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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, PROVIDENCE EQUITY PARTNERS VI L.P., PROVIDENCE EQUITY PARTNERS VI-A L.P., 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, C.A. No. 6354-VCN

ANSWERING BRIEF OF THE PROVIDENCE DEFENDANTS, APPELLEES

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NATURE OF THE PROCEEDINGS

This appeal challenges the Court of Chancery's order granting summary judgment to Defendants Below-Appellees ("Defendants") on claims by the Plaintiff Below-Appellant ("Plaintiff") of breach of fiduciary duty and aiding and abetting breach of fiduciary duty in connection with the merger (the "Merger") between affiliates of Providence Equity Partners LLP (collectively, the "Providence Defendants")[1] and SRA International, Inc. ("SRA"). *See Se. Penn. Transp. Auth. v. Volgenau*, 2013 WL 4009193 (Del. Ch. Aug. 5, 2013) (cited as "SJ Op. __").[2]

Plaintiff filed suit shortly after the proposed Merger was announced, seeking to enjoin the Merger based on allegations that SRA's directors had failed to conduct a reasonable process or secure the best price for SRA. Plaintiff later amended its complaint to add allegations that SRA's Proxy omitted material facts. After conducting expedited discovery, Plaintiff filed a motion for a preliminary

[1] The "Providence Defendants" include Providence Equity Partners LLC, Providence Equity Partners VI L.P., Providence Equity Partners VI-A L.P., Sterling Parent Inc., Sterling Merger Inc. and Sterling Holdco Inc.

[2] Plaintiff also appeals an earlier Court of Chancery opinion granting in part and denying in part a motion by the directors of SRA for judgment on the pleadings as to Count IV of Plaintiff's second amended complaint, which relates to an alleged violation of SRA's Certificate of Incorporation. *See Se. Penn. Transp. Auth. v. Volgenau*, 2012 WL 4038509 (Del. Ch. Aug. 31, 2012). For the reasons set forth in that decision, the Vice Chancellor allowed Count IV to proceed only as a breach of fiduciary duty claim. To the extent that Count IV survives in a form other than as a breach of fiduciary duty claim, it cannot support an aiding and abetting breach of fiduciary duty claim against the Providence Defendants – the only cause of action asserted against Providence. Accordingly, the Providence Defendants do not address that aspect of Plaintiff's appeal.

injunction but withdrew it after SRA agreed to make supplemental disclosures. (SJ Op. 4.)

After the Merger closed, the parties conducted extensive document discovery and witness depositions, including of Providence Managing Director Julie Richardson and Providence Senior Advisor Renato "Renny" DiPentima. The Providence Defendants, the "SRA Defendants,"[3] and Dr. Ernst Volgenau, SRA's former chairman and controlling stockholder, filed motions for summary judgment, which the Court of Chancery granted on all counts. Plaintiff now appeals.

[3] The "SRA Defendants" include SRA and its directors, other than Dr. Volgenau: John W. Barter, Larry R. Ellis, Miles R. Gilburne, W. Robert Grafton, William T. Keevan, Michael R. Klein, Stanton D. Sloane, and Gail R. Wilensky.

SUMMARY OF ARGUMENT

1. Denied. The Vice Chancellor correctly applied the business judgment rule in reviewing the Merger because Dr. Volgenau, SRA's controlling stockholder, did not stand on both sides of the transaction and because robust procedural protections were in place to safeguard the interests of the minority stockholders. The transaction was recommended by a disinterested and independent special committee, which was fully authorized to negotiate on behalf of the minority stockholders, hire its own legal and financial advisors, and reject any proposed transaction that it found inadequate. The transaction was also subject to a non-waivable condition of approval by a fully informed vote of the holders of a majority of SRA's minority stock.

The Vice Chancellor correctly concluded that, contrary to Plaintiff's assertions, Dr. Volgenau did not stand on both sides of the transaction. Accordingly, neither *Americas Mining Corporation v. Theriault*, 51 A.3d 1213 (Del. 2012), nor any other decision of this Court (or the Court of Chancery) mandates review under the entire fairness standard. For the same reason, *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), does not apply, and the Vice Chancellor correctly did not rely on it.

After thorough consideration of the record evidence, the Vice Chancellor found no genuine issue of material fact that the special committee was independent

and disinterested or that the stockholders were fully informed when they approved the Merger in a non-waivable majority of the minority vote. Accordingly, the Vice Chancellor reviewed the Merger under the business judgment rule and found no breach of fiduciary duty. The Vice Chancellor also concluded that, even if the record supported a breach of fiduciary duty (which it does not), there was no evidence that the Providence Defendants knowingly participated in any such breach.

2. For the reasons set forth above in footnote 2 above, the Providence Defendants do not address Plaintiff's second argument, which seeks to revive a claim not asserted against Providence.

STATEMENT OF FACTS

I. PROVIDENCE AND DR. VOLGENAU ARE INTRODUCED AND HAVE PRELIMINARY DISCUSSIONS.

Providence is a private equity firm specializing in investments in media, communications, information services, and education. (SJ Op. 5; B0187; B0471-73.) In its regular course of business, Providence identified the government IT services sector as one in which it wanted to pursue acquisitions. (B0470-72.) Providence accordingly began considering a potential acquisition of a number of government IT contractors, including SRA. (B0473-74.)

In February 2010, Providence hired Renny DiPentima as part of its efforts to assess the government IT sector. (B0475-77; B0628-30; B0639.) Mr. DiPentima had a long career working with the government, both as a government-sector executive and in the private sector at SRA, where he ultimately served as Chief Executive Officer from 2005 to 2007. (B0620-27.)

After Mr. DiPentima left SRA, he and Dr. Volgenau continued to meet socially. (B0404; B0631-33.) On February 9, 2010, Mr. DiPentima informed Dr. Volgenau that he had begun working as an advisor for Providence and mentioned that it might be possible to structure a potential transaction with Providence that would restore SRA's culture of honesty and service and provide Dr. Volgenau a role in the post-merger company. (B0632-35.)

Dr. Volgenau subsequently informed Mr. DiPentima that he was willing to meet with Providence. On March 2, 2010, an initial meeting was held among Dr. Volgenau, Mr. DiPentima, Julie Richardson (Providence Managing Director), and Chris Ragona (Providence Principal). (B0409-10; B0479; B0640.) At meetings in March and April 2010, representatives of Providence and Dr. Volgenau discussed generally SRA's business; how leveraged buyouts work; how "go-shop" periods typically work and the impact one might have on a sale of SRA; a possible leveraged buyout of SRA, including what financing and leverage was available to Providence; and the possibility of a role for Dr. Volgenau in a post-merger company. (SJ Op. 9-10; B0480-98; B0502-03; B0641-46.)

At these meetings, Dr. Volgenau expressed his opinion that there was market value in SRA's "name, values, and culture" that would accrue to an acquirer that chose to keep the company intact and his preference that, if SRA were to be sold, it be sold to a buyer willing to preserve SRA's "name, values, and culture." (SJ Op. 10; B0406-08; B0480-81; B0636-38.) Providence expressed agreement that SRA's "name, values, and culture" had market value and discussed with Dr. Volgenau its belief that it could be competitive with any other potential bidders in terms of price. (A1426; B0411; B0428-30; B0481; B0501.) Providence made clear to Dr. Volgenau that, for negotiations to commence, SRA would need to

establish an independent special committee to negotiate any potential sale of SRA. (B0412-13; B0649-50.)

II. THE SRA BOARD FORMS THE STRATEGIC ALTERNATIVE STUDY TEAM.

Following Providence's expression of interest in pursuing a possible acquisition of SRA, Dr. Volgenau chose not to ask the Board to begin negotiations with Providence. Instead, in May 2010, he suggested and the Board approved the formation of a Strategic Alternatives Study Team (the "Study Team") to explore all potential alternatives for the company. (SJ Op. 11; B0190; B0418-19; B0426.) The Study Team hired Citigroup to research and report back on the potential strategic options available to SRA. (B0190.) From May through July, while Citigroup conducted its study, Dr. Volgenau and others from SRA management continued preliminary discussions with Providence regarding a potential transaction and provided Providence with financial information to assist it in assessing the viability of an acquisition. (B0190.)

On July 26, 2010, Citigroup presented five strategic alternatives to the Study Team, including maintaining the status quo, a significant share repurchase, a potential significant acquisition, a potential sale or leveraged buyout, or a potential merger of equals. (B0094; B0098-100; B0190; B0431-34.) The following day, Dr. Volgenau and the Board decided to pursue the acquisition of Enterprise

Integration Group ("EIG"), a subsidiary of Lockheed Martin, rather than a potential sale of SRA. (SJ Op. 11; B0094-98; B0190; B0434-40; B0443-44.)

III. SRA PURSUES AN ACQUISITION OF EIG.

From July 27 to mid-October 2010, SRA pursued an acquisition of EIG, despite the fact that Providence made clear, and the SRA Board understood, that Providence would not pursue an acquisition of SRA if SRA acquired EIG. (B0103-07 ; B0190-91; B0511-12; B0518; B0651-53.) Dr. Volgenau made it clear to Providence that he was "discontinuing any work effort or work stream related to [their] discussions" and that acquiring EIG "was [SRA's] priority, not having discussions with [Providence] to explore a potential strategic transaction." (B0508; B0511-12.) During this time, Providence and Dr. Volgenau ceased their discussions regarding a potential transaction, but Providence maintained periodic contact with Dr. Volgenau, so that it could restart those discussions in the event that SRA was unsuccessful in acquiring EIG. (B0507-18.) Ultimately, SRA's attempt to acquire EIG ended unsuccessfully in October 2010. (SJ Op. 12; B0190; B0441.)

IV. THE SRA BOARD FORMS THE SPECIAL COMMITTEE.

On October 27, 2010, following the failed EIG bid, representatives of Providence, including Jonathan Nelson, Providence's founder and CEO, Ms. Richardson, and Mr. Ragona, made a formal presentation to the Study Team

regarding a proposed acquisition of the company and communicating an initial indication of interest of up to $28 per share. (SJ Op. 12; B0112-13; B0191; B0445-47; B0517-21.) In connection with that initial indication, Providence requested that SRA agree to negotiate exclusively with Providence. (B0126-32; B0523-25.) The day after Providence's presentation, the Board formed a Special Committee of independent and disinterested directors, which was authorized to consider potential strategic alternatives, to negotiate the terms of any such strategic transactions, and to recommend to the Board the approval of a specific strategic transaction. (SJ Op. 12-13; B0191.)

Through its chairman, Michael Klein, the Special Committee communicated that Providence's $28 per share price was "insufficient to start formal discussions" and rejected Providence's request for exclusivity. (SJ Op. 14; B0110; B0113; B0118; B0124-25; B0191-92; B0522-23.) Providence then revised its informal indication of interest downward to $27.25 per share, which Mr. Klein told Providence put it "out of the game." Providence subsequently communicated to Dr. Volgenau and the Special Committee's financial advisor Houlihan Lokey ("Houlihan") that it was raising that opening proposal to $28.50 per share. (B0132-33; B0192-93; B0526-28.) Even at $28.50 per share, however, the Special Committee declined to commence negotiations with Providence. (B0135-38; B0193; B0527-31.)

V. THE SPECIAL COMMITTEE OPENS UP AN AUCTION AND SOLICITS OTHER BIDDERS; PROVIDENCE WITHDRAWS.

To Ms. Richardson's surprise, SRA's reaction to Providence's $28.50 bid was not to ask Providence for its "best bid," but rather to open the bidding up to an auction and solicit other potential buyers. (B0136-38; B0193; B0530-31.) At the time, Providence was concerned that the Special Committee was using Providence to increase other bidders' offers. (B0533-34; B0541.) That was in fact what the Special Committee intended: its initial strategy was to extract from Providence a high bid that it could use to set a floor for an auction that would include other potential buyers. (B0116-18; B0131-32.)

On February 18, 2011, Providence submitted an offer of $30 per share, conditioned on a grant of exclusivity by February 23 to permit negotiation of a merger agreement with SRA. (B0195; B0535; B0540.) Again, the Special Committee denied Providence's request to negotiate on an exclusive basis. (B0144-45; B0196; B0540.) After being refused exclusivity for the second time, Providence withdrew from the auction, feeling as though it was being "used" and was not "going to end up buying [SRA]." (B0196; B0541-44.)

The Special Committee subsequently sent potential bidders a letter calling for bids by March 18, 2011. Notwithstanding Providence's withdrawal from the process, the Special Committee sent the letter to Providence as well. (B0196; B0544-45.) Reading the letter as an indication that the auction might be moving

toward a conclusion rather than further attempts by the Special Committee to extract ever-higher bids, Providence decided, after some internal deliberation, to re-join the auction by submitting a bid by the March 18 deadline. (B0545.) On March 18, Providence submitted a bid of $30 per share. (B0196.)

VI. PROVIDENCE AND VERITAS COMPETE IN A FINAL BIDDING CONTEST; SRA GRANTS VERITAS EXCLUSIVITY.

By March 18, 2011, Providence and Veritas Capital ("Veritas") were the only two bidders left in the auction. Through the rest of that month, they engaged in a final bidding war to acquire SRA. (B0196-200.) The Special Committee negotiated with both bidders in an effort to increase their offering prices.

The Special Committee also engaged with Dr. Volgenau, seeking concessions from him in order to extract the highest bids from the two final bidders. For example, Dr. Volgenau wanted to roll over $100 million of his SRA stock in the post-merger entity, but Veritas could not finance the transaction at the price level the Special Committee was seeking unless Dr. Volgenau rolled over $150 million of his SRA equity. (B0150-53.) Ultimately, the Special Committee persuaded Dr. Volgenau to roll over $150 million in order to keep Veritas in the auction through its final hours. (SJ Op. 18; B0150.)

On March 30, Veritas's bid stood at $31 per share and Providence's bid was $30.50 per share. (SJ Op. 18.) Providence was "tapped out," however, and could not raise its bid unless it had "some help from [Dr. Volgenau] in terms of the way

[its] bid [was] structured." (B0548-50.) After discussions with Dr. Volgenau and Houlihan, Providence reached an agreement with Dr. Volgenau that part of his $150 million rollover would consist of a $30 million non-recourse loan, which was to be repaid solely from the proceeds of two subsidiary divestitures that were underway. (SJ Op. 18-19; B0151 ;B0198; B0549.) This concession by Dr. Volgenau enabled Providence to raise its bid to $31 per share.

Upon communicating its $31 bid, Providence was told that the Special Committee was "moving in another direction." (B0552-53.) In fact, SRA had entered into exclusive negotiations with Veritas, with the exclusivity period set to expire at 3:00 PM the following day, March 31, 2011. (SJ Op. 20; B0158-59; B0199.) The exclusivity period expired without an agreement having being finalized between SRA and Veritas. Shortly thereafter, Providence submitted its final bid of $31.25 per share, matching the final bid submitted by Veritas. (B0199.)

That evening, in the final hours of the auction, information uncovered in due diligence raised the prospect that Veritas would not be able to secure necessary approvals from its partnership to finance a purchase of SRA. (SJ Op. 20; B0154; B0158-61.) The Special Committee became concerned with Veritas's ability to guarantee a transaction and communicated that concern to Veritas, which subsequently withdrew its bid, leaving Providence the only bidder left in the

auction. (B0154; B0158-61.) The Special Committee then voted unanimously to recommend the Providence proposal to the full SRA Board, which unanimously approved the transaction (other than Dr. Volgenau, who abstained). (SJ Op. 20-21; B0199-200.)

On April 1, SRA announced that it had reached an agreement to be acquired by Providence at $31.25 per share. (B0173-74.) Pursuant to the merger agreement, Dr. Volgenau would receive cash for the majority of his SRA shares and, in exchange for $150 million worth of his shares, he would receive $120 million worth of shares in the surviving entity (based on the same $31.25 per share) and a $30 million non-recourse note (also based on the same $31.25 per share) to be repaid solely from the proceeds of the two subsidiary divestitures. (B0229.) The agreement provided for a go-shop process and required the approval of the holders of a majority of all the minority stock. (B0174; B0200.)

A go-shop process was conducted from April 1 to April 30, 2011. Fifty parties were contacted during the go-shop process, but no additional interest in acquiring SRA was expressed. (B0200.) Finally, on July 20, 2011, at a stockholders meeting called for the purpose of voting on the proposed merger, 81.3% of the total outstanding shares not owned or controlled by Dr. Volgenau were voted in favor of the transaction. (SJ Op. 21; B0579.)

ARGUMENT

I. INTRODUCTION.

Plaintiff's aiding and abetting claims against the Providence Defendants (Count III) are based solely on conjecture and innuendo and are unsupported by the record evidence. The Vice Chancellor correctly found that Plaintiff had failed to raise a genuine issue of material fact that either (*i*) the directors of SRA breached their fiduciary duties to the minority stockholders, or (*ii*) the Providence Defendants knowingly participated in any such breach.

First, the Vice Chancellor properly applied the business judgment rule in finding that the directors of SRA did not breach their fiduciary duty in approving the Merger. Under Delaware law, the business judgment standard of review applies to the Merger because Dr. Volgenau did not stand on both sides of the transaction and robust procedural protections ensured that the interests of SRA's minority stockholders were adequately safeguarded. An independent and disinterested Special Committee conducted a competitive auction, which resulted in the merger consideration of $31.25 per share – a 52.8% premium over the company's unaffected stock price. The Merger was also subject to the non-waivable condition of approval by the holders of the majority of SRA's minority stock, and 81.3% of the total outstanding minority shares – 99.7% of the voting minority shares – was voted in favor of the Merger.

Plaintiff's assertion that Dr. Volgenau stood on both sides of the transaction is unsupported by any evidence in the record. Plaintiff imagines a secret deal between Dr. Volgenau and Providence, in which Providence was chosen to acquire SRA long before the auction began and former SRA employees acted as double agents. Plaintiff's imagined conspiracy, however, amounts to nothing more than conjecture and is flatly contradicted by the overwhelming evidence of a rigorous and competitive auction process.

Nor does the record evidence raise a genuine issue of material fact as to whether the Special Committee, including Mr. Klein, was independent and disinterested, or that the stockholder vote was fully informed. Again based on nothing more than conjecture, Plaintiff asserts that Mr. Klein drove the auction towards Providence. That assertion ignores the undisputed evidence which demonstrates that Providence received no favorable treatment from Mr. Klein or the Special Committee. These undisputed facts are not undermined by Mr. Klein's post-agreement request for a charitable contribution in his name, as there is no evidence that Mr. Klein would have benefitted materially from such a charitable contribution or that any expectation Mr. Klein might have had was tied to an acquisition by Providence.

The Vice Chancellor also correctly concluded that the directors of SRA did not breach their fiduciary duties in approving the Merger, insofar as Plaintiff

claims that it violated a provision of SRA's charter that required all stockholders to receive equal per share consideration in the event of a merger. That Dr. Volgenau received a portion of his consideration in the form of rollover equity and a non-recourse note – based on the same merger consideration of $31.25 per share – did not violate SRA's charter. The charter does not require that every stockholder receive the same ***form*** of consideration, and the undisputed evidence demonstrates that SRA's directors rationally and in good faith believed that Dr. Volgenau would receive equal or less consideration than the minority stockholders.

Second, even assuming – contrary to fact – that the directors of SRA breached a fiduciary duty to the minority stockholders, there is no evidence in the record suggesting that Providence knew of any such breach, much less that Providence knowingly participated in a breach as is required to establish aiding and abetting liability under Delaware law. Indeed, the record clearly demonstrates that Providence negotiated with the Special Committee at arm's-length – a fact that precludes aiding and abetting liability with regard to the negotiation of the Merger. Moreover, there is no evidence that Providence negotiated Dr. Volgenau's rollover equity and non-recourse note with any belief, much less knowledge, that they might be construed as a breach of SRA's charter.

II. THE COURT OF CHANCERY PROPERLY REVIEWED THE MERGER UNDER THE BUSINESS JUDGMENT RULE.

A. Question Presented.

Did the Court of Chancery correctly apply the business judgment rule to the merger of a company with an unaffiliated third party that was (*i*) recommended by an independent and disinterested special committee and (*ii*) approved by stockholders in a non-waivable vote of the majority of the company's minority stockholders?

B. Scope of Review.

"On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the Chancellor's findings are clearly supported by the record, and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process. This Court 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. Deriv. Litig.*, 906 A.2d 27, 48 (Del. 2006) (citations omitted). Questions of law are reviewed *de novo*. *Id.*

C. Merits of the Argument.

1. Business Judgment Is the Proper Standard of Review.

Where, as here, a controlling stockholder does not stand on both sides of a merger transaction and robust procedural protections are in place, business

judgment is the proper standard of review under Delaware law. (SJ Op. at 26-27.) *Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009). Any concerns that might be raised by the presence of a controlling stockholder are adequately addressed where there are "robust procedural protections in place to ensure that the minority stockholders have sufficient bargaining power and the ability to make an informed choice of whether to accept the third-party's offer for their shares." *Hammons*, 2009 WL 3165613, at *12. In particular, business judgment is the applicable standard of review for a third-party transaction involving a controlling stockholder if the transaction was "(1) recommended by a disinterested and independent special committee, *and* (2) approved by stockholders in a non-waivable vote of the majority of all the minority stockholders." *Id.* (emphasis in original); *accord Frank*, 2012 WL 1096090, at *8.[4]

Plaintiff's contention that the entire fairness standard applies to Providence's acquisition of SRA is premised on the baseless assertion that Dr. Volgenau stood on both sides of the transaction. (Pl.'s Br. 23-24.) The Vice Chancellor correctly

[4] The *Hammons* court also noted that the special committee "must be given sufficient authority and opportunity to bargain on behalf of the minority stockholders, including the ability to hire independent legal and financial advisors," that the special committee approval and stockholder vote must be free of "threats, coercion, or fraud," and that the stockholder vote must not be "based on disclosure that contained material misstatements or omissions." 2009 WL 3165613, at *12 n.38.

concluded, however, that Dr. Volgenau's receipt of a portion of his consideration in the form of rollover equity does not make him a buyer. (SJ Op. 29.) "When 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 receives a minority interest in the surviving company, the controlling stockholder does not 'stand on both sides' of the merger." *Frank*, 2012 WL 1096090, at *7.

The cases that Plaintiff cites do not support the application of the entire fairness standard here because they are expressly limited to situations in which – unlike here – a controlling stockholder stands on both sides of the transaction. For example, in *Kahn v. Lynch Communication Systems, Inc.*, this Court held: "A controlling or dominating shareholder ***standing on both sides of a transaction***, as in a parent-subsidiary context, bears the burden of proving its entire fairness." 638 A.2d 1110, 1115 (Del. 1994) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)) (emphasis added). Likewise, in *Americas Mining*, this Court reaffirmed that "[w]hen a transaction ***involving self-dealing by a controlling shareholder*** is challenged, the applicable standard of judicial review is entire fairness." 51 A.3d at 1239 (emphasis added).

For the same reason, the Court of Chancery's decision in *MFW* is inapposite and, contrary to Plaintiff's contentions, the Vice Chancellor did not rely on that

decision. (Pl.'s Br. 3, 24.) The Vice Chancellor noted that *MFW* "illuminates many of the procedural protections at issue in this case," but clearly stated: "Unlike *MFW,* which involved a controlling stockholder on both sides of the transaction, this case involves a merger between a third-party and a company with a controlling stockholder. Despite SEPTA's attempt to show otherwise, Volgenau is not a buyer in this transaction." (SJ Op. 25-26.)

The mere presence of a controlling stockholder who has the ability to veto a proposed transaction does not justify departing from the business judgment rule, "Delaware's default standard of review." *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 43 (Del. Ch. 2013). Plaintiff's citation to the statement in *Weinberger* that "[t]here is no 'safe harbor' for such divided loyalties in Delaware" ignores the ensuing sentence, which explains: "When directors of a Delaware corporation ***are on both sides of a transaction***, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." 457 A.2d at 710 (emphasis added).

Plaintiff offers no support for its assertion that *Hammons* and *Frank* – on which the Vice Chancellor did rely – are "at odds with Delaware law." (Pl.'s Br. 24.) Because *Hammons* and *Frank* both concerned acquisitions by unaffiliated third parties, those decisions rightly concluded that *Lynch* "does not mandate that the entire fairness standard of review apply notwithstanding any procedural

protections that were used." *Hammons*, 2009 WL 3165613, at *10; *Frank*, 2012 WL 1096090, at *7.[5] In *Lynch*, this Court made clear that the policy rationale underlying its holding does not extend to a third-party transaction: "The controlling stockholder relationship has the potential to influence, however subtly, the vote of [ratifying] minority stockholders in a manner that is not likely to occur in a transaction with a noncontrolling party." 638 A.2d at 1116 (internal quotation omitted) (alteration in original). Plaintiff's assertion that neither *Hammons* nor *Frank* turned on the determination of whether the controlling stockholder stood on both sides of the transaction is belied by the plain language of those decisions. (Pl.'s Br. 25-26.) *See Hammons*, 2009 WL 3165613, at *9-11; *Frank*, 2012 WL 1096090, at *7-8.

[5] *See also eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 37-38 (Del. Ch. 2010) ("Entire fairness review ordinarily applies in cases where a fiduciary either literally stands on both sides of the challenged transaction or where the fiduciary 'expects to derive personal financial benefit from the [challenged] transaction in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.'") (alteration in original) (quoting *Litle v. Waters*, 1992 WL 25758, at *4 (Del. Ch. Feb. 11, 1992)); *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 666 (Del. Ch. 2013) ("The fact that a corporation has a controlling stockholder or large blockholder who suggests a change of control transaction does not automatically subject that transaction to heightened scrutiny. Rather, the presumption is that a large blockholder, who decides to take the same price as everyone else, believes that the sale is attractive, and thus is a strong indication of fairness and that judicial deference is due.") (footnote omitted).

2. The Court Properly Granted Summary Judgment Based on the Business Judgment Standard.

a. Dr. Volgenau Did Not Stand On Both Sides of the Transaction.

Plaintiff does not, and cannot, offer any evidentiary support for its assertion that "Volgenau stood on both sides of the self-dealing Merger." (Pl.'s Br. 26.) That claim simply "is not supported by the factual record or Delaware law." (SJ Op. 28.) Plaintiff cites to Sections III.B, III.C.1, III.C.4, and III.C.5 of its brief, but much of that material is unrelated to Dr. Volgenau's role in the transaction and none of it supports the claim that he stood on both sides. (Pl.'s Br. 26.)

Plaintiff mischaracterizes Providence's initial discussions with Dr. Volgenau as "secretly" planning a "self-dealing LBO," but the record demonstrates that those preliminary discussions were general in nature and did not result in any concrete plans for a transaction. (Pl.'s Br. 6-12; SJ Op. 9-10.) Nor is there any evidence that Mr. DiPentima's relationship with Dr. Volgenau had any impact on the sale of SRA beyond his advice to Providence about how best to approach Dr. Volgenau and his introduction of Dr. Volgenau to Ms. Richardson and others from Providence. (B0654-56.) There is nothing improper about a potential acquirer engaging in preliminary discussions with a controlling stockholder for the purpose of exploring whether an acquisition is possible prior to spending the time and resources to engage in the diligence necessary to make a formal bid for the

company. Certainly, as the Vice Chancellor concluded, those preliminary conversations "did not somehow magically transform Volgenau into an affiliate of Providence." (SJ Op. 28-29.)

Plaintiff's contention that "Volgenau and Providence were partners in the Merger" is likewise unsupported by evidence. (Pl.'s Br. 20.) That Dr. Volgneau accepted part of his consideration in the form of rollover equity does not make him a "partner" of Providence. Indeed, the undisputed evidence shows that Dr. Volgenau also agreed to accept rollover equity from Veritas. (Pl.'s Br. 20-21; B0150-53.) That Ms. Richardson informally referred to Providence and Dr. Volgenau as "partners" two-and-a-half months after the Merger Agreement was executed clearly does not imply that they were partners prior to that time. (Pl.'s Br. 21; A1274.)

Plaintiff's focus on preliminary meetings between Providence and Dr. Volgenau in the spring of 2010 (months before the auction had begun) and an informal comment made in the summer of 2011 (months after the Merger Agreement was executed) ignores the undisputed facts that Dr. Volgenau and SRA first rejected Providence's overtures in favor of seeking to acquire EIG and then conducted a competitive auction in which Providence undeniably received no special treatment. As the Vice Chancellor found, "Plaintiff has failed to dispute

materially that the Special Committee executed a robust process in which all interested bidders were afforded an equal opportunity to buy SRA." (SJ Op. 30.)

b. The Transaction Was Subject to Robust Procedural Protections.

The record is clear that the "robust procedural protections" required by *Hammons* and *Frank* for application of the business judgment rule were present in this case. As soon as Providence made a proposal to acquire SRA, the SRA Board formed a Special Committee of independent and disinterested directors. (B0113-14; B0116, B0118; B0191-92.) The Special Committee was given full authority to bargain on behalf of SRA's minority stockholders, hired its own legal and financial advisors, oversaw a rigorous, competitive auction process, and ultimately recommended to the full Board Providence's final bid of $31.25 per share. (B0199-200.) That recommendation was approved unanimously by the full Board. (B0200.) On July 20, 2011, the Merger was approved by a vote of the holders of a majority of all the minority stock. (B0200; B0579.) No evidence in the record contradicts these facts.

i. The Special Committee Was Independent and Disinterested.

Plaintiff's criticism of the Special Committee process ignores the overwhelming evidence of a rigorous and competitive auction process and instead focuses narrowly on a memorandum sent by Mr. Klein months after the Merger

Agreement was executed, requesting that a donation be made in his name to two charities. (Pl.'s Br. 14-18, 27-29.) The Vice Chancellor thoroughly analyzed this issue and correctly found that Mr. Klein's request – which was denied – does not create a genuine issue of material fact as to whether Mr. Klein had a material self-interest in the Merger. (SJ Op. 35-42.)

First, there is no evidence in the record indicating that Mr. Klein would have received a non-monetary "reputational" benefit from the requested charitable donation, much less a material one. (Pl.'s Br. 28; SJ Op. 39-40.) Plaintiff asks the Court to fill that void by assuming that the requested charitable contributions "would enhance Klein's community standing and [that] he would be credited socially and politically for the contributions." (Pl's Br. 30; SJ. Op. 39.) Even if there were evidence to support such a conclusion, which there is not, there is no basis to conclude that Mr. Klein would have received reputational benefits of such significance that the mere prospect of obtaining them would taint his independent and disinterested judgment. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (to be considered "interested," a director must derive a "personal financial benefit" that rises to level of "self-dealing"), *overruled in part on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Second, there is no evidence that Mr. Klein's purported expectation of a bonus was tied to an acquisition ***by Providence***. As the Vice Chancellor noted,

"Klein's memorandum suggests that he would have likely requested a bonus regardless of whether a deal was done with Providence or some other buyer." (SJ Op. 40-41.) Plaintiff's failure to identify any evidence that Mr. Klein believed he would receive a bonus only if SRA was acquired by Providence – as opposed to Veritas or another bidder – is fatal to Plaintiff's attempt to disqualify Mr. Klein.

Third, there is no evidence that any interest of Mr. Klein "infect[ed] the process and deliberations of the Special Committee." (SJ Op. 42.) No evidence suggests that Mr. Klein or the Special Committee favored Providence in the auction process. To the contrary, the undisputed evidence is that Providence's multiple requests for exclusivity were all denied, that Providence withdrew from the process at one point because it felt it was being used to extract higher offers from other parties, and that Providence ultimately acquired SRA only after an intense bidding contest with Veritas. (SJ Op. 40.)

ii. The Merger Was Subject to a Non-Waivable Condition of Approval by the Holders of a Majority of SRA's Minority Stock.

Plaintiff does not and cannot dispute that the merger agreement contained a non-waivable condition requiring approval by the holders of a majority of SRA's minority stock, or that the minority stock was voted overwhelmingly in favor of the merger. As the Vice Chancellor made clear, "A fully informed, non-waivable majority of the minority vote affords minority stockholders the ability to protect

themselves from an unfair deal by vetoing a transaction." (SJ Op. 46.) Plaintiff is thus left to fall back on the argument that the Proxy issued to SRA stockholders was materially misleading, but Plaintiff fails to meet its burden of showing that material information was missing from the Proxy. (SJ Op. 48; Pl.'s Br. 29-31.)

With respect to the Providence Defendants, Plaintiff claims that the Proxy contains "partial and misleading disclosures" regarding Providence's meetings with Dr. Volgenau and others at SRA. The "Background of the Merger" section of the Proxy described Providence's acquisition of SRA in considerable detail, from its "preliminary discussions" with Dr. Volgenau and others from SRA in the Spring and Summer of 2010, to its final winning bid on March 31, 2011. (B0189-200.) The Vice Chancellor correctly concluded that "Plaintiff has not shown what meetings were omitted or explained why those meetings or the contents of those meetings were material." (SJ Op. 49-50.) Nor has Plaintiff explained "why disclosure of DiPentima's role in those meetings would have been important to a reasonable shareholder in deciding how to vote." (SJ Op. 49.)

Additional facts concerning Providence's meetings with Dr. Volgenau and others at SRA – meetings that did not involve negotiation of any deal terms – would not have "significantly altered the 'total mix' of information made available" to the stockholders. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449

(1976)); *see also In re Ness Techs. S'holders Litig., Inc.*, 2011 WL 3444573, at *4 (Del. Ch. Aug. 3, 2011) ("[S]hareholders are not entitled to a play-by-play description of merger negotiations, but, instead, to a fair summary of the sale process.") (internal quotation marks omitted). "Thus, there is no dispute of material fact that the stockholders were adequately informed of the early meetings between Providence and Volgenau." (SJ Op. 50.)

c. The Merger Did Not Violate SRA's Certificate of Incorporation.

There is no merit to Plaintiff's claim that Dr. Volgenau's receipt of part of his consideration in the form of rollover equity and a non-recourse note violated the Merger Provision of SRA's Certificate of Incorporation and therefore constituted a breach of the duty of loyalty. (Pl.'s Br. 21-22, 31-32.)

The Merger Provision states that "holders of each class of Common Stock will be entitled to receive equal per share payments or distributions" in the event of a merger. (B0386-87.) Plaintiff's claim that Dr. Volgenau's rollover equity was not an "equal per share payment[]" is premised on the theory that the merger price of $31.25 per share undervalued SRA's stock. (Pl.'s Br. 22.) As such, it is nothing but an attempt to get a second bite at valuation, putting the merger price to the test notwithstanding the robust procedural protections that shield the price from judicial scrutiny under Counts I-II.

The Vice Chancellor properly rejected this claim. The Merger Provision plainly permits differential forms of consideration: it simply requires "equal per share payments" without regard to form. Plaintiff's proposed interpretation, however, would effectively prohibit differential forms of consideration by holding the Board to an unachievable standard of exactitude with regard to enterprise valuation, when even the foremost experts speak only in ranges. (*See* SJ Op. 65 ("Plaintiff is seeking precision in a practice (*i.e.*, the valuing of enterprises) that defies exactness.").) As a result, under Plaintiff's interpretation, the Board could not in practice allow differential forms of consideration without exposing itself and/or the controlling stockholder to risk. That interpretation would negate, rather than give effect to, the Merger Provision, in violation of fundamental principles of contractual interpretation.

In this case, the SRA Directors determined that $31.25 per share represented the fair value of SRA shares based on the lengthy, competitive auction conducted by the Special Committee and on the independent analysis of the Special Committee's financial advisor. All payments and distributions – cash, rollover equity, and non-recourse note – were valued based on the same merger consideration of $31.25 per share. (B0229.) As a result, all payments and distributions were "equal" within the meaning of the Merger Provision. It would

not be reasonable, much less feasible, to interpret the Merger Provision to require the SRA Directors to do more.

The Vice Chancellor correctly concluded that there was no genuine issue of material fact that the Board's business judgment that the value of Dr. Volgenau's rollover interest was equal to or less than $150 million "was both rational and made in good faith." (SJ Op. 65-66.) The undisputed evidence demonstrates that Dr. Volgenau's rollover and non-recourse note were concessions made against his own financial interest and specifically for the purpose of keeping Veritas and Providence in the auction through its final stage and obtaining the highest possible price for the stockholders. (B0150-52; B0162-63; B0546-50.) Mr. Klein testified that without the two concessions the share price would have "ended up at about $30 or at most $30.50 a share" and that Dr. Volgenau's acceptance of the non-recourse note was alone responsible for "at least 25 if not 75 cents of the per share price [] being paid to the other shareholders" by Providence. (B0152.) Likewise, Ms. Richardson testified that "the only way [Providence] could bid higher, because we were tapped out, was if [Dr. Volgenau] would do this promissory note structure, which allowed us to bid 50 cents more per share." (B0549.)

d. Providence Did Not Knowingly Participate in Any Breach of Fiduciary Duty.

Plaintiff makes little effort to defend its plainly insufficient claim that Providence aided and abetted a breach of fiduciary duty by the SRA Directors.

(Pl.'s Br. 32.) The Vice Chancellor correctly granted summary judgment in favor of the Providence Defendants on this count because (*i*) the SRA Directors did not breach their fiduciary duties, and (*ii*) the record is devoid of facts showing that Providence knowingly participated in such a breach. (SJ Op. 67.)

Plaintiff offers no substantive response to the record in this case, which overwhelmingly demonstrates that Providence negotiated with the Special Committee at arm's length and precludes aiding and abetting liability with regard to the negotiation of the merger. *See Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001) ("[A] bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting . . . ."); *In re Frederick's of Hollywood, Inc.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9, 1998) ("This Court has consistently held that evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries."), *aff'd sub nom. Malpiede*, 780 A.2d 1075.

Plaintiff does not dispute the following facts, which demonstrate that Providence was an arm's-length bidder. (*See also* SJ Op. 67-69.) Providence's initial meetings in March and April of 2010 were preliminary in nature and did not involve discussion of the details of a potential Providence-SRA transaction. (B0480-98; B0502-05; B0647-48.) When Providence expressed to Dr. Volgenau

in April 2010 that its level of interest in a transaction with SRA was "extremely high," Dr. Volgenau and the SRA Board did not pursue negotiations with Providence. (B0495) Instead, the SRA Board formed the Study Team to review and assess all potential strategic transactions available to the company. (B0190; B0415; B0417-19; B0426.) And after the Study Group received Citigroup's presentation about potential strategic options, the Board decided to pursue an acquisition of EIG, despite Providence's indication, and the Board's understanding, that a successful acquisition of EIG would rule out a sale to Providence. (B0094-98; B0103-07; B0434-40; B0507-14; B0518; B0651-53.)

It was only after SRA's unsuccessful attempt to acquire EIG that Providence was invited to make a proposal to the Study Team, presenting for the first time a preliminary indication of a price it might be willing to pay, conditional on due diligence and negotiation of a merger agreement. (B0112-13; B0191; B0515-21.) The SRA Board's response was to form a Special Committee, which then invited other potential acquirers to participate in a competitive auction process. (B0191.)

When Providence presented its initial $28 per share indication of interest to the SRA Board on October 27, 2010, it did so in good faith as a third-party, arm's-length bidder without any advance knowledge from Dr. Volgenau or anyone else at SRA whether $28 would be sufficient to start negotiations. (B0520-21.) In fact, $28 per share was not deemed sufficient by the Board, and the Special Committee

declined to commence negotiations with Providence. (B0110; B0113; B0124-25; B0192; B0522-23.) Even when Providence increased its offer to $28.50 per share, the Special Committee still considered the offer too low and declined to commence negotiations, and instead began to solicit other bidders without communicating with Providence at all. (B0530-31.)

Throughout the auction, the Special Committee repeatedly refused Providence's requests to negotiate exclusively, and Providence never negotiated with SRA on an exclusive basis. (B0128; B0144.) At one point, Providence became frustrated with the lack of exclusivity, as well as with the feeling of being "used to get . . . higher bids from others," and withdrew from the auction. (B0196; B0541-44.) Even in the final stages of the auction, Veritas was granted exclusivity, and Providence was told that SRA was "moving in a different direction." (B0158-59; B0199; B0552-53.)

The Special Committee also relentlessly pushed Providence's offer prices higher. When Providence proposed its initial offer of $28 per share, the Special Committee immediately began attempting to extract from Providence a higher bid, then used Providence in an effort to set a floor price on SRA before soliciting other potential buyers. (B0110-11; B0116-18; B0124-25; B0131-32; B0522-23; B0533-34; B0541.) The Special Committee continued with that aggressive negotiating strategy through the rest of the auction.

In the final two days of the auction, the Special Committee extracted an additional $1.25 per share by keeping Veritas and Providence locked in a final bidding contest. (B0198-99.) The record shows that Providence was pushed beyond its "indifference point" and that it was "tapped out" at $30.50 per share, having already exceeded the "amount that [its] investment committee had felt comfortable with." (B0548-50; B0556-558.) In the end, Dr. Volgenau's concessions on the amount of his SRA equity he would roll into the post-merger company, as well as his willingness to take the downside risk of the $30 million non-recourse note, kept Veritas in the auction and allowed Providence to bid more per share than it otherwise could, making Providence the last, highest bidder capable of financing the acquisition. (B0150-54; B0199; B0549.)

To the extent that Plaintiff also intends to allege that Providence aided and abetted a breach of fiduciary duty in connection with SRA's Certificate of Incorporation, it has not a shred of evidence to stand on. Plaintiff failed even to seek evidence supporting such a claim, much less to obtain it. The only evidence in the record regarding Providence's knowledge or views as to the Merger Provision of the Certificate of Incorporation is the testimony of Ms. Richardson that she was not aware of any provision in SRA's charter regarding mergers and that she had no discussion of any such provision. (B0551-52.) There is no evidence that anyone at Providence had any belief, much less "knowledge," that

SRA's charter would be breached by a deal in which Dr. Volgenau received rollover shares valued at $31.25 – the same merger consideration that he and the minority stockholders received for their cashed-out shares – or that such a breach would constitute a breach of fiduciary duty. Instead, the record shows that Providence negotiated Dr. Volgenau's rollover equity and non-recourse note in good faith, and as a part of an effort to remain competitive in the SRA auction. (B0546-50.)

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court below granting summary judgment in favor of the Providence Defendants.

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