, she calculated a per share value of $1.30 as of the date of the Debt Conversion.

There are at least three problems with Kirk's approach, assuming that one accepts the methodology she employed. First, there is no basis, at least in the Court's judgment, for utilizing $0.75 per share as fair value as of March 10, 2000. It was a number that had been set for the option exercise price, which could not be less than fair value; there was no necessity that it be equal to anyone's understanding of fair value. Second, in the interim, Rossette had caused a substantial loan that he had made to be booked as revenue. That resulted in a massive increase in the "revenue" on SinglePoint's books. Of course, there was, in fact, no material increase in actual revenue during the seventeen-day span. Third, and most importantly, the notion that the per share value of a company experiencing the fiscal distress of SinglePoint would increase from $0.75 to $1.30 in a period of seventeen days, a 73% increase, defies common sense, logic, and the facts of this matter. To sponsor such an improbable increase in value does little but undermine any confidence the Court might have in Kirk's opinions.

Kirk, perhaps because of her growing doubts about the reliability of her initial efforts, also looked to the Merger and its implicit valuation of SinglePoint

and worked back from that number, considering Company and market changes, to derive an alternative valuation. Data after the valuation date must be used with care. Yet, the Merger was negotiated at arms length with a third party, and the Company's financial condition had not improved in the interim. Thus, the Cofiniti transaction should serve at least as something of a check. The usefulness, however, of the Cofiniti transaction several months after the Debt Conversion is limited. One can find two potential valuations of Cofiniti as of September 2000: the $5 per share number trumpeted to the Company's shareholders, and the $1.86 per share internal valuation supposedly supported by Cofiniti's management.[43] There is no credible reason to give any credit to the $5 per share valuation.[44] The

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[43] As Stephen Martin of Cofiniti described the relationship between these two numbers:

> [W]e felt that . . . our stock was worth about $1.85 a share . . . at the time . . . . We did not feel that . . . the relationship . . . with SinglePoint and Cofiniti would have immediate value in the market place, and we had a very difficult time establishing the value. We pulled a . . . number of $5 a share out of the air, very candidly, with the thought that if in the next year or so, given all the investment we would have to make in our technology . . . that that was a reasonable number, and it was . . . not scientific. It was simply something we established. . . . We just simply didn't know . . . what it was worth. We—we talked about a $5 to $7 number. But the $5 was pulled out of the air and $7 was also pulled out of the air, and we . . . had no idea—simply had no idea.

JTX O (Martin Dep.) at 49-50.

[44] Cofiniti had every incentive to inflate the public valuation of the Company because it both made its prospects appear better and reduced the number of shares to be paid out to SinglePoint shareholders. While this had the effect of increasing the nominal value of Rossette's Put Option, the conditions placed upon the exercise of the option helped to mitigate the possibility that Cofiniti might be overpaying. As Martin explained:

> We thought our stock was worth about $1.85 at the date of the transaction. If we exchanged the debt, or the exchange rate, if you will, at $5 a share, . . . we felt . . . if a year went by and we established a $5 share, that—that they and we would have a chance to ride the same rollercoaster up in terms of valuation. . . . [I]f it didn't occur, then the value wouldn't be there. In other words, if we didn't grow

lower value—Cofiniti at $1.86 per share, suggesting an implicit valuation of the Company's stock at approximately $0.90 per share—seems somewhat more likely to reflect the actual judgment of Cofiniti's management, although this number also is not particularly meaningful.[45] Ordinarily, the management of an entity is presumed to understand the entity's financial condition as well as, if not better than, anyone else. Cofiniti management's public valuation should not be ignored, but, in light of Cofiniti's subsequent demise, it is not a number in which one can place much faith, either.

It is also true that the broader technical market measured by NASDAQ averages had peaked at just about the time of the Debt Conversion. By September 2000, it had declined by more than 20%. That, at least as a matter of logic and if applicable to SinglePoint, would suggest that SinglePoint's stock price would have been higher (as was the broader NASDAQ market) in March. Moreover, Bachelor believed that the Company's financial condition had worsened between the Debt

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> because of what we did, the value wouldn't be there. . . . If it didn't go up and the value wasn't there; well, I guess I would just say there would be no—there would be no risk to us. . . . [W]e felt . . . that between the time the transaction occurred and a year from then, or earlier if certain things happened, that—that $5 would be much, much easier to pay then as opposed to at the date of transaction because of the cash we would have to put in the transaction. So we felt that was a pretty good trade-off.

JTX O (Martin Dep.) at 51-52.

[45] Cofiniti eventually came to view the Merger as the acquisition of "some people and some code," along with an increasingly dubious relationship with S&P, instead of as the acquisition of a going concern. As Cofiniti management realized the precariousness of the Company's financial situation and its limited options, they knew that it "would be much less expensive." JTX O (Martin Dep.) at 26-27, 33-34.

Conversion and the Merger. Whether he held this view because Rossette was no longer able by September to continue subsidizing the Company's operations, or whether the Company had genuinely experienced a deterioration otherwise, is not clear.

Nevertheless, Kirk can fairly opine that the negative developments both within SinglePoint and in the market for technology stocks generally during the period from March to September 2000 suggest that SinglePoint may have been worth more at the time of the Debt Conversion than at the time of the Merger. Yet, this analysis depends upon two broad considerations. First, one should accept the Cofiniti price, as disclosed to SinglePoint stockholders during the course of the Merger, as a reasonable indicator of value. As a general matter, arms-length negotiations yield numbers upon which courts routinely rely. The idea that Cofiniti stock was then worth $5 per share (suggesting a SinglePoint price of $2.46 per share), however, is impossible to accept.[46] Although it is unusual not to employ a negotiated and publicly reported number as a fair marker for value, to accept that the stock of SinglePoint was worth anything approaching the numbers derived from the apparently unreliable numbers used during the Merger process would be unreasonable.

[46] Indeed, the internal valuation by Cofiniti management of $1.86 per share, suggesting an implicit valuation of SinglePoint at $0.90 per share, is even cause for some skepticism.

Second, this is also an example—albeit perhaps an extreme one—of the problem of using data that arose after the valuation date. Analogizing anything about SinglePoint to the broad technology market, given SinglePoint's unique circumstances and abject reliance upon Rossette's continued infusion of cash to keep it in business, renders any significant reliance on such inputs unreliable. This is not to say, however, that some consideration of post-Debt Conversion events would be improper. For SinglePoint, however, they are simply another set of factors to be included as part of an overall assessment of fair value as of the time of the Debt Conversion.

The most persuasive evidence offered by the Plaintiffs that the Company's stock was worth considerably more than the $0.05 per share conversion rate is Rossette's persistent willingness—even though admittedly marked at times by grave doubts—to pour his ultimately limited resources into the Company. He did so almost to the point of impoverishment. As the controlling shareholder and one, by the fall of 1999, closely involved with the Company's operations, his apparent perception of the Company's value must be given weight. He may now say, in substance, that the Company was worthless and on a path to oblivion, but his conduct at that time cannot be squared with his current perception of value.[47] In

[47] Rossette contends that he was compelled to invest in the Company, first doing so to help a friend and continuing in an attempt to salvage his original investment. Tr. 121-25. The Plaintiffs suggest that Rossette worked to preclude outside investment in order to recoup all of

1999, he acknowledged the fair value of the Company to be $0.50 per share.[48] Indeed, with respect to the balance of the debt not addressed by the Debt Conversion, he agreed again to a $0.50 per share conversion price. For him to continue infusing the Company with money would have been rational only if he believed that it would survive and eventually prosper. The S&P relationship was the only viable pathway for the Company. It was far from a "sure thing," but, in the spirit of the tech boom, it was viewed by Rossette as having a chance for a substantial upside. There is no other plausible explanation for Rossette's ongoing support of the Company in the face of continuing unhappy accounting statements. This perception of Rossette's motives persuades the Court that a nickel per share was not a fair conversion rate, but it does not provide a quantitative basis for a value determination.

The Defendants' valuation expert, Frank C. Torchio, presented a plausible analytical approach that yields a value of $0.09 per share. He began with two reasonable assumptions: that the shares were each worth $0.50 in November 1999 and that the Company's prospects were not all that much better or worse by the time of the Debt Conversion—in other words, that the enterprise value remained,

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the potential gains for himself. Evidence that Rossette fought off outside investment is, at best, dubious. Still, the reality of Rossette's motivation for financing SinglePoint—particularly during its final stages—is likely somewhere between the two explanations presented by the parties. Rossette appears to have vacillated along with the Company's "fortunes."

[48] JTX 55.

more or less, constant. He attributed the material difference in shareholder value between November 1999 and March 2000 to the significant amount of new debt owed to Rossette. If that new debt, incurred over the five-month period (together with a few other adjustments), is subtracted from the enterprise value using the November price of $0.50 per share, that would equate to a value per share of $0.09 as of the time of the Debt Conversion. This is a suitable lower bound for the range of potential values of SinglePoint stock at the time of the Debt Conversion.[49]

As for the upper bound, courts frequently pay particular attention to management's assessment of an enterprise's value, especially shortly before the

[49] Torchio pursued another valuation effort that yielded a value consistent with the Debt Conversion rate. *See* JTX 216 at 13. He started with the Merger consideration—accepting $1.86 per share as a value for Cofiniti—and calculated back to a fair value as of the Debt Conversion. He discounted the Merger consideration to the date of the Debt Conversion and then made a few adjustments, primarily dealing with the Company's debt and contingent liabilities. That effort presented him with a per share price of $0.75, assuming that the Company was a viable entity and that its solvency travails could be resolved. He then assessed the Company's prospects for survival. (In one model, he applied an illiquidity discount. However, both the Company and Cofiniti were thinly traded; the stock of both companies suffered from a lack of liquidity. The liquidity shortcomings of Cofiniti were presumably factored into its price, as well. Thus, by applying an illiquidity discount to a comparative value based upon a similarly illiquid market for Cofiniti, Torchio, in essence, applied two liquidity discounts.) Torchio was then confronted with the question of how to assess the risk that SinglePoint would fail. That risk was substantial. The only source of ongoing funding was Rossette, and his wealth was not unlimited. As a means of establishing the probability of failure, Torchio calculated a "cash burn ratio" defined as the Company's cash balance divided by its EBITDA (taken as a negative). That yielded roughly a 5% chance of survival. When multiplied by the $0.75 price, he ascertained a fair value of $0.04, or approximately the $0.05 of the Debt Conversion. This methodology, at best, supplies only a very imprecise estimate of the likelihood of survival. Although perhaps deserving of some consideration, this methodology fails to account for Rossette's ongoing—if not unequivocal—substantial, personal support for the enterprise.

start of the chain of events leading to the transaction at issue.[50] In February 2000, less than two months before the Debt Conversion, Rossette agreed to increase the option price for Company stock from $0.50 to $0.75 per share. That option price did not purport to define fair value; the price simply could not be set at less than fair market value. This, especially in light of the Company's financial travails, sets an upper limit on the possible range of fair value for the SinglePoint stock.[51]

Thus, the Court works within a range from roughly $0.10 per share, based on Torchio's analysis, to something less than $0.75 per share. That, of course, is a wide range, but, given the uncertainty and the absence of a useful financial history, it is a start.[52] The value of SinglePoint, if there was value, came almost entirely

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[50] *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *7 (Del. Ch. Dec. 31, 2003), *aff'd in part and rev'd in part on other grounds*, 884 A.2d 26 (Del. 2005) ("Contemporary pre-merger management projections are particularly useful in the appraisal context because management projections, by definition, are not tainted by post-merger hindsight and are usually created by an impartial body. In stark contrast, *post hoc*, litigation-driven forecasts have an 'untenably high' probability of containing 'hindsight bias and other cognitive distortions.'"). *See also Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *5 (Del. Ch. May 20, 2004) ("Delaware law clearly prefers valuations based on contemporaneously prepared management projections because management ordinarily has the best first-hand knowledge of a company's operations."). Here, however, there is little evidence that management employed anything beyond general intuition in determining the option prices employed.

[51] The Court has generally rejected the unduly rosy assumptions and methodologies employed by Plaintiffs' expert. No significant improvement in the Company's prospects occurred in the interim from when the revised option price was set. The use of improperly booked revenues by Kirk to justify an optimistic uptick in price has been rejected. Furthermore, the S&P option price cannot be viewed as a valuation metric. The option simply offered S&P the opportunity to protect the product that the Company was developing for it in the event that such effort was about to be successful and an undesired (and probably unexpected) suitor for the Company appeared.

[52] Both experts, properly in the Court's view, did not to use the discounted cash flow method because of the shortage of useful data. Although Kirk valiantly attempted to draw upon data involving comparable companies (or a more general, industry-based source), the results of that

from the S&P relationship. In a sense, it was the value of a chance. Although there was a ways to go, some progress had been made in developing the platform for S&P and, given S&P's market potential, successful development of the software would have been a lucrative accomplishment. The progress in that project was, at best, bumpy, and it was likely that Rossette, himself not a programmer, had an unduly optimistic view of the Company's prospects. The best evidence, however, is that Rossette—an officer of the Company and its controlling shareholder, one who should be expected to know the value of his enterprise—kept injecting his own—rapidly dwindling—funds. Unless he believed in SinglePoint's future,[53] this would have been a course of conduct approaching the irrational, and the Court does not consider Rossette, with his extensive business background, irrational.[54]

There simply is no reliable way to "calculate" a "fair value" for SinglePoint at the time of the Debt Conversion. One should start with the $0.50 per share value of November 1999 (and recall that this was the per share value most

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effort offer little useful guidance because SinglePoint was in an unusual, if not unique, position. It was surviving only because of Rossette's assistance, it had little predictable and consistent income, Rossette was about to run out of money, and there was no reasonable expectation that anyone else would emerge to support the enterprise. That particular amalgam of limiting factors leaves little room for any confidence in any attempt to compare SinglePoint with any other enterprise, or even to assess it within the context of some precisely defined market.

[53] If SinglePoint had value as an entity going forward, it would have been well in excess of a nickel per share.

[54] It is somewhat ironic that Rossette's own conduct is an important factor in assessing the fair value of the Company during the last few months before the Debt Conversion.

frequently employed during a large portion of the Company's brief existence) and then consider the few moments of hope, recognize the desperate financial circumstances, accept the chance—perhaps a small one—of developing a viable product for S&P, take a brief glance at the Merger's effective price based on the value assigned to Cofiniti (one that seems to bear little resemblance to reality), and acknowledge that the difficulty in calculating such a number sometimes may cut against the fiduciary who has not faithfully discharged his duties.[55] The Court is persuaded that fair value for SinglePoint at the time of the Debt Conversion was something less than $0.50 per share: that is, a number in the mid-range between $0.10 per share and something a little less than $0.75 per share is as accurate as one can be. For these reasons, on balance, the Court finds that the fair value of SinglePoint stock at the time of the Debt Conversion was $0.40 per share.[56]

With this finding, it follows that the price component of the Debt Conversion also was not fair; consequently, the Court must conclude that price and process fairness was absent from the overall transaction.

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[55] *See, e.g.*, *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("[A] defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."); *Centrix HR, LLC v. On-Site Staff Mgmt., Inc.*, 349 Fed. Appx. 769, 775 (3d Cir. 2009) ("In cases where a defendant's wrongful conduct renders an exact calculation of damages difficult, . . . courts will not permit a defendant to profit from its misconduct by allowing the defendant to avoid damages based on the plaintiff's failure to provide precise evidence of damages.").

[56] The outcome here may seem at odds with the conclusions in the appraisal action. *See Gentile v. SinglePoint Fin., Inc.*, 2003 WL 1240504, at *7 (Del. Ch. Mar. 5, 2003). The appraisal proceeding, however, involved an unopposed, default valuation, and, accordingly, is entitled to no weight in this context.

4. The Calculation of Damages

The Court, having concluded that the Debt Conversion was not fair to the minority stockholders as a matter of price and process, now turns to a calculation of damages. The framework for a remedy in this case has been provided: "The only available remedy would be damages, equal to the fair value of the shares representing the overpayment by [the Company] in the debt conversion."[57] With a fair price and process valuation of $0.40 per share established for the Company at the time of the Debt Conversion, the damages suffered by the Plaintiffs may be calculated in accordance with the following table:[58]

Debt Conversion at $0.40 Per Share:

Shares Outstanding Before Debt Conversion	5,904,566
Pre-Conversion Share Value	$0.40
Pre-Conversion Equity Value	$2,361,826
Debt Conversion Rate	$0.40
Shares Required for Debt Conversion	5,552,378
Debt Converted	$2,220,951
Pre-Conversion Equity Value	$2,361,826
Value of Debt Converted to Equity	$2,220,951
Post-Conversion Equity Value	$4,582,777
Shares Outstanding Before Debt Conversion	5,904,566
Shares Issued for Debt Conversion	5,552,378
Shares Outstanding After Debt Conversion	11,456,944

[57] *Gentile*, 906 A.2d at 103.

[58] The approach taken here follows the general methodology of Torchio. *See* JTX 216 (demonstrative) at 33.

Post-Conversion Share Value	$0.40
Shares Held by the Plaintiffs	1,000,000
Value of the Plaintiffs' Shares When Debt Converted	$400,000

Debt Conversion at $0.05 Per Share:

Post-Conversion Equity Value	$4,582,777
Shares Outstanding After Debt Conversion @ $0.05 per Share	50,323,586
Implied Share Price	$0.091
Shares Held by the Plaintiffs	1,000,000
Value of the Plaintiffs' Shares	$ 91,000

Damages:

Value of the Plaintiffs' Shares When Debt Converted at $0.40 per share	$400,000
Value of the Plaintiffs' Shares When Debt Converted at $0.05 per share	($ 91,000)
Damages	$309,000

5. Bachelor's Liability for Money Damages

Bachelor has invoked the provisions of the Company's charter that would exculpate him from liability for money damages caused by his breach of fiduciary duty as long as he acted neither disloyally nor in bad faith. By Article 7 of the Company's Certificate of Incorporation, "[n]o director shall be personally liable to the Corporation or its stockholders for any monetary damages for breach of

fiduciary duty by such director as a director."[59] This provision was adopted under the auspices of 8 *Del. C.* § 102(b)(7) which, of course, does not allow for the exculpation of liability for money damages if there was a breach of the duty of loyalty or if the director's conduct was not in good faith.[60]

Bachelor is entitled to the protection of this exculpatory provision. He received no personal benefit from the Debt Conversion. Indeed, as the holder of the largest block of Company stock other than Rossette, its dilutive effects affected him more than anyone else. He thought for himself and attempted to do the best that he could in difficult circumstances. His ability to discharge his duties effectively was crimped by his lack of experience as a director and the lack of resources to advise him separately and independently of Rossette. At most, Bachelor breached his fiduciary duty of care. He has demonstrated that otherwise he acted loyally and in good faith.[61] Accordingly, he may not be held liable for any money damages.[62]

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[59] JTX 208.

[60] *See, e.g.*, *Globis Partners L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, *15 (Del. Ch. Nov. 30, 2007).

[61] *See, e.g.*, *Union Illinois v. Korte*, 2001 WL 1526303, at *12 (Del. Ch. Nov. 28, 2001).

[62] Rossette also seeks to avoid liability for money damages by relying upon the exculpatory provision of the Company's charter. As a controlling shareholder who used his position to direct the Debt Conversion, with its unfair price and process, for his personal benefit, his liability was accompanied by, and indeed the result of, a breach of his fiduciary duty of loyalty. Thus, the § 102(b)(7) provision affords him no relief.

B. *The Put Option*

With the continuing support of Rossette's loans, the Company was able to stay alive following the Debt Conversion despite its lack of sales and failure to complete the software for S&P. Rossette, with the help of a college friend, interested Cofiniti in acquiring the Company. After a few weeks of negotiations, the parties agreed on a term sheet. The term sheet provided that the Company's stockholders would collectively receive 2,200,000 shares of Cofiniti; it also recognized that Cofiniti would accept responsibility for the immediate payment of the Company's indebtedness to Rossette. Cofiniti eventually came to recognize the Company's precarious financial condition and sought to take advantage of its plight. After Rossette thought that the terms of the acquisition had been set and after he had signed his shareholder's agreement to sell, Cofiniti's board revised the conditions of the transaction. It balked at the immediate obligation to repay the debt owed to Rossette. Instead, it insisted that he accept deferred payment and continue to personally guarantee various Company obligations.[63] In an effort to assuage Rossette's frustration and concerns regarding the loss of the right to immediate payment, Cofiniti offered the Put Option.[64]

[63] Among other obligations, Rossette remained the sole guarantor of the Company's two office leases and its debt to LeaseNet, Inc., as well as the sole indemnifying party to litigation with Gentile in Rhode Island and the sole guarantor of post-closing costs related to the Merger that were not absorbed by Cofiniti. JTX C (Rossette Dep.) at 184.
[64] JTX 188.

The Put Option, in theory, guaranteed Rossette the right to sell (or "put") 360,000 shares of Cofiniti stock to Cofiniti after one year or upon the realization of certain other benchmarks[65] at a price of $5 per share, the price formally used for Cofiniti at the time of the Merger. Cofiniti was thinly traded and the lack of liquidity for its stock was a serious detriment. A commitment to buy a significant portion of Rossette's post-Merger holdings at $5 per share, when, it seems, that a fair value at the time of the Merger was more along the lines of $1.86 per share or perhaps even less, can be seen as having value.[66] As the Plaintiffs point out, no other stockholder was offered a comparable opportunity. Then again, no other stockholder had loaned the Company so much money, either.

Assessing the fairness of the Put Option requires the Court to review it within the context of merger negotiations and final transactional terms. There would have been no challenge to the Merger if the term sheet had been implemented. The debt owed by the Company to Rossette was a demand liability; under the term sheet version, it would have remained a demand obligation subject to immediate collection upon the Merger. Rossette did not seek a revision of his right to insist upon immediate repayment. He acquiesced in the revision only when he understood that the Merger would fail without his further cooperation.

[65] The Put Option could be exercised at the earliest of one year, the exercise of an S&P option to acquire shares in Cofiniti, or a successful public offering.

[66] As a result of the reverse stock split, *see supra* note 33, the 360,000 shares subject to the Put Option amounted to approximately 23% of the shares held by Rossette.

The impetus for the adjustment came from Cofiniti's board. Although the right to sell Cofiniti back its stock for $5 per share in a year might seem like a sizeable benefit, it is clear that no one involved in the negotiations—on either side—believed that the Put Option had much, if any value. Indeed, it does not appear that anyone even attempted to put a value on the Put Option. Moreover, because it was proposed by and insisted upon by Cofiniti, one may readily assume that it made the Merger more advantageous to Cofiniti than it would have been under the term sheet arrangements; if so, since only Rossette's interests were affected, any benefit accruing to Cofiniti came at Rossette's expense.[67]

In short, the Put Option was imposed by Cofiniti and caused a significant detriment to Rossette. Thus, the inclusion of the Put Option as an element of the Merger transaction was entirely fair to the Company's shareholders. Defendants are entitled to judgment in their favor on this claim.[68]

C. *The Shifting of Attorneys' Fees*

The Plaintiffs seek an award of their attorneys' fees from Rossette because of what they characterize as his bad faith conduct in this litigation. Generally, of course, under the so-called American Rule, each party bears its own attorneys'

[67] Indeed, Rossette regarded the Put Option as a "cram down," and was "livid" about its late inclusion; he informed Martin that "he felt deceived" and that Cofiniti "had duped him." JTX O (Martin Dep.) at 45, 52.

[68] Cofiniti's management seemed to be of the view that Cofiniti would either go public or not be around when the year expired. JTX O (Martin Dep.) at 48-52. One doubts that Rossette fully appreciated how fragile Cofiniti was.

fees. Those fees, however, may be shifted in the event that a party's bad faith conduct increased the costs of litigation.[69]

The Plaintiffs have observed that Rossette's self-serving version of the "facts" has been revised from time to time, suggesting a pattern of prevarication. Although Rossette's testimony at times was marked by a reluctance to be forthcoming and although he (or his counsel) was late in providing full disclosure of the breadth of the inaccuracies in the Company's financial records—especially in the months leading up to the Debt Conversion—both of which are troubling, they do not reach the level that would justify a reallocation of the burden of representation. Much of the inconsistency in Rossette's testimony can be traced to his after-the-fact full realization that the Company's prospects never amounted to much; at the critical times, he showed his then-more optimistic view of its affairs by continuing to prop it up with his personal funding. With the benefit of hindsight and the realization that he threw lots of good money down what may now be viewed from a historical perspective as a rat hole, a certain inconsistency seems inevitable.[70]

The Plaintiffs also assert that Rossette's pre-litigation conduct should support a finding that he acted in bad faith in defending this action, thus entitling

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[69] *See, e.g.*, *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998).

[70] More to the point, the Court is satisfied that Rossette, although he did not always testify with total accuracy, did not intentionally tell untruths.

them to a shifting of fees. Although the Court has found a breach of the duty of loyalty by Rossette, his behavior, before or during this litigation, likewise did not rise to the level of bad faith necessary to justify a shifting of attorneys' fees.

In short, the Plaintiffs have not provided an adequate basis for recovery of their attorneys' fees.

V. CONCLUSION

For the foregoing reasons, judgment will be entered in favor of Plaintiffs and against Rossette in the amount of $309,000, together with interest at the legal rate, compounded quarterly, and costs. Judgment will be entered in favor of Bachelor and against Plaintiffs on all claims against him. Plaintiffs' application for an award of attorneys' fees will be denied. Counsel are asked to confer and to submit an implementing form of order.