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Case No. 6120-VCN

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

RICHARD FRANK, Plaintiff, v. ZAK W. ELGAMAL, JAIME OLMO-RIVAS, BLAND E. CHAMBERLAIN III, JOSE CHAPA JR., CHARLES BAILEY, MICHAEL KLEINMAN, HENRY Y. L. TOH, GREAT POINT PARTNERS I, LP, AH HOLDINGS INC., AH MERGER SUB, INC., and AMERICAN SURGICAL HOLDINGS, INC., Defendants.	)	**C.A. No. 6120-VCN**

MEMORANDUM OPINION

Date Submitted: November 14, 2013
Date Decided: March 10, 2014

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Richard Frank ("Frank") brings claims against the board (the "Board") and two key employees of Defendant American Surgical Holdings, Inc. ("American Surgical") in the context of American Surgical's merger (the "Merger") with an affiliate of Great Point Partners I, LP (together with AH Holdings Inc. and AH Merger Sub, Inc., "GPP"). In the Merger, which was the culmination of a market canvass to sell the company in response to an unsolicited expression of interest by GPP, some stockholders who together held a majority of American Surgical's stock (the "Rollover Group") received a combination of cash and equity in the surviving entity, while the other stockholders received only cash.

Frank alleges that the Rollover Group breached its fiduciary duties by "foisting an unfair transaction, both in terms of process and price," upon the other stockholders. This unfair transaction allegedly deprived these minority stockholders of the "true value inherent in and arising from American Surgical."[1] Substantially identical allegations underlie Frank's claim for unjust enrichment against the Rollover Group.[2] In addition, Frank alleges that Defendants Zak W. Elgamal ("Elgamal"), Jaime Olmo-Rivas ("Olmo-Rivas"), Charles Bailey

[1] Verified Am. Class Action Compl. (the "Amended Complaint" or "Am. Compl.") ¶¶ 68-76. Previously, the Court dismissed Frank's claim against GPP for aiding and abetting the breaches of fiduciary duty because he failed to state a claim. *See Frank v. Elgamal*, 2012 WL 1096090, at *11-12 (Del. Ch. Mar. 30, 2012).
[2] Am. Compl. ¶¶ 77-79.

("Bailey"), Michael Kleinman ("Kleinman"), Henry Y.L. Toh ("Toh"), Bland E. Chamberlain III ("Chamberlain") and Jose Chapa Jr. ("Chapa," and collectively, with American Surgical, the "Defendants") breached their fiduciary duties to the stockholders of American Surgical under three primary theories: (i) by failing to maximize stockholder value in the sale of the company;[3] (ii) by approving a transaction at a purportedly unfair price after a sale process dictated by the Rollover Group;[4] and (iii) by failing to disclose material information in the proxy statement for the stockholder vote on the Merger.[5]

Pursuant to Court of Chancery Rule 56, the Defendants have moved for summary judgment on Frank's remaining claims (the "Motion"). The Motion implicates two primary questions: first, whether the Merger, in whole or in part, should be subject to the entire fairness standard of review; and second, whether the conduct of a special committee of the Board (the "Special Committee") should shift the burden of proof of entire fairness to Frank.

For the following reasons, the Court is unable to conclude whether the allocation of the consideration paid to the Rollover Group and the minority stockholders in the Merger is subject to the entire fairness standard of review.

[3] *Id.* ¶¶ 85-86. The Court interprets the allegation of a breach of fiduciary duty for failure to adopt a majority-of-the-minority provision in the Merger agreement (the "Merger Agreement") as part of Frank's unfair process claim. *Id.* ¶ 84.
[4] *Id.* ¶¶ 81-82.
[5] *Id.* ¶ 83.

Issues of material fact remain as to whether the Rollover Group was a control group that dictated certain aspects of the negotiations with GPP or that competed with American Surgical's minority stockholders for the consideration paid by GPP. Likewise, assuming the entire fairness standard applies, the Court is unable to conclude if the burden of proof should shift to Frank because issues of material fact remain as to whether the Special Committee was well functioning and fully informed about the material negotiations with GPP over the allocation of the consideration in the Merger.

Separately, the Court concludes that certain defendants are entitled to summary judgment in their favor on certain aspects of Frank's breach of fiduciary duty claim asserted against them. There is no genuine issue of fact that these individuals either did not owe fiduciary duties to the corporation and its stockholders or did not breach their duty of loyalty or act in bad faith by selecting GPP as the highest bidder after the market canvass or by agreeing to the Merger. The Court cannot grant summary judgment as to other aspects of the breach of fiduciary duty claim because there is a possibility that the entire fairness standard may apply.

For these and other reasons set forth below, the Motion is granted in part and denied in part.

II. THE PARTIES

American Surgical was a Delaware corporation headquartered in Houston, Texas. It provided "surgical assistant services to patients, surgeons, and healthcare institutions" in metropolitan areas in Texas, Oklahoma, Virginia, Tennessee, and Georgia.[6] American Surgical's charter included an exculpatory provision for potential monetary liability of its directors under 8 *Del. C.* § 102(b)(7) (the "Exculpatory Provision").[7] Frank was a stockholder of American Surgical until the Merger closed on March 23, 2011.[8]

Elgamal, Olmo-Rivas, Bailey, Kleinman, and Toh comprised the Board of American Surgical. Elgamal and Olmo-Rivas formed the company in 1999,[9] and it went public in March 2007, trading on the OTC Bulletin Board. Elgamal was

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[6] Kwoka Trans. Aff. in Supp. of the Opening Br. of Defs. in Supp. of their Mot. for Summ. J. ("Defs.'") Ex. 12 (American Surgical Holdings, Inc., Proxy Statement (Schedule 14A) (Jan. 20, 2011)) ("Proxy") at 1.

[7] Defs.' Ex. 86. The Exculpatory Provision provides:

> [N]o director of the corporation shall be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit.

[8] Defs.' Ex. 78.

[9] Defs.' Ex. 3 (Elgamal Dep.) at 11-12.

American Surgical's President and Chief Executive Officer; Olmo-Rivas was also an executive officer.[10]

Each of Bailey, Kleinman, and Toh joined the Board in 2007.[11] Bailey has a law degree and has significant experience as a surgeon. Kleinman is a board-certified surgeon and a clinical professor at two prominent universities.[12] Elgamal invited these two doctors to be directors because of their positive working relationships with American Surgical, likely stemming from their use of the company's surgical assistants in their practices.[13] Bailey, for one, was friends with Elgamal and had even used Elgamal and Olmo-Rivas personally as surgical assistants.[14]

Toh was recommended to serve on the Board by Dawson James Securities, Inc. ("Dawson James"), an investment brokerage firm that held a large amount of American Surgical's debt.[15] He had served as a director of several companies and was also designated American Surgical's lead independent director and financial expert.[16] Toh did not have a personal relationship with anyone in the Rollover Group prior to joining the Board, and his professional relationship with Elgamal

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[10] Defs.' Ex. 7 (American Surgical Holdings, Inc., Annual Report (Form 10-K) (Mar. 19, 2010) ("2009 Form 10-K") at 11, 21.
[11] *Id.* at 22.
[12] Defs.' Ex. 7 (2009 Form 10-K) at 22.
[13] Defs.' Ex. 3 (Elgamal Dep.) 18-20.
[14] Zeldin Trans. Aff. in Supp. of Pl.'s Answering Br. in Opp'n to Defs.' Mot. for Summ. J. ("Pl.'s") Ex. 1 (Bailey Dep.) 17, 20-23, 25.
[15] Defs.' Ex. 3 (Elgamal Dep.) 20.
[16] Defs.' Ex. 7 (2009 Form 10-K) at 21.

and Olmo-Rivas away from the company before the Merger was limited to receiving, in exchange for serving as an interpreter, a five percent interest in a company founded by Elgamal and Olmo-Rivas that he claimed "never went anywhere."[17]

During the time period at issue in this action, the Board would form first a mergers and acquisitions committee (the "M&A Committee") and then the Special Committee. Elgamal, Olmo-Rivas, and Toh comprised the M&A Committee. Bailey and Kleinman comprised the Special Committee.

Chamberlain and Chapa were surgical assistants employed by American Surgical. They started working for the company, respectively, after it purchased Regional Surgical Assistants, Inc., from Chapa in 2005[18] and Katy Surgical Assistants, Inc., from Chamberlain in 2006.[19] Chamberlain and Chapa were neither directors nor officers of American Surgical, but they were designated as "key employees" in the company's filings with the Securities and Exchange Commission ("SEC").[20]

Elgamal, Olmo-Rivas, Chamberlain, and Chapa are the members of the Rollover Group. They were American Surgical's four largest stockholders before the Merger: Elgamal beneficially owned 27.53% of the company's common stock;

[17] Defs.' Ex. 5 (Toh Dep.) 18-20, 28-32.
[18] Defs.' Ex. 8, 9.
[19] Defs.' Ex. 10, 11.
[20] *See, e.g.*, Defs.' Ex. 7 (2009 Form 10-K) at 21-22.

Olmo-Rivas beneficially owned 27.58%; and Chamberlain and Chapa each beneficially owned 8.04%. Excluding options and stock held by their families, the members of the Rollover Group held 68.42% of American Surgical's stock at the time of the Merger, with Elgamal and Olmo-Rivas holding over 50%.[21]

III. BACKGROUND

A. *American Surgical's Financial Performance in 2009*

American Surgical's business model was relatively straightforward: its surgical assistants would perform medical procedures, and the company would bill the patient's insurance company. The overwhelming majority of the company's revenue was generated through procedures involving patients covered by private insurance.[22] In 2007, only a handful of states required insurance companies to reimburse surgical assistants;[23] accordingly, the company's national growth prospects were fairly limited.

From summer 2007 until early 2009, the company was suffering from negative cash flow, primarily because some insurers were not reimbursing the company for services already provided by its surgical assistants. To compound

[21] Defs.' Ex. 12 (Proxy) at 89.
[22] Defs.' Ex. 7 (2009 Form 10-K) at 1.
[23] *See, e.g.*, Defs.' Ex. 16.

this problem, Dawson James indicated its intent to foreclose on an American Surgical note in excess of $2 million that had become due around this time.[24]

By mid-2009, American Surgical's financial outlook had improved. The company made budget cuts, filed lawsuits to recover outstanding insurance claims, and entered into agreements with certain third-party administrators to improve collection rates. And, Toh was able to negotiate more favorable terms with Dawson James on the outstanding note.[25] Others—including GPP, a private equity firm with several portfolio companies in the medical industry[26]—took notice of this improved performance.

B. *GPP First Expresses Interest in a Transaction with American Surgical*

In June 2009, a GPP representative cold-called Elgamal to see if he was interested in talking with GPP about its interest in "buying the company."[27] After dismissing the GPP representative's overtures more than once, Elgamal referred him to Jim Longaker ("Longaker"), the company's Chief Financial Officer ("CFO"). The GPP representative again expressed interest to Longaker about a possible transaction between his firm and American Surgical, and Longaker relayed this information to Elgamal.[28]

[24] Defs.' Ex. 5 (Toh Dep.) 39-40.
[25] *Id.*
[26] Defs.' Ex. 4 (Longaker Dep.) 30.
[27] Defs.' Ex. 3 (Elgamal Dep.) 47-48.
[28] Defs.' Ex. 14; Ex. 4 (Longaker Dep.) 26-28.

C. *The Board Responds to GPP's Interest by Forming the M&A Committee*

Eventually, the Board was notified about GPP's expression of interest. Then, the Board considered its options and, according to Elgamal, "agreed on the concept of putting the company up for sale."[29] Several reasons motivated their thinking that it might be an opportune time in general to sell American Surgical. First, the directors expected that the company would be an attractive target because of its recent financial performance. Second, Elgamal and Olmo-Rivas were approaching retirement and looking for an "exit strategy."[30] Third, the Board was uncertain about the company's future in light of upcoming federal healthcare legislation—namely, the Patient Protection and Affordable Care Act.[31] Because American Surgical was not reimbursed for providing surgical assistants to patients covered by Medicare and Medicaid, the expected enrollment increase for these federal programs by virtue of healthcare reform legislation was perceived as a threat to the company's future revenue. Bailey could not recall exactly when the concept of putting the company up for sale was agreed upon, but he nonetheless thought it was "a rational thing to consider."[32]

The directors soon had informal discussions in late June or July 2009 about forming a committee to take charge, at least initially, of this project. Elgamal,

[29] Defs.' Ex. 3 (Elgamal Dep.) 57.
[30] *Id*. 70-71; Ex. 4 (Longaker Dep.) 27; Ex. 14.
[31] Defs.' Ex. 3 (Elgamal Dep.) 70-71; Ex. 1 (Bailey Dep.) 49-50; Ex. 5 (Toh Dep.) 42.
[32] Pl.'s Ex. 1 (Bailey Dep.) 55-58.

Olmo-Rivas, and Toh were the focus of who would serve on the M&A Committee, which would quickly begin a process to canvass the market for potential acquirers of American Surgical.[33] Elgamal and Olmo-Rivas asked Toh to find a financial advisor; Toh recommended Marshall Webb ("Webb") of Polaris Group ("Polaris").

In Toh's opinion, Webb was the right advisor at the right price. Toh understood that Webb had "immense public company experiences," particularly with companies similar to American Surgical.[34] Although he did not know anyone in the Rollover Group, Webb described his focus at Polaris as providing financial advisory services to the "staffing and healthcare services industry."[35] After meeting with Webb, the M&A Committee found him "credible" and then "agreed on hiring him" as the company's financial advisor.[36]

On July 10, 2009, American Surgical formally engaged Polaris to provide certain sell-side advisory services. Specifically, Polaris would "identify and qualify select potential acquirers of One-Hundred Percent (100%), or subject to the final decision of Messrs. Elgamal and Olmo[-Rivas], a controlling equity interest, of [American Surgical]." Webb would receive $7,500 as an advisory fee plus

[33] Defs.' Ex. 3 (Elgamal Dep.) 57; Ex. 5 (Toh Dep.) 48-49, 58.
[34] Defs.' Ex. 5 (Toh Dep.) 45-47.
[35] Defs.' Ex. 6 (Webb Dep.) 13-14. Polaris's general business is to provide "M&A services, raising of capital, debt and the advisory services." *Id.*
[36] Defs.' Ex. 3 (Elgamal Dep.) 32-33.

reimbursement of reasonable expenses.[37] Elgamal anticipated that Webb's primary assignment would be to find "a credible potential acquirer to buy the company."[38]

More than a month after hiring Webb, on August 12, 2009, the Board formally ratified the formation of the M&A Committee "for the purpose of pursuing business opportunities" for the company. The Board also formally appointed Polaris as the financial advisor to the M&A Committee.[39]

D. *Webb's Market Canvass Yields Three, Serious Indications of Interest*

Webb began to compile a list of "qualified acquirer[s]" that would "potentially have interest in American Surgical."[40] By October 2009, Polaris had distributed blind summaries to thirty-five possible acquirers.[41]

Potential acquirers, including private equity firms such as GPP, began preliminary discussions with Webb. In the midst of this process, Elgamal and Olmo-Rivas noted to Webb and Toh that, were there to be a merger, they would be open to rolling over a portion, between 20-30%, of their American Surgical stock into equity in the surviving entity.[42] It was framed as a "no less than 70% up front"

[37] Defs.' Ex. 17.
[38] Defs.' Ex. 3 (Elgamal Dep.) 38-40.
[39] Defs.' Ex. 18.
[40] Defs.' Ex. 6 (Webb Dep.) 38-42.
[41] Defs.' Ex. 19.
[42] Defs.' Ex. 90.

condition.[43] Both individuals also expressed their unwillingness to rollover any equity without a sufficient employment package with the surviving entity.[44]

Based on a representative's initial conversation with Longaker, GPP expected that members of management would want to cash out their entire interest in American Surgical in any transaction. But, after a meeting with various members of the Rollover Group, a GPP representative noted in an internal email that "the owners mentioned their desire to roll 30% into Newco."[45] In a separate internal email in January 2010, a GPP representative would describe the firm's "strong preference" for a 30% rollover "by all the key management members."[46] As a member of the GPP deal team testified, his position was for the company's management "to have a meaningful rollover into Newco," while the Rollover Group was only "willing to roll enough to get the deal done."[47]

Over twenty entities contacted by Webb indicated varying levels of positive responses.[48] Before the end of the year, the company received non-binding indications of interest from three potential acquirers: (i) Celerity Partners ("Celerity") on November 16;[49] (ii) GPP on October 6, with financial terms

[43] Pl.'s Ex. 31.
[44] Defs.' Ex. 90.
[45] Pl.'s Ex. 30. As will be seen, the Court's analysis does not turn on the truth of this statement, and thus the Court need not resolve whether it should be excluded as hearsay.
[46] Defs.' Ex. 50.
[47] Defs.' Ex. 2 (Dolder Dep.) 124.
[48] Defs.' Ex. 19.
[49] Defs.' Ex. 22.

provided on November 25;[50] and (iii) Nurses in Partnership ("NIP") on December 15.[51]

The financial terms of the three letters varied. Celerity contemplated purchasing 100% of the stock held by the Rollover Group for $26.1 million.[52] GPP proposed to acquire American Surgical through a merger in which the company's largest stockholders—the Rollover Group plus Longaker and Toh—would receive $2.065 in cash per share and $0.885 in stock in the surviving entity per share and the minority stockholders would receive $2.95 in cash per share. This ratio reflected an effective 30% rollover for an approximately 21% interest in the surviving entity.[53] Finally, NIP proposed to acquire 65% of the company's fully diluted shares for $15.6 million, with $7 million paid in cash and $8.6 million paid in a note over 36 months. NIP's offer implied an enterprise value of $24 million,[54] which was the lowest of the three indications of interest.

The M&A Committee delegated primary responsibility for responding to potential acquirers and preliminary due diligence requests to Toh and Webb.[55] Less than a week after its first letter, Celerity submitted a second indication of interest that implied an enterprise value of $27.5 million. It contemplated, after

[50] Defs.' Ex. 20, 23.
[51] Defs.' Ex. 21.
[52] Defs.' Ex. 22.
[53] Defs.' Ex. 23.
[54] Defs.' Ex. 21.
[55] Defs.' Ex. 6 (Webb Dep.) 52-53.

reimbursement of transaction fees, a preferred stock issue for 70% of the company to Celerity with current American Surgical stockholders receiving a pro-rata portion of a $22 million dividend, financed by cash and debt, and retaining a 30% equity interest in the company.[56]

E. *The Board Forms the Special Committee to Take Over the Sale Process*

1. The Special Committee's Purpose

In the midst of receiving these indications of interest, on December 2, 2009, the Board held a meeting and deemed it in "the best interests of all shareholders, especially the minority shareholders," to form the Special Committee of independent directors "to carry out the duty of care and loyalty, in the evaluation of these potential offers, in order to maximize shareholders value."[57] At Toh's nomination, Bailey and Kleinman comprised the Special Committee.[58] Elgamal in particular "wanted independent directors to be involved [in the sale process] . . . to make sure that the interest of the minority shareholders is taken care of" in any possible transaction.[59] Although he was initially considered, Toh declined to serve on the Special Committee, presumably due to Dawson James's recommending him to the Board, because he "felt there should be zero conflict of interest."[60]

[56] Defs.' Ex. 29.
[57] Defs.' Ex. 30.
[58] *Id.*
[59] Defs.' Ex. 3 (Elgamal Dep.) 88-92.
[60] Defs.' Ex. 5 (Toh Dep.) 59.

Bailey understood his role on the Special Committee as "protecting the minority shareholders." He believed that he and Kleinman should "look at everything . . . from the viewpoint of how it would impact the minority shareholders . . . and act in their best interest."[61] At the time, there was no particular discussion about whether the sale of American Surgical would create a conflict between the Rollover Group, particularly Elgamal and Olmo-Rivas, and the company's minority stockholders.[62]

On December 10, 2009, after a presentation by Toh on the qualifications of the law firms bidding on the engagement, the Special Committee retained Robert Viguet ("Viguet") from Thompson & Knight LLP as its legal advisor.[63] Bailey considered the firm well-respected and appreciated that Viguet personally "had done a lot of this type of work in the past."[64] At the next Special Committee meeting on December 12, Viguet informed Bailey and Kleinman about "the rules that exist for the protection of minority shareholders," especially "the function of special committees." The minutes reflect additional discussion about this topic.[65]

[61] Pl.'s Ex. 1 (Bailey Dep.) 72-73, 77.
[62] Pl.'s Ex. 1 (Bailey Dep.) 63.
[63] Defs.' Ex. 33.
[64] Defs.' Ex. 1 (Bailey Dep.) 78-79.
[65] Defs.' Ex. 34.

2. The Special Committee's Role in Negotiations

The Special Committee, Bailey and Kleinman, did not directly negotiate with any potential acquirer, including GPP.[66] At his deposition, Bailey conceded that he considered mergers and acquisitions as "out of [his] area of expertise."[67] The process adopted, from Bailey's perspective, was that the Special Committee would "monitor negotiations" conducted by others on its behalf—primarily Toh, Webb, and Viguet—and then "send instructions back" with an eye toward discharging its "duty to not go along" with "anything that looks like it's harmful to the minority stockholders." Bailey personally viewed Webb not so much as an advisor but rather as someone who kept the Special Committee "informed."[68]

At their depositions, Webb and Toh agreed with this description of the overall negotiation process.[69] Toh explained the procedure as "[t]he M&A committee, through me, at the direction of the special committee[,] negotiated directly with [potential acquirers] through me and Marshall [Webb]." When possible, Toh consciously structured the negotiations in a way that would avoid any direct contact between the Special Committee and any potential acquirer.[70]

[66] Pl.'s Ex. 56 (Toh Dep.) 84-85.
[67] Defs.' Ex. 1 (Bailey Dep.) 60-61.
[68] *Id.* 73-75.
[69] Defs.' Ex. 5 (Toh Dep.) 84-85; Ex. 6 (Webb Dep.) 52-53.
[70] Defs.' Ex. 5 (Toh Dep.) 84-85.

The Special Committee held six meetings after its formation in December 2009 through January 2010.[71] During this period, the Special Committee generally did not review the specific actions taken by the M&A Committee, such as the market canvass conducted by Webb.[72] On December 16, 2009, Webb presented to the Special Committee a summary of the indications of interest from Celerity, GPP, and NIP.[73] Based on his past experiences, Bailey was most interested in a transaction that would yield all cash, instead of a mix of cash and equity in the surviving entity, for American Surgical's minority stockholders.[74] The Special Committee directed Webb and Toh to continue to negotiate with all three potential acquirers.[75]

F. *Negotiations Continue with the Three Potential Acquirers*

1. NIP Soon Drops from Contention

On January 10, 2010, NIP submitted a revised, non-binding letter of intent on the same financial terms—acquiring 65% of the company's fully diluted stock for $15.6 million—as its earlier letter.[76] The Special Committee found many terms in the NIP offer, including this price, to be "not attractive."[77] Webb also found the NIP offer to be "unrealistic" such that no one seriously viewed NIP as a

[71] Defs.' Ex. 33-38.
[72] Pl.'s Ex. 1 (Bailey Dep.) 82.
[73] Defs.' Ex. 35.
[74] Defs.' Ex. 1 (Bailey Dep.) 92-93.
[75] *See, e.g.*, Defs.' Ex. 35-37.
[76] Defs.' Ex. 44.
[77] Defs.' Ex. 1 (Bailey Dep.) 92.

"contender."[78] It does not appear that the Special Committee requested any further negotiations with NIP after this revised letter.

2. Competing Offers by Celerity and GPP

Based on continuing negotiations and due diligence, Celerity submitted a third, non-binding indication of interest on January 12 (the "Third Celerity Letter"). The proposal implied an enterprise value of $46 million "based on a 4.6x multiple of approximately $10.0 million of 2009 adjusted EBITDA." It provided for Celerity to receive 70% of the equity of American Surgical and reimbursement of its transaction fees, with current stockholders receiving a pro-rata portion of a $39,075,000 dividend, financed by cash and debt, and retaining a 30% equity interest in the company. The Third Celerity Letter also contemplated a termination fee of $1.84 million.[79]

GPP submitted its own revised letter of intent on January 15 (the "Second GPP Letter"). The consideration contemplated was largely similar to GPP's previous letter, with the minority stockholders of American Surgical to receive $2.95 in cash per share and a select group of stockholders—now the Rollover Group plus only Longaker—to receive $2.065 in cash per share and a pro-rata portion of a 21% equity interest in the new subsidiary of GPP. The Second GPP Letter capped each of the transaction reimbursement and termination fees at

[78] Defs.' Ex. 6 (Webb Dep.) 61.
[79] Defs.' Ex. 45.

$500,000, and it included a fiduciary out that would appear in every subsequent proposal by GPP. Further, it proposed the "key terms of employment" for Elgamal and Olmo-Rivas.[80]

The Special Committee and its advisors considered the Third Celerity Letter and the Second GPP Letter at a meeting on January 15, 2010. The employment terms for Elgamal and Olmo-Rivas of the Second GPP Letter were described as "a condition to the proposed acquisition." Webb and Toh reported on their discussions with Elgamal and Olmo-Rivas about "their requirements as to compensation in order to continue as officers and employees of the Company," and both individuals had "indicated that they would" accept the key employment terms proposed. Webb viewed the Second GPP Letter as "much more attractive to the Company than any of the other offers," but he nonetheless thought he could negotiate a higher offer from Celerity. The Special Committee directed him to obtain the "highest and best offer for the sale of the Company" from Celerity and GPP.[81]

3. The Highest and Best Offers

Webb was not successful in negotiating an all-cash offer from Celerity for the minority stockholders of American Surgical. Celerity did submit a fourth letter of intent, but its financial terms did not differ materially from those of the Third

[80] Defs.' Ex. 46.
[81] Defs.' Ex. 37.

Celerity Letter and the implied enterprise value of $46 million.[82] By contrast, Webb's efforts with GPP were more fruitful. A week after the Second GPP Letter, GPP submitted another revised letter of intent on January 22 (the "Third GPP Letter"). At an enterprise of approximately $47.5 million, the Third GPP Letter provided for the minority stockholders to receive $3.1655 in cash per share and for the Rollover Group plus Longaker to receive $2.2158 in cash per share and approximately 21% ownership of the surviving entity. Once again, these terms assumed an effective 30% rollover by the Rollover Group and Longaker. The Third GPP Letter further contemplated a forty-five day exclusivity period, but it still included a fiduciary exception for the Board to consider a superior proposal.[83]

4. Contemporaneous Actions by the Board

Around this time, the Special Committee determined that, because outstanding options would vest upon a transaction and thus reduce the per-share consideration received by American Surgical stockholders, it was in the interest of all stockholders to reduce the number of outstanding options. At a January 21 meeting, the company's compensation committee, comprised of Bailey and Kleinman, decided to offer cash bonuses totaling $562,500 to Board members in exchange for their cancelling of 625,000 options for American Surgical stock (the "Option Exchange"). At an average strike price of $2.20, the consideration was

[82] Defs.' Ex. 47.
[83] Defs.' Ex. 49.

approximately $0.90 per option. Through the Option Exchange, Elgamal and Olmo-Rivas received $225,000 each; Toh received $67,500; and Bailey and Kleinman received $22,500 each.[84]

G. *The Special Committee Accepts the Third GPP Letter*

During a meeting on January 23, 2010, the Special Committee considered, for a final time, the highest and best proposals from Celerity and GPP. At this time, the Special Committee does not appear to have requested or received financial projections from management.[85] Webb considered these proposals from Celerity and GPP to be "the most favorable offer that he believed could be obtained from the potential purchasers." When asked directly by the Special Committee which proposal was more favorable to the company's minority stockholders, Webb described the Third GPP Letter as representing "the best overall proposal for shareholders of the Company." Based on Webb's comments and additional analysis by Toh and Viguet, the Special Committee voted to accept the terms of the Third GPP Letter.[86] The Board then unanimously accepted the recommendation of the Special Committee on January 25.[87]

[84] Pl.'s Ex. 5.
[85] Pl.'s Ex. 1 (Bailey Dep.) 107.
[86] Defs.' Ex. 38.
[87] Defs.' Ex. 51.

H. *GPP Revises the Financial Terms of its Proposal*

As GPP conducted further due diligence of American Surgical, a material dispute arose. The company was notified in late February 2010 about a quality of earnings report by KPMG, GPP's due diligence advisor, raising an objection to certain aspects of the company's revenue for 2009.[88] In brief, American Surgical recognized $2.7 million in revenue in 2009 for surgical assistant services provided in 2008.[89] KPMG took the position that, even though this revenue recognition was not improper under generally accepted accounting principles, it artificially inflated American Surgical's 2009 revenue, and thus GPP's valuation of the company.[90] Based on this and other objections, KPMG recommended revising the company's 2009 EBITDA from $10.5 million to $7.1 million.

Consequently, GPP wanted to revise the terms of the Third GPP Letter. In an early March 2010 diligence presentation, GPP expressed its interest to Toh and Webb in reducing the consideration to be received from $3.166 in cash per share for American Surgical's minority stockholders and $2.216 in cash per share and approximately 21% ownership of the surviving entity for the Rollover Group plus Longaker to $2.532 in cash per share for the minority stockholders and $1.773 in

[88] Defs.' Ex. 2 (Dolder Dep.) 87-89; Defs.' Ex. 12 (Proxy) at 25.
[89] Defs.' Ex. 3 (Elgamal Dep.) 113.
[90] Defs.' Ex. 52.

cash per share and 21.4% of the surviving entity for the Rollover Group and Longaker.[91]

Sometime during March 9 or March 10, representatives of GPP met with Toh and Webb to negotiate revised financial terms.[92] After the meeting, GPP thought it had "reached a revised deal" at $2.86 per share.[93] The next day, Webb circulated by email to Elgamal, Olmo-Rivas, and Toh his recollection of three options (the "Three Options") discussed with GPP,[94] although that GPP representative testified at his deposition that he could not recall specifically discussing "this array" of particular options at that meeting.[95] The Three Options differed in the amount of cash and equity in the surviving entity to be received by the Rollover Group, now without Longaker, and the per-share cash consideration to be received by American Surgical's minority stockholders.

On one side of the scale, the "First Option" provided that the Rollover Group would receive $2.217 in cash per share and a 16.06% interest in the surviving entity, with the minority stockholders receiving $2.86 in cash per share. On the other side, the "Third Option" provided that the Rollover Group would receive $2.103 in cash per share and a 19.62% interest in the surviving entity, with

[91] Defs.' Ex. 54.
[92] Pl.'s Ex. 53 (Dolder Dep.) 114-15.
[93] Pl.'s Ex. 11.
[94] Defs.' Ex. 91. As used in this memorandum opinion, the spreadsheet outlining the Three Options is admissible as a recorded recollection. D.R.E. 803(5).
[95] Pl.'s Ex. 53 (Dolder Dep.) 114-15.

other stockholders receiving $2.90 in cash per share. The "Second Option" contemplated consideration terms between those of the First Option and the Third Option.[96]

In sum, based on Webb's presentation of the Three Options, the less stock rolled over by the Rollover Group, the more net cash received by the Rollover Group but the less cash per share received by the minority stockholders, and vice versa. In the spreadsheet outlining the Three Options, Webb noted that the First Option—the $2.86 figure—had been selected on March 10, which comports with the understanding of GPP's representative. The spreadsheet further noted that the selection was "subject to review" by Elgamal and Olmo-Rivas.[97]

The next day, GPP submitted an amended and restated letter of intent (the "Amended GPP Letter"). The Amended GPP Letter closely tracked the terms of the First Option, providing for the Rollover Group to receive $2.217 in cash per share and a 14.9% interest in the new entity, with the minority stockholders to receive $2.86 in cash per share. These terms implied an effective 22.5% rollover. The Amended GPP Letter expressly contemplated an aggregate equity value of approximately $42.8 million such that the per-share consideration would be

[96] Defs.' Ex. 91.
[97] *Id.*

adjusted if the total number of fully diluted shares changed before the transaction closed.[98]

I. *The March 12, 2010, Meeting of the Special Committee*

1. Approval of the Amended GPP Letter

The Special Committee met on March 12 to discuss the Amended GPP Letter. Toh testified that he informed the Special Committee about the recent negotiations with GPP and that Webb described the Three Options to the Special Committee.[99] But, Webb testified that he believed "what we discussed [at this meeting] is set forth in the minutes."[100] The minutes of this meeting do not reflect any discussion of the Three Options.[101] At his deposition, Bailey could not recall if the Three Options were discussed at this meeting, and he had no recollection of how the $2.86 per share figure was arrived at.[102]

The minutes reflect that the Special Committee discussed some of the merits of the downward revision. Webb explained that the Amended GPP Letter reflected a downward adjustment in the valuation of American Surgical, based on the 2009 revenue objections from KPMG, from $48 million to approximately $43 million.[103] Outside the meeting, both Webb and Toh adamantly disagreed with the

[98] Defs.' Ex. 48.
[99] Defs.' Ex. 5 (Toh Dep.) 89-90, 94-95.
[100] Defs.' Ex. 6 (Webb Dep.) 110-11.
[101] Defs.' Ex. 52.
[102] Pl.'s Ex. 1 (Bailey Dep.) 118-22.
[103] Defs.' Ex. 52.

conclusions of the KPMG report.[104] At one point, Toh even discussed the issue with the company's own auditor, which claimed it could prove that the KPMG objections were wrong.[105] But, from Bailey's perspective, a further investigation was not necessary; he testified that he would only have looked into the propriety of the downward revisions if he expected GPP was "making [it] up."[106]

The meeting minutes by this time still do not reflect any direct conversation about American Surgical's financial projections. Nor do they reflect any discussion between the Special Committee and Longaker, the company's CFO, about American Surgical's financial prospects. Bailey, for one, did not recall any "real discussion" with Longaker.[107] Still, Bailey was "sure somebody did the math for us" to demonstrate that the downward revision was reasonable.[108] The meeting minutes do not reflect any discussion about a counterproposal, and Bailey could not remember if the Special Committee ever made one.[109]

Nonetheless, at the meeting, Webb expressed his belief that the Amended GPP Letter "still represented an attractive offer for shareholders of the Company." Based primarily on Webb's comments, the Special Committee concluded that the revisions to the consideration to be received by the company's minority

[104] Pl.'s Ex. 2 (Webb Dep.) 91-93; Pl.'s Ex. 56 (Toh Dep.) 81-82.
[105] Pl.'s Ex. 56 (Toh Dep.) 82.
[106] Pl.'s Ex. 1 (Bailey Dep.) 114-19.
[107] *Id.* 81.
[108] *Id.* 125-26.
[109] *Id.* 119-21.

stockholders and the consideration and employment terms for the Rollover Group were "reasonable and appropriate." In particular, the Special Committee concluded that there was a "significant likelihood" that any other potential acquirer, such as Celerity, "would demand similar adjustments" upon discovering the issue raised by KPMG such that the Amended GPP Letter was still the best value for American Surgical stockholders. Accordingly, the Special Committee approved the terms of the Amended GPP Letter.[110] As Bailey would later note at a Special Committee meeting in May 2010, he had concluded that the $2.86 price was fair in part because it was more than double the market price for the company's stock on the OTC Bulletin Board.[111]

2. The Selection of a Financial Advisor for a Fairness Opinion

The next topic at the March 12 Special Committee meeting was the "engagement of an investment banker with the requisite skills to provide a fairness opinion for the benefit of the non-Rolling Shareholders of the Company." Viguet advised that it would be important for the Special Committee to engage a financial advisor to opine that the terms of the Amended GPP Letter were fair, from a financial perspective, to American Surgical's minority stockholders.

Webb identified several candidates and discussed two strictly confidential proposals he had received from Gulfstar Group and Howard Frazier Barker Elliot

[110] Defs.' Ex. 52.
[111] Defs.' Ex. 81; Pl.'s Ex. 1 (Bailey Dep.) 165-66.

("HFBE").[112] In fact, these were two of several firms that Toh had contacted to solicit engagement proposals at the request of the M&A Committee after the Board adopted the Third GPP Letter in January 2010.[113] However, neither of these two or any other bank was formally engaged before this Special Committee meeting.[114]

Webb noted that he was confident in the qualifications of the two banks that had submitted proposals; Viguet echoed that recommendation, noting that he had had positive experiences with both of them. Toh explained that the Gulfstar Group proposal was for a fixed fee of $100,000 plus expenses and the HFBE proposal was for $70,000 plus expenses. After some discussion, the Special Committee selected HFBE and authorized Webb and Toh to negotiate further terms of engagement with it.[115]

3. A Proposal Regarding American Surgical's Outstanding Litigation

The final topic discussed at this March 12 meeting was how best to handle, in the transaction with GPP, American Surgical's outstanding litigation against various insurers over reimbursement denials. Toh discussed the possibility of creating a subsidiary of the company to receive, hold, and distribute the proceeds

[112] Defs.' Ex. 52.
[113] Pl.'s Ex. 56 (Toh Dep.) 96-101.
[114] It should be noted that by March 10, 2010, Toh had solicited and received an engagement letter from HFBE regarding an evaluation of American Surgical's executive compensation. This letter was to be for a project "separate from the transaction" that would be considered if there was no sale of American Surgical. Toh could not recall whether American Surgical executed this engagement letter. Pl.'s Ex. 56 (Toh Dep.) 101-02. No evidence suggests that it did.
[115] Defs.' Ex. 52.

from these claims to the pre-Merger stockholders. Viguet noted that the terms of the Amended GPP Letter permitted this action. The Special Committee directed Toh to prepare a plan to be submitted to the Board for consideration.[116]

Over time, this topic became a difficult issue for Toh and Webb to negotiate with GPP because several lawsuits had prompted counterclaims against American Surgical.[117] The Special Committee was interested in having the benefit from those claims accrue to the company's stockholders rather than to GPP,[118] while GPP was concerned about inheriting counterclaim liability.[119] At certain points, negotiations between the parties would even be put on "hold" because of this issue.[120] Eventually, American Surgical and GPP agreed to carve-out these litigation assets and liabilities from the merger agreement and transfer them to a separate entity, CMC Associates, LLC ("CMC"), which was to distribute the proceeds pro-rata to the company's pre-Merger stockholders.[121]

J. *The Overall Workings of the Special Committee*

The Special Committee would meet nine times over eleven months after approving the Third GPP Letter (and then the Amended GPP Letter) to consider

[116] *Id.*
[117] Defs.' Ex. 55.
[118] Defs.' Ex. 68.
[119] Defs.' Ex. 55.
[120] Defs.' Ex. 69.
[121] Defs.' Ex. 5 (Toh Dep.) 65-66; Ex. 70-71.

the terms of the prospective Merger.[122] Toh sensed that he "talk[ed] constantly" with the Special Committee members about the negotiations.[123] Viguet would attend and provide advice at all but one of the fourteen Special Committee meetings held after he was retained as its legal advisor in December 2009.[124] Additionally, Viguet circulated a memorandum to the Special Committee in September 2010 about the fiduciary duties of directors of Delaware corporations,[125] and he confirmed several times that the Special Committee understood what the memorandum stated.[126] Only once did any member of the Rollover Group attend a Special Committee meeting. Elgamal attended the telephonic meeting on December 12, 2009, during which Viguet was introduced and "the responsibilities of the Committee in connection with certain proposed strategic transactions" were briefly "review[ed] and discuss[ed]."[127]

K. *Additional Developments Related to the Special Committee*

1. Internal Discussion of a Majority-of-All-the-Minority Condition

During a meeting in May 2010, the Special Committee had a significant discussion, lead by Viguet, about whether to require that there be a majority-of-

[122] Defs.' Ex. 52, 55, 68, 69, 79, 80, 81, 82, 83.
[123] Defs.' Ex. 5 (Toh Dep.) 93-94.
[124] Defs.' Ex. 34, 35, 36, 37, 38, 52, 55, 69, 79, 80, 81, 82, 83.
[125] Defs.' Ex. 96.
[126] *See, e.g.*, Defs.' Ex. 81, 82.
[127] Defs.' Ex. 34.

the-minority vote condition to the Merger.[128] To Bailey's knowledge, at the time, no one had raised this specific condition with GPP,[129] and it was not contemplated in the Amended GPP Letter. During the meeting, Viguet noted how the presence of a majority-of-all-the-minority provision may affect a court's standard of review if an American Surgical stockholder were to bring a lawsuit alleging that the Board breached its fiduciary duties when agreeing to a transaction.[130]

The minutes reflect that the Special Committee was concerned that requesting a majority-of-all-the-minority condition might endanger the overall negotiations. Moreover, the Special Committee was concerned that, even if GPP accepted the condition, the company might not receive a sufficient number of proxies to meet it.[131] Bailey in particular was worried that too many American Surgical stockholders might share his tendencies—the proxies he receives personally "all go in the trash."[132]

Accordingly, the Special Committee decided to reconsider whether to seek a majority-of-all-the-minority condition "if the fairness opinion were anything but

[128] Defs.' Ex. 81.
[129] Pl.'s Ex. 1 (Bailey Dep.) 171.
[130] Defs.' Ex. 81. The minutes even include passing references to this Court's recent decision in *In re John Q. Hammons Hotels Inc. Shareholder Litigation*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009).
[131] Defs.' Ex. 81.
[132] Pl.'s Ex. 1 (Bailey Dep.) 158.

positive."[133] The subsequent meeting minutes do not reflect further discussion of this issue.

2. The Ratification of the Special Committee and its Charter

On September 23, 2010, more than nine months after the Special Committee was first established and more than six months after it adopted the Amended GPP Letter, the Board ratified the formation of the Special Committee and clarified its purpose. Specifically, the Board resolved that the Special Committee had the authority "to engage and consult with independent legal counsel and financial advisors," "to direct the activities of the Polaris Group and the merger committee on behalf of the Company," "to negotiate terms and conditions of any potential transaction involving the sale of the Company," and "to reject, at its sole discretion, any proposal relating to a proposed transaction involving the sale of the Company."[134]

L. *A Closer Look at the Actions and Compensation of Toh, Webb, and Viguet*

1. Toh

In April 2010, Toh sent to GPP a list of certain "observations" about the lack of productive negotiations between the parties. Several of these issues related to the surviving entity. In particular, Toh mentioned removing the indemnification to be provided by Elgamal and Olmo-Rivas to GPP for the insurance reimbursement

[133] Defs.' Ex. 81.
[134] Defs.' Ex. 31.

counterclaims, revising the compensation for Chapa and Chamberlain, decreasing the percentage of stock that the Rollover Group would rollover, and increasing Elgamal and Olmo-Rivas's bonus structure.[135] Toh would repeat many of these requests in another email the following day, but at the same time he expressed an interest in "[r]estoring the aggregate equity value and purchase price" to the $3.16 per share figure of the Third GPP Letter.[136] At his deposition, Toh testified that he "always tried to get back [to] what the original purchase price was" during the negotiations with GPP, although he was ultimately unsuccessful in that endeavor.[137]

Toh would later exchange a series of emails in August 2010 with a lawyer representing the Rollover Group in the negotiation of their ancillary agreements with GPP. Largely at the instigation of the lawyer, Toh briefly alluded to the possibility of an American Surgical stock buyback, were the Merger with GPP to fall apart, as one way for Elgamal and Olmo-Rivas to increase their ownership of the company.[138] Then, in September 2010, Toh and Elgamal met with a separate law firm to discuss the steps the company would need to take to buy back stock from major stockholders or to initiate a self-tender.[139] Toh testified that these

[135] Pl.'s Ex. 35.
[136] Pl.'s Ex. 36.
[137] Defs.' Ex. 5 (Toh Dep.) 117.
[138] Pl.'s Ex. 47, 48.
[139] Pl.'s Ex. 49.

early-stage proposals were just ideas that, as members of the Board and as members of the M&A Committee, they were exploring "to increase the value of the company" if the Merger with GPP was not consummated.[140]

In addition to his regular fees for Board and M&A Committee membership, Toh received a $250,000 fee upon the closing of the Merger "for his services in structuring and coordinating the Merger."[141] Toh was the only member of the Board who received this type of fee. It is unclear when this fee was proposed or agreed upon.

2. Webb

Webb was responsible for his own "deal flow," and thus his own compensation, at Polaris.[142] Under the terms of his initial engagement letter with American Surgical, executed on July 10, 2009, Webb was to receive an advisory fee of $7,500 plus reasonable expenses.[143] On March 26, 2010, after the Board adopted the Amended GPP Letter, Webb executed an addendum to his earlier agreement by which he would receive an additional $350,000 "[u]pon completion of the contemplated merger" described in the Amended GPP Letter.[144] Finally, Webb and the Board, represented by Toh, executed a third agreement on July 13,

[140] Pl.'s Ex. 56 (Toh Dep.) 170.
[141] Defs.' Ex. 12 (Proxy) at 45.
[142] Defs.' Ex. 6 (Webb Dep.) 12.
[143] Defs.' Ex. 17.
[144] Pl.'s Ex. 51.

2010, by which Webb would receive $87,500 "to supplement [American Surgical's] internal resources, to compile and provide additional information, and perform and coordinate other services and activities as needed and/or requested by the Company and its Special Committee."[145] The Special Committee minutes do not reflect any specific discussion of the terms of these subsequent agreements or the contingency nature of Webb's $350,000 fee.

In August 2010, in the midst of negotiations with GPP but after the final changes to his advisory fee agreement, Webb emailed the members of the M&A Committee with a list of items to discuss. Under the first heading, Webb wrote, "I believe you [Elgamal] and Jamie [Olmo-Rivas] know that I will initiate any plan, or multiple plans, of action both of you direct me to undertake—and successfully get to the finish line." Webb further requested Elgamal and Olmo-Rivas to consider possible courses of conduct going forward: either continue with the proposed Merger with GPP and "do all we can as fast as we can, to get that deal closed," or "make decisions on whether we want to go full-speed ahead" on alternatives including a recapitalization, a stock buyback program, a management-buyout, possible acquisitions by American Surgical, or "any other track that you

[145] Pl.'s Ex. 52.

and Jamie are comfortable with."[146] It is unclear whether there were any significant conversations about these possible alternatives.

3. Viguet

In February 2010, Viguet sent to GPP a tax memorandum on how to enable deferred tax treatment for the stock in the surviving entity to be received by the Rollover Group.[147] Bailey testified that the Special Committee did not ask Viguet to create or share this memorandum. In fact, Bailey was not even aware of its existence.[148]

M. *American Surgical's Financial Projections*

While the terms of the Merger were being negotiated, the Rollover Group separately wanted to negotiate with GPP the terms of their bonus targets in the surviving entity. A basic problem arose: American Surgical had not customarily maintained financial projections. In May 2010, GPP provided to Webb projections that it had created for the company based on its due diligence review.[149] Webb then shared these projections with Elgamal and Olmo-Rivas.[150] After various adjustments to the bonus targets based on subsequent negotiations, these equity case projections were finalized.[151]

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[146] Pl.'s Ex. 50.
[147] Pl.'s Ex. 45.
[148] Pl.'s Ex. 1 (Bailey Dep.) 111-12.
[149] Pl.'s Ex. 12.
[150] Pl.'s Ex. 13.
[151] Pl.'s Ex. 14.

Around the same time, GPP provided a similar set of financial projections to various lenders to secure financing for the Merger.[152] Webb would describe these as the bank case projections that reflected a conservative approach based on the premise of "[p]romis[ing] the bank less than you expect." The two sets of financial projections then provided by management to HFBE for use in its fairness opinion presentations featured the same revenue and gross profit figures but different EBITDA figures from the equity case and bank case projections provided by GPP to Webb.[153]

N. *Drafts of HFBE's Fairness Opinion*

1. The First Draft

HFBE presented a draft of its proposed fairness opinion to the Special Committee on June 2, 2010.[154] This was the first time the Special Committee spoke with HFBE representatives.[155] The presentation included projections for 2010 through 2014 based on the equity case, the bank case, and a new, midpoint case that, in an effort to be the "most reasonable case," was an average of the other two sets projections.[156] Based on Webb's comments about management's expected

[152] Pl.'s Ex. 15.
[153] Pl.'s Ex. 2 (Webb Dep.) 154, 160-62.
[154] Defs.' Ex. 55.
[155] Pl.'s Ex. 57 (Gates Dep.) 48; Ex. 58 (Moore Dep.) 81-82.
[156] Pl.'s Ex. 16; Ex. 57 (Gates Dep.) 33-34.

compensation as a percent of revenue, the projected EBITDA in the midpoint case decreased.[157]

HFBE noted that, while it did perform a market analysis and other valuations, metrics like the premium over the current stock price were not significant to its conclusion. Instead, the proposed fairness opinion "primarily relied on a discounted cash flow analysis of the Company" based on the projections provided.[158] At his deposition, Bailey could not recall whether the Special Committee discussed how those projections were created.[159] The draft opinion was contingent on several open issues, but, assuming no material changes, HFBE "was prepared to issue the fairness opinion in the form presented to the Committee if and when the merger agreement was finalized by the parties."[160]

2. HFBE Asks for Revised Financial Projections

Because of the on-and-off negotiations between American Surgical and GPP, HFBE was not asked to make another presentation to the Special Committee until December 2010. By that time, HFBE recognized that, in the first nine months of 2010, the company had outperformed the conservative base case projections for all of 2010. That is, in June, projected EBITDA for 2010 was $4.795 million; by

[157] *Compare* Pl.'s Ex. 16, *with* Defs.' Ex. 94.
[158] Defs.' Ex. 55.
[159] Pl.'s Ex. 1 (Bailey Dep.) 187-88.
[160] Defs.' Ex. 55.

the end of the third-quarter, actual EBITDA for the first nine months of 2010 was $5.494 million.[161]

HFBE asked Webb for updated projections, but he initially resisted providing them. Part of his explanation to HFBE was that the company was uncertain about the effects of healthcare reform and the state of the overall economy.[162] Separately, Webb would describe this as a "big issue" for HFBE.[163] Eventually, Webb did provide an update to the averaged, midpoint case projections, which primarily increased the expected EBITDA for 2011 by approximately 10%.[164] Even though the projections for each successive year were based on a growth rate applied to the prior year's projections, no material changes to the 2012 through 2014 projections were made.[165] HFBE had requested updates to the equity case and bank case projections, but it did not receive them. And, no projections for 2015 were provided. Nonetheless, HFBE understood that the updated projections were represented by management to be "representative of [the company's] expected performance."[166]

[161] *Compare* Defs.' Ex. 94, *with* Defs.' Ex. 95.
[162] Pl.'s Ex. 17.
[163] Pl.'s Ex. 44.
[164] Pl.'s Ex. 18.
[165] *See, e.g.*, Pl.'s Ex. 2 (Webb Dep.) 148-51.
[166] Pl.'s Ex. 57 (Gates Dep.) 62-65.

3. The Second Draft

On December 15, 2010, HFBE presented the second draft of its proposed fairness opinion to the Special Committee. Unlike in the June presentation, now HFBE only presented an analysis based on the updated midpoint case projections. The presentation was again based on several valuation methodologies, with the discounted cash flow analysis "very similar" to, but slightly "adjusted" from, that conducted by HFBE in June. Assuming no material changes, HFBE was prepared to issue the fairness opinion.[167]

O. *Further (Minor) Changes to the Financial Terms of the Merger*

The per share consideration terms were slightly increased during the course of negotiations. First, the parties agreed, based on a decrease in the number of fully diluted shares and consistent with the terms of the Amended GPP Letter, that the per-share consideration in the Merger should increase from $2.86 to $2.87.[168] Second, the parties agreed that the company would retain the ability to declare dividends before executing the Merger Agreement.[169] At its December 1, 2010, meeting, the Board approved a cash dividend of $0.16 per share to be paid on December 23.[170] Third, Webb, on behalf of the Special Committee, negotiated the

[167] Defs.' Ex. 82.
[168] Defs.' Ex. 72.
[169] Defs.' Ex. 73, 74.
[170] Defs.' Ex. 75.

ability of the company to declare a post-signing dividend, of which the Board would take advantage to pay an additional $0.02 per share to stockholders.[171]

P. *The Ancillary Agreements Negotiated by the Rollover Group*

In the middle of the overall negotiations over the transaction, the Rollover Group negotiated voting agreements, exchange agreements, and employment agreements with GPP (the "Rollover Agreements"). The Rollover Agreements would generally effect what was reflected in the Amended GPP Letter. By their terms, the Rollover Group would vote in favor of the Merger,[172] exchange a portion of its American Surgical stock for stock in the surviving entity,[173] and agree to employment terms with GPP.[174] Aside from their being informed about the process, it does not appear that the Special Committee, Toh, Webb, or Viguet was materially involved in the negotiations of these terms beyond what was initially included in the Amended GPP Letter.[175]

Q. *The Board and American Surgical Stockholders Approve the Merger*

The Special Committee met a final time on December 19, 2010. At the meeting, HFBE opined that the consideration to be received by American

[171] Defs.' Ex. 76, 77, 78.
[172] Defs.' Ex. 56, 57, 58, 59.
[173] Defs.' Ex. 60, 61, 62, 63.
[174] Defs.' Ex. 64, 65, 66, 67.
[175] For example, in April 2010, Elgamal and Olmo-Rivas described to Toh and Webb, for scheduling purposes, that their negotiation strategy was going to be to work together as a "package" that would "[t]ake the same deal or no deal." Pl.'s Ex. 19; Ex. 54 (Elgamal Dep.) 127.

Surgical's minority stockholders was fair from a financial perspective. After reviewing the terms of the proposed transaction with Webb, Toh, and Viguet, the Special Committee recommended that the Board approve the Merger.[176] That same day, the Board held a special meeting and unanimously voted to approve the Merger Agreement. At the Board meeting, HFBE reviewed its fairness opinion presentation, noting that it placed the most emphasis on the selected company analysis and discounted cash flow analysis.[177] The company publicly announced the Merger with GPP on December 20, 2010,[178] the same day on which the Rollover Group executed the Rollover Agreements.[179]

American Surgical held a special stockholder meeting on February 23, 2011. Overall, the holders of 86.6% of the company's stock voted in favor of the Merger.[180] The minority stockholders received $2.89 in cash per share (representing the $2.87 in adjusted Merger consideration from GPP plus $0.02 from the post-signing dividend) and an interest in CMC.[181]

IV. CONTENTIONS

Frank's argument is premised on his position that entire fairness is the appropriate substantive standard of review, if not due to his interpretation of the

[176] Defs.' Ex. 83.
[177] Defs.' Ex. 84.
[178] Defs.' Ex. 105.
[179] Defs.' Ex. 56-67.
[180] Defs.' Ex. 85.
[181] Defs.' Ex. 78. At his deposition, Toh estimated that "millions" had since been distributed by CMC. Defs.' Ex. 5 (Toh Dep.) 166.

Court's motion to dismiss opinion in this action, then because the Rollover Group constituted a control group in the Merger.[182] Specifically, Frank contends the evidence demonstrates that the Rollover Group negotiated the material elements of the Merger, especially regarding the allocation of the consideration to be received by the Rollover Group and American Surgical's minority stockholders in the Amended GPP Letter.[183] The entire fairness burden, according to Frank, should be on the Rollover Group because, among other reasons, the Special Committee allegedly did not control the material negotiations and was not sufficiently informed about certain material information, including the presentation of the Three Options and the selection of the First Option.[184]

Frank further contends that no member of the Board can avoid liability by reliance on American Surgical's Exculpatory Provision at this time because the entire fairness standard applies, and he maintains that there were material omissions from the proxy materials provided in advance of the stockholder vote on the Merger.[185] Finally, Frank notes that evidence related to fair price has not been submitted to the Court; that would preclude summary judgment if entire fairness applies.[186] For these reasons, he argues that the Motion should be denied.

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[182] Pl.'s Answering Br. in Opp'n to Defs.' Mot. for Summ. J. ("Pl.'s Answering Br.") 20-23.
[183] *Id.* 26-31.
[184] *Id.* 39-54.
[185] *Id.* 54-60
[186] *Id.* 53.

The Defendants, for their part, dispute that entire fairness is the appropriate substantive standard of review. Rather, based on their position that the Rollover Group was not on both sides of the Merger or competing with the company's minority stockholders for consideration from GPP, they contend that the Special Committee's conduct during the negotiations was a sufficient procedural protection to warrant application of the business judgment standard of review.[187] In particular, the Defendants contest many of Frank's assertions about the Special Committee's role in negotiations and whether it, especially through its advisors, was adequately provided with all material information.[188] Much of the Defendants' argument disputes whether the Rollover Group was a control group, although they largely do not make an express statement to that effect. In addition, the Defendants deny that Frank's disclosure allegations have merit.[189] For these reasons, and in light of the Exculpatory Provision, the Defendants argue that the Court should grant the Motion as to all of Frank's claims against all Defendants, or, alternatively, as to all the claims against the Special Committee.[190] Finally, were the Court to conclude that the entire fairness standard applies, the Defendants

[187] Opening Br. of Defs. in Supp. of their Mot. for Summ. J. ("Defs.' Opening Br.") 27-40.
[188] Reply Br. of Defs. in Further Supp. of their Mot. for Summ. J. ("Defs.' Reply Br.") 11-16; Defs.' Opening Br. 40-59.
[189] Defs.' Reply Br. 30-31; Defs.' Opening Br. 61-62.
[190] Defs.' Opening Br. 62-69.

argue that the burden of proof should shift to Frank because the Merger was approved by the Special Committee.[191]

V. ANALYSIS

A. *The Procedural Standard of Review*

For the Court to grant a motion for summary judgment under Court of Chancery Rule 56, the moving party must show that "there is no genuine issue as to any material fact" such that it "is entitled to judgment as a matter of law."[192] The Court must consider the evidence presented and view reasonable inferences from this evidence "in the light most favorable to the non-moving party."[193] To withstand a motion for summary judgment, the non-moving party must demonstrate, based on submitted evidence, "a triable issue of material fact."[194] A material fact is one that "might affect the outcome of the suit under the governing law."[195] A genuine issue may exist where there is conflicting deposition testimony about a material fact, as "[r]esolving conflicting testimony is the province of a fact finder at a trial, not a judge on summary judgment."[196]

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[191] *Id.* 60-61.
[192] Ct. Ch. R. 56(c).
[193] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009).
[194] *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 473 (Del. Ch. 2000).
[195] *Deloitte LLP v. Flanagan*, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).
[196] *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2002); *see also Cont'l Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969) ("[T]he function of the judge in passing on a motion for summary judgment is not to weigh evidence and to accept that which seems to him to have the greater weight. His function is rather to determine whether or not there is any evidence supporting a favorable conclusion to the nonmoving party.").

The parties' submissions to the Court feature an extended debate on whether the Court previously ruled on the appropriate substantive standard of review of the Merger. When reviewing whether there was a reasonably conceivable basis for recovery based on the well-pled allegations of the Amended Complaint, the Court explained that the Merger "will be reviewed for entire fairness."[197] That conclusion was undoubtedly premised on the procedural standard of review in which the Court was required to assume the truth of Frank's well-pled allegations,[198] which generally represented the "universe of facts" for the Court's analysis.[199]

The Court is not necessarily bound now, at the summary judgment stage, to that earlier statement on the then-appropriate substantive standard of review. The procedural standard for a motion for summary judgment is altogether different from that for a motion to dismiss—here, assertions of fact must be supported by competent evidence.[200] Thus, it is certainly possible that, because the Defendants may now present evidence, the Court's determination of the appropriate substantive standard of review may be different.

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[197] *Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012).
[198] *See id.*, at *7 (citing *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC*, 27 A.3d 531, 537 (Del. 2011)).
[199] *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).
[200] *See* Ct. Ch. R. 56(c); *see also Lyondell Chem. Co.*, 970 A.2d at 241.

B. *Whether the Rollover Group is a Control Group*

Before turning to the substantive claims, the Court addresses a threshold question: whether, when, and to what extent the Rollover Group may have constituted a control group that could implicate the entire fairness standard of review. Frank contends that the Rollover Group was functionally a control group because it controlled the negotiations with GPP and dictated the terms of the Amended GPP Letter.[201] In opposition, the Defendants argue that Frank improperly conflates the Rollover Group with Webb and Toh and contend that it was the Special Committee, through Webb and Toh, who exercised control over the negotiations.[202] Although, as Frank points out,[203] the Defendants do not expressly deny that the Rollover Group constituted a control group, implicit in their argument is their position that the Rollover Group could not have been a control group because its members did not control the negotiations and, ultimately, they received consideration less valuable than what American Surgical's minority stockholders received.[204]

The existence of a controlling stockholder may affect the Court's standard of review of the business decisions of a corporation's board of directors. A

[201] Pl.'s Answering Br. 26-27.
[202] Defs.' Reply Br. 7-11; Defs.' Opening Br. 48-59.
[203] Pl.'s Answering Br. 21.
[204] Defs.' Opening Br. 29-40. For example, the Defendants argue that entire fairness does not apply because Frank has not presented evidence that rebuts the business judgment review presumption, which is a position that assumes there is no control group. *Id.* 59-60.

stockholder is said to control a corporation where "it owns a majority interest in or exercises control over the business affairs of the corporation."[205] A group of stockholders, none of whom individually qualifies as a controlling stockholder, may collectively be considered a control group that is analogous, for standard of review purposes, to a controlling stockholder. Allegations of mere "parallel interests," without more, are insufficient to establish that the individual stockholders constituted a control group.[206] Rather, the stockholders must be "connected in some legally significant way—*e.g.*, by contract, common ownership, agreement or other arrangement—to work together toward a shared goal" to be deemed a control group.[207]

Because the existence of a control group typically depends on factual issues related to the significance of relationships among stockholders, the Court may not be able to conclude at the summary judgment stage whether there is or is not, as a matter of law, a control group.[208] This procedural limitation, in part, dictates the Court's conclusion here.

In assessing whether the Rollover Group constituted a control group, two distinct periods of time are at issue: first, during the period when the Board decided

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[205] *Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (quoting *Ivanhoe P'rs v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987)).
[206] *See Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *6 (Del. Ch. June 5, 2006).
[207] *See Dubroff v. Wren Hldgs., LLC*, 2009 WL 1478697, at *3 (Del. Ch. May 22, 2009) (citing *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *9-10 (Del. Ch. Aug. 18, 2006); *Emerson Radio Corp. v. Int'l Jensen Inc.*, 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996)).
[208] *See In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *6 (Del. Ch. Feb. 28, 2013).

to put American Surgical up for sale, the Special Committee took over the sale process and negotiations from the M&A Committee after the market canvass, and then the Board adopted—based on the Special Committee's recommendation—the Third GPP Letter; and second, during the period surrounding the selection of the First Option from the Three Options and the presentation of the resulting Amended GPP Letter to, and approval of it by, the Special Committee. At neither time did any member of the Rollover Group individually hold a majority of the company's stock.

1. Was There a Control Group During the Sale of American Surgical?

There is no evidence suggesting that the Rollover Group was functionally a control group when American Surgical was put up for sale. The Rollover Group did not time this decision—it was reached by the Board after the first expression of interest in a transaction by GPP, a third party that had no material relationship with any member of the Rollover Group. There is no evidence suggesting that the Rollover Group dictated the terms of the market canvass. For example, the members of the Rollover Group did not condition the terms of any possible transaction on rolling over a portion of their interest in American Surgical into equity in the surviving entity. The very terms of the three serious indications of interest bear this out: GPP proposed a partial rollover; Celerity first suggested buying the Rollover Group's stock outright before proposing to acquire 70% of

American Surgical through a preferred stock issue; and NIP likewise proposed to acquire 65% of the company's fully diluted stock. That is, the final terms of two of the three serious offers would treat the Rollover Group as any other American Surgical stockholder—they would have received identical consideration and remained minority stockholders.

It is immaterial whether GPP or Elgamal and Olmo-Rivas first proposed the rollover. Even if Elgamal and Olmo-Rivas proposed it, there is no evidence that this was a mandatory minimum requirement by the Rollover Group to a deal—it more appears as a maximum concession by the Rollover Group to receive an offer from GPP. Supporting this conclusion is that, during the Special Committee's discussion of the serious indications of interest, its primary focus was on obtaining the best financial terms for the minority stockholders, and preferably through an all-cash offer.

These facts and circumstances are not ones from which the Court can reasonably infer, at a minimum, an agreement or other arrangement by the Rollover Group to exercise collective control over American Surgical during the sale process. What the undisputed evidence instead demonstrates is that the Board decided to put American Surgical up for sale in a way that was not conditioned on any terms from the Rollover Group. Of course, given that the members of the Rollover Group happened to own more than half of the company's stock, a

potential acquirer might need to structure its proposal in a way that the Rollover Group would find agreeable. But this reality does not automatically convert the Rollover Group into a control group. Of the serious offers received, it just so happened that the best offer for American Surgical's stockholders, from the Special Committee's perspective, happened to be one which contemplated that several large stockholders, who happened to own a majority of the company's stock, would rollover a portion of their holdings into equity in the surviving entity.

Put simply, this was the sale of a company, not alchemy. There is no evidence of a control group before the sale process, and the Special Committee's selecting the Third GPP Letter as the best offer reasonably available from this sale process, without more, does not warrant designating the Rollover Group as a control group. Accordingly, the Court concludes as a matter of law from the undisputed facts that the Rollover Group did not comprise a control group during this period.

2. Was There a Control Group During the Selection of the First Option?

The Court cannot reach the same conclusion as a matter of law in the context of the selection of the First Option and the subsequent presentation of the Amended GPP Letter to the Special Committee. There is a genuine issue of fact as to whether the members of the Rollover Group, particularly Elgamal and Olmo-

Rivas, unilaterally selected the First Option from the Three Options discussed with GPP in March 2010.

In contrast to the initial sale process, in which there was no preexisting agreement or other arrangement uniting the interests of the individual members of the Rollover Group, at this point a reasonable inference can be drawn that the Rollover Group was connected in a legally significant way because of the Board's prior adoption of the Third GPP Letter. In other words, the Court can reasonably infer from the evidence presented that the Rollover Group may have been united in interest through the arrangement contemplated by the Third GPP Letter and that the Rollover Group may have exercised its control to select from the Three Options the terms most favorable to its members' self-interests, such as receiving the most net cash up front. Supporting this inference is, as the Court will later discuss, a genuine issue of material fact as to whether the Special Committee was informed about the existence of the Three Options and the Rollover Group's possible role in selecting or reviewing the First Option.

This inference is not necessarily the best one that could be drawn, but it is nonetheless reasonable. It is certainly possible that the preponderance of the evidence presented at trial may demonstrate that the Rollover Group (or a smaller grouping of its members) was not functionally a control group during this period.

That remains to be seen. For now, the Court cannot conclude as a matter of undisputed fact whether the Rollover Group was a control group in this context.

C. *The Fiduciary Duty Claim Against Chamberlain and Chapa Individually*

In American Surgical's SEC filings, Chamberlain and Chapa were identified as "key employees" of the company. They were not directors, and there is no evidence suggesting that they had the type of managerial responsibilities which might qualify them as officers. Under Delaware law, the individuals who owe fiduciary duties to a corporation and its stockholders are the corporation's directors and, to a similar extent, officers.[209] Viewing the proffered evidence most favorably to Frank, there is no reasonable inference from which the Court would fail to conclude that Chamberlain and Chapa, individually, did not owe fiduciary duties akin to those owed by the Board. Accordingly, the Motion is granted as to this fiduciary duty claim against Chamberlain and Chapa as a matter of law.

D. *The* Revlon *Claim Against the Board*

Along the lines of similar allegations, Frank asserts that the Board breached its fiduciary duties by failing to "maximize the value" of American Surgical stock.[210] These allegations are, fundamentally, a *Revlon*[211] claim. The Board contends that *Revlon* is not implicated because the Rollover Group held a majority

[209] *See Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009); *see also Hampshire Gp., Ltd. v. Kuttner*, 2010 WL 2739995, at *11 (Del. Ch. July 12, 2010).
[210] Am. Compl. ¶¶ 85-86.
[211] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).

of the company's stock before the Merger.[212] Frank generally declined to respond to this argument based on his position that entire fairness review applies.[213]

1. Putting American Surgical up for Sale Implicated *Revlon*

In certain change-of-control situations, such as when a board of directors embarks on a process to sell the corporation, the directors must then discharge their fiduciary duties of care and loyalty with a "focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders."[214] In reviewing a stockholder's claim that the directors breached these so-called *Revlon* duties by failing to obtain the best value reasonably available, the Court will examine the board's actions under an "enhanced scrutiny" standard of review in which the focus is whether the board adopted a value-maximizing process that was reasonable, not necessarily perfect, under the circumstances. Specifically, the directors must demonstrate that they were "adequately informed and acted reasonably."[215]

It is a hallmark of Delaware corporate law that "there is no single blueprint that a board must follow to fulfill its duties" in the context of selling the corporation.[216] That said, there are certain "best practices" that the Court has

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[212] Defs.' Opening 59.
[213] Pl.'s Answering Br. 54 n.19.
[214] *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993) (citing *Revlon*, 506 A.2d at 182).
[215] *Id.* at 45 (citing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989)).
[216] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

identified as ways in which directors can demonstrate that they were adequately informed and acting reasonably in discharging their duties of care and loyalty in a situation implicating *Revlon*.[217]

Soliciting potential acquirers in advance of agreeing to a transaction can be evidence upon which the Court may rely to conclude that the board reasonably informed itself about the value-maximizing opportunities available to the corporation's stockholders.[218] Considering the "alternative transactions offered by any responsible buyer" can support a similar conclusion.[219] Receiving a reliable fairness opinion from a sufficiently independent financial advisor can likewise be evidence upon which the Court may rely to determine whether the board was adequately informed about whether a particular offer was fair, from a financial

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[217] Extensive literature has developed on the ways in which this Court has encouraged, implicitly or explicitly, certain "best practices" of corporate governance. *See, e.g.*, Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 Va. L. & Bus. Rev. 189, 206 (2007) ("The Delaware judges, from their vantage point at the center of the corporate governance arena, offer their insights to the community of those who regularly think about best practices, and in doing so can help to bring certain questions to the forefront of the collective mind on these issues."); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399, 1404 (2005) ("Delaware judges have had a substantial role in shaping best practices in corporate governance."); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009, 1016 (1997) ("Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as 'corporate law sermons.'").

[218] *See In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 (Del. Ch. Apr. 11, 2011); *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *5 (Del. Ch. May 12, 2011).

[219] *See Wells Fargo & Co. v. First Interstate Bancorp.*, 1996 WL 32169, at *4 n.3 (Del. Ch. Jan. 18, 1996).

perspective, to the stockholders.[220] Where the potential for a conflict to develop is recognizable, forming a special committee of independent and disinterested directors[221] who have the ability to and do engage independent financial and legal advisors to assist in negotiations[222]—especially if the potential conflict becomes an actual one—can further support the Court's conclusion that the board engaged in a reasonable process to maximize value. In sum, the relevant inquiry is one in which the Court must determine whether the process the board followed, overall, was reasonable as it was being implemented.[223] The inquiry is not one that invites judicial second-guessing of how smart or ideal an otherwise reasonable decision was.[224]

The requirement that a board discharge its fiduciary duties toward the goal of obtaining the best price reasonably available for stockholders under *Revlon* has a different characteristic when the corporation up for sale has a controlling stockholder or, by extension, a control group. Because a controlling stockholder has no duty to sell its stock, it has the obvious ability to reject any transaction it

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[220] *See Koehler v. NetSpend Hldgs. Inc.*, 2013 WL 2181518, at *16-17, *20 (Del. Ch. May 21, 2013); *In re Vitalink Commc'ns Corp. S'holders Litig.*, 1991 WL 238816, 17 Del. J. Corp. L. 1311, 1331 (Del. Ch. Nov. 8, 1991).

[221] *See In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *7 (Del. Ch. Jan. 31, 2013).

[222] *See Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1150-51 (Del. Ch. 2006).

[223] *See In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 676 (Del. Ch. 2013); *In re Plains Exploration & Production Co. S'holder Litig.*, 2013 WL 1909124, at *4-7 (Del. Ch. May 9, 2013).

[224] *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005).

does not like. Thus, where a controlling stockholder proposes a cash-out merger between it and the corporation, *Revlon* may not be implicated if the corporation is not otherwise up for sale.[225] However, that a board decides to sell the entire corporation to a third party, such as at the controlling shareholder's suggestion[226] or direction,[227] does implicate *Revlon*. In that situation, the concomitant goal of the directors is then to determine if the sale to the third party "will result in a maximization of value for the minority shareholders."[228]

When the Board agreed to the concept of putting American Surgical up for sale after GPP first mentioned the possibility of a transaction, the company entered *Revlon* mode. At this time, there is no issue of material fact that the Rollover Group was not a control group. Accordingly, the Board was then responsible for seeking the best price reasonably available for the company's stockholders. There is, however, an issue of material fact as to whether the Rollover Group later constituted a control group when the First Option was selected. To the extent there was a control group during this period, the Board's *Revlon* duties would have shifted slightly to obtaining the best price reasonably available for American Surgical's minority stockholders.

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[225] *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987).
[226] *See In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005).
[227] *See McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000)
[228] *Id.*; *see also In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1091 n.139 (Del. Ch. 2001).

2. The *Revlon* Claim Against the Special Committee and Toh

For a *Revlon* claim to survive a motion for summary judgment where the corporation's charter includes an exculpatory provision under 8 *Del. C.* § 102(b)(7), such as the Exculpatory Provision here, the challenging stockholder must demonstrate a material issue of fact as to whether the directors did not act in good faith or breached their duty of loyalty.[229] For a loyalty claim to survive summary judgment, there must be a material issue of fact as to whether the director was disinterested, independent, or acting in good faith.[230]

The basic example of a director's interest in a transaction is when the director appears on both sides of it.[231] If a director does not appear on both sides, then he still may be found interested if he derives a personal benefit or suffers a detriment from the transaction.[232] The alleged benefit or detriment must be material "in the context of the director's economic circumstances."[233]

A director is independent if his decision "is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[234] Thus, a director may lack independence if he is "beholden" to an extraneous

[229] *See In re Answers Corp. S'holders Litig.*, 2014 WL 463163, at *17 (Del. Ch. Feb. 3, 2014); *see also In re BJ's Wholesale Club, Inc.*, 2013 WL 396202, at *6 (quoting *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch. Sept. 30, 2009)) (describing the analogous requirement at the motion to dismiss stage).
[230] *See In re Alloy, Inc.*, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011).
[231] *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993).
[232] *See Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002).
[233] *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999).
[234] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

influence, like a controlling stockholder, such that his business discretion "would be sterilized."[235] Merely because a director is nominated and elected by a large or controlling stockholder does not mean that he is necessarily beholden to his initial sponsor.[236] Likewise, for a friendship or professional relationship to support a finding that a director is not independent, it must rise to the level where "the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director."[237]

Finally, a director may not be acting in good faith if he exhibits "a conscious disregard for his duties" when charged with "a known duty to act."[238] In the *Revlon* context, directors may not be acting in good faith if they "knowingly and completely failed to undertake their responsibilities"—that is, if they "utterly failed to attempt to obtain the best price."[239] An otherwise independent and disinterested director may exhibit bad faith if he intentionally facilitates a transaction to the benefit of an interested party at the expense of—and with an indifference toward his duties to—the minority stockholders.[240] Successfully alleging a director's lack of good faith to survive a motion to dismiss has been described as requiring a "very

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[235] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).
[236] *See In re W. Nat. Corp. S'holders Litig.*, 2000 WL 710192, at *15 (Del. Ch. May 22, 2000).
[237] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004); *see also Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del Ch. 2000).
[238] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006).
[239] *Lyondell Chem. Co.*, 970 A.2d at 243-44.
[240] *See Crescent/Mach I P'rs*, 846 A.2d at 982-83; *Strassburger v. Earley*, 752 A.2d 557, 581-82 (Del. Ch. 2000).

extreme set of facts";[241] by extension, successfully demonstrating a genuine issue of material fact as to a director's lack of good faith at the summary judgment stage requires a similarly extreme set of facts.[242]

(a) The Special Committee and Toh were Disinterested

There is no evidence that either the Special Committee or Toh was interested during the sale process. The Special Committee did not appear on both sides of, or derive any material benefit from, the Merger or the proposals by any potential acquirer. Bailey and Kleinman were pursuing the best interests of, and aligned with, the company's minority stockholders. There is no evidence that the Option Exchange was material to the Special Committee or, more fundamentally, contemplated by the Third GPP Letter, the Amended GPP Letter, or any other transaction proposal. In other words, even if the Option Exchange were material to the Special Committee, it was unrelated to any indication of interest. Thus, the Special Committee was disinterested.

Although Toh was originally identified by GPP as one of the stockholders who would rollover a portion of his equity into the surviving entity, by the time of the Second GPP Letter, Toh was no longer part of that group. When the highest and best offers were solicited and reviewed, Toh had the same personal incentives as the Special Committee—obtaining the best price for the company's minority

[241] *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654 (Del. Ch. 2008).
[242] *See Lyondell Chem. Co.*, 970 A.2d at 243 (quoting *Lear Corp.*, 967 A.2d at 654).

stockholders, such as himself. For the same reasons that the Option Exchange did not render the Special Committee interested, it did not render Toh interested. Regardless of whether the $250,000 transaction was material to Toh, there is no evidence from the initial sale process suggesting that Toh would have received a bonus conditioned on any particular offer. Finally, when looked at in context, even in the light most favorable to Frank, Toh's comments about alternatives to the Merger in late 2010 were nothing more than perfunctory responses to a third party's statements. Toh, like the Special Committee, was disinterested.

There is no evidence that Webb, although his first work for American Surgical was with the M&A Committee, had an improper conflict of interest that would taint his subsequent advice to the Special Committee.[243] Before his engagement with American Surgical, Webb did not know the members of the Rollover Group or GPP. By the time Webb agreed to the $350,000 fee contingent on the Merger with GPP, the Special Committee had not only already selected GPP as the highest bidder from the market canvass in January 2010, but also adopted the Amended GPP Letter in March 2010. A contingency fee arrangement of this kind here was not unreasonable.[244] There is no reasonable inference that Webb's

[243] *See In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 831-36 (Del. Ch. 2011) ("This Court has not stopped at disclosure, but rather has examined banker conflicts closely to determine whether they tainted the directors' process.").
[244] *See, e.g., In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch. May 20, 2011, revised May 24, 2011) ("Contingent fees for financial advisors in a merger context are somewhat 'routine' and previously have been upheld by Delaware courts.").

comments in late 2010, like those by Toh, were anything more than mere comments about alternatives in the event the Merger with GPP was not consummated. If anything, by this time, Webb's financial incentive was actually for the company to agree to a transaction with GPP along the terms of the Amended GPP Letter, which the Special Committee had already determined was the best price reasonably available to the company's stockholders. There is thus no issue of fact that Webb did not have an improper conflict of interest that tainted the Special Committee or Toh.

(b) The Special Committee and Toh were Independent

Likewise, there is no evidence that the Special Committee or Toh was not independent during the sale process. The decisions of Bailey, Kleinman, and Toh were based on the merits of the proposals in front of them and, more importantly, on obtaining the best value for the company's minority stockholders, a group of which all three of them were members. Even when viewed most favorably to Frank, the pre-existing relationships by which Bailey and Kleinman became directors did not rise to the level of making them beholden to the interests of the Rollover Group collectively or Elgamal or Olmo-Rivas individually. Furthermore, the Court cannot reasonably infer that Viguet's sharing a single tax memorandum with GPP would render him no longer independent. Thus, there is no genuine issue of fact that the Special Committee and Toh were independent.

(c) The Special Committee and Toh Acted in Good Faith

Finally, there is no genuine issue of material fact that the Special Committee and Toh acted in good faith during the sale process. The overall sale process initiated by the Board and then continued by the Special Committee was, under the circumstances, reasonable.

The Board sought to obtain the best price reasonably available by forming the M&A Committee, hiring Webb as a financial advisor, and then directing Webb to conduct a market canvass. Webb put together the list of potential acquirers—thirty-five entities—and then solicited indications of interest. Likely recognizing that some of the initial indications of interest treated certain stockholders somewhat differently—GPP proposed a rollover by the Rollover Group, while Celerity first proposed to buy just the Rollover Group's stock—the Board formed the Special Committee to take over the rest of the negotiations during the sale process.

The Special Committee was expressly charged with evaluating the offers "to maximize shareholders value." It hired its own independent legal advisor (Viguet), relied on a disinterested and independent director with merger and acquisition experience (Toh), and continued to use the company's existing, independent financial advisor (Webb) when negotiating the financial terms of the three serious offers. Both GPP and Celerity raised their offers, reflecting the Special

Committee's bargaining power. Only after requesting the highest and best offers did the Special Committee, in consultation with its advisors, select the best value reasonably attainable in terms of both the highest price and the most cash offered to the minority stockholders: the Third GPP Letter. Through this reasonable process, the Special Committee adequately informed itself of the best value reasonably available for the stockholders of American Surgical. No evidence supports a contrary conclusion.

When GPP's due diligence revealed a possible issue with the revenue the company recognized for 2009, the Special Committee's advisors—Toh and Webb—worked to negotiate an appropriate revised offer. There is evidence suggesting GPP wanted to decrease the offer from $3.16 per share in value to $2.53 per share, but the revised price was ultimately a higher $2.86 per share. To the extent the Board's *Revlon* duties may have shifted if the Rollover Group were a control group during this period, there is no issue of material fact that the Special Committee and Toh continued to act in good faith. That is, there is no evidence or any reasonable inference that the Special Committee or Toh facilitated the Amended GPP Letter to the benefit of the Rollover Group and with an indifference toward American Surgical's minority stockholders. Rather, the opposite is evident.

Based on the presentation of the Three Options in Webb's email, it may be the case that the Second Option and the Third Option would have provided more

cash per share to American Surgical's minority stockholders. As the Court will later discuss, there is a genuine issue of material fact as to whether the Special Committee was aware of the Three Options (and as to whether the Rollover Group would have received equally higher value consideration under these alternatives). However, even if the Special Committee was not aware of these superficially higher options, there is no evidence that the Special Committee and Toh were acting in bad faith because they actively attempted—by hiring advisors, conducting a market canvass, soliciting best and final offers, selecting the offer with both the best price and the most cash for the minority, and then receiving a fairness opinion—to obtain the best price reasonably available to American Surgical's minority stockholders. Because of their good faith and reasonable reliance on Webb's financial expertise, it was not unreasonable for the Special Committee to recommend the Third GPP Letter and then the Amended GPP Letter without previously obtaining a formal fairness opinion.[245]

Quite simply, these actions are not the type of extreme facts necessary to support a reasonable inference of bad faith.[246] The record shows that the Special Committee and Toh understood their purpose to maximize value for the company's

[245] *See In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 706-07 (Del. Ch. 2001) ("While there is case law that might be read as suggesting that a board's knowledge of the value of its own business is not sufficient, the more traditional view is that an informed board is, of course, free to manage a corporation in all its aspects. It is unlikely the court will later conclude that it was unreasonable for [the] board to conclude price negotiations, subject to confirmation from [the financial advisor] that the tentatively-fixed $19 price was fair.").
[246] *See Lyondell Chem. Co.*, 970 A.2d at 243.

minority stockholders and acted in good faith during what can only be reasonably inferred as a reasonable, though not perfect, process. Again, no evidence supports a contrary conclusion.

When reviewing the terms of the Amended GPP Letter, the Special Committee and its advisors reasonably determined that, even though this latest GPP offer was nominally less that the Third Celerity Letter, it was nonetheless the best value reasonably available. Had Celerity learned about the 2009 revenue issue, the Special Committee posited, Celerity would in all likelihood have revised its offer (which was expressly a multiple of 2009 revenue) to a price lower than that of the Amended GPP Letter. This decision, under these circumstances, was reasonable. So too was the Special Committee's decision during the negotiations to not demand a majority-of-all-the-minority condition to the Merger a reasonable one. The Court will not second-guess them.[247]

Furthermore, the Special Committee and then the Board received an opinion from HFBE that the $2.86 in cash per share to be received by American Surgical's minority stockholders was fair from a financial perspective. HFBE may have been first solicited by the M&A Committee and may not have been chosen by the

[247] *See Toys "R" Us*, 877 A.2d at 1000.

Special Committee after a competitive interview process,[248] but there is no evidence in the record implying that HFBE had any material relationship with the Rollover Group or GPP or that HFBE was not qualified for this engagement. The fairness opinion, under the circumstances, is further evidence of the Special Committee and Toh attempting to obtain the best value reasonably available. There are, admittedly, certain questions of fact as to whether the Special Committee and Toh discussed the creation of or assumptions underlying the financial projections submitted to HFBE, particularly regarding whatever role GPP may have played in producing an initial version of them. But, these questions of fact relate exclusively to whether the Special Committee was fully informed in discharging their duties of care, not whether they were acting in good faith in discharging their duty of loyalty.

The decision in late 2010 not to update projections beyond 2011 may, in hindsight, have been less than ideal, but the Court cannot reasonably infer that it was unreasonable at the time. Frank has not offered evidence refuting the company's reasonable explanations—concerns over healthcare reform and the overall economy—for why no further changes to the projections were appropriate. Even if, when viewed most favorably to Frank, there is an issue with the

[248] *See In re MFW S'holders Litig.*, 67 A.3d 496, 514 (Del. Ch. 2013) (noting the benefits of competitive interview process for a financial advisor as obtaining better engagement terms and receiving several preliminary perspectives on the relevant economic terms).

projections that may be said to make the fairness opinion "weak" and thus a "poor simulacrum of a market check,"[249] there was still an earlier market canvass here from which the Special Committee was reasonably and adequately informed about the best value-maximizing opportunities available for American Surgical's minority stockholders. It was also, perhaps, less than ideal for the negotiations between the Special Committee and GPP to extend from the Amended GPP Letter in March 2010 to the Merger Agreement in December 2010. But, there were legitimate reasons for that delay—primarily related to how best to handle American Surgical's outstanding litigation assets and liabilities. And, throughout the delay, Toh and Webb continued to request, albeit unsuccessfully, that GPP increase its offer back to the higher $3.16 per share. Overall, this process followed by the Special Committee was reasonable.

Toh's conduct throughout this process also evidenced good faith. There is no reasonable inference that can be drawn from the record that Toh failed to attempt to obtain the best price reasonably available. By contrast, the record demonstrates that Toh may have been the most active—particularly through his direct negotiations with the potential acquirers and then GPP—to obtain the best value for the company's minority stockholders.

[249] *See Koehler*, 2013 WL 2181518, at *17.

In sum, the uncontroverted evidence demonstrates that the Special Committee and Toh were not interested in the sale process or the resulting Merger but instead were acting based on the merits of the best offer as they attempted in good faith to obtain the best value reasonable available for the company's stockholders in adopting the Third GPP Letter. To the extent the Rollover Group may have constituted a control group during the period surrounding the presentation of the Amended GPP Letter, the Special Committee and Toh acted with independence, disinterest, and good faith in adopting the Amended GPP Letter as the best value reasonably available. Therefore, the Special Committee and Toh are entitled to judgment as a matter of law as to this *Revlon* claim because of the Exculpatory Provision.[250]

3. The *Revlon* Claim Against Elgamal and Olmo-Rivas

In light of there being a genuine issue of material fact as to whether the Rollover Group selected or reviewed the terms of the First Option from among the Three Options without informing the Special Committee, there is a reasonable inference, when the evidence is viewed most favorably to Frank, that Elgamal and Olmo-Rivas may have acted in bad faith "with a purpose other than that of advancing the best interests of the corporation."[251] This inference of bad faith

[250] *See, e.g.*, *Morton's Rest. Gp.*, 74 A.3d at 662-65; *BJ's Wholesale Club*, 2013 WL 396202, at *6-7.
[251] *Walt Disney Co.*, 906 A.2d at 67.

arises from their not informing the Special Committee about the availability of alternatives to the First Option in which, at least superficially, American Surgical's minority stockholders would receive more cash per share than the $2.86 of the resulting Amended GPP Letter. In other words, even though the Board formed the Special Committee, presumably due to possible conflicts of interest, to take over the sale process and maximize stockholder value, Elgamal and Olmo-Rivas may have undermined the Special Committee's role in handling the negotiations by selecting the First Option, to the apparent detriment of the company's minority stockholders, and then not informing the Special Committee about the other options.

Typically, the Court's analysis of whether a *Revlon* claim should survive a motion for summary judgment is predicated on whether there is a genuine issue of material fact as to whether a majority of the board discharged their fiduciary duties of loyalty.[252] Here, however, a reasonable inference of bad faith exists for two directors who may have been part of a control group that may have been on both sides of the negotiations or been competing for the consideration to be paid by GPP. Under these circumstances, the Court cannot conclude as a matter of law

[252] *See Answers Corp.*, 2014 WL 463163, at *17.

that Elgamal and Olmo-Rivas are entitled to exculpation under American Surgical's Exculpatory Provision.[253]

As before, the evidence presented at trial may not support this inference. As before, that remains to be seen.

E. *The Breach of Fiduciary Duty Claim Against the Rollover Group*

Frank adamantly maintains that the appropriate standard of review for the Merger is entire fairness.[254] But, because the Court concluded as a matter of law that there was no control group (and that a majority of the Board was disinterested, independent, and acting in good faith) at the time the Special Committee and then the Board adopted the Third GPP Letter, that initial business decision is not subject to entire fairness. The Court's legal conclusion on that issue of undisputed fact thus renders Frank's larger argument inapplicable.

However, the Court identified a genuine issue of material fact as to whether the Rollover Group constituted a control group during the period surrounding the selection of the First Option from the Three Options. As an implicit alternative argument, Frank contends that the Court should apply entire fairness scrutiny to the "allocation of the Merger proceeds" in the Amended GPP Letter because the Rollover Group, as a control group, selected the First Option. This choice purportedly had a "direct and deleterious effect on the cash received by the outside

[253] *See Emerald P'rs v. Berlin*, 787 A.2d 85, 93-94 (Del. 2001).
[254] Pl.'s Answering Br. 20-22.

shareholders."[255] That is, Frank portrays the selection of the First Option as an unfair choice, made by the controlling Rollover Group standing on both sides of the negotiation, from competing proposals that treated American Surgical's minority stockholders materially differently. In opposition, the Rollover Group argues that it did not stand on both sides of the transaction or otherwise compete with American Surgical's minority stockholders for the consideration from GPP.[256] But, to the extent entire fairness may apply, it argues that the burden should shift to Frank because of the well functioning Special Committee,[257] an assertion of fact that Frank contests.[258]

1. The Application of the Entire Fairness Standard of Review

(a) A Controlling Stockholder on "Both Sides" of the Transaction

The Delaware Supreme Court's seminal decision on the application of the entire fairness standard of review regarding a transaction involving a controlling stockholder is *Kahn v. Lynch Communication Systems, Inc*. *Lynch* mandates that when a controlling stockholder stands on "both sides" of a merger, it bears the burden to establish that the transaction was entirely fair to the corporation's minority stockholders.[259] The classic example of a controlling stockholder

[255] *Id.* 31.
[256] Defs.' Opening Br. 29-40.
[257] *Id.* 40-61.
[258] Pl.'s Answering Br. 37-53.
[259] *See Lynch*, 638 A.2d at 1115.

standing on both sides, as demonstrated in *Lynch*, is the "parent-subsidiary context."[260] Because of a controlling stockholder's inherent "potential to influence, however subtly, the vote of minority stockholders," the most appropriate way to determine "whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation" is for the Court to subject the transaction to entire fairness review.[261] Separate from the parent-subsidiary relationship, whether a controlling stockholder may be said to be on both sides of the transaction depends on whether the controlling stockholder and the acquirer had a "prior relationship,"[262] as well as the context in which the transaction is proposed to and negotiated on behalf of the minority stockholders.[263]

(b) A Controlling Stockholder "Competing" for Consideration

This Court has recognized the policy considerations animating application of the entire fairness standard of review in factual circumstances that do not necessarily arise under *Lynch* because a controlling stockholder does not stand on "both sides" of the transaction at issue.[264] Under the reasoning articulated in *In re*

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[260] *See id.*
[261] *See Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990).
[262] *See Hammons*, 2009 WL 3165613, at *10.
[263] *See Orman*, 794 A.2d at 22.
[264] *See, e.g.*, *Hammons*, 2009 WL 3165613, at *10-12; *PNB Hldg. Co.*, 2006 WL 2403999, at *13 (concluding that a transaction was not governed by *Lynch* but nonetheless subject to entire fairness review because, even though there was no controlling stockholder or control group, "the defendants' status as major stockholders who were eligible to remain [while other stockholders were cashed-out] rendered them conflicted"); *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *6-7 (Del. Ch. Dec. 21, 2005, revised Jan. 10, 2006) (concluding that entire

John Q. Hammons Hotels Inc. Shareholder Litigation, because a stockholder with a controlling interest "could effectively veto any transaction," the Court should subject a transaction to entire fairness review, even if the controlling stockholder does not stand on both sides, where the controlling stockholder and the minority stockholders are "competing" for the consideration of the acquirer.[265] The Court may conclude that there is competition when the controlling stockholder receives a benefit not shared by the minority stockholders.[266] That benefit could include the exclusive opportunity to receive equity in the surviving entity because it is possible that a rational controlling stockholder may "agree to a lower sale price in order to secure a greater profit from his [equity] investment."[267] Entire fairness may apply in these situations absent "robust procedural protections" that are needed 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."[268]

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fairness was the appropriate standard of review when "the directors of the corporation . . . own significant non-majority stakes of the corporation's voting shares and have personal interests that significantly diverge from those of other equity holders"); *In re LNR Prop. Corp. S'holders Litig.*, 896 A.2d 169, 177 (Del. Ch. 2005) ("[T]he business judgment rule does not protect the board's decision to approve a merger (even where a majority of the directors are independent and disinterested) where a controlling shareholder has a conflicting self-interest.").

[265] *Hammons*, 2009 WL 3165613, at *12.

[266] *See id.* at *10 (identifying the benefits that the controlling stockholder received as "the 2% interest in the surviving LP, the preferred interest with a $335 million liquidation preference, and various other contractual rights and obligations").

[267] *LNR Prop. Corp.*, 896 A.2d at 178.

[268] *Hammons*, 2009 WL 3165613, at *12.

2. The Effect of a Special Committee on the Standard of Review

When implicated, the exacting entire fairness standard of review is one under which the defendant must demonstrate the fairness of the transaction at issue as a product of both "fair dealing and fair price."[269] The Court's conclusion on fairness is a unitary one.[270] Both *Lynch* and *Hammons* teach that, if the transaction was either recommended by a special committee or approved in a non-waivable majority-of-all-the-minority vote, then the entire fairness standard of review still applies but the burden shifts to the plaintiff to prove that the transaction was not fair.[271]

The determination of whether it is appropriate to shift the burden for entire fairness review because of the procedural protection afforded by a special committee is context-specific. The Court should give strong weight to "evidence of whether the special committee was truly independent, fully informed, and had the freedom to negotiate at arm's length."[272] The controlling stockholder should not "dictate the terms of the merger," and the special committee "must have real

[269] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).
[270] *See Kahn v. Tremont Corp.*, 694 A.2d 422, 432 (Del. 1997).
[271] *See Lynch*, 638 A.2d at 1117; *Hammons*, 2009 WL 3165613, at *14 n.48.
It is undisputed that the Merger was not conditioned on an unwaiveable majority-of-all-the-minority vote. The Court thus need not describe the effect of this condition on the standard of review.
[272] *Lynch*, 638 A.2d 1120-21.

bargaining power."[273] The Delaware Supreme Court has described this inquiry as one of whether the special committee was "well functioning."[274] This Court has interpreted that language to require an examination into "the actual effectiveness of the special committee" rather than merely "the independence of the committee and the adequacy of its members."[275]

Foremost among the indicia relevant to the Court's assessment of whether a special committee is well functioning is whether the committee is well informed. As any director must do to discharge his duty of care, a special committee director must inform himself, "prior to making a business decision, of all material information reasonably available" to him.[276] Typically, under the business judgment standard of review, the Court presumes that a director acts on an informed basis, subject to a gross negligence test.[277] There, a challenging stockholder bears the burden to rebut this presumption.[278]

But, under the qualitatively different entire fairness standard of review, the Court generally does not presume that the directors on a special committee, charged with faithfully representing the interests of the minority stockholders in an

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[273] *Id.* at 1117 (quoting *Rabkin v. Olin Corp.*, 1990 WL 47648, 16 Del. J. Corp. L. 851, 861-62 (Del. Ch. Apr. 17, 1990), *aff'd*, 586 A.2d 1202 (Del. 1990) (TABLE)).
[274] *Tremont Corp.*, 694 A.2d at 428.
[275] *See In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 789-93 (Del. Ch. 2011), *aff'd sub nom.*, *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239-44 (Del. 2012)
[276] *See Aronson*, 473 A.2d at 812.
[277] *See Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).
[278] *See Aronson*, 473 A.2d at 812.

approximation of an arm's length transaction, are adequately informed. Rather, the defendants must demonstrate that the special committee was, under the circumstances, adequately informed of the information material to the special committee's decision.[279] Material information—especially material information about the fair value of the corporation and the minority stock—should not be withheld from the special committee or its advisors.[280] The special committee should also be aware of its fundamental purpose "to aggressively seek to promote and protect minority interests."[281] To that end, the directors on a special committee must conduct themselves as "advocates" who are "committed" to "the minority's true interests."[282]

The special committee's financial and legal advisors who may assist in negotiating the transaction should help "bolster the independence of the principals."[283] If the controlling stockholder recommends or has a pre-existing, material relationship with a financial advisor, the special committee's reliance on

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[279] *See Tremont Corp.*, 694 A.2d at 430; *S. Peru Copper Corp.*, 52 A.3d at 789-93; *MFW*, 67 A.3d at 516 ("The record is clear that the special committee met frequently and was presented with a rich body of financial information relevant to whether and at what price a going private transaction was advisable, and thus there is no triable issue of fact as to its satisfaction of its duty of care.").

[280] *See In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *36 (Del. Ch. May 3, 2004, revised June 4, 2004); *see also Strassburger v. Earley*, 752 A.2d 557, 571 (Del. Ch. 2000).

[281] *See In re Trans World Airlines, Inc. S'holders Litig.*, 1988 WL 111271, 14 Del. J. Corp. L. 870, 884 (Del. Ch. Oct. 21, 1988).

[282] *See Strassburger*, 752 A.2d at 571.

[283] *See Tremont Corp.*, 694 A.2d at 430.

that advisor may cast doubt on the committee's independence and access to adequate information.[284] Although it may not be *per se* inappropriate for the special committee to not negotiate directly with a potential acquirer, the advisor charged with the direct negotiations must be faithful to the special committee and its utmost duty to protect the interests of minority stockholders, and the special committee should be informed about material actions by its advisors and material developments in the negotiations—particularly related to price.[285] Absent an undisputed showing to that effect, the Court may be unable to conclude as a matter of law that the special committee was well functioning.

3. Genuine Issues of Material Fact

For completeness, the Court provides the following analysis on the assumption that the Rollover Group constituted a control group during the selection of the First Option.

There is an issue of material fact as to whether the Rollover Group could be said to be on "both sides" of the Amended GPP Letter because of its possible role in the negotiations leading to the selection of the First Option.[286] The Board's prior adoption of the Third GPP Letter suggests the possibility, however slight, of a

[284] *See id.*
[285] *See, e.g.*, *Tele-Commc'ns, Inc.*, 2005 WL 3642727, at *10 ("[A]n important element of an effective special committee is that it be fully informed in making its determination.").
[286] *See Lynch*, 638 A.2d at 1115.

prior relationship between the Rollover Group and GPP.[287] But, more importantly, the context in which the Three Options were presented could have been one in which the minority stockholders' interests, if the Special Committee was not fully informed about the Three Options, were not adequately represented in the negotiations.[288]

It may be the case that the Rollover Group did not stand on both sides. Still, there is a separate issue of material fact as to whether the Rollover Group was "competing" with the minority stockholders for the consideration from GPP.[289] In part, this issue requires a comparative valuation of the consideration to be received by the two sets of stockholders. By the Rollover Group's calculations, they received less valuable consideration under the terms of the Amended GPP Letter ($2.217 in cash per share plus a 14.9% interest in the surviving entity) than American Surgical's minority stockholders received ($2.86 in cash per share).[290] In contrast, by Frank's calculations, the Rollover Group and the minority stockholders received consideration of approximately equal value.[291] The critical problem with the parties' analyses is that they focus primarily, if not exclusively, on the terms of the First Option that was imported into the Amended GPP Letter.

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[287] *See Hammons*, 2009 WL 3165613, at *10.
[288] *See Orman*, 794 A.2d at 22.
[289] *See Hammons*, 2009 WL 3165613, at *12.
[290] Oral Arg. Defs.' Mot. for Summ. J. ("Oral Arg.") 18-19, 57-58; Defs.' Reply Br. 20-24; Defs.' Opening Br. 35-39.
[291] Oral Arg. 39, 55-56; Pl.'s Answering Br. 29-30.

Instead, the proper focus appears, to the Court, to be whether there was competition between the Rollover Group and the minority stockholders across the Three Options. Facially, the different amounts of cash per share to be received by the minority stockholders—from $2.86 under the First Option to $2.90 under the Third Option—implies there may have been competition. Yet, an equally important fact that remains in dispute is the appropriate value of the total consideration that the Rollover Group would have received under each of the Three Options. The parties did not submit evidence on those relative values. Moreover, it remains unsettled whether the proper valuation of the equity in the surviving entity should be derived from the Three Options, as the parties did, or, for example, from the anticipated capital structure of that entity.[292] To summarize, even if the consideration terms of the Amended GPP Letter were equivalent, it remains to been seen whether the First Option was the best or worst option for the Rollover Group individually and when compared to the minority stockholders.[293]

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[292] *See LNR Prop. Corp.*, 896 A.2d at 177 n.48 ("There is no reason to assume that the capital structure of Riley Property, immediately after the closing of the transaction, looked anything like that of LNR immediately before. Thus, it would be illogical to draw any comparison between the value paid by Miller for 20.4% of Riley Property and the value obtained by him for selling 31% of LNR. The two are 'apples and oranges,' and nothing about one can be inferred from the other.").

[293] The issue is not whether the overall enterprise value of the Amended GPP Letter was fair because the offer was found to be the best price reasonably available after an altogether reasonable process to sell American Surgical. The issue is whether the allocation of the consideration in the Amended GPP Letter was fair. If, as Frank contends here, the Rollover Group and the company's minority stockholders received consideration of the same value, then he may be hard-pressed to demonstrate a way in which that equal allocation was unfair. This Court has recognized that "when a controlling stockholder . . . shares its control premium evenly

Finally, assuming the Rollover Group was a control group and assuming further that the Rollover Group was either on both sides or competing with the minority, there is yet another genuine issue of material fact: whether the Special Committee was informed of the circumstances surrounding the presentation of the Three Options and the selection of the First Option. There is no reasonable inference that prevents the Court from concluding that the Special Committee was generally well aware of its purpose to maximize stockholder value.[294] But, the same cannot presently be said about its awareness of the Three Options. Put

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with the minority stockholders, courts typically view that as a powerful indication that the price received was fair." *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1039 (Del. Ch. 2012) (internal quotations omitted). The pro-rata apportionment of the purported control premium can be a "safe harbor" from close judicial review. *See Morton's Rest. Gp.*, 74 A.3d at 662 ("When a large stockholder supports an arm's-length transaction resulting from a thorough market check that spreads the transactional consideration ratably across all stockholders, Delaware law does not regard that as a conflict transaction.").

What, for the moment at least, distinguishes the facts here from those of *Synthes* and *Morton's Restaurant* is that, even if the allocation of the consideration in the Amended GPP Letter was equal, it remains unclear (because evidence was not submitted on this point) whether the allocations of the consideration of the Second Option and Third Option were also equal. If, under the Third Option, the Rollover Group would receive consideration valued at $2.90 per share—the same value as the $2.90 in cash per share that the minority stockholders would receive—then there may be a fairness issue regarding the allocation of the Amended GPP Letter consideration because a better deal for all stockholders was left on the table in favor of the First Option that gave the most cash up-front to the Rollover Group.

But, conversely, if the consideration under the Third Option were not equal—say, the minority would receive $2.90 in cash per share but the Rollover Group would receive only $2.80 in value per share—then the decision to decline the Third Option in favor of one that treated all stockholders equally in terms of value, such as the Amended GPP Letter, is unlikely to be found an unfair decision. A controlling stockholder is not required to sacrifice its economic interest in that way. *See Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 888 (Del. 1970); *Synthes*, 50 A.3d at 1041 ("Put simply, minority stockholders are not entitled to get a deal on better terms than what is being offered to the controller, and the fact that the controller would not accede to that deal does not create a disabling conflict of interest.").

[294] *See Trans World Airlines, Inc.*, 1988 WL 111271, 14 Del. J. Corp. L. at 884.

simply, this was material information that, if the Special Committee did not know it, the Court would be unable to conclude that the Special Committee was adequately informed.[295]

Toh testified that Webb informed the Special Committee about the Three Options; Webb testified that the meeting minutes reflect what was discussed with the Special Committee; the relevant minutes do not mention the Three Options; and Bailey could not recall whether the Three Options were discussed. Because this issue of fact stems from conflicting testimony, the Court cannot resolve it on a motion for summary judgment.[296] Accordingly, because there is an issue of fact about whether the Special Committee was adequately informed, the Court cannot conclude as a matter of undisputed fact whether the Special Committee was well functioning.[297] Therefore, at the present time, the Court cannot conclude that the entire fairness burden on the allocation of the Merger consideration in the Amended GPP Letter should shift from the Rollover Group to Frank. The Motion is denied in this respect.

F. *The Unjust Enrichment Claim Against the Rollover Group*

At the motion to dismiss stage, the Court noted that Frank's unjust enrichment claim against the Rollover Group appeared to be duplicative of his

[295] *See Emerging Commc'ns, Inc.*, 2004 WL 1305745, at *36.
[296] *See Telxon Corp.*, 802 A.2d at 264.
[297] *See Tremont Corp.*, 694 A.2d at 428; *S. Peru Copper Corp.*, 52 A.3d at 789-93.

breach of fiduciary duty claim against the same defendants.[298] Under Delaware law, a claim for unjust enrichment requires the plaintiff to demonstrate: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law."[299] The theory of liability for Frank's unjust enrichment claim is that the members of the Rollover Group improperly enriched themselves at the expense of American Surgical's minority stockholders. The exact same theory, simply couched in fiduciary duty terms, forms the basis of Frank's fiduciary duty claim against the Rollover Group.

Thus, it is fair to say that the unjust enrichment claim depends *per force* on the breach of fiduciary duty claim against the Rollover Group. There is no evidence in the record or argument submitted to the Court that this unjust enrichment claim is materially broader than or different from the analogous breach of fiduciary duty claim. The Court frequently treats duplicative fiduciary duty and unjust enrichment claims in the same manner when resolving a motion to dismiss. For example, if the Court dismisses a fiduciary duty claim for failure to state a claim, then it very likely also dismisses a duplicative unjust enrichment claim.[300]

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[298] *See Frank*, 2012 WL 1096090, at *11.
[299] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).
[300] *See, e.g.*, *Monroe County Employees' Ret. Sys. v. Carlson*, 2010 WL 2376890, at *1 (Del. Ch. June 7, 2010).

Conversely, where the Court does not dismiss a breach of fiduciary duty claim, it likely does not dismiss a duplicative unjust enrichment claim.[301]

The policy considerations supporting this principle at the motion to dismiss stage—that, assuming there is a reasonably conceivable basis for both claims, the plaintiff is entitled to discovery on them—are not as strong at the summary judgment stage because discovery is generally, if not entirely, complete. Since a plaintiff is entitled to only one recovery after trial,[302] if a breach of fiduciary duty claim survives summary judgment, then an entirely duplicative unjust enrichment claim premised on the exact same theory of liability would not only be unnecessary, but also redundant. Such is the case here. The elements of proof are the same, and so are the possible recoveries. Accordingly, the Motion is granted as to the unjust enrichment claim against the Rollover Group.

G. *The Unfair Process Claim Against the Board*

Frank also asserts that the Board breached its fiduciary duty by acquiescing in an unfair process that improperly favored the Rollover Group to the detriment of American Surgical's minority stockholders.[303] To the extent this theory implicates a *Revlon* claim, the Court concluded that the Special Committee and Toh could not have personal liability pursuant to American Surgical's Exculpatory Provision

[301] *See, e.g.*, *Dubroff v. Wren Hldgs., LLC*, 2011 WL 5137175, at *11 (Del. Ch. Oct. 28, 2011).
[302] *See MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *25 n.147 (Del. Ch. May 5, 2010).
[303] Am. Compl. ¶¶ 81-83.

because they did not breach their duty of loyalty or otherwise act in bad faith. To the extent this theory relates to a purportedly unfair process regarding the allocation of the consideration in the Amended GPP Letter, the Defendants argue that it should be dismissed as to the Special Committee for the same reasons that the *Revlon* claim was dismissed.[304] Frank contends that the Exculpatory Provision neither requires nor permits dismissal of the claim.[305]

When entire fairness is the standard of review, it is usually premature for the Court to hold at the summary judgment stage that an individual director faces no possible monetary liability by virtue of a Section 102(b)(7) exculpatory charter provision because there is no evidence supporting a loyalty or bad faith claim against him.[306] The very nature of an interested transaction implicating the entire fairness standard—and the accompanying "specter of impropriety [that] can never be completely eradicated"—is one that requires "careful judicial scrutiny" of whether the directors involved, even those who may facially appear to be independent, disinterested, and acting in good faith, discharged their fiduciary

[304] Defs.' Opening Br. 66-69.
[305] Pl.'s Answering Br. 54-57.
[306] *See Emerald P'rs v. Berlin*, 787 A.2d 85, 93-94 (Del. 2001) ("[W]hen entire fairness is the applicable standard of judicial review, this Court has held that injury or damages becomes a proper focus only *after* a transaction is determined *not* to be entirely fair. *A fortiori,* the exculpatory effect of a Section 102(b)(7) provision only becomes a proper focus of judicial scrutiny after the directors' potential personal liability for the payment of monetary damages has been established."); *see also Hammons*, 2009 WL 3165613, at *14; *LNR Prop.*, 896 A.2d at 178.

duties.[307] In other words, whether a Section 102(b)(7) provision relieves a director of monetary liability in this context is a determination that can only be made after a trial on the merits.[308]

There is persuasive, uncontroverted evidence in the record that the Special Committee and Toh did not breach their fiduciary duty of loyalty or otherwise act in bad faith when approving the allocation of consideration in the Amended GPP Letter. Yet, there is a possibility that entire fairness review may apply to that allocation. Under Delaware precedent, the Court cannot relieve the Special Committee or Toh of personal liability at the summary judgment stage. Thus, the Motion is denied as to this theory of liability for the breach of fiduciary duty claim against the Special Committee and the rest of the Board.

H. *The Disclosure Claim Against the Board*

The final aspect of Frank's breach of fiduciary duty claim against the Board is a disclosure claim in which he alleges that American Surgical stockholders were

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[307] *See Tremont Corp.*, 694 A.2d at 428; *see also In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 811579, at *27 (Del. Ch. Feb. 28, 2014) ("The entire fairness test helps uncover situations where facially independent and disinterested directors have failed to act loyalty and in good faith to protect the interests of the corporation and the stockholders as a whole and instead have given in to or favored the interests of the controller."); *Gesoff*, 902 A.2d at 1166-67 (concluding, in a post-trial opinion in which the Court found a transaction not entirely fair, that a particular director was relieved of personal liability under the corporation's exculpatory provision).

[308] *See Orchard Enters.*, 2014 WL 811579, at *27 (citing *Emerald P'rs*, 787 A.2d at 93-94) ("It will require a trial to determine whether the merger was unfair and, if so, to 'identify the breach of fiduciary duty upon which liability for damages will be predicated.' . . . It will then be necessary to examine each of the individual defendants to determine whether the Exculpatory Clause applies.").

not provided with all material information when asked to vote on the Merger.[309] The Board contends that Frank waived this claim when he first withdrew his motion for a preliminary injunction due to allegedly inadequate disclosures after additional disclosures were made, and then submitted an application for interim attorney's fees that referenced that the disclosure claims in the initial complaint were mooted.[310] Even if the claim was not waived, the Board argues, it is not meritorious because the information at issue was not material.[311] In opposition, Frank maintains that he did not waive the claim in that it relates to the Board's failure to disclose material information only learned through discovery. Specifically, Frank contends that the proxy materials failed to disclose purportedly material information about (i) the qualitative weight placed by HFBE on its valuation analyses; (ii) the Option Exchange; (iii) the initial, multiple sets of financial projections; (iv) the nature and amount of Webb's contingency fee; and (v) the details of the meeting between Webb, Toh, and GPP in March 2010 during which the Three Options were presented and the First Option was selected.[312] As a threshold matter, the Court concludes that Frank did not waive this claim to the extent it relates to information learned through discovery.

[309] *See, e.g.*, Am. Compl. ¶¶ 71, 73, 83.
[310] Defs.' Opening Br. 61-62.
[311] Defs.' Reply Br. 30-31.
[312] Pl.'s Answering Br. 57-60.

Delaware law requires that when a board seeks stockholder action, the directors must "disclose fully and fairly all material information within [their] control."[313] A fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[314] "Material" information, however, does not mean "all" information.[315] In the proxy materials provided to stockholders in advance of a vote on a transaction, the directors do not need to recount a "play-by-play description of merger negotiations," but they nonetheless must provide an "accurate, full, and fair characterization" of what is disclosed.[316]

The compensation and potential conflicts of a financial advisor are most likely material information that the board should generally disclose.[317] So too should the valuations and methodologies of the financial advisor be "accurately described and appropriately qualified."[318] Furthermore, for price negotiations, the exact value of every rejected proposal may not need to be recounted in the proxy materials if the overall negotiation process is disclosed "in sufficient detail" such

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[313] *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).
[314] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).
[315] *See Stroud*, 606 A.2d at 85.
[316] *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007).
[317] *See, e.g.*, *In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8-9 (Del. Ch. Mar. 4, 2011); *Hammons*, 2009 WL 3165613, at *17 ("[T]he compensation and potential conflicts of interest of the special committee's advisors are important facts that generally must be disclosed to stockholders before a vote.")).
[318] *See In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) (noting that "quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim").

that stockholders can reasonably determine whether the final, agreed-upon price "is the product of arms' length negotiations and whether these negotiations succeeded in maximizing shareholder value."[319] To survive a motion for summary judgment where there is a Section 102(b)(7) charter provision such as the Exculpatory Provision here, the purported disclosure violations must relate to a possible duty of loyalty or good faith claim.[320]

Many of the purported disclosure violations identified by Frank are not material information that a reasonable American Surgical stockholder would have found important in deciding whether to vote for the Merger. To start, the proxy statement noted that HFBE made "qualitative judgments as to the significance and relevance" of the valuation methodologies it used in preparing and presenting the fairness opinion.[321] This disclosure adequately reflected HFBE's statement at the final fairness opinion presentation, as described in the meeting minutes, that it performed several valuation analyses but "placed most emphasis" on the selected company and discounted cash flow analysis.[322] In other words, there is no material difference between the meeting minutes and what was disclosed in the proxy statement.

[319] *Atheros Commc'ns, Inc.*, 2011 WL 864928, at *12.
[320] *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 362-63 (Del. Ch. 2008)
[321] Defs.' Ex. 12 (Proxy) at 37.
[322] Defs.' Ex. 84.

The Option Exchange was unrelated to any specific transaction proposal, and it was not suggested by any potential acquirer. The Court cannot reasonably infer that an American Surgical stockholder would have found the Option Exchange important in deciding whether to vote for the Merger. Thus, the Option Exchange was not material and did not need to be disclosed in the proxy materials.

Frank next complains that the Board failed to disclose or provide the equity case and bank case projections relied upon by HFBE during its first fairness opinion presentation in June 2010. American Surgical only disclosed the updated midpoint case projections, but these projections were the only ones relied upon by HFBE when it delivered its second and then final fairness opinion presentations in December 2010. As an HFBE representative testified, the midpoint case projections were simply an average of the other two sets in an effort to be the most reasonable case. Under these circumstances, the Court cannot reasonably infer that the equity case and bank case projections from June 2010 would have been material to American Surgical stockholders.[323] Rather, the Court concludes that the midpoint case projections from December 2010 were material, and those were disclosed.

[323] *See, e.g.*, *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *10 (Del. Ch. June 27, 2008) (citing *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *2-3 (Del. Ch. Nov. 1, 2007)) ("The record indicates that the projections used by [the financial advisor] reflected management's best estimates at the time. Given this, the Plaintiff has failed to meet its burden of showing how disclosing lower-probability projections would have been considered material by the reasonable stockholder.").

The evidence submitted to the Court in the context of the Motion demonstrates that the Special Committee relied on Webb, in no small part, throughout the American Surgical sale process, especially in the direct negotiations with GPP. After the Special Committee recommended that the Board adopt the Amended GPP Letter, Webb executed a second advisory engagement letter under which he would earn $350,000 upon the consummation of the Merger with GPP. Although Webb nonetheless remained engaged in important negotiations with GPP throughout 2010 and continued to provide advice to the Special Committee, this agreement was executed after the overall price terms were finalized. Given the Special Committee's substantial reliance on Webb, the Court can reasonably infer that information about Webb's contingency fee arrangement would have been material to an American Surgical stockholder,[324] but the Court cannot reasonably infer that the timing of this arrangement—and the lack of any relationship between Webb and GPP—undermines the independence of Webb's earlier advice.[325] Because Webb's contingency fee arrangement does not implicate a duty of loyalty or good faith claim, the Motion is granted as to this purported disclosure violation under American Surgical's Exculpatory Provision.[326]

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[324] *See, e.g.*, *Hammons*, 2009 WL 3165613, at *17.
[325] *See, e.g.*, *In re Rural Metro Corp. S'holders Litig.*, C.A. No. 6350, at 81-83 (Del. Ch. Mar. 7, 2014) (finding that a proxy statement contained material misstatements because it did not disclose a financial advisor's material conflicts of interest, particularly related to its "lobbying" to participate in the acquirer's debt financing package).
[326] *See Transkaryotic Therapies*, 954 A.2d at 362-63.

Finally, the Court is presently unable to conclude as a matter of undisputed fact whether the Special Committee was adequately informed of the circumstances surrounding the discussion of the Three Options, the selection of the First Option, and whatever role the Rollover Group may have played in this process. Although the Board need not have disclosed all details of the negotiation process with GPP, the revision of the terms of the Third GPP Letter—in which a choice was made among the Three Options that contemplated different per-share cash consideration to American Surgical's minority stockholders—is material information because the selected First Option represented the lowest cash consideration for the very stockholders being asked to vote on the Merger. That is, this information directly related to whether the price was the result of arm's length negotiations.[327] Consequently, because the Court cannot presently determine who was informed of what surrounding the Three Options, the Court also cannot conclude whether the failure to disclose what may or may not have occurred is appropriate or not or whether this disclosure implicates loyalty or good faith concerns.

Overall, the Court concludes as a matter of law that many of the purported disclosure violations were not material or that they cannot survive summary judgment due to the Exculpatory Provision. But, there is a triable issue of fact that prevents the Court from determining whether the material information surrounding

[327] *See, e.g.*, *Atheros Commc'ns, Inc.*, 2011 WL 864928, at *12.

the Three Options was adequately disclosed to American Surgical's stockholders and whether the Board may face monetary liability for the nondisclosure.

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The Supreme Court has encouraged this Court, when the entire fairness standard is implicated, to "provide a reliable pretrial guide for the parties regarding who has the burden of persuasion" for the claims at issue. "[I]f the record does not permit a pretrial determination that the defendants are entitled to a burden shift, the burden of persuasion will remain with the defendants throughout the trial to demonstrate the entire fairness of the interested transaction."[328] Such is the case in this action. There is a genuine issue of material fact as to whether the Special Committee was well functioning such that the entire fairness burden does not shift.

But, in this case, there is also a predicate factual question that is unresolved. There is a genuine issue of material fact as to whether the Rollover Group was a control group at the time of the selection of the First Option. There are further factual questions as to whether the Rollover Group was on "both sides" or otherwise "competing" with the minority stockholders for the consideration to be received from GPP. Thus, Frank retains the burden to establish that there was a control group and the other issues necessary to implicate the entire fairness standard of review. To the extent the entire fairness standard applies, the Rollover

[328] *Ams. Mining Corp.*, 51 A.3d at 1243.

Group would bear the burden to establish that the allocation of the consideration in the Amended GPP Letter was entirely fair.

VI. CONCLUSION

For the reasons set forth above, the Motion is granted in part and denied in part. Specifically, the Motion is granted as to: (i) the breach of fiduciary duty claim against Chamberlain and Chapa in their individual capacity; (ii) the *Revlon* claim against the Special Committee and Toh; (iii) the unjust enrichment claim against the Rollover Group; (iv) the disclosure claim, except regarding the one disclosure identified above; and (v) any claim against American Surgical.[329] The Motion is denied as to the other claims and issues.

Counsel are requested to confer and submit an implementing form of order.

[329] American Surgical is not expressly identified as a defendant for any particular cause of action in the Amended Complaint, and Frank has not advocated the merits of any claim against the company. American Surgical, as the corporate entity, "did not owe fiduciary duties to its stockholders." *See In re Wayport, Inc. Litig.*, 76 A.3d 296, 322-23 (Del. Ch. 2013). Therefore, summary judgment on any claim against American Surgical must be granted as a matter of law.