IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, individually, and on behalf of all those similarly situated,

Plaintiff-Below,
Appellant,

v.

ERNST VOLGENAU, JOHN W. BARTER, LARRY R. ELLIS, MILES R. GILBURNE, W. ROBERT GRAFTON, WILLIAM T. KEEVAN, MICHAEL R. KLEIN, STANTON D. SLOANE, GAIL R. WILENSKY, SRA INTERNATIONAL, INC., PROVIDENCE EQUITY PARTNERS LLC, STERLING PARENT INC., STERLING MERGER INC. AND STERLING HOLDCO INC.,

Defendants-Below,
Appellees.

No. 461, 2013

On appeal from the Court of Chancery of The State of Delaware in C.A. No. 6354-VCN

ANSWERING BRIEF OF DR. ERNST VOLGENAU, DEFENDANT-BELOW, APPELLEE

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November 21, 2013

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NATURE OF PROCEEDINGS

On July 20, 2011, Providence Equity Partners LLC ("Providence"), a private equity firm, purchased SRA International Inc. ("SRA"), a government contractor. A. 530. The transaction was recommended by an independent special committee and approved by 81.3% of minority shares. B. 579. In this class action, plaintiff Southeastern Pennsylvania Transportation Authority ("SEPTA") is suing Dr. Ernst Volgenau, the founder and controlling shareholder of SRA, multiple other individual defendants, SRA itself, and Providence. As relevant to Dr. Volgenau, Count II of the complaint alleges that Dr. Volgenau violated his fiduciary duties of loyalty and care by planning, structuring, and timing the merger for his benefit and in violation of SRA's Certificate of Incorporation. A. 84. Count IV similarly alleges that Dr. Volgenau and the other individual defendants violated their fiduciary duties by approving a merger that allegedly violated SRA's Certificate of Incorporation and also alleges that the merger is invalid. A. 85-86.

On August 31, 2012, the Court of Chancery held that Section 124 of the Delaware Code bars SEPTA's claim that the merger is invalid. B. 697. On August 5, 2013, the Court of Chancery granted defendants summary judgment on all remaining claims. B. 1020. SEPTA filed a timely notice of appeal.

SUMMARY OF ARGUMENT

1. Denied. SEPTA alleges that Dr. Volgenau violated his fiduciary duties by (1) "planning, structuring and timing the [merger] to benefit himself . . . at the unfair expense of the stockholders and in violation of the equal treatment provision of the Certificate of Incorporation" and (2) approving, in his capacity as a member of SRA's Board of Directors, a merger that violated SRA's Certificate of Incorporation. A. 84, 85-86. The record evidence, however, would not permit any trier of fact to reach such a conclusion, and indeed affirmatively establishes precisely the opposite.[1]

SEPTA first contends that Dr. Volgenau steered the sale of SRA away from potential "strategic" purchasers (other government contractors) and toward private equity firm Providence, believing that Providence would be more likely to preserve SRA's unique brand. SEPTA's assertion that Dr. Volgenau caused the Special Committee to favor Providence in the sale process and deterred potential strategic purchasers from bidding on SRA, however, is based on nothing except speculation and innuendo, which as a matter of law is insufficient to survive summary judgment in the face of uncontroverted record evidence to the contrary.

The evidence shows that although Dr. Volgenau had initial reservations about selling SRA to a competing government contractor, ultimately SRA was

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[1] Dr. Volgenau joins in full the briefs for SRA and Providence.

open to all interested buyers. The independent Special Committee, which was formed to manage a possible sale of the company, solicited interest from both strategic competitors and private equity firms. It encouraged Dr. Volgenau to meet with top executives from prospective buyers, B. 670-71, and the uncontradicted evidence shows that Dr. Volgenau was equally receptive to expressions of interest from strategic competitors (including Boeing, CGI, and Serco) and from financial institutions (including Providence and the other final bidder, Veritas Capital), and that the strategic competitors' ultimate decisions not to bid were made purely for business reasons B. 451-54, 460, 463, 704, 766, 893.

The evidence also shows that Providence received no preferential treatment in the sale process. SEPTA's arguments in this regard are based almost entirely on the fact that Dr. Volgenau responded somewhat favorably to initial indications of interest from Providence, but that is of no legal consequence whatsoever. Those very preliminary discussions, which never even reached the question of price, did not lead to an agreement between Providence and Dr. Volgenau and did not somehow put Volgenau "on both sides of the merger." In fact, those preliminary discussions ended in the summer of 2010, when SRA decided to pursue its own acquisition of another company. B. 400, 508-09. It was only after SRA lost out on that acquisition that it gave renewed attention to a possible sale, and formed an independent Special Committee for that purpose. During the Special Committee process Providence was afforded no special place at the bargaining table, and was told by the Special Committee that SRA would be sold to the highest bidder. B. 504. Volgenau supported that effort, including by making personal financial concessions to both of the final bidders (not just Providence) in order to obtain the highest per share price for all shareholders. A. 531. As addressed in detail in the SRA Defendants' Answering Brief, the result, at the conclusion of a fair, vigorous process run by an independent and impartial Special Committee, was the sale of SRA to the highest bidder, at a large premium over the unaffected share price. The record is clear on that point, and entirely bereft of evidence that would reasonably support any different conclusion.

SEPTA's argument that the merger violated SRA's Certificate of Incorporation is also belied by the uncontroverted evidence. The Certificate provided that in a sale transaction both the holders of public Class A shares and Dr. Volgenau, who held Class B shares, were to receive "equal per share payments or distributions" for their shares. A. 815. As SEPTA does not dispute in this appeal, such a "payments *or* distributions" provision does not require the *form* of consideration to be identical for all shares, but only that the *value* be equal. That is exactly what occurred, save for the fact that Dr. Volgenau agreed to accept a lower value for one portion of his shares, in the form of a nonrecourse promissory note, in order to facilitate a higher across-the-board sale price for the benefit of the company's public shareholders. A. 531; B. 152. The uncontradicted evidence demonstrates that at the time of the transaction the Special Committee reasonably valued Dr. Volgenau's rollover shares at $31.25 per share, the same price received by the minority shareholders in cash for their shares and the same price received by Dr. Volgenau in cash for the substantial majority of his shares. A. 530. SEPTA offers no evidence that this valuation—which was disclosed to the minority shareholders—was unreasonable.

2. Denied. SEPTA contends that the Court of Chancery erred by holding that Section 124 of the Delaware Code barred its claim that the merger is invalid because it does not comply with the equal treatment provision of SRA's Certificate of Incorporation. Because the merger complied with the Certificate in any event, the Court need not and should not even reach the question whether the lower court's reading of Section 124 was correct. If it does, however, the plain language of Section 124 supports the Court of Chancery's holding.

STATEMENT OF FACTS

On July 20, 2011, Providence purchased SRA for a price of $31.25 per share. At the time of its sale SRA was a public company, with shares divided into Class A stock and Class B stock. Dr. Volgenau held Class B stock and all other shareholders held Class A stock. A. 809. The principal difference between the classes of stock was that, to prevent a hostile takeover, Dr. Volgenau's Class B stock held a ten-to-one voting preference over Class A stock. B. 401; A. 809. Apart from the question of control, the different classes were to be treated equally in the event of any sale. To that end, SRA's Certificate of Incorporation provided that, upon a sale, the two classes of stock would receive "equal per share payments or distributions" [hereinafter, the "equal treatment provision"]. A. 815.

A. SRA Builds Its Brand on Honesty and Service

Dr. Ernst Volgenau founded SRA, a government contracting firm, out of his basement more than 40 years ago. B. 399. From its inception, SRA's business has been based on an ethic of honesty and service. In Dr. Volgenau's words, "[h]onesty means high ethical performance," which includes "not only complying with the law, but complying with the spirit of the law." B. 406-07. Service means that SRA seeks to "[s]erve our country well, serve our customers well, take care of one another, and serve our country and society as a whole." B. 407. Dr. Volgenau adopted those values because he felt it was the right thing to do, but they have also helped SRA build a strong reputation for delivering good work on time. That reputation, in turn, has market value. B. 407-08.

Over the years, various competitors approached Dr. Volgenau about purchasing SRA, but Dr. Volgenau always rebuffed them. B. 418. As long as the company was doing well, Dr. Volgenau believed that he could continue to generate profits for his shareholders, B. 420, and he also worried that selling SRA to a strategic competitor would put the company's brand at risk, B. 460-61. Using a colorful metaphor in his draft memoir, Dr. Volgenau wrote that if a strategic competitor purchased SRA, it would "grind up SRA and homogenize us into their system." A. 1055.

On the strength of its values, SRA had a number of successful years. But in 2008 and 2009 SRA began to struggle. Its growth stalled and it became less profitable. B. 421. Its stock price decreased. *Id.* Two of its recently acquired subsidiaries were doing poorly. B. 422. Dr. Volgenau and the Board of Directors understood that something had to be done, B. 420-22, and Dr. Volgenau in particular felt an obligation to improve SRA's fortunes before he turned 80 and his shares lost their voting preference, B. 418.

B. SRA Explores A Possible Sale

In early 2010, with the encouragement of several board members, Dr. Volgenau met several times with officials from Providence, where several former

SRA colleagues worked. A. 1424; B. 670-71. No negotiations took place at those meetings. A. 1680-81. Instead, their purpose was for Providence and SRA to learn as much about each other as possible. B. 413-14. But a top Providence official described the discussions as "slow moving," B. 498, and explained that "there were many, many meetings where it was pretty much the same thing being discussed at every meeting, where there wasn't forward progress, but every meeting was talking about just Ernst and the company and our firm and how [leveraged buyouts] work," B. 506. That same official opined that Dr. Volgenau "did not really know what he wanted to do at that point in time." B. 498.

Nevertheless, Dr. Volgenau was convinced that SRA needed to make some sort of change, so in May 2010 he proposed that SRA form the Strategic Alternatives Study Team to consider SRA's options going forward. B. 3. The Study Team emphasized "factors such as company reputation, values and employee relations," A. 1561, completed its own internal analysis of its options, and solicited advice from outside analysts.

By the summer of 2010, the Study Team decided its best course would be to make a strategic acquisition, and it chose to focus on acquiring the Enterprise Integration Group ("EIG"), a subsidiary of Lockheed Martin. B. 435-36. Providence concluded that SRA "had moved completely in a different direction," and would likely not be open to a sale. B. 507.

But SRA lost out on EIG to Veritas Capital, a private equity firm, and so it refocused on a potential sale. Based on his prior discussions with Providence officials, Dr. Volgenau viewed Providence as an attractive option because he believed that Providence would preserve SRA's brand and would be competitive on price. B. 515-16. For their part, Providence remained interested in purchasing SRA.

In response to Providence's interest, SRA formed an independent Special Committee to explore a sale. A. 1680-81. The Special Committee hired legal and financial advisors, A. 1685, and then issued instructions to Providence and Dr. Volgenau about how to proceed. The Special Committee told Providence that SRA would "be open to the highest bid," B. 504, and it told Dr. Volgenau that once the sale process started, "events take over" and he would "have no control over [the sale process]," B. 92. From the beginning, then, Dr. Volgenau understood that he "would have limited information about what the Special Committee was doing and that [he] could not interfere in the Special Committee process." B. 448. The record shows that Dr. Volgenau complied with the Special Committee's directions. He did not initiate contact with potential buyers and always informed SRA when he communicated with representatives from potential buyers. *See, e.g.*, B. 453-54. Most importantly, Dr. Volgenau's meetings with potential buyers were always professional and productive.

C. The Special Committee Process Begins

And so the Special Committee's work began. However, early discussions proved unproductive.

In late 2010, SRA held some initial discussions with Serco, a competing government contractor. Dr. Volgenau even met with Serco officials, B. 449-51, but despite initial interest, Serco withdrew from the process in early 2011. Most of the Special Committee's work at that point, however, focused on financial purchasers. Although the conventional wisdom was that strategic purchasers would be able to pay more than financial purchasers, SRA had recently been outbid for EIG by Veritas, a financial purchaser, and after that experience Dr. Volgenau believed that a financial purchaser could make a competitive offer. B. 416. Moreover, a sale to Providence seemed the most promising lead. But in late 2010, SRA rejected two offers from Providence, and, indeed, did not view those offers as serious enough to even begin formal negotiations with Providence. B. 1032-33. A few months later, in February 2011, Providence temporarily dropped out of the bidding, concluding that it was not making enough progress toward a deal. B. 42.

Meanwhile, the Special Committee concluded that SRA needed to seek out strategic purchasers, and Dr. Volgenau agreed. B. 1034. And so SRA contacted several well-known competing government contractors in February 2011. B. 1035.

Two—Boeing and CGI—showed serious interest in purchasing SRA, and so Dr. Volgenau met with executives from both companies in March 2011.

D. Dr. Volgenau Had Productive Meetings With Representatives from Strategic Purchasers

First, Dr. Volgenau met with representatives from Veritas, the private equity firm that outbid SRA for EIG. He was impressed because Veritas believed that SRA's unique brand "helped the company to recruit good people and do good work and have a higher calling." B. 463. Dr. Volgenau reported that, "*[i]f their price was right*, [he] was enthusiastic about continuing the dialogue" with Veritas. *Id.* (emphasis added).

Dr. Volgenau also met with representatives from CGI, a strategic competitor. B. 451. Dr. Volgenau believed that CGI, like Providence and Veritas, saw value in SRA's unique brand and wanted to preserve it. B. 451-54. And Claude Séguin, a top CGI official, reported that "CGI was treated with the utmost respect and consideration by Dr. Volgenau, SRA's management, and [SRA's accounting firm]" and that "Dr. Volgenau never indicated that he was unwilling to sell to CGI or any other strategic bidder, and he never attempted to dissuade CGI from participating in the process or submitting a bid." B. 704. Séguin also explained that Dr. Volgenau "expressed his desire to do what was best for SRA's stockholders." *Id.* Ultimately, CGI did not make a bid for SRA due to concerns about financing the merger, acquiring the necessary regulatory approval, and becoming too dependent on contracts from the federal government. *Id.*

Next, Dr. Volgenau met with Dennis Muilenburg, a top official at Boeing. B. 458. Prior to the meeting, Muilenburg provided Dr. Volgenau with a list of references from companies that Boeing had previously acquired. Dr. Volgenau checked those references and came away convinced that Boeing and SRA saw eye-to-eye on corporate culture issues. B. 458-59. Likewise, Muilenburg came away from his meeting with Dr. Volgenau enthusiastic about purchasing SRA. He later explained that his meeting with Dr. Volgenau "deepened [Boeing's] admiration and respect for the organization that [Dr. Volgenau] built and the values it is based upon." B. 893.

Boeing "devoted a substantial amount of resources to evaluating a potential acquisition of SRA, including engaging a major accounting firm and investment bank as advisors" and "deploying a substantial number of Boeing employees to conduct due diligence." B. 765. And Boeing officials later described the effort that SRA put into discussions: SRA's senior management "worked diligently to provide Boeing with the information Boeing would need to submit an offer to acquire SRA," including providing Boeing access to SRA's proprietary information, and also "answered dozens of questions" about the company to help Boeing decide whether to make an offer. *Id.*

Ultimately, Boeing decided not to make a bid for SRA, explaining that "a combination of factors has impacted [Boeing's] financial assessment and our confidence in our ability to generate an attractive return in the current environment." A. 893. In particular, Boeing highlighted concern about "risks in the government services industry." B. 766.

Soon there were only two bidders left: Providence, which had rejoined the bidding at the behest of the Special Committee's financial advisor, and Veritas.

E. The Final Negotiations

As the bidding wound down, Providence and Veritas looked for ways to maximize the amount of cash they could offer to SRA's minority shareholders. With the high bid at $30 per share from Providence, Veritas told the Special Committee that, to continue, it would need Dr. Volgenau to roll over $150 million in equity in the new SRA (Dr. Volgenau had previously agreed to accept a $100 million rollover interest). B. 150-51. Dr. Volgenau agreed, and as a result, Veritas was able remain in the bidding. B. 72-73. Dr. Volgenau agreed to accept the same $150 million in rollover equity from Providence. *Id.* If Dr. Volgenau had not accepted such a large interest in the new SRA, Veritas probably would have dropped out of the bidding and the final price would have been $30 per share. B.152. Instead, bidding continued.

Later, with the high bid from Veritas at $31 per share, Providence asked Dr. Volgenau to accept a $30 million nonrecourse note as part of his $150 million in equity rollover. B. 464-65. Payment on the note would be drawn from whatever money was generated by selling two poorly performing SRA subsidiaries, Era and GCD. *Id.* Both companies were losing money, so everyone involved (Providence, Dr. Volgenau, and the Special Committee) understood that Dr. Volgenau would likely take a loss on the note. As Dr. Volgenau explained, it was "a rotten deal" for him because "there was no upside and all downside, and those two firms we knew were risky." B. 465. The Special Committee understood that fact, too, explaining that the note "require[d] Dr. Volgenau to bear the downside risk" of the loan. B. 70. But Dr. Volgenau accepted the note, B. 465-66, and that enabled Providence to bid $31.25 per share.

The Special Committee recommended the merger, B. 70, and on July 15, 2011, 81.3% of the minority shares voted to approve the merger. B. 579. The merger closed five days later, on July 20, 2011. A. 530.

F. The Final Deal

In the end, the minority shareholders received $31.25 per share. Dr. Volgenau's shares were valued the same: He received $31.25 per share in cash for 7 million of his shares, and he received $150 million of equity in the new SRA for his remaining shares. *Id.* Of that $150 million, Dr. Volgenau received a $120 million rollover interest for 3.84 million shares, meaning that each share in the new SRA was valued at $31.25. *Id.* (Dr. Volgenau also received certain management rights in the new SRA.) Finally, Dr. Volgenau received a $30 million nonrecourse note for 960,000 shares, again meaning that each share was valued at $31.25. *Id.*

In reality, as everyone involved anticipated, Dr. Volgenau will receive less than $31.25 per share. SRA projects that it will only repay $17 million (combined cash and tax benefits) on the $30 million note, meaning that Dr. Volgenau will receive approximately $17.71 per share for 960,000 shares. A. 531. In addition, just as Boeing and CGI worried, the government services industry has shrunk since the merger, and as a result, the estimated value of Dr. Volgenau's rollover interest is now between $24.87 and $25.91 per share. A. 531-32.

ARGUMENT

I. DR. VOLGENAU DID NOT BREACH HIS FIDUCIARY DUTIES.

A. First Question Presented

Did the Court of Chancery correctly grant Dr. Volgenau summary judgment on SEPTA's claim that Dr. Volgenau pursued a self-dealing merger?

B. Scope of Review

This Court reviews a grant of summary judgment *de novo*. *Reddy v. MBKS Co.*, 945 A.2d 1080, 1085 (Del. 2008). The Court reviews the factual record to determine whether the Vice-Chancellor's "findings are clearly supported by the record" and whether they "are the product of an orderly and logical reasoning process," and it will revisit those findings only if they are "clearly wrong." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006). Uncontroverted evidence presented in support of a motion for summary judgment will be accepted as true, *see Battista v. Chrysler Corp.*, 454 A.2d 286, 290 (Del. 1982), and "summary judgment is proper if the moving party can show a failure of proof concerning an element that is essential to the nonmoving party's case," *Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991). Arguments resting solely on speculation will not defeat a motion for summary judgment. *See Colgain v. Oy Partek Ab*, 799 A.2d 1151, 1153 (Del. 2002).

C. Merits of the Argument

1. The Business Judgment Rule Applies

The business judgment rule applies (1) because Dr. Volgenau did not stand on both sides of the merger and (2) because the merger was approved by an independent and disinterested special committee and by an informed majority of the minority shareholders. *See In re John Q. Hammons Hotels Inc. S'holder Litig.*, No. 758, 2009 WL 3165613, at *10 (Del. Ch. Oct. 2, 2009).

A controlling shareholder does not stand on both sides of a merger in which (1) the merger is with an unaffiliated company, (2) the minority shareholders are cashed-out, and (3) the controlling shareholder receives a minority interest in the new company. *See Frank v. Elgamal*, 2012 Del. Ch. LEXIS 62, *23 (Del. Ch. Mar. 30, 2012). Each of those three conditions is indisputably met here. SEPTA argues that Dr. Volgenau stood on both sides of the merger because he had pre-existing personal relationships with several officials working for Providence. *See* Pl. Br. 26 n.20. But as this Court has explained in the demand futility context, "[a]llegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). Professional or personal relationships implicate a director's independence only if they "border on or even exceed familial loyalty and closeness." *Id.* SEPTA has offered no credible evidence that Dr. Volgenau's relationships with various Providence employees and consultants approximated "familial loyalty."

In addition, the transaction was (1) recommended by a disinterested and independent special committee and (2) approved by stockholders in a non-waivable vote of all the majority of the minority stockholders. *Hammons*, 2009 WL 3165613 at *10. Dr. Volgenau joins the arguments advanced by co-defendants that the vote of the minority shareholders approving the merger was informed and that the work of the Special Committee was independent and disinterested. But Dr. Volgenau also emphasizes that SEPTA has presented no evidence that he meddled in the Special Committee's work or otherwise directed its deliberations. *See infra* Part I.C.2.b.

Because the business judgment rule applies, Dr. Volgenau is entitled to summary judgment if no reasonable trier of fact would conclude that he acted in bad faith or breached his fiduciary duties. *See Walt Disney Co.*, 906 A.2d at 52. The record clearly demonstrates that Dr. Volgenau acted properly.

2. Dr. Volgenau Did Not Control the Sale to Providence

According to SEPTA, Dr. Volgenau breached his duty of loyalty by steering the sale of SRA toward Providence and away from strategic purchasers that would be able to pay more for the company. SEPTA claims that, by doing so, Dr. Volgenau shrunk the market for SRA and consequently reduced the price for the company. SEPTA's case against Dr. Volgenau hinges on the premise that his goal throughout the sale process was to sell SRA to a private equity firm, not a strategic competitor. But uncontested record evidence disproves that premise.

a. The Sale Process Was Open to All Who Showed Interest

SEPTA makes much of Dr. Volgenau's early concerns that selling SRA to a strategic competitor would threaten SRA's unique brand. To be sure, Dr. Volgenau had a negative impression of strategic competitors at the start of the sale process. Standing alone, however, that is not itself a bar to summary judgment. SEPTA must show that Volgenau violated his fiduciary duties owed to SRA's minority shareholders. Because a controlling shareholder is permitted to have a personal opinion of the bidders, Dr. Volgenau's personal views were irrelevant so long as they did not influence his conduct as a director. *See Hammons*, 2009 WL 3165613 at *14. And uncontroverted evidence shows that Dr. Volgenau came to realize that strategic competitors could be "inclined to preserve the main values and culture . . . of the firm because they believed it had value." B. 425. As a result, in February 2011, Dr. Volgenau agreed that the Special Committee should seek out strategic purchasers. B. 1034. And SRA then contacted several well-known companies, including Boeing and CGI, which both showed serious interest in purchasing SRA. B. 39.

One of Boeing's top officials explained that Boeing "devoted a substantial amount of resources to evaluating a potential acquisition of SRA, including engaging a major accounting firm and investment bank as advisors" and "deploying a substantial number of Boeing employees to conduct due diligence." B. 765. Likewise, SRA's management "worked diligently to provide Boeing with the information it would need to submit an offer to acquire SRA." *Id.*

At the Special Committee's request, Dr. Volgenau met with Dennis Muilenburg, Boeing's top official in its defense, space, and security division. B. 458, 766. Dr. Volgenau came away impressed with the way that Boeing treated the companies that it acquired. B. 459. And another of Boeing's top officials explained that "*Dr. Volgenau did not indicate that he was unwilling to sell to Boeing, and he did not attempt to dissuade Boeing from participating in the process or submitting a bid.*" B. 766 (emphasis added). To the contrary, Muilenburg later wrote to Dr. Volgenau, personally thanking him for the time and resources that SRA poured into talks with Boeing and concluding that Muilenburg's meeting with Dr. Volgenau "deepened [Boeing's] admiration and respect for the organization that [Dr. Volgenau] built and the values it is based upon." B. 893; *see* B. 766. (separate official explains that Boeing's interactions with SRA's management and advisors and Dr. Volgenau "deepened Boeing's admiration and respect for SRA, its people, and its values").

That Boeing ultimately did not submit a bid is of no consequence. Muilenburg explained that "a combination of factors has impacted [Boeing's] financial assessment and our confidence in our ability to generate an attractive return in the current environment." B. 893. Chief among those concerns was that Boeing worried about "risks in the government services industry." B. 766.

It was a similar story with CGI. Claude Séguin, a top CGI official, explained that "[i]n CGI's discussions with SRA's management and separate discussions with Dr. Volgenau, it appeared to CGI that SRA was sincerely interested in pursuing a potential strategic transaction." B. 703. Séguin further explained that "CGI was treated with the utmost respect and consideration by Dr. Volgenau, SRA's management, and [SRA's accounting firm]" and that "*Dr. Volgenau never indicated that he was unwilling to sell to CGI or any other strategic bidder, and he never attempted to dissuade CGI from participating in the process or submitting a bid.*" B. 704 (emphasis added). Finally, Séguin explained that Dr. Volgenau "expressed his desire to do what was best for SRA's stockholders," further undermining SEPTA's claim that Dr. Volgenau sacrificed the interests of the minority shareholders for personal enrichment. *Id.*

Like Boeing, CGI dropped out of the bidding for business reasons. Officials worried about the company's ability to finance the merger; thought it would be too difficult to integrate a company as large as SRA into its own operations; were concerned about securing the necessary regulatory approval; and thought that acquiring SRA would make CGI too dependent on federal contracts at a time when the government was considering spending cuts. B. 703-04.

In sum, SEPTA has portrayed Dr. Volgenau's meetings with prospective bidders as a series of backroom negotiations shrouded in secrecy. *See* Pl. Br. 13 ("[T]he Special Committee allowed Volgenau to meet, unsupervised, with bidders."). But the uncontroverted evidence paints a much more mundane picture. Dr. Volgenau met with representatives from both strategic competitors (Serco, CGI, and Boeing) and private equity firms (Providence and Veritas). Dr. Volgenau did not initiate those meetings or any other contact with representatives of prospective buyers, and informed SRA when he had contact with representatives of prospective buyers. Most importantly, those meetings were professional and productive, with the strategic buyers—the buyers Dr. Volgenau was allegedly attempting to repel—reporting back enthusiastically and positively. SEPTA points to no evidence to the contrary and cannot point to a single company that was deterred from discussing a sale or making a bid by Dr. Volgenau.

b. Dr. Volgenau's Early Meetings With Providence Did Not Interfere With The Sale Process

SEPTA also argues that Dr. Volgenau laid the groundwork for the sale to Providence in early meetings with representatives from the company. *See, e.g.*, Pl. Br. 9, 11. Again, uncontested record evidence shows that is simply not true.

A high-ranking Providence official involved in those early discussions describes those talks as "slow moving" and said that her impression was that Dr. Volgenau "did not really know what he wanted to do at that point in time." B. 498. She explains that "there were many, many meetings where it was pretty much the same thing being discussed at every meeting, where there wasn't forward progress, but every meeting was talking about just Ernst and the company and our firm and how [leveraged buyouts] work." B. 506.

Indeed, rather than proceed with Providence in early 2010, Dr. Volgenau proposed the formation of the Strategic Alternatives Study Team to explore SRA's strategic options. A. 1561. And in the summer of 2010, the Study Team abandoned plans to sell to Providence and instead decided to focus on purchasing EIG. B. 3. At that point, Providence believed that SRA "had moved completely in a different direction." B. 507.

It was only in late 2010, after SRA lost out on purchasing EIG, that Providence and SRA began to discuss a sale again. But things did not go smoothly from Providence's point of view. Providence made two offers for SRA in late 2010, and SRA rejected both. B. 1032. In fact, SRA looked at those offers so unfavorably that it did not even begin formal negotiations with Providence, and SRA refused to grant Providence an exclusive negotiating window. B. 1032-33.

SRA instead solicited offers from the open market in February 2011. B. 1034-35. And Providence was told that although it was "free to talk to Ernst," it "should not negotiate any element of an arrangement between Ernst and Providence until [it was] informed that [it was] allowed to do so." B. 523. Soon, Providence temporarily dropped out of the bidding because it did not think it was making progress toward an agreement. B. 42.

In sum, after initial discussions with Providence in early 2010, by the summer, SRA was looking to make a strategic acquisition. And after re-engaging with Providence in late 2010, SRA sought out different purchasers. Providence knew that it would acquire SRA only if it was the highest bidder. B. 504. That is simply not what would have happened if Dr. Volgenau had been steering the sale process toward Providence, and SEPTA has offered nothing but speculation to the contrary.

c. SEPTA's Other "Evidence" Is Simply Too Speculative to Create A Material Fact Dispute

SEPTA also cites (1) articles from *The Daily Deal* and *WallStCheetSheet.com* concluding that SRA was freezing out strategic purchasers, *see* Pl. Br. 13-14; A. 1952, 1959; (2) an internal SRA analysis predicting that strategic purchasers would be able to offer $5 more per share than financial purchasers, *see* Pl. Br. 11; and (3) a July 26, 2010 analysis by CitiBank concluding that there were better alternatives for SRA than a leveraged buyout, *see* Pl. Br. 11, A. 1561.

As demonstrated above, however, SRA welcomed strategic purchasers, and the Internet articles were simply wrong. Likewise, SRA's prediction that strategic buyers would offer more for the company was also incorrect. In reality, Boeing and CGI dropped out based on well-founded concerns that the government services industry was too risky. As for CitiBank's analysis, its recommendation against a leveraged buyout was based on the prediction that the price per share for a leveraged buyout would be between \$23.50 and \$27. *See* A. 1576. That analysis underestimated the final price of \$31.25, and based on the record, it is clear that CitiBank's conclusion would have been different if it correctly predicted a \$31.25 share price. CitiBank's most optimistic projection for SRA's stock was that if it made a successful strategic acquisition—as SRA tried and failed to do with EIG—its share price might climb to \$32.45 in five years. *See* A. 1576. The final sale price was thus near the upper end of CitiBank's projections for SRA.

To sum up: Uncontroverted record evidence demonstrates that SRA conducted a fair and open sale process and that, by early 2011, Dr. Volgenau was open to a sale to a strategic competitor. SEPTA offers nothing but speculation to the contrary, which is simply not sufficient to lead a reasonable trier of fact to conclude that Dr. Volgenau prevented strategic purchasers from bidding for SRA.

To the contrary, the record shows that SRA was put on the open market and interested parties were given a full and fair chance to acquire the company.

3. The Merger Complied With SRA's Certificate of Incorporation

SEPTA argues that the individual defendants violated their fiduciary duties because the merger violated SRA's Certificate of Incorporation, which required that Class A and Class B shareholders receive "equal per share payments or distributions" when the company was sold. A. 815. The Special Committee reasonably valued Volgenau's rollover shares at $31.25 per share, the same as the minority shareholders received for their shares. Moreover, the uncontroverted record shows that, in reality, everyone involved in the merger (the bidders, Dr. Volgenau, and the Special Committee) understood that Dr. Volgenau would likely receive *less* per share than the minority shareholders, a belief that subsequent events has borne out.

a. The Board's Calculation of the Value of Dr. Volgenau's Rollover Shares was Reasonable

It is not disputed that, under the Merger Agreement, Dr. Volgenau's rollover shares were valued at $31.25—the same as all other shares. The $30 million note that Dr. Volgenau accepted for 960,000 shares equates to $31.25 per share, as does the $120 million rollover Dr. Volgenau accepted for 3.84 million shares. *See* B. 897; A. 530. SEPTA has offered no evidence that this calculation—which was fully disclosed in the proxy statement, B. 219-20, and approved by an informed vote of the shareholders—was unreasonable. Therefore, the Court of Chancery's grant of summary judgment should be affirmed.

But, given that the central theme of SEPTA's argument is that Dr. Volgenau sacrificed the interests of the minority shareholders for his own personal enrichment, it is surely relevant to note that, just as the parties anticipated, Dr. Volgenau has ultimately received less than the minority shareholders—*to the benefit of the minority shareholders*. In March 2011, as Providence and Veritas prepared to make their final offers for SRA, the high bid was from Providence for $30 per share. B. 63-64. At that point, Veritas requested that Dr. Volgenau accept a $150 million rollover in order to enable Veritas to make a competitive bid (Dr. Volgenau had previously agreed to accept a $100 million rollover interest). B. 150-51. Dr. Volgenau agreed—and also agreed to accept the same rollover as part of Providence's bid. B. 64. Dr. Volgenau's decision allowed both Providence and Veritas to increase their bids.

Then, with Providence's bid at $30.50 per share and Veritas' bid at $31 per share, Providence explained that it would have to drop out of the bidding unless, as part of his $150 million in equity, Dr. Volgenau accepted a $30 million nonrecourse note in exchange for 960,000 shares. A. 530. Thus, Dr. Volgenau would receive $31.25 per share for those 960,000 shares *only if he received full* *payment on the note*. But because the note was to be repaid from the proceeds of the sale of two poorly performing SRA subsidiaries, Dr. Volgenau would almost certainly take a loss on the note, a fact that was apparent at the time of the deal. B. 464-65. As Dr. Volgenau explained it, "there was no upside and all downside, and those two firms . . . were risky." B. 465. The Special Committee also understood that fact, explaining that the note "require[d] Dr. Volgenau to bear the downside risk" of the loan. B. 70. Nevertheless, Dr. Volgenau accepted the note, and because he did, Providence was able to offer $31.25 per share.

Had Dr. Volgenau not accepted the rollover or the $30 million note, the minority shareholders would have received *less* per share than they ultimately did. By one estimate, Dr. Volgenau's decision to accept the rollover and the note accounts for between 25 and 75 cents of the share price. B. 152. Meanwhile, SRA expects to pay only $17 million on the note, meaning that Volgenau will receive about $17.71 for those 960,000 shares. A. 531. And because the government services industry has shrunk significantly since the merger, Dr. Volgenau's rollover interest is now estimated to be worth between $95.5 million and $99.5 million, meaning that, for 3.48 million of his shares, Dr. Volgenau will receive between $24.87 and $25.91 per share. A. 531-32. SEPTA's premise is thus exactly backwards—Dr. Volgenau accepted less per share so that the minority shareholders could receive the best possible price.

b. Dr. Volgenau's Management Rights In the New SRA Do Not Mean He Received a Premium for His Rollover Shares

For the first time, SEPTA argues that Dr. Volgenau's management rights in the new SRA mean that he received more per share than the minority shareholders. *See* Pl. Br. 32. Dr. Volgenau became Chairman of the Board of Directors of the new SRA, and received a veto right (i) over any name-change of SRA; (ii) over any change to SRA's Certificate of Incorporation or bylaws that would materially impair his rights under the Stockholder Agreement; and (iii) over certain types of transactions. B. 897-99.

Before the Court of Chancery, SEPTA did not argue those rights meant that Dr. Volgenau received more than $31.25 per share. *See* B. 1083 (explaining that "[n]either the Plaintiff nor the Defendants attempted to value these benefits"); A. 240. SEPTA is therefore procedurally barred from making that argument now. *See In re Walt Disney Co.*, 906 A.2d at 48.

But even if SEPTA may raise that argument, it has produced no evidence showing that Dr. Volgenau's post-merger management rights constitute a "premium" for his shares, or even what standards would apply to such a valuation (especially considering that, after the transaction, Dr. Volgenau ceased to be a controlling shareholder—a fact that cuts against any supposed "premium" based post-merger managerial rights). SEPTA's "failure of proof concerning an element that is essential" to its claim is grounds for summary judgment. *Burkhart*, 602 A.2d at 60.

c. The Certificate of Incorporation Did Not Require the Same Form of Consideration for Class A and Class B Shares

Before the Court of Chancery, SEPTA argued that the Certificate of Incorporation required that the Class A shareholders receive the same *form* of consideration as the Class B shareholders. Thus, SEPTA contended that Dr. Volgenau was prohibited from accepting the rollover and the promissory note unless the Class A shareholders also received a rollover interest and a promissory note. *See* B. 1080-84. SEPTA appeared to back away from that position at oral argument before the Court of Chancery, and that argument is now waived because, before this Court, SEPTA argues only that Dr. Volgenau received greater value for his shares than the minority shareholders received. *See* Pl. Br. 21-22; 31-32; Del. Supr. Ct. R. 14(b)(vi)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

But even if SEPTA has preserved that argument, it cannot prevail. The Certificate of Incorporation provided that, "upon merger or consolidation" of SRA, the Class A and Class B shareholders would receive "equal per share payments *or* distributions." A. 815 (emphasis added). A corporate charter is a contract, "subject to the general rules of contract and statutory construction," and as such, a court must first look to the language of the agreement, and "if the charter language is clear and unambiguous, it must be given its plain meaning." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006). In this charter, the clear import of the word "*or*" is that it permits the different classes of shareholders to receive different forms of consideration, so long as they receive the same value. Indeed, this Court has previously held that, in a corporate charter that required that shareholders "shall participate share and share alike in all dividends and distributions of assets upon liquidation or otherwise and shall be identical in all other respects," the use of the phrase "identical in all other respects" did "not mandate identical treatment of Class A and Class B stock in a recapitalization." *Levco Alt. Fund Ltd. v. The Reader's Digest Ass'n*, 803 A.2d 428, 2002 WL 1859064, at *1 (Del. 2002).

Further, uncontroverted record evidence shows that in this deal, Dr. Volgenau's acceptance of a rollover stake and a $30 million nonrecourse note increased the consideration that minority shareholders received for their SRA stock. Discouraging mixed cash-stock deals like this one would thus potentially harm shareholders subject to similar equal treatment provisions in corporate charters.

d. The Merger Was Designed to Comply with the Equal Treatment Requirement

SEPTA also argues that the individual defendants violated their fiduciary duties because they never expressly considered whether the deal complied with the equal treatment requirement in the Certificate of Incorporation. *See* Pl. Br. 31-32.

SEPTA has failed to show that there is any material dispute as to SRA's substantive compliance with the equal treatment provision. In the absence of any showing of a substantive breach of the provision, whether SRA ever expressly considered the text of the equal treatment provision is immaterial, and SEPTA has offered no authority to the contrary. In any event, it is no coincidence that the $30 million note Dr. Volgenau accepted for 960,000 shares equates to $31.25 per share, or that the $120 million rollover Dr. Volgenau accepted for 3.84 million shares also equates to $31.25 per share. A. 530. Indeed, the proxy statement expressly states that the rollover and note were valued at $31.25 per share. B. 229. That is strong evidence that, contrary to SEPTA's speculation, the Special Committee *did* take affirmative steps to ensure that the merger complied with the equal treatment requirement. Again, SEPTA has offered nothing but speculation to the contrary.

II. THE COURT NEED NOT REACH THE QUESTION WHETHER SECTION 124 BARS SEPTA'S CLAIM THAT THE MERGER IS INVALID UNDER SRA'S CERTIFICATE OF INCORPORATION.

A. Second Question Presented

Did the Court of Chancery correctly hold that Section 124 of the Delaware Code bars SEPTA's claim alleging that the merger is invalid?

B. Scope of Review

The proper scope of Section 124 is a legal question that is reviewed *de novo*.

C. Merits of the Argument

In Count IV, SEPTA alleged (1) that the merger is "invalid under the Company's Certificate of Incorporation" because it did not comply with the equal treatment provision and (2) that "[b]y approving the invalid Merger," the defendants "breached their fiduciary duty of loyalty to the public stockholders of SRA." A. 86. The court below allowed SEPTA to proceed on its claim that the individual defendants violated their fiduciary duties but held that Section 124 bars SEPTA's claim that they "breached" their fiduciary contractual duties by approving an invalid merger. B. 697. On appeal, SEPTA argues that Section 124 does not bar its breach of contract claim that the merger is invalid.

As set forth in Part II.B above, the Court of Chancery correctly concluded that the plain language of the Merger Provision plainly permits differing forms of consideration. Because all payments and distributions were indisputably based on the same merger consideration of $31.25 per share, they were "equal" within the meaning of that provision. The exactitude in enterprise valuation that Plaintiff's theory demands is unattainable and would have the practical effect of prohibiting mergers involving different forms of consideration. Therefore, even if the Court of Chancery misinterpreted Section 124, any error would have been harmless. *See, e.g., Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210-11 (Del. 2005) (error in grant of summary judgment is harmless when a required element of a claim or defense cannot be established).

Further, even if the breach of contract claim survived, SEPTA could prove no damages flowing from the breach. SEPTA's claim rests on an assertion that the per-share price paid for SRA's stock was unfairly low. But SEPTA has offered no credible evidence that this price was unfair. At oral argument before the Court of Chancery, counsel for SEPTA conceded that if $31.25 per share is a fair price for SRA's stock, any "problem under the charter provision [wouldn't be] a problem that would have damages." A. 3808.

More substantively, there was in any event no error. With three exceptions not applicable here, Section 124 provides that "[n]o act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity or power to do such act." 8 *Del. C.* § 124. SEPTA's claim that the merger is invalid because the Board of Directors had no authority to approve a merger that did not comply with the equal treatment provision is thus unambiguously barred. In response, SEPTA relies on *Carsanaro v. Bloodhound Technologies, Inc.*, 65 A.3d 618 (Del. Ch. 2013), which it contends is at odds with the decision below. But the analysis in *Carsanaro* relies heavily on divining the legislature's intent in enacting a series of related statutes abrogating the common law *ultra vires* doctrine, and such analysis cannot prevail over unambiguous statutory text. As this Court has made clear, if, as here, the meaning of a provision is clear on its face, other approaches to interpreting its meaning are foreclosed. *See, e.g.*, *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012) ("[I]f statutory text is unambiguous, this Court's role is limited to an application of the literal meaning of the statute's words.").

CONCLUSION

The judgment of the Court of Chancery should be affirmed.

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