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Case Number 461,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, individually, and on behalf of all those similarly situated,	:	No. 461, 2013
Plaintiff-Below, Appellant,	:	Case Below:
v.	:	Court of Chancery
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.	:	C.A. No. 6354-VCN
Defendants-Below, Appellees.	:	

PLAINTIFF-BELOW, APPELLANT'S REPLY BRIEF

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I. PRELIMINARY STATEMENT

Defendants urge this Court to defer to the factual findings of the Court below and affirm the dismissal based on the business judgment rule. The deference urged by the Defendants is inconsistent with this Court's *de novo* review of the record. The record supports judicial review under the entire fairness standard in accordance with *Kahn v. Lynch* and its progeny, and does not support judicial deference under the business judgment rule.

The record also supports that the Merger violated the Equal Payment Provision of the Certificate and that the Board's failure to enforce the Equal Payment Provision was a breach of the Certificate and the director Defendants' fiduciary duties.[1] The Court below's ruling that 8 *Del. C.* §124 limited Plaintiff's ability to challenge the Certificate violation after closing was erroneous.

The judgments of the Court below should be reversed. The record supports that: Volgenau, SRA's controller, stood on both sides of the LBO; the approval process was not "independent" from Volgenau and was not led by an "independent" special committee; the information provided to the stockholders was materially false and misleading; Volgenau received greater payment for his shares than received by the public stockholders in violation of the Certificate; and neither the price nor the process was entirely fair to SRA's public stockholders.

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[1] Capitalized terms used herein have the same meaning as in Plaintiff's Opening Brief.

II. ARGUMENT

A. Defendants Have Articulated an Incorrect Standard of Review

As an initial matter, Defendants do not properly articulate the standard of review for an appeal from summary judgment.

This Court reviews *de novo* a trial court's decision to grant summary judgment. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996) (reviewing a grant of summary judgment by the Court of Chancery).[2] This is so because the trial court's grant of summary judgment "presents the legal conclusion that there is no factual bar to the determination of the legal merit of the movant's position." *Rand v. W. Air Lines, Inc.,* 659 A.2d 228 (Del. 1995). From an appellate perspective, a decision granting summary judgment over the objection of the non-movant does not present for review "factual findings" but rather presents the legal conclusion that there is no factual bar to the determination of the legal merit of the movant's position. *Hoechst Celanese Corp. v. Certain Underwriters at Lloyds, London*, 656 A.2d 1094, 1099 (Del. 1995). This Court is "free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence." *Williams*, 671 A.2d at 1375. Given the same record, this Court "is as

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[2] *Accord Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012); *LaPoint v. AmerisourceBerger Corp.*, 970 A.2d 185, 191 (Del. 2009); *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002); *Cerberus Int'l, ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1153 (Del. 2002); *Law v. Law*, 753 A.2d 443, 445 (Del. 2000); *United States Cellular Inv. Co. v. Bell Atl. Mobile Sys.*, 677 A.2d 497, 499 (Del. 1996).

institutionally competent to discern the existence of factual disputes as is the trial court." *Id. quoting Hoechst Celanese*, 656 A.2d at 1099. The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party. *Id.*

Citing *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006), Defendants argue that factual findings by the Court below should not be disturbed as long as those conclusions are the product of an "orderly and logical reasoning process." SRA Br. at 15; EV Br. at 16; PEP Br. at 17.[3] Under this standard, Defendants urge the Court to affirm the Court below's findings that Volgenau did not stand on both sides of the Merger (SRA Br. at 17-18) and that Klein had no material self interest in the Merger (SRA Br. at 22). Defendants' position is flawed. First, summary judgment is not a fact finding exercise, but rather a judgment of law where no dispute of facts exists. Ch. Ct. R. 56. To make factual findings or to weigh evidence in determining a summary judgment motion is improper. *Continental Airlines Corp. v. American General Corp.*, 575 A.2d 1160, 1170 (Del. 1990). Second, the part of *Brehm* on which Defendants rely involved: (1) a grant of partial summary judgment had not been opposed below and so the appeal from it violated Sup. Ct. R. 8; (2) a post-trial appeal where the Court below and this Court had the

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[3] The Answering Brief to the SRA Defendants, Appellees (Trans. ID No. 54598146) shall be referred to as "SRA Br." The Answering Brief of Dr. Ernst Volgenau, Defendant-Below, Appellee (Trans. ID No. 54598900) shall be referred to as "EV Br." The Answer Brief of The Providence Defendants, Appellees (Trans. ID No. 54599191) shall be referred to as "PEP Br."

benefit of the Chancellor's post-trial findings of fact to apply to all issues on appeal, including the matter decided on summary judgment;[4] and (3) this Court's conclusion that the Chancellor was not clearly wrong was based on the Court's own review of the factual record. *See Brehm*, 906 A.2d at 47-49.

B. Nominal Compliance with the Tests Established By *Hammons* and *MFW* Should Not Trigger Business Judgment Presumptions

"When a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012). The only modest procedural benefit available to defendants in those circumstances is a burden shift under certain circumstances. *Id.* at 1240. Relying on *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013) and *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 Del Ch. LEXIS 174 (Oct. 2, 2009), the Court below reduced that bedrock principle to an exercise in checking boxes without any of the scrutiny necessary to ensure that controllers are not using their position to take advantage of minority stockholders.

1. *Hammons* Does Not Create a Rule of Law Applicable to All LBO's in which the Controlling Stockholder Receives a Minority Post-Closing Ownership Position

The Court below's expansive reading of *Hammons* would, in effect, provide

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[4] The language articulated in *Brehm* originated in *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972), a post-trial decision specifically referring to the evaluation of live witnesses as the reason to defer to trial findings of fact in such circumstances.

safe harbor for any LBO in which a controlling stockholder is on the buy-side through participation with a private equity venture in a minority capacity. Such a broad reading of *Hammons* is improper.

Chancellor Chandler struggled with whether entire fairness should apply *ab initio* under *Lynch*. *Hammons*, 2009 Del. Ch. LEXIS 174 at *30-*33. While it was a close call, the Chancellor determined *Lynch* did not mandate entire fairness if the controller was not on both sides of the transaction. *Id.* at *32-*33. The determination that the controller did not stand on both sides was based on close scrutiny of the facts present, not a bright-line rule. Those facts included that the controller had a parting of the ways with the firm with which he initially proposed to pursue the transaction (*Id.* at *14-*18) and that the winning bidder was identified by an independent committee and introduced to the controller through that committee (*Id.* at *18-*21).

The SRA Defendants also rely (SRA Br. at 18 & n.7) on *In re Budget Rent A Car Corp S'holders Litig.*, 1991 Del. Ch. LEXIS 29 (Mar. 15, 1991) to support the Court below's application of the business judgment rule and conclusion that Volgenau did not stand on both sides of the transaction. *Budget*, however, shows the error in the Court below's analysis and supports the conclusion that Volgenau stood on both sides of the SRA transaction.

The acquisition in *Budget* was structured to give Budget's majority stockholder, Fulcrum II, L.P., 100% ownership of the common stock of the acquiring merger entity in order to take advantage of the anti-trust clearance Fulcrum previously obtained to acquire more than 50% of Budget. *Id.* at *10-*11. Contractual restrictions on the common stock and Fulcrum's rights guaranteed Fulcrum would receive no economic benefits as a stockholder. *Id.* at *10 ("the restrictions on [Fulcrum's] ownership were so complete as to guarantee that Fulcrum would receive no benefit as a [post-closing] stockholder"). Defendants in *Budget* did not dispute that the two Budget employee directors who received a continuing economic interest in the form of preferred stock of the acquirer were "interested." *Id.* at *8. The Court observed: "They were members of Budget's top management and were going to continue their employment following the merger... [and] also were given the opportunity to share in the future profits of Budget through their purchase of Holdings' Series C Stock." *Id.*

Here, the Court below accepted, as a matter of law and in disregard of substantial evidence to the contrary, that Volgenau was not on both sides of the Merger and proceeded to review the factual record regarding the Special Committee and the stockholder vote through the lens of business judgment with the attendant presumptions and deference.

2. Even if Volgenau Did Not Stand on Both Sides, *Hammons* and *MFW* Do Not Support Automatic Business Judgment Presumptions in Defendants' Favor

The entire fairness standard exists even where independent committees are deployed and fully informed stockholder votes are held "because the underlying factors which raise the specter of impropriety can never be completely eradicated and still require careful judicial scrutiny." *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). Because no court can be certain that the negotiation of "interested transactions" truly replicated an arm's length negotiation, Delaware employs, and continues to employ, the entire fairness standard. *Id.* at 428-9. It is a standard based upon the "public policy derived from a profound knowledge of human characteristics and motives" and which "requires an undivided and unselfish loyalty...that there shall be no conflict between duty and self-interest." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) *quoting Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

Not only does the Court below's application of the law unravel the fabric of the entire fairness standard for self-interested controllers, it represents a victory of form over substance. *Contra Tremont*, 694 A.2d at 429 (holding that to obtain burden shifting – the lone modest procedural benefit available to self-interested controllers – the special committee must not be a merely perfunctory body but well-functioning). Even if this Court was inclined to adopt some or all of the

rationale for business judgment review under *Hammons* or *MFW* – and, Plaintiff submits that such erosion of the protection for minority stockholders where controllers receive special benefits in transactions is unwarranted – the concerns articulated in *Tremont* remain. As such, Defendants must retain the burden of establishing that the protections in place are, in fact, effective. Boards approving transactions with special benefits for controllers and the controllers themselves should not receive business judgment deference in the examination of their conduct. Rather, the facts and circumstances should remain subject to exacting scrutiny.

Even if the directors are entitled to business judgment presumptions in connection with the committee process and vote as contemplated by *MFW* and *Hammons*, the record supports fatal defects in the process and vote in this case.

C. Defendants Distort the Factual Record Regarding Several Events Central to the Process Leading to the Merger

1. The "Study Team" and Pursuit of EIG Were Separate from Volgenau's Secret Pursuit of an LBO

Defendants point to the creation by Volgenau of a "Study Team" in May 2010 (five months before the creation of the Special Committee) to ascertain SRA's strategic options as evidence of faithful discharge of Defendants' duties. Defendants insist that the Study Team – led and appointed by Volgenau –

represented a robust analysis of strategic alternatives for SRA.[5] SRA Br. at 5-6; EV Br. at 8-9, 23; PEP Br. at 7-8, 23, 32. The problem with Defendants' argument is that Volgenau's discussions with Providence were parallel to those with and not disclosed to the Study Team. The Board, in creating the Study Team, recognized that Volgenau may experience conflicts with the other stockholders and Volgenau admitted that "given his voting and ownership position, it would be important to monitor for potential conflicts of interest that might develop involving him, other major shareholders and/or the management team." B4. The Board members, nevertheless, did nothing to monitor his activities during the existence of the Study Team. A264, 372-3, 442-3, 474, 1562. The non-management Board members also knew nothing of the substance or fact of Volgenau's and management's extensive and continuing discussions with Providence, their development of an LBO plan, the sharing of proprietary information or the sharing of SRA's plans regarding a strategic acquisition. A263, 379, 444, 469.[6] These meetings were not routine meet-and-greet events, the type of which Volgenau regularly held over the years. A1055, B21. The meetings with Providence were frequent and substantive and, as Volgenau admitted upon introducing Providence to the Board in October 2010, it

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[5] Defendants argue that the sale decision was motivated by changes in the federal contracting landscape and SRA's position within that landscape. SRA Br. at 4-5; EV Br. at 7. However, the record indicates that SRA was poised to exploit this because it had pursued a strategy of diversification and exposed itself to government segments likely to grow despite an overall slowdown. A1277-78; 2776-78, 2780, 2801; AR74, 78, 80, 125-26, 132, 134-36.

[6] The "confidentiality agreement" to which Defendants point (SRA Br. at 5) was not approved by the Board and lacked basic provisions such as a standstill requirement. B5-10.

was the only potential buyer that had ever interested him. A2740-1.[7]

That the Board, on the recommendations of the Study Team, chose to pursue an acquisition of EIG (which was ultimately unsuccessful) does not change the faithless conduct of Volgenau. Rather, it amplifies it. SRA's banker Citi had recommended a strategic acquisition and concluded an LBO was a poor alternative. A1561, 1576. Nevertheless, Volgenau and Sloane kept Providence informed regarding SRA's efforts to acquire EIG and Volgenau stated his belief that the acquisition of EIG might slightly delay, but not derail, his desire for an LBO with Providence. A330, 426-7, 429, 2632-8.

2. Volgenau Set the Ground Rules for the Process and Limited the Value Available in a Sale of SRA

Volgenau set the ground rules for the sale process including the initiation of the Merger, timing of the Merger and disclosures to fellow directors. *See Weinberger*, 457 A.2d at 711 (Del. 1983) (listing factors considered in determining fair dealing). These actions led directly to the approval of the Merger by the directors and stockholders. *See id.* Volgenau also articulated the ultimate cudgel –

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[7] Providence's claims of innocence as an aider and abettor must also be rejected. The record shows it knew it would be unlikely to compete with a strategic industry bidder. A1411. To combat this, Providence employed and deployed a group of Volgenau loyalists to design a pitch specifically tailored to Volgenau's idiosyncratic nature and to draw him into the ways in which an LBO would "address Ernst's key non-economic deal issues." A337, 407-8, 412-14, 422, 1389, 2569-70, 2572, 2627-8; AR3-6. Providence bolstered its efforts to co-opt Volgenau's loyalty by providing him assurance that there were no examples of a company with a controlling stockholder having a merger agreement "disrupted" by another bidder in a go-shop process. A417-18, 2578; AR15-18, 20, 52.

the ability to vote no – in ensuring that the sale process would not thwart his personal goals for SRA. A1058.[8]

Defendants argue the Merger consideration represented the best price available from the sale process. SRA Br. at 24; EV Br. at 25-26; PEP Br. at 24, 29-34. Volgenau's manipulation of the process and presence during the process as permitted by the "independent" Board members highlights why entire fairness scrutiny must apply in these circumstances.[9] This Court adopted similar reasoning regarding the problematic nature of the so-called controlled board mentality:

> [A]lthough the Special Committee members were competent business men and may have had the best of intentions, they allowed themselves to be hemmed in by the controlling stockholder's demands.

Am. Mining Corp. v. Theriault, 51 A.3d 1213, 1245 (Del. 2012) *quoting In re S. Peru Copper S'holder Derivative Litig.*, 52 A.3d 761, 801 (Del. Ch. 2011). Even if Defendants could establish that they obtained the best price available under the circumstances, they failed to obtain an entirely fair price as a result of the self-dealing and breaches. Further, as discussed, below, Defendants admit they did not get the best price from the preemptively narrowed sale process.

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[8] Volgenau initiated the LBO process despite the fact he lacked the power to sell control because of restrictions on his super-voting stock. A811-15. By doing so he forced SRA into a sale while retaining power to reject anything that did not satisfy his goals. By doing so he was able to secure his position on both sides of the Merger.

[9] Defendants cite affidavits from executives at Boeing and CGI regarding their meetings with Volgenau and determination not to bid for SRA. SRA Br. at 35; EV Br. at 20-22. Volgenau admits that he discussed his post-closing requirements during these meetings. A1871. Once that genie was out of the bottle, the effect of Volgenau's demands on potential bidders' returns analyses cannot be ignored in considering why those firms did not bid.

3. Klein Admitted a Higher Price was Available Even within the Distorted Process

The record supports that even within the skewed sale process, Klein believed more value was available for public stockholders of SRA. As Klein told Barter:

> Moreover, as I will remind [Julie Richardson], but for the diligence of [Kirkland], Veritas would have stayed in, and either outbid her or required her to pay more. AR63.

Klein also observed that Kirkland's act had provided a benefit to Providence because even a nickel more per share would dwarf the bonus Klein was seeking for Kirkland. AR30.

Further, the record shows a final sequence of events inconsistent with obtaining the highest value for shares and consistent with a scramble to deliver Providence as the winning bid.[10] During a brief period of exclusivity with Veritas, Providence's counsel sent Volgenau an article indicating that Veritas's chairman had a history of treating business partners poorly. Volgenau ordered that article sent to Klein and Kirkland. AR33-38. On March 31, 2011, Klein and Antenucci asked Providence and Veritas for best and final offers. B76-77. In addition, Antenucci advised Veritas, for the first time, that the Special Committee had doubts about Veritas's ability to close the deal and requested additional

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[10] While Defendants argue that Volgenau made special concessions to Providence by accepting a promissory note as part of his consideration in order to get more money for the SRA stockholders (SRA Br. at 10, 32; EV Br at 14; PEP Br. at 30), his special concession just as easily demonstrates his desire to ensure Providence could submit the highest bid.

information from Veritas.[11] Rather than submit a further offer, Veritas withdrew. Providence never submitted a best and final offer and its prior offer of $31.25 per share was accepted. B77. Veritas's chairman emailed Volgenau the next day stating his opinion that Providence had behaved in an underhanded way that seemed, in his view, to have been encouraged by the Special Committee and Houlihan. AR22-23.

4. The Special Committee Members Did Not Deny Klein's Reward Request – They Endorsed it Against Advice

Defendants insist that Klein's request for a reward payment was rejected by the SRA Special Committee.[12] SRA Br. at 19, 23; PEP Br. at 25. That statement is contradicted by the record evidence.[13] Each member of the Special Committee testified that when Volgenau inquired he supported an additional reward for Klein beyond what the Board had approved. A386, 460, 482, 499, 1134, 2043. They did so despite having received contrary advice from Kirkland regarding typical levels of special committee compensation. A496-7, 1966-8. In any event, the record evidence of the actual continuing and increasing giving to Klein's favored charities suggests the reward was bestowed indirectly after closing. A1765- 2887-88, 2820. Whether Klein actually received the reward, Klein's own words establish that he

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[11] The notions that Veritas, an established private equity firm that had just acquired EIG for $815 million, could not satisfy closing conditions and that its supposed deficiency was discovered at such a late stage are illogical.

[12] Further supporting Plaintiff's arguments that Volgenau was on both sides of the Merger, Klein made his request to Volgenau alone, not to the Board. A1993.

[13] Defendants cite only Klein's self-serving affidavit in support. SRA Br. at 19-20, 23.

expected an outrageously priced reward from the controller throughout the sale process and did not disclose his expectation to the other directors. The conclusion that such an expectation by a special committee chairman (*i.e.*, payment of an amount many times precedent compensation levels) was not material, is illogical. Klein's persistence in seeking it further establishes materiality.

5. Each Disclosure Defect Identified by Plaintiff Reveals Omissions Showing Disloyal Conduct and Lack of Minority Protections

Defendants adopt the Court below's determination that, as a matter of law, none of the disclosure defects identified by Plaintiff was material.[14] The standard for materiality is well-established. It is an objective standard as to what would alter the total mix of information available to a reasonable investor, but need not rise to the level of causing such an investor to actually alter his vote. *Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993). The objective nature of the standard is important to a contextual analysis of the materiality of disclosure issues challenged here. That is so because each omitted material fact would have provided SRA stockholders with information demonstrating conflicts of interest among the parties to the Merger and their advisors and a less than robust set of protections for minority stockholders. To wit:

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[14] The outcome of a vote, where stockholders have been misled, is not exculpatory of Defendants' conduct. *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 848 (Del. 1987). Moreover, the vote cannot serve as a cleansing ratification of Defendants' breaches. *Gantler v. Stephens*, 965 A.2d 695, 712 (Del. 2009).

- Klein's demand for a reward several multiples the size of typical special committee compensation evidences self-interest by a supposedly independent director. Putting aside the open question as to whether the reward was paid, the request evidences a conflict of interest. It is a material because it aligns an admitted interest of Klein with a transaction that would satisfy Volgenau. Moreover, the partial disclosure in the Proxy regarding Klein's compensation, despite that issue not being resolved, is materially misleading. *Arnold v. Society for Sav. Bancorp.*, 650 A.2d 1270, 1280 (Del. 1994).

- The contingent aspect of Kirkland's compensation tends to undermine the minority's protection and is material.[15] Defendants argue that attorney compensation should not be analogized to Board members' or bankers' compensation because attorneys do not communicate directly to stockholders. That is a naïve view of the central role played by counsel in the course of a sale process and related statements made to minority stockholders. Attorneys are in a sensitive position to affect the fairness of such a process and any contingent interests they possess must be disclosed particularly where interests of counsel became aligned with the outcome desired by the controller.

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[15] Defendants quibble with the characterization of Kirkland's bonus as "contingent" as opposed to "discretionary." SRA Br. at 26. Nomenclature aside, in pitching that compensation structure to his fellow Special Committee members, Klein cited the fact that the prevailing bidder would be footing the bonus bill indicating it would only be paid in a sale, and such a sale would have to satisfy Volgenau. AR25.

- The Proxy's description of the nature, participants and extent of the meetings between SRA management and Providence omits material information regarding Volgenau's relationship with Providence.[16] The complete omission of Mr. DiPentima from the Proxy is also material. A reasonable investor would expect to know the role played by SRA's former CEO and Volgenau's close friend in initiating the LBO and his relationship to Providence. Similarly, the failure to disclose that Sloane and Volgenau provided Providence with SRA's strategy regarding EIG is material and evidence of disloyalty.[17]

- Citi's representation of SRA and conclusions regarding an LBO relative to other alternatives at the same time Volgenau was secretly planning an LBO would have altered the total mix of available information as it contradicts the solicited vote. The omission of Citi's work for SRA in 2010 also forces Defendants to take inconsistent positions. On the one hand, they tout the "Study Team" and its work (SRA Br. at 5-6) but also argue that the identity of that group's advisor – SRA's long time banker and one that worked for Providence on the Merger – is immaterial. SRA Br. at 27. They cannot have it both ways.

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[16] Even after Volgenau was instructed to have no further contact with Providence, Volgenau continued to communicate with Providence's affiliate, Mr. DiPentima, and expressed his continued support for a sale to Providence. A433; AR7-8, 54, 56-57, 59, 61.

[17] Defendants argue that Plaintiff could have raised and corrected this disclosure point during preliminary injunctive proceedings. SRA Br. at 28. However, the email records of Mr. DiPentima, which provide the detail and timeline of many of these meetings, were not produced until after the Merger closed.

- Defendants point to no disclosure describing the fulfillment of the Equal Treatment Provision.[18] Defendants instead point (SRA Br. at 29; EV Br. at 32; PEP Br. at 29) to a description of the mathematical formula applied in Volgenau's rollover agreement with Providence as some sort of evidence that the Board met its obligations and properly disclosed how it did so.

6. The Merger Was Not "Designed" to Satisfy the Equal Treatment Provision –That Duty to Act was Ignored

Defendants ignored their obligation to comply with the Certificate requiring equal treatment of minority stockholders. They are also faced with the testimony of their own expert that because of the nature of LBO's, that Volgenau may be receiving a value "bonanza." A523. Defendants seek to justify their inaction with post-closing speculation and their supposed understanding that Volgenau was getting less than others.[19] SRA Br. at 10; EV Br. at 26-28; PEP Br. at 11-12, 34. The use of the Merger price per share to calculate Volgenau's equity percentage in his roll-over agreement with Providence (SRA Br. at 29; EV Br. at 32; PEP Br. at 29) does not equate to affirmative compliance by the Board members as to their fiduciary duty of loyalty. That is particularly so where the Certificate created a

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[18] Given that no documents or testimony indicate that the Board complied with that obligation, it is unsurprising.

[19] Post-closing information is irrelevant to Plaintiff's claims regarding the fairness of the Merger and equal treatment. *See e.g. Southern Peru,* 52 A.3d at 815-16 ("I will take the difference between this fair price and market value of 67.2 million shares of Southern Peru as of the merger date"). It is also inconsistent the business plan presented by Providence and Volgenau to potential lenders. AR43-49.

specific duty for the Board in mergers above and beyond default fiduciary duties.[20] Implicit adherence is not good enough. Moreover, Defendants' own experts agree that the Merger consideration is unequal if the intrinsic value of SRA stock was greater than $31.25 per share. AR11, 13.

Defendants incorrectly assert that Plaintiff "for the first time" raised that Volgenau's post-closing governance rights as part of his overall consideration in the Merger was of value. EV Br. at 29. Plaintiff raised the issue in summary judgment briefs (A214, 240) and at oral argument. A3134-36. In addition, the Court below included it in its Opinion. SJ Op. at 60 n.186. The Court below expressed reservations regarding Volgenau's role as chairman-to-be of post-closing SRA. That these governance rights evade economic valuation by their nature does not render them valueless as part of the full package obtained by Volgenau in the Merger. Indeed, the record supports that these rights were essential to Volgenau as they provided him with a means to protect his demand for preservation of his vision for SRA, post-closing.

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[20] Defendants' argument that Plaintiff's position "would have the practical effect of prohibiting mergers involving different forms of consideration" (EV Br. at 34, PEP Br. at 29), ignores the fact it is the Certificate, and not specific interpretation of Delaware law, that dictates the equal treatment of the shares. Because the Board did not seek stockholder approval to amend the Certificate, its members' duty of loyalty required that the Certificate be followed.

D. Defendants' Interpretation of Section 124 is Wrong

The Court below's partial judgment on the pleadings under Section 124 is the first and only case to block a direct claim challenging the validity of the consequences of fiduciaries' conduct in violation of a charter provision. *See Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 653 (Del. Ch. 2013) (citing the Court below's opposite holding).[21]

Defendants attack *Carsanaro* as convoluted statutory interpretation that ignores the plain meaning of Section 124. EV Br. at 35. They have it backwards. Section 124 is titled, "[e]ffect of lack of corporate capacity or power; *ultra vires*," and speaks to invalidity by reason of "the corporation [being] without power to do such act…" Defendants are correct that the language is unambiguous, but it says the opposite of what they want. Section 124 does not address actions undertaken by individuals or the resulting voidability or invalidity of a transaction due to individual, as distinct from corporate, acts. Defendants also criticize Plaintiff for not articulating damages under the claim. That is why the Court of Chancery is vested with the power "to fashion any form of equitable and monetary relief" to redress Defendants' inequitable conduct. *Weinberger*, 457 A.2d at 714 (Del. 1983). And, Plaintiff has established a record quantifying the harm done to SRA stockholders as a result of Defendants' inequitable conduct. *See e.g.*, A645-736.

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[21] *Carsanaro* identified numerous examples of cases that would have run afoul of the Court below's expansive interpretation of Section 124. *Id.* at 652 n.7.

III. CONCLUSION

Defendants and the Court below seize on *MFW* and *Hammons* to narrow the scope of *Lynch*. In doing so, the entire fairness standard that has protected the interests of minority stockholders from abuse by controllers has been all but eliminated. Neither *MFW* nor *Hammons* should be adopted by this Court. To the extent this Court believes either test should be adopted, the mere nominal compliance with factors enumerated by those cases should not earn controlling stockholders and their controlled boards business judgment deference. Rather, this Court should insist on exacting scrutiny of compliance. Without it, controlling stockholders will have free reign to extract disproportionate benefits at the expense of minority stockholders.

For the reasons stated above and in its Opening Brief, Plaintiff respectfully requests the Court reverse the judgments of the Court below and remand this action for trial on all counts.

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