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Case Number 461,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

PLAINTIFF-BELOW, APPELLANT'S OPENING BRIEF

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I. NATURE AND STAGE OF PROCEEDINGS

This action arises from the going-private acquisition (the "Merger") of SRA International Inc. ("SRA") by its controlling stockholder, Ernst Volgenau ("Volgenau"), and private equity firm, Defendant Providence Equity Partners LLC and its affiliates[1] (collectively, "Providence"), by means of a leveraged buyout ("LBO").[2] This action presents important questions of Delaware law including the applicable standard of review for controlling stockholder transactions and the scope of 8 *Del. C.* §124 ("Section 124").

In its Verified Second Amended Class Action Complaint (A41-90), Plaintiff-below, Appellant, Southeastern Pennsylvania Transportation Authority ("Plaintiff"), asserted four counts challenging the Merger. Count 1 alleged breaches of fiduciary duty against all members of the SRA Board of Directors (the "Board")[3] for approval of the Merger, which was the product of an unfair process and resulted in an unfair price for public stockholders. Count 2 alleged breaches of fiduciary duty specific to Volgenau and SRA's CEO, Defendant Stanton Sloane ("Sloane"), respectively. Count 3 alleged aiding and abetting by Providence of the Board members' breaches of fiduciary duty. Count 4 alleged the Merger is invalid

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1 Defendants Providence Equity Partners VI L.P., Providence Equity Partners VI-A L.P., Sterling Parent Inc., Sterling Merger Inc., and Sterling Holdco Inc.

2 The Merger was consummated July 20, 2011 pursuant to the Agreement and Plan of Merger dated March 31, 2011 (the "Merger Agreement") for $31.25 per share for all SRA stockholders other than Volgenau and select insiders.

3 Defendants Volgenau, Stanton Sloane, Michael Klein, Miles Gilburne, John Barter, Larry Ellis, Robert Grafton, William Keevan and Gail Wilensky.

as a result of Board's failure to adhere to the terms SRA's Certificate of Incorporation ("Certificate") and that the Board's failure in that regard was an additional breach of fiduciary duty.

On February 21, 2012, Defendants moved for judgment on the pleadings as to Count 4. On August 31, 2012, following oral arguments heard on May 24, 2012, the Court dismissed in part and upheld in part Count 4.[4] On December 21, 2012, all Defendants moved for summary judgment on the remaining claims. On August 5, 2013, following oral arguments heard on April 4, 2013, the Court issued its Memorandum Opinion granting all Defendants summary judgment on all remaining claims.[5] On August 30, 2013, Plaintiff filed its notice of appeal. A3074-76. This is Plaintiff-below, Appellant's Opening Brief.

For the reasons stated herein, Plaintiff respectfully requests the Court reverse and remand the decisions of the Court below granting Defendants summary judgment as to Counts 1, 2, 3 and 4 and partial judgment on the pleadings as to Count 4.

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[4] The Court below's letter opinion, *Se. Pa. Trans. Auth. v. Volgenau*, C.A. No. 6354-VCN, Noble, V.C. (Aug. 31, 2012), is attached hereto as Exhibit A and is cited as "Let. Op. at ___."

[5] The Court below's Memorandum Opinion, *Se. Pa. Trans. Auth. v. Volgenau*, C.A. No. 6354-VCN, Noble, V.C. (Aug. 5, 2013), is attached hereto as Exhibit B and is citied as "SJ Op. at ___." The corresponding Final Order and Judgment Pursuant to Court of Chancery Rule 54(b) was entered on August 19, 2013 and is attached hereto as Exhibit C. The Final Order is pursuant to Rule 54(b) to preserve the Court below's jurisdiction to consider a fee application, if any, by Plaintiff and its counsel for disclosure benefits generated during the injunction stage of the litigation.

II. SUMMARY OF ARGUMENT

1. The Court below applied the incorrect standard of review to Defendants' conduct. The record evidence supports that the Merger was a self-dealing transaction involving an unfair process, resulting in an unfair price for stockholders and unduly benefitting SRA's controlling stockholder, Volgenau. The standard of review for a self-dealing transaction involving a controlling stockholder is entire fairness. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1239-40 (Del. 2012). Relying on *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013) ("*MFW*") and *In re John Q. Hammons Hotels Inc. S'holders Litig.*, 2009 Del. Ch. LEXIS 174 (Del. Ch. Oct. 2, 2009) ("*Hammons*"), the Court below committed reversible error by applying the business judgment rule and requiring Plaintiff to rebut the presumptions thereunder. As applied in this case, *MFW* and *Hammons* are not consistent with the established law of Delaware. Even if this Court adopts the standards and/or tests articulated in *MFW* and *Hammons*, Defendants' conduct would be subject to entire fairness review because the record evidence supports that: (1) Volgenau stood on both sides of the Merger; (2) the process lacked the necessary "robust" independent protections and a fully informed vote by minority stockholders required to obtain business judgment review under *MFW* and *Hammons*; and (3) the SRA Board members breached their fiduciary duties in connection with the Merger. *Cede v. Technicolor, Inc*, 634 A.2d 345, 367

(Del. 1993). In reaching its conclusions, the Court below incorrectly applied the summary judgment standard. Summary judgment is only properly granted if the moving party demonstrates that there is no genuine issue as to any material fact. *Brown v. Ocean Drilling & Exploration Co.*, 403 A.2d 1114, 1115 (Del. 1979). The trial court cannot weigh evidence, resolve factual conflicts or determine questions of credibility. *Texelon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). The trial court must rather view the record evidence in the light most favorable to the non-moving party. *Motorola Inc. v. Amkor Tech.*, 849 A.2d 931, 935 (Del. 2004). The Court below did not consider the record evidence supporting Plaintiff's claims and otherwise gave evidence supporting Plaintiff's claims less weight than evidence supporting Defendants' positions.

2. The Court below erred by granting judgment on the pleadings, in part, as to Plaintiff's Count 4 regarding the validity of the Merger and in so doing misinterpreted Section 124. Section 124 applies to corporate acts that are *ultra vires*. Plaintiff did not challenge the Merger as an *ultra vires* corporate act by SRA, but rather as the product of improper and unauthorized action by the Board members under the Certificate. Section 124 was correctly interpreted, and the relevant distinctions recognized, in the subsequently decided case, *Carsanaro v. Bloodhound Techs.*, 65 A.3d 618 (Del. Ch. 2013).

III. STATEMENT OF FACTS

A. Volgenau Dominated and Controlled SRA

SRA was founded in 1978 by Volgenau. A284, 342. SRA provides technology solutions and professional services, primarily to federal government customers across diverse markets. A749. SRA had two classes of common stock (A and B), that were identical except B shares had a 10:1 voting preference. A795.

Volgenau was SRA's "controlling stockholder." A1075. Volgenau owned approximately 21.8% of SRA's equity but 71.8% of its voting power through his ownership of the B shares. A1143. The voting preference of the class B shares was personal to Volgenau and limited. The voting preference would dissolve if he: (1) sold the shares; (2) died; or (3) turned eighty and became infirm or was no longer involved in SRA's operations. A797-801. The Certificate required equal treatment of the Class A and B Shares in any merger (the "Equal Treatment Requirement"), as follows:

> Upon the merger or consolidation of the Corporation (whether or not the Corporation is the surviving entity), holders of each class of Common Stock will be entitled to receive equal per share payments or distributions... A801-2.

Volgenau was also SRA's Chairman and CEO until he stepped down and was succeeded as CEO in 2002 by Renato DiPentima ("DiPentima"). Volgenau remained Chairman. DiPentima was Volgenau's deputy at SRA for many years and a close friend. A1034. When DiPentima retired in 2007, he remained a paid

consultant to SRA with a non-disclosure agreement. A2555-66. Volgenau led the search for a replacement and the Board accepted Volgenau's recommendation of Sloane. A1035-36. DiPentima also maintained an SRA.com e-mail address and met regularly with Volgenau and Sloane. A1315-84.

Volgenau, regardless of title, was the ultimate authority in the eyes of SRA management and the outside directors. A1040, 1042-43. For example, when the Board was divided on whether to terminate Sloane, Volgenau confidant, Defendant Michael Klein ("Klein"), told Volgenau that the Board was split but that Klein would defer to Volgenau. A1040. Similarly, when Sloane decided to terminate a senior SRA executive, Barry Landew ("Landew"), Volgenau nevertheless kept Landew at SRA through an arrangement with Landew's new company, Wolf Den Associates ("Wolf Den"). A1042.

B. Volgenau Planned a Self-Dealing LBO with Providence without the Board's Knowledge

Volgenau mandated SRA's credo: "name, values and culture." By "name," Volgenau meant the generic brand name, "SRA International," must always be preserved; by "values and culture," Volgenau referred to the idiosyncratic ethical and employment philosophies that Volgenau established and demanded be preserved regardless of the effect on shareholder value. A288, 951-61.

Volgenau knew the negative economic impact to the public stockholders of requiring potential buyers to retain SRA's "name, values and culture," because

retaining his credo would limit the value such a buyer could extract. According to Volgenau, over the years, he met with CEOs of companies extolling synergistic value available by integrating SRA. A1055. Volgenau would not allow SRA's "name, values and culture" to be lost in a value-additive strategic deal, stating in his draft memoir dated mere weeks after the Merger Agreement was signed:

> I began to refer to them privately with a few close friends as 'sausage factories' that would grind up SRA and homogenize us into their system. Our name, values and culture would be lost forever. Many of those companies were quite successful, but I did not want SRA to become an Oscar Meyer weiner. A1055.[6]

Volgenau believed it was his decision as controlling stockholder as to when and how SRA would be sold. A1054. Volgenau decided an LBO would allow him to achieve his personal goals, writing:

> Private equity firms use the money of investors (such as big retirement funds) to buy companies, improve their management, or make other changes, and then sell them or take them public. The company would invest money and augment it with a large bank loan in a so-called leveraged buy-out (LBO). This would allow us to preserve the name, values and culture of SRA and they would ask me to be chairman of a small, capable board that would oversee the launch of a refurbished, privately-held SRA. The shareholders would be asked to approve the LBO and presumably they would agree because the price would be substantially higher than our roughly $20 per share, which was prevailing on the New York Stock Exchange.
>
> The alternative was appealing. The Company would once again be private. I would chair a small board without all of the regulatory procedures associated with a public company. A291, 1056-57.

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[6] Volgenau's memoir is apparently still pending publication. It has been delayed several times during this action, but the draft reveals his personal agenda for SRA and its shareholders.

In early 2010, Providence was seeking an acquisition in SRA's industry. A313-14. To pursue that goal, in January 2010, Providence hired DiPentima, who continued to serve as a paid consultant to SRA. A401-3, 1276, 2555-66. Providence planned to exploit Volgenau's trust in DiPentima to win Volgenau's commitment to a partnership with Providence for an LBO of SRA:

> Renny has Ernst's trust, understands his motivations and has helped us develop a specific plan to address Ernst's key non-economic deal issues. A1389.

Like Volgenau, Providence knew that strategic buyers could pay more because of synergies. A1391. Aside from Defendant Gilburne's vague testimony, outside directors deposed were ignorant regarding DiPentima's involvement with LBO planning and no steps were taken to ensure that DiPentima could not use his position with SRA to aid Providence. A356, 370, 439, 470-1. For purposes of the LBO, DiPentima's loyalties were strictly with Providence. A433-4, 1386.[7]

On February 9, 2010, DiPentima initiated LBO discussions with Volgenau about which Volgenau wrote:

> Renny recently became senior advisor to Providence Equity Partners, which has about 25B under management. He suggested a buy-out in which the name and values are preserved and that the board include (among others) Ted, Renny and me. A1424.

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[7] The definitive proxy materials provided to shareholders ("Proxy") were silent as to DiPentima's involvement in the LBO and dual roles with Providence and SRA. After the Merger closed, SRA opened the "Renny DiPentima Collaboration Center." A2764-5.

"Ted" Legasey ("Legasey") was a former SRA executive and a friend to Volgenau. A289, 337. He was a paid SRA consultant with a non-disclosure agreement and recruited by DiPentima to entice Volgenau to an LBO. A337, 412-4, 2568-72. The Board was oblivious to Legasey's work for Providence. A374, 440, 471-2.

Following the first meeting with DiPentima, Volgenau (and, later, SRA management) began a series of discussions and meetings from February to October 2010 with DiPentima and senior Providence representatives. A290-301, 316-29, 339-40, 343-9, 361-2, 405-6, 408, 1425-36, 2574-92, 2596-600.[8] On February 16, 2010, DiPentima outlined the plan for dealing with Volgenau:

> After 32 years, SRA is Ernst's "baby" and he is more protective of it, and what he believes it stands for, than probably anything else you can imagine. A2594.

DiPentima continued:

> I strongly believe the reason Ernst is meeting with us and listening to our proposal is that he is drawn to and intrigued with the elements of our approach, such as protecting the culture of "Honesty and Service" that is of the utmost importance to him, keeping the SRA name, and cashing him out but giving him an opportunity to invest and participate on the Board with other people he knows and respects. A2595.

The meetings between Volgenau and other SRA management during the first half of 2010 addressed Volgenau's desires for equity ownership in an LBO and a post-closing management role, equity incentives for management, and

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[8] The frequency and substance of the discussions through October 2010 was not accurately or completely portrayed in the Proxy provided to stockholders. A1092-3.

indicative price points. A290-5, 297-01, 316-23, 325-7, 329. The non-management Board members were unaware of the discussions. A263, 379, 444, 469. Providence sought and obtained assurances at Volgenau's request, including that financing would be available for an LBO. A2554.

Unbeknownst to non-management directors, in May 2010, Sloane, SRA CFO Richard Nadeau ("Nadeau") and Mark Schultz, SRA's general counsel, began furnishing proprietary SRA information to Providence, and Volgenau directed management to develop LBO scenarios, which were provided to Providence. A1437-1512, 1516-27. Meanwhile, Providence recruited more Volgenau loyalists, retaining Wolf Den, the firm co-founded by Landew and DiPentima's son-in-law. A413, 422, 2627-8. Wolf Den was also a paid SRA consultant with a non-disclosure agreement. A2684-98. The non-management directors were unaware of Wolf Den's work for Providence, including due diligence and strategic planning for a resale of SRA to strategic buyers following the LBO. A373, 413, 424, 439-40, 472, 2630, 2701, 2772-01.

Volgenau knew his goals for SRA were not consistent with all stockholders'. A1561. The Board knew the importance of monitoring for conflicts, but did not do so. A264, 372-3, 442-3, 474, 1562. Rather, Volgenau wrote that Klein encouraged him to exploit his control of SRA to achieve his personal goals:

> 'You are 77 years old. If you die or become incapacitated, your estate will no longer have the Class B (ten for one) voting shares, and the

company's disposal will be unpredictable. Wouldn't you rather determine its future now, while you are in good health?' A1056.

While Volgenau was in secret discussions with Providence to pursue an LBO, during mid-2010, SRA retained Citi to provide advice regarding strategic alternatives for SRA. A1054, 1529-30, 1561. Citi had been SRA's investment banker for years and concluded that an acquisition would be SRA's best alternative and that an LBO would be an unappealing strategy. A1561, 1576, 2804. The Proxy did not disclose Citi's work for SRA or its conclusions regarding an LBO. SRA's internal analysis also indicated that a strategic acquirer would have a $5 per share advantage. A1801. During the October 27, 2010 Board meeting (discussed below), Nadeau stated his belief that a strategic buyer would likely pay $5 per share more than a financial buyer and Sloane indicated his view that a price in the mid-$30's would be available with strategic buyer. A2746.

Although SRA explored an acquisition from July 2010 through September 2010, it did not change Volgenau's desire to engage in an LBO with Providence. He and Sloane kept Providence informed about SRA's efforts to make a strategic purchase, even though Providence was a potential competing bidder. A330, 426-7, 429, 2632. The non-management Board members were unaware of those communications. A376, 446, 476. Providence's representatives, including DiPentima and Legasey, sought to dissuade Volgenau from pursuing an acquisition but Volgenau believed Providence would still do an LBO with him even if SRA

made a strategic acquisition. A2633-8.

C. Volgenau Pursued a Self-Dealing LBO

In October 2010, Volgenau began planning to introduce Providence to the SRA Board. A332, 303, 351, 431, 1677. Volgenau had never taken such a step with any other potential buyer. A289, 379, 478. At the Board meeting on October 27, 2010, Volgenau introduced Providence and announced it was the only potential bidder for SRA that had ever interested him and cited Providence's commitment to Volgenau's personal criteria of "name, values, culture." A2740-1.

With the Providence/Volgenau LBO at the door, a Special Committee of the Board was formed. A2641-2. Volgenau selected the members, including Klein, as chairman, along with Defendants Gilburne, Grafton and Barter. A381-2.[9]

1. Klein Permitted Volgenau's Special Personal Interests to Drive the Process

Despite the unanimous view of SRA management and their advisors that strategic bidders would pay more, Volgenau resisted because of his criteria of "name, values and culture." And, notwithstanding the nominal broad authority conveyed to the Special Committee, twice the Special Committee sought Volgenau's permission to allow strategic bidders to participate. A1829, 1832. In early February 2011, Volgenau agreed to allow strategic buyers into the process but continued to require the preservation of his special agenda of "name, values

[9] Defendant Ellis was added after expressing his desire to be a member. A382, 448.

and culture." A1836. Houlihan Lokey Capital, Inc. ("Houlihan"), the Special Committee's banker, then prepared a script to communicate to potential strategic bidders making it clear that Volgenau intended actively to participate in the process for the purpose of advancing his personal agenda:

> As you likely know, [Volgenau] cares deeply about a series of humanistic concerns relating to SRA's employees, identity and culture. Accordingly, the exploration process is being ***bifurcated***, with a Special Committee of outside directors addressing traditional price and certainty issues and Dr. Volgenau prepared to explore the humanistic issues. A1836 (emphasis added).

Other than Klein, the Special Committee members were unaware of the script to communicate to potential strategic bidders. A390, 454, 490. Moreover, the Special Committee allowed Volgenau meet, unsupervised, with bidders. A1871. Volgenau admits he emphasized his personal requirement of the post-Merger preservation of "name, values, and culture" in his meetings. A305, 307-8.

The Special Committee also allowed SRA's long-time banker, Citi, to be retained by Providence. A2806-12. Thus, Providence was able to obtain the assistance of another source of inside SRA information.

The market was flooded with reports that Volgenau would not sell to a strategic buyer or to a foreign company and that he would take less money to get what he wanted. A1952-5, 1959. One report stated:

> [Volgenau] wants a financial buyer in particular because he would like to control who buys, even if he receives a lower price as a result. What a trooper. A1959.

Another read, "[s]trategic bidders...were effectively kept out of the bidding..." A1955. Within the explicitly bifurcated process, the winning bidder, Providence, was a private equity firm sponsoring an LBO and committed to deliver on Volgenau's personal agenda.

2. Klein Was Not Independent and Disinterested

Klein was not independent and disinterested. In addition to being a long-time Volgenau confidant (A1040), Klein had an expectation (undisclosed to the SRA Board) that he would receive an astronomical "reward" for delivering a deal acceptable to Volgenau. Klein's had recently received such a "reward" for running a process that considered an insider self-dealing transaction where, as here, he was chosen by a close friend to head a special committee.

At the November 9, 2010 Special Committee meeting, with Special Committee counsel Kirkland & Ellis LLP ("Kirkland") and Houlian, the February 3, 2011 Board meeting and the March 31, 2011 Board meeting, as the Merger Agreement was signed, the topic of Special Committee compensation was addressed and set by the Board at $75,000 all Special Committee members and $150,000 in charitable donations on Klein's behalf.[10] A1686, 1963, 1972. At the February 3, 2011 meeting, the Board received a chart of precedent special

[10] The amount was increased at each of the meetings where the topic was raised. A1963, A1972, 1981.

committee compensation packages, none of which exceeded $118,250 for the chairman. A496-7, 1966-8. There was never discussion of any additional, special "rewards" or that any aspect of the compensation would be contingent on the result of the process. A385-6, 450-1, 453, 457, 480, 497. Klein did not disclose that he expected an additional "reward" exceeding $1 million (more than ten times the precedents identified by Kirkland) from Volgenau, who would be on the buy-side, at the end of the process.

On June 8, 2011, Klein sent Volgenau, not the Board, a memorandum about which, in his own words, he had "thought a good deal." A1993-5. Klein labeled the Board-approved compensation a "disappointment." A1995. Klein expected throughout the process to receive a "reward" in excess of $1 million in addition to his Board-approved compensation:

> My experiences as a M&A lawyer and board member have been that the amounts, if any, awarded outside directors who lead such efforts are usually issued when the occasion was ripe -- i.e., the deal was about to close or had closed. By that point the boards have a better sense of context: in that the result is then known and the amount of all transaction fees and expenses are on the table. A1994.

In support of his demand for a "reward" in the amount of not less than $1.3 million, Klein cited his receipt of a $2.6 million bonus for his work on a self-dealing transaction involving the CEO of the Perini Corporation ("Perini"). *Id.* In 2008, Klein was chairman of a special committee formed to consider an acquisition

by Perini from its CEO.[11] A2095. The original compensation for special committee work was set at a typical level as stated in the proxy statement, but Klein received an additional $2.6 million stock bonus at closing. A1994. Thus, according to Klein's own admission, based upon his Perini experience, he led the process leading to the SRA Merger with this "reward" expectation. In further support for his "reward," Klein cited the fees being paid to financial and legal advisors. A1994. Klein also emphasized that the process he led in effect by himself resulted in the deal Volgenau wanted:

> [T]hat a buyer prevailed whom you believe will likely preserve SRA's identity and values, and least adversely affect SRA's family of long time employees, was a happy additional result. A1994-5.

Thus, the chairman of the Special Committee, formed nominally to negotiate independently on behalf of the SRA public stockholders, expected a "reward" and made his "reward" request to Volgenau. Moreover, Volgenau pressed the issue despite his knowledge of Board opposition. In an email forwarding Klein's memo to some SRA directors (but not Keevan and Wilensky, who had already stated an objection to more compensation for Klein), Volgenau noted that the subject had

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[11] In 2008, Ronald N. Tutor ("Tutor"), Perini's CEO, chose Klein as committee chairman to consider the acquisition of Tutor-Saliba, a company 96% owned by Tutor. Klein and Tutor joined the Perini Board together in 1997 when a firm in which Klein and Tutor-Saliba were partners, invested in Perini. A2095. Kirkland represented the committee chaired by Klein. A2098. The Perini proxy, signed by Klein, described his compensation as $60,000 plus a per diem. A1994, 2130. Perini stockholders never got the truth. In the annual proxy issued several months after the transaction, a footnote cryptically revealed that Klein had received shares for "contributions to the board." A2450.

been raised at a May 5, 2011 meeting and Keevan and Wilensky were opposed.[12] A1993. In response to Volgenau's conveyance of Klein's memo, the Special Committee members endorsed varying levels of additional payments for Klein in excess of the Board-approved amount approved despite the advice they had received about precedent compensation for special committee members and the explicit statement in the Proxy that no more than the stated Board-approved amounts would be paid. A386, 460, 482, 499, 1134, 2043. After discussing the matter with the Special Committee members, Volgenau advocated to Providence on Klein's behalf to secure additional compensation.[13] A2761.

The Proxy, issued June 15, 2011, falsely described Klein's compensation as of that date as follows:

> [T]he Board determined that each member of the special committee shall receive a one-time fee of $75,000. Such fees are payable whether or not the merger is completed. ***No other meeting fees or other compensation (other than reimbursement for out-of-pocket expenses in connection with attending special committee meetings) will be paid to the members of the special committee in connection with their service on the special committee.*** In addition, in recognition of the considerable additional time commitment and efforts of the chairman of the special committee, the Board determined that on behalf of the Company it would make charitable contributions in the aggregate amount of $150,000 to two charitable organizations known to be supported by the chairman of the special committee. A1134 (emphasis added).

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[12] The Board members could not recall the discussions of May 5, 2011 to which Volgenau referred and provided conflicting testimony on the subject. A459-60, 482, 502.

[13] Klein's official compensation package was resolved, at the earliest, June 27, 2011, when Providence objected to the appearance of such a reward to Klein. A2761.

No mention was made of the extraordinary reward sought by Klein and recommended by Volgenau and the Special Committee members.

In addition to Klein's self-written admissions, just two days after he wrote his memo, when asked by Plaintiff's counsel about his compensation and the related disclosure in the Proxy, Klein provided no information concerning his long-held expectation or the demand he made just two days earlier.[14] A266. Further, in support of Defendants' summary judgment motion, Klein submitted an affidavit that did not deny his expectation during the process of receiving a "reward" or the materiality of such a "reward," but he stated he never received it, either directly or indirectly. A2816. Whether Klein eventually received the reward directly or indirectly is immaterial to his state of mind as he ran the process. Klein admittedly conducted a process leading to Volgenau's desired outcome with the expectation of receiving an extraordinary reward in addition to Board-approved compensation. A1994-5. Record facts, however, raise a strong inference that the bonus reward was paid based on a pattern of substantial increased giving by persons and entities central to the Merger after closing.[15] A1765, 2887-88, 2820.

Klein's interest in the Merger is crucial because he was a *de facto* one-man committee as acknowledged by the other Special Committee members. A380-1,

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[14] Klein's memorandum was not produced in litigation until nearly a year later.

[15] Although an issue of credibility and an issue of fact not reachable on summary judgment, the Court below accepted Klein's representation.

384, 392, 455, 461, 482-3, 485.

3. The Special Committee's Advisors Were Not Independent and Disinterested

The Special Committee's advisors were not independent and disinterested. Klein selected advisors from his Washington, D.C. social circle and structured their compensation with incentives to deliver a deal acceptable to Volgenau.

Klein is chairman of the board of the Shakespeare Theatre Company ("Shakespeare"). A1689. In 2011 and again in 2012, after the Merger, SRA was one of the Shakespeare's largest donors. A1765, 2887. Kirkland's lead transaction attorney, George Stamas ("Stamas"), and Klein were previously partners at Wilmer, Cutler & Pickering. A1778. Stamas is also on the Shakespeare board and is a major donor to that organization as was Kirkland in 2012, after the Merger.[16] A1689, 1765, 2888. In negotiating Kirkland's engagement terms, Kirkland agreed to a small discount to its hourly rates, but Klein agreed to provide for a contingent discretionary bonus for Kirkland (A1782-3), a fact undisclosed to stockholders, incentivizing Kirkland to please Klein and complete a transaction that Volgenau, as controlling stockholder, would approve.

Likewise, the vast majority of Houlihan's compensation was tied to consummation of a transaction. A1785-95. Houlihan's lead banker, Anita Antenucci ("Antenucci"), sits on the Shakespeare board and she and Houlihan are

[16] In 2012, Volgenau's legal counsel initiated charitable giving to Shakespeare. A2888.

major donors to that organization. A1689, 1765, 2820, 2887. In 2012, both Houlihan and Antenucci joined SRA and Klein in the top rung of donors. A2887.[17]

4. Volgenau Stood on Both Sides of the Self-Dealing Merger

As discussed above, the Merger achieved Volgenau's self-dealing agenda to attain an LBO that would allow Volgenau to achieve every personal goal he had for SRA. Volgenau developed his LBO plan with his confidant, DiPentima. He was able to take SRA private so that Volgenau could be "chairman of a small, capable board that would oversee the launch of a refurbished, privately-held SRA." It would permit Volgenau to retain SRA's "name, values and culture" without succumbing to a "sausage factory." And Volgenau, together with Providence, would own SRA without the pressures of public stockholders. He worked with Providence to establish that an LBO was the strategy for SRA that most pleased him and then introduced Providence to the Board with that message. Volegnau selected the majority of the Special Committee and then dictated his demands to the bidders.

Volgenau and Providence were partners in the Merger. Volgenau, together with Providence agreed to commit equity to fund the Merger prior to stockholder

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[17] A comparison of Houlihan's February 2, 2011 presentation to the Special Committee with the March 31, 2011 presentation (by which time Houlihan knew the bids) is evidence of the result-driven process. Houlihan, the sell-side advisor, manipulated multiples, comparables and inputs all of which served the goal of lowering implied value of SRA to justify the price of $31.25 per share. A278-9, 515-9, 700, 703-4, 1672, 1674, 2502, 2508, 2512.

approval to provide the capital necessary to purchase the minority shares and complete the Merger. Indeed, a significant portion of Volgenau's SRA stock was pledged as a guarantee to fulfill the financing obligations of the LBO. A1130. During her presentation to potential lenders after the Merger Agreement was signed, Julie Richardson of Providence summed up Providence and Volgenau's relationship, characterizing them as "partners" and touting the long head start Providence had over any potential rivals. A1276, 2756.

5. Neither Volgenau Nor the Board Complied with the Certificate

No member of the Board recalled any effort to ascertain whether the payments or distributions in the Merger as between Volgenau and the public stockholders were equal per share or that the Merger complied with the Equal Treatment Requirement. A286, 358-9, 394, 456, 491. Volgenau testified that, to his knowledge, the Equal Treatment Requirement had not been discussed. A286. The Proxy makes no reference to any determination on the Board's part regarding adherence to the Certificate nor did the Board seek shareholder approval to amend the Certificate. No minutes or other Board documents produced by Defendants include any discussion concerning the Equal Treatment Requirement, much less compliance with it.

The record evidence supports Plaintiff's claims that Volgenau received more for his class B shares than the payment to class A shares. Defendant Volgenau

received $31.25 per share in cash for his 113,514 Class A shares. For 6,902,469 of his Class B shares, Volgenau received $31.25 cash; for 3,840,000 of his class B shares, Volgenau received an ownership stake of 23.4% in post-Merger SRA; and for 960,000 shares, Volgenau received a promissory note. A710-1. One of Defendants' expert testified that if SRA's value exceeds the Merger consideration, the Merger consideration may be a "bonanza" for Volgenau:

> [T]he people who get left over and get shares get all the benefits of these highly valued shares plus the impact of it getting magnified by leverage, so that's a bonanza for them. A523.

In addition to the economic payment for his shares, Volgenau received a stockholders' agreement pursuant to which Volgenau obtained significant benefits essential to him, including terms restricting Providence's ability to sell, guaranteed participation for Volgenau in management, and veto rights for Volgenau regarding SRA's "name, values and culture." A2524-51.

Not only was Volgenau's Merger consideration disproportionately more than that paid to the public stockholders, but the public stockholders received well below fair value based on the $31.25 per share Merger consideration.[18] A200-216, 645-718.

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[18] A discussion of details on the various valuation evidence and testimony is not necessary for the purpose of the appeal. There is, indisputably, genuine and material disagreement among parties and experts alike as to SRA's value. A228-32. Defendants, for example, have offered no evidence of SRA's value as of the date the Merger closed, leaving them unable to prove SRA's fair value or the equality of Volgenau's Merger consideration on the relevant valuation date. A508-9, 521, 547-9.

IV. ARGUMENT

A. The Court Below Erred by Applying the Incorrect Substantive and Procedural Standards to Plaintiff's Claims

1. First Question Presented

Did the Court below commit reversible error by applying the business judgment rule to grant summary judgment in favor of Defendants? A151-243, 2991-3044, 3064-68, 3071-73.

2. Scope of Review

The Court reviews the granting of summary judgment *de novo*, need not defer to determinations below of facts or law and "draw[s] its own inferences in making factual determinations and in evaluating the legal significance of the evidence." *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

3. Merits of the Argument

a. Entire Fairness Applies to the Merger

The standard of review applicable to self-dealing transactions by controlling stockholders is entire fairness. *Ams. Mining*, 51 A.3d at 1239-40. In addition to their procedural burden, Defendants have the burden to demonstrate substantive fairness. *Id.*; *See also*, *Kahn v. Lynch Communications Systems*, 638 A.2d 1110, 1117 (Del. 1994). The "underlying factors which raise the specter of impropriety can never be completely eradicated and still require careful judicial scrutiny" in controlling stockholder transactions. *Ams. Mining*, 51 A.3d at 1239-1241.

The record evidence supports Plaintiff's claim that the Merger was a self-dealing transaction by Volgenau (*see* §§ III.A; III.B; III.C.1, 4, *supra.*) and that Volgenau received payment for his SRA shares in excess of the payment to minority stockholders (*see* § III.C.5, *supra.*).

b. Summary Judgment Based on the Business Judgment Rule Was Improper

Relying on *MFW* and *Hammons,* the Court below applied the business judgment rule and its presumptions to grant summary judgment. *MFW* and *Hammons* (at least as applied here by the Court below) are at odds with Delaware law. There is no need for a "road map" to business judgment where a controlling stockholder obtains special benefits because one already exists: to prove an entirely fair transaction. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 ("There is no 'safe harbor' for...divided loyalties in Delaware"); *Cinerama, Inc. v. Technicolor, Inc.*, 633 A.2d 1156, 1163 (entire fairness is not an "insurmountable obstacle"). *MFW* held that *Lynch* does not mandate application of entire fairness to self-dealing transactions by controlling stockholders if the transaction is approved by and conditioned on *both* an effective properly functioning independent special committee *and* a fully informed vote of a majority of the minority, among other requirements.[19] 67 A.3d at 535. Here, the Court below concluded that "[a]s does

[19] *MFW* holds that if the fair dealing prong of entire fairness is satisfied, price is not considered. *Contra Weinberger*, 457 A.2d at 711 (Del. 1983) (entire fairness is not bifurcated).

MFW, this case serves as an example of how the proper utilization of certain procedural devices can avoid judicial review under the entire fairness standard and, perhaps in most instances, the burdens of trial." SJ Op. at 69.

In *Hammons*, the Court concluded that if facts establish that the controlling stockholder did not stand "on both sides of the transaction," *Lynch* does "not ***mandate*** that the entire fairness standard of review apply notwithstanding any procedural protections that were used." 2009 Del. Ch. LEXIS 174, *32-*33 (emphasis added). Here, the Court below concluded that "*Hammons* sets forth the procedural protections necessary for a third-party transaction involving a controlling stockholder to qualify for review under the business judgment rule..." SJ Op at 26. The Court below concluded that Volgenau did not stand on both sides and required Plaintiff to overcome the presumptions of business judgment.

Even if this Court adopts the analyses and/or tests in *MFW* or *Hammons,* the Court below erred in applying the business judgment rule here.

i. Volgenau Was on Both Sides of the Merger

Neither *Hammons* nor any case of which Plaintiff is aware applying *Hammons* has turned on the factual determination of whether the controlling

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MFW's rationale is that the Supreme Court has never specifically considered an interested, controlling stockholder transaction in which each a functioning independent committee and a fully informed majority of the minority vote was present. 67 A.3d at 521. This Court did, however, contemplate such a scenario discussing the entire fairness policy. *Lynch*, 638 A.2d at 1116 *quoting Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990).

stockholder stood on both sides of the transaction. The Court in *Hammons* found as a factual matter that the controller had no relationship with the ultimate bidder, and thus did not stand on both sides of the transaction, but applied entire fairness because the necessary minority protections were not met. 2009 Del. Ch. LEXIS 174 at *33.[20] Here, the Court below wrongly concluded, as a matter of law, that Volgenau did not stand on both sides of the Merger. SJ Op. at 27-30.

The Court below's conclusion that Volgenau did not stand on both sides of the Merger is unsupported by and inconsistent with the record evidence. The record evidence supports Plaintiff's claims that Volgenau stood on both sides of the self-dealing Merger. *See* §§ III.B; III.C.1, 4-5, *supra*. The dispositive conclusion of the Court below that "there is no genuine issue of material fact as to whether Volgenau did not stand on both sides of the transaction..." (SJ Op. at 30) constitutes reversible error. As such, entire fairness applies. *Ams. Mining*, 51 A.3d at 1239-40. Defendants, thus, had the burden to establish any shift in burden to Plaintiff under the entire fairness standard. *Id* at 1240-42.

Moreover, summary judgment should be given sparingly to afford the parties a trial where issues require determination of state of mind because much depends

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[20] In *Frank v. Elgamal*, 2012 Del. Ch. LEXIS 62 (Del. Ch. Mar. 30, 2012) the third party unaffiliated buyer had no prior relationship with the controlling stockholder and emerged through a strategic alternatives process run by a special committee. The Court in *Frank* concluded the controller did not stand on both sides but applied the entire fairness standard on other grounds and denied Defendants' motion to dismiss.

on credibility of witnesses. *Texelon*, 802 A.2d at 262 (Del. 2002). Volgenau's memoir shows that he sought out an LBO to the exclusion of other types of sales and his reasons. His motivations are triable issues. Likewise, genuine issues exist regarding the process that resulted in a bifurcated process.[21] Further, an analysis of facts at summary judgment must be viewed through the lens of the substantive burdens in the action, which here is entire fairness, not business judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

ii. Neither an Independent Process Nor a Fully Informed Vote Was Employed

Even under *MFW* and *Hammons*, the standard of review is entire fairness unless Defendants establish effective protections for minority stockholders. 67 A.3d at 535; 2009 Del. Ch. LEXIS 174, *41-*43.

The Court below determined that the Special Committee's process was sufficient to protect the minority's interests. SJ Op. at 30-46, 53-56. That conclusion as a matter of law is inconsistent with the record evidence. Volgenau's confidant, Klein, among other things, encouraged Volgenau to force the sale of SRA while Volgenau still had the super-voting rights and then polluted the process he ran with myriad conflicts of interests and a demand for a result-based "reward."

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[21] The Court below relied on affidavits from strategic bidders indicating that they were not affirmatively discouraged by Volgenau. SJ Op at 58-59. This ignores Volgenau's admitted demands for retention of "name, values and culture" that would cause those "sausage factories" to find SRA less financially desirable. A291, 1056-7.

See §§ III.C.1-3, *supra.* The other Special Committee members allowed Volgenau's active involvement in the process and endorsed a "reward" to Klein.[22]

The record facts, taken alone or in conjunction, demonstrate that the Merger was not the product of an independent process to protect the minority. The record evidence of Klein's expectations and motivations regarding his reward raises significant issues of his state of mind and credibility. The Court below held, as a matter of law, that Klein's pecuniary and reputational interests and expectations in the Merger were immaterial. SJ Op. 32-42. Such a holding cannot be made without assessing Klein's credibility, particularly given Delaware's subjective, "actual person" standard for materiality. *Cinerama,* 663 A.2d at 1167.[23] The record evidence shows a course of conduct on Klein's part demonstrating subjective materiality. *See* §§ III.C.1-3, *supra.*

The Court below's conclusions are also inconsistent with prior decisions in the Court of Chancery. *See, e.g., In re Freeport-McMoRan Sulphur, Inc. S'holders Litig.*, 2005 Del. Ch. LEXIS 96, *49-*53 (Del. Ch. Jun. 30, 2005) (mere presence of a controller's agent raised doubts as to independence); *In re Tele-Communications, Inc. S'holders Litig.*, 2005 Del. Ch. LEXIS 206, *19, *41-*42

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[22] All Board members aside from Volgenau adopted unified positions as to the facts and claims of this case and did not provide their own responses to Plaintiff's Interrogatories, instead allowing Klein and Nadeau to respond on their behalf. A2681-2, 2737. As such each should be judged together. *See Smith v. Van Gorkom*, 488 A.2d 858, 889 (Del. 1985).

[23] At oral argument, Plaintiff's counsel suggested that the best way to understand Klein's motivations was to put him on the witness stand. A3106.

(Del. Ch. Dec. 21. 2005) ("uncertain, contingent and potentially large" payments to special committee members can affect judgment; the contingent payment of advisors "creates a serious issue of material fact"); *Cinerama,* 663 A.2d at 1168 (contingent interests by a board member are particularly troublesome when those interests are undisclosed to fellow board members). The Court below's own statements admit serious concerns, doubts and potential conclusions and inferences supporting Plaintiff's claims based on record evidence. *See, e.g.*, SJ Op. at 35-41, 50-51, 63-65.

Further, under both *MFW* and *Hammons* the standard of review is entire fairness if the vote is not fully informed. *Id.* The Court below determined, as a matter of law, that none of the disclosure challenges raised by Plaintiff was material. SJ Op. at 46-53. That conclusion constitutes reversible error. The disclosure issues are important in two respects. Each relates to facts concerning the fairness of the process. *See Emerald Partners v. Berlin*, 726 A.2d 1215, 1222 (Del. 1999) (discussing the intertwined nature of disclosures and fairness). And, each would have altered the total mix of information available to stockholders.

When the Proxy was issued, Klein's compensation was unresolved and the disclosures made regarding it were, thus, false and misleading. The Court's finding (SJ Op. at 50-1), that because Klein's charities ultimately may not have received the payments rendered the false disclosure immaterial, is erroneous.

Klein demonstrated the materiality of the reward by his own words and actions.[24] It is material to stockholders that Klein ran the process with the expectation of a "reward" payment and that the demand was unresolved.[25] When the Proxy was issued, at least Defendants Klein, Volgenau, Barter, Ellis, Gilburne and Grafton knew of Klein's expectation and demand for a reward. That Klein preferred the payments to him be made, on his behalf, to charities that he runs and which depend on such contributions does not diminish materiality of the interest or the non-disclosure. Such charitable contributions would enhance Klein's community standing and he would be credited socially and politically for the contributions.

The contingent interest of Kirkland in this context is also material, particularly where the controller's stated intention is only to approve an LBO that met his list of personal demands. Such contingencies should be treated as material and analogous to contingent banker compensation.

The omission of Citi's representation of SRA and its advice to the Board that an LBO was a bad alternative is also material. Citi had long represented SRA and knew it and its business intimately, unlike Houlihan.

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[24] In a lengthy discussion, the Court below characterized Klein's conduct as "troubling" but ultimately concluded that his interests were not material. SJ Op. at 32-42. The Court below's apparent struggle with Klein's conduct is logically disconnected from the Court's concluding statement that this case was an exemplar of proper utilization of procedural devices to avoid entire fairness review. SJ Op. at 69.

[25] These are the types of facts that have been held to be material. *Hammons*, 2009 Del. Ch. LEXIS 174 at *54-*56 (an ***expectation*** of a banker was material) (emphasis added); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) ("[A] reasonable stockholder would want to know an important economic motivation of the negotiator...").

The partial and misleading disclosures regarding Volgenau's and SRA management's meetings with Providence throughout 2010, including DiPentima's involvement and topics discussed, concern material aspects of the genesis of the Merger. *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 Del. Ch. LEXIS 169, at *49-50 (Del. Ch. Nov. 30, 2007). The Court below's conclusion (SJ Op. at 49-50) that this information was not material, as a matter of law, likely flowed at least in part from the Court's erroneous conclusion that Volgenau had no prior relationship with Providence and Providence was an unaffiliated third-party.

Finally, the Proxy's silence as to whether and how the Equal Treatment Requirement was considered is of utmost materiality given the Requirement's bargained-for importance to fair treatment of SRA minority stockholders.

iii. Defendants Breached Their Duty of Loyalty Ignoring the Equal Treatment Requirement

The Board's failure to adhere to or even consider the Equal Treatment Requirement was a breach of the Board members' fiduciary duties. *Cede*, 634 A.2d at 367 (directors in breach of their fiduciary duties are not entitled to business judgment deference). Defendants introduced no evidence that the Board followed the Equal Treatment Requirement and Volgenau admitted the Board did not consider the Requirement. Also, the minutes and documents produced by Defendants include no reference to the Equal Treatment Requirement, much less Board consideration concerning compliance.

The record evidence supports Plaintiff's claim that Volgenau received more than the minority stockholders. *See* § III.C.5, *supra*. The Court's acceptance (SJ Op. at 60-61), as a matter of law, that the Board complied with the Certificate is in error. The Board never made a determination of the value of the package of rights Volgenau received. As Defendants' expert testified Volgenau may have received a "bonanza." The directors disregarded a known duty causing SRA to act illegally, resulting in a breach of all Board members' duty of loyalty. *Brehm v. Eisner*, 906 A.2d 27, 67 (Del. 2006); *See also Hampshire Group, Ltd. v. Kuttner*, 2010 Del. Ch. LEXIS 144, *130 (Del. Ch. Jul. 12, 2010) (causing a corporation to do illegal acts is a breach of the duty of loyalty).[26]

iv. Providence Aided and Abetted Defendants' Breaches of Fiduciary Duty

Providence knowingly co-opted Volgenau's loyalty by recruiting a group of SRA insiders and loyalists to persuade Volgenau that an LBO would serve his desires. Providence hired DiPentima to pursue that end and to extract information from Volgenau and Sloane. *See* § III.B, *supra*. Providence's conduct renders it liable for the breaches of fiduciary duty committed by the Board members. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1284 n. 33 (Del. 1989).

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[26] The Board members' failure to consider the Equal Treatment Requirement undermines protection of minority interests by an effective independent committee. Even if the disinterested directors' breaches were limited to a breach of the duty of care, and that is not the case, that results in entire fairness review of the Merger. *MFW*, 67 A.3d at 535

B. The Court Below Incorrectly Interpreted Section 124 in Granting Judgment on the Pleadings, in Part, as to Count 4

1. Second Question Presented

Did the Court below commit reversible error by interpreting Section 124 as limiting claims challenging invalid Board acts rather than solely limiting claims concerning *ultra vires* corporate acts? A77-78, 85-86, 95-123, 135-143, 147-149.

2. Scope of Review

The Court reviews judgment on the pleadings *de novo*, but limited to a review of the pleadings. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1204 (Del. 1993). Interpretation of statutes is subject to *de novo* review. *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

3. Merits of the Argument

The Court below entered judgment for Defendants on Plaintiff's challenge to the Merger's validity, holding that Section 124 bars Plaintiff's claim. Let. Op. at 6-10. The Court below's decision was the first to interpret Section 124 in such circumstances. *Carsanaro*, decided shortly thereafter, reached the opposite conclusion resulting in a split within the Court below. 65 A.3d at 651-654.

Count 4 alleged the Board members did not comply with their obligations by breaching the Equal Treatment Requirement, making the Merger "voidable at the discretion of the Court." *Arnold v. Society for Savings Bancorp, Inc.*, 1995 Del.

Ch. LEXIS 86, *8-*9 (June 15, 1995).[27] Where a transaction involves improper self-dealing the Court has power to fashion an appropriate award."[28] *Weinberger*, 457 A.2d at 714.

As argued by Plaintiff below, Section 124(1) applies only to claims relating to the "the doing of any act...by or to the corporation." Plaintiff has not challenged the Merger as void *ab initio* due to an *ultra vires* corporate act.[29] As *Carsanaro* observes, "*ultra vires*" has been used colloquially as synonymous with "void" or "invalid" and not within the bounds of its actual meaning. 65 A.3d at 654.[30] A broad interpretation of "*ultra vires*" is both inconsistent with the intent of Section 124 and with a reading in context with neighboring provisions of the Delaware General Corporation Law.[31] *Id.*

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[27] Voidable acts are those the corporation can accomplish if done in the correct manner. *Michelson v. Duncan*, 407 A.2d 211, 218-9 (Del. 1979). Defendants could have complied with or sought amendment of the Certificate. They did neither.

[28] The relief sought in the action is direct in nature, not derivative as contemplated by Section 124. Count 4 seeks relief that would go to SRA stockholders, not to SRA.

[29] Void acts, including *ultra vires*, are the sort that cannot be sanctioned. *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 896 (Del. Ch. 1999).

[30] Several cases have entertained challenges to the validity of board acts without running afoul of Section 124. *Carsanaro*, 65 A.3d at 651-652 (citations omitted).

[31] Section 124 was adopted to avoid the then-rampant use of *ultra vires* arguments to evade contractual obligations. 1 David A. Drexler, *et.al.*, *Delaware Corporation Law and Practice*, §11.05 (Matthew Bender 2011) at 11-10.

V. CONCLUSION

For the above reasons, Plaintiff respectfully requests the Court reverse and remand the decisions of the Court below granting Defendants summary judgment as to Counts 1, 2, 3 and 4 and partial judgment on the pleadings as to Count 4.

Dated: October 14, 2013

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