IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Date Submitted: April 4, 2013
Date Decided: August 5, 2013

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NOBLE, Vice Chancellor

This case arises from the merger between a private equity sponsor and a former Delaware corporation. As part of the transaction, the controlling stockholder received a minority interest in the merged entity, a non-recourse note, certain authority in the private entity, and, in exchange for fifty-nine percent of his shares, $31.25 per share in cash. Minority stockholders received $31.25 per share in cash. A former minority stockholder has brought fiduciary duty claims against the former directors of the acquired company relating to their conduct in approving the merger and an aiding and abetting claim against the buyer (collectively, the "Defendants"). In addition to alleging that the controlling stockholder engaged in self-dealing, the former stockholder alleges that the merger was consummated at an unfair price, through an inadequate process, and in violation of the company's charter. The Defendants have moved for summary judgment.

At the center of the Defendants' motion is whether robust procedural protections were used that entitle the merger to review under the deferential business judgment rule instead of the exacting entire fairness standard. A transaction involving a third party and a company with a controller stockholder is entitled to review under the business judgment rule if the transaction is (1) recommended by a disinterested and independent special committee and (2) approved by stockholders in a non-waivable vote of the majority of all the minority stockholders.

Because of the procedural protections that were used, the Court reviews the merger under the business judgment rule. The Court concludes that there is no dispute of material fact that the merger-related decisions of the directors of the former company were attributable to a rational business purpose and that the buyer was an arms' length bidder. The former shareholder asserts a duty of loyalty claim against the directors for consciously disregarding a provision in the company's charter requiring that the controlling stockholder receive "equal" consideration as all other stockholders in a merger. Because there is no dispute of material fact that the former directors did not act in bad faith, and because the Defendants are entitled to judgment on all claims asserted against them, the Court grants the Defendants' motions for summary judgment on all counts.

The Plaintiff, Southeastern Pennsylvania Transportation Authority ("SEPTA" or the "Plaintiff"), brings claims arising from the buy-out (the "Merger") of Defendant SRA International, Inc. ("SRA" or the "Company") by Defendants Providence Equity Partners LLC ("Providence") and its related entities.[1] SEPTA asserts fiduciary duty claims against the former directors of SRA (the "SRA Directors" or the "Board"), who include Ernst Volgenau ("Volgenau"),

[1] The related entities are Defendants Providence Equity Partners VI L.P., Providence Equity Partners VI-A L.P., Sterling Parent Inc., Sterling Merger Inc., and Sterling Holdco Inc. Verified Second Am. Class Action Compl. ("Compl.") ¶ 1. Some of these entities were formed by Providence for the purpose of structuring a transaction with SRA. Transmittal Aff. of Robert B. Gilmore to the Opening Br. in Supp. of the SRA Defs.' Mot. for Summ. J. ("Gilmore Aff.") Ex. 4 (Proxy) at 16.

the former controlling stockholder of SRA, and Stanton D. Sloane ("Sloane"), the former chief executive officer ("CEO") of SRA, relating to their conduct in connection with the Merger.[2] SEPTA also asserts that Providence aided and abetted the SRA Directors' breach of their fiduciary duties.

I. BACKGROUND

A. *An Overview of the Claims*

SEPTA has asserted four claims in its Verified Second Amended Class Action Complaint (the "Complaint").

- Count I asserts a breach of the duty of loyalty and duty of care against the SRA Directors (including Volgenau) for approving the merger agreement, disclosing misleading or incomplete information, and failing to disclose material information.

- Count II asserts a breach of the duty of loyalty and duty of care against Volgenau and Sloane. Volgenau is accused of "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."[3] Sloane is alleged to have "encourage[d] and facilitate[d] the [Merger]" and Volgenau's self-dealing conduct.[4]

- Count III asserts that Providence aided and abetted the SRA Directors' breach of fiduciary duties in Counts I and II.[5]

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[2] The former directors of SRA are: Volgenau, John W. Barter ("Barter"), Larry R. Ellis ("Ellis"), Miles R. Gilburne ("Gilburne"), W. Robert Grafton ("Grafton"), William T. Keevan ("Keevan"), Michael R. Klein ("Klein"), Sloane, and Gail R. Wilensky ("Wilensky").

[3] Compl. ¶ 114. Arguably, the Plaintiff has alleged its fiduciary duty claim relating to the charter against Volgenau in both Counts II and IV. The Court will address this claim in Count IV.

[4] *Id*. at ¶¶ 113-16.

[5] It is unclear whether the Complaint also alleges that Providence aided and abetted the breach of loyalty claim set forth in Count IV.

- Count IV asserts that the SRA Directors breached their fiduciary duties by approving the Merger in violation of SRA's certificate of incorporation (the "certificate" or "charter").

B. *Procedural History*

Following the announcement of the Merger, SEPTA filed its original complaint on April 7, 2011. Thereafter, it filed a Motion for Preliminary Injunctive Relief based on unresolved disclosure claims, but withdrew its motion when the Defendants made supplemental disclosures. On June 21, 2011, the Plaintiff filed its most recent Complaint. The SRA Defendants filed a Motion for Judgment on the Pleadings as to Count IV, which the Court granted in part and denied in part.[6] The Court held that "SEPTA's claim that the Merger is invalid fails as a matter of law" under 8 *Del. C.* § 124. However, the Court denied the Defendants' motion to dismiss "SEPTA's claim that [the SRA Directors'] breached their fiduciary duties by approving a transaction that violated SRA's certificate of incorporation."[7]

C. *Parties*

SEPTA was a stockholder of SRA at the time of the Merger. Volgenau founded SRA in 1978.[8] SRA is a leading provider of technology solutions and

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[6] *Se. Pa. Transp. Auth. v. Volgenau*, 2012 WL 4038509 (Del. Ch. Aug. 31. 2012).
[7] *Id.* at *3.
[8] Transmittal Aff. of A. Zachary Naylor Submitted in Supp. of Pl.'s Omnibus Answering Br. in Opp'n to Defs.' Mots. for Summ. J. ("Naylor Aff.") Ex. 3 (Volgenau Dep.) at 9.

professional services, primarily to the federal government.[9] SRA serves customers in four markets: national security, civil government, health, and intelligence and space. At the time of the Merger, Sloane was SRA's CEO. The Board consisted of Volgenau, Sloane, Klein, Gilburne, Grafton, Barter, Ellis, Keevan, and Wilensky.

Providence is a private equity firm specializing in equity investments in media, communications, information services, and education.[10]

D. *History of SRA*

Volgenau has been SRA's controlling stockholder from its inception in 1978. In 2002, the Company made an initial public offering. As a public company, SRA had two classes of common stock: Class A and Class B. The only difference between the two classes of stock was that a holder of Class A stock was entitled to one vote per share, while a holder of Class B stock was entitled to ten votes per share.[11] Despite owning only 21.8 percent of the outstanding equity of the Company, Volgenau retained control of SRA through his ownership of Class B common stock, which enabled him to control approximately 71.8 percent of the voting power.[12]

[9] Naylor Aff. Ex. 23 (Lenders Presentation) at 11.
[10] Naylor Aff. Ex. 4 (Richardson Dep.) at 21.
[11] Naylor Aff. Ex. 24 (Amended & Restated Certificate of Incorporation of SRA) ("Certificate of Incorporation") at ¶ A.2.
[12] Naylor Aff. Ex. 26 (Proxy) at 78.

Under the terms of SRA's certificate, Volgenau could convert—at any time—each share of his Class B common stock to one share of Class A common stock. Each Class B share was also subject to an automatic conversion at the same one-to-one ratio upon the occurrence of certain events, such as the death of the holder, loss of competency, and if the holder became eighty years old and was no longer affiliated with the Company.[13] The certificate also required that the holders of Class A and Class B common stock be treated equally in the event of a merger.[14] As Volgenau testified in his deposition, the "primary objective in having Class B stock was to prevent harmful takeovers of the company, not to enrich the Class B shareholders."[15]

SEPTA asserts that Volgenau dominated and controlled SRA.[16] There is no doubt that Volgenau, even after stepping down as SRA's CEO in 2002, exercised considerable influence over the operations of the Company in his capacities as

[13] Naylor Aff. Ex. 24 (Certificate of Incorporation) at ¶ A.6(b).

[14] *Id*. at ¶ A.9. The provision states: "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, except that in any transaction in which shares of capital stock are distributed to holders of Common Stock, the shares of capital stock distributed to holders of Class A Common Stock and Class B Common Stock may differ as to voting and conversion rights, but only to the extent that the voting and conversion rights of the Class A Common Stock and the Class B Common Stock differ in this Certificate of Incorporation." To amend or repeal any provision in the certificate required the consent of 67 percent of the outstanding Class A shares and Class B shares, voting separately as a single class. *Id*. at ¶ A.11.

[15] Naylor Aff. Ex. 3 (Volgenau Dep.) at 14-15.

[16] Pl.'s Omnibus Answering Br. in Opp'n to Defs.' Mots. for Summ. J. ("Pl.'s Br.") 9-11.

Chairman of the Board and controlling stockholder.[17] Volgenau actively participated in the selection of his replacement, Renato DiPentima ("DiPentima"), and DePentima's successor, Sloane. As the Company struggled under Sloane, he regularly conferred with Sloane on all "major decisions."[18] Perhaps neither of these actions is unusual for a Chairman. But, as a controlling stockholder, Volgenau's influence was more pervasive. When Sloane terminated the employment of a valuable executive, Volgenau arranged to keep the former employee engaged as a consultant to SRA.[19] As SRA struggled under Sloane, SRA began considering possible strategic alternatives, including a sale of the Company. During that time, Volgenau was actively involved in the decision to pursue a strategic transaction and in ensuring that the Company's ethics of honesty and service would be preserved.[20]

SEPTA attempts to cast a negative light on Volgenau's insistence on preserving the Company's values and culture, asserting that it had a "negative

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[17] Naylor Aff. Ex. 25 (Draft of Volgenau's Book) at 207-16.
[18] *Id*. at 215-16.
[19] *Id*. at 215.
[20] *See* Naylor Aff. Ex. 3 (Volgenau Dep.) at 27-28. Volgenau created SRA with the intention of demonstrating "that a company with high values and culture can be a business success." Transmittal Decl. of Kevin M. Coen ("Coen Decl.") Ex. 36. The core values of SRA were honesty and service. According to Volgenau, honesty means "high ethical performance, not only complying with the law, but complying with the spirit of the law," and service means serving country and customers, and "tak[ing] care of one another." Naylor Aff. Ex. 3 (Volgenau Dep.) at 27-29.

economic impact."[21] Whether that is true or not, Volgenau testified that "many people believe that honesty and service increased the market value of . . . SRA."[22] At least initially, Volgenau's views affected his willingness to consider a sale of the Company to a strategic acquirer. In his book, Volgenau candidly admits that he had a negative disposition to that type of buyer.

> Virtually every year since our founding I had been approached by a CEO in a company that wanted to buy SRA. In each case I declined, explaining that we were on a special mission to create one of the world's great companies—a business and ethical success. . . . I don't think any of those CEOs and companies were unethical, but they could not compare with SRA. I began to refer to them privately . . . 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 [sic] wiener.[23]

The record reflects that the idea to sell SRA was never seriously considered until a few years after the Company had begun to experience various problems. Since 2008, SRA had been experiencing declining growth rates, lower profit margins, and poorly performing acquisitions.[24] As the Company's performance continued to falter in 2010,[25] Volgenau became interested in the prospect of a

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[21] Pl.'s Br. 11.
[22] Naylor Aff. Ex. 3 (Volgenau's Dep.) at 28.
[23] Naylor Aff. Ex. 25 (Draft of Volgenau's Book) at 228.
[24] Naylor Aff. Ex. 3 (Volgenau Dep.) at 61-64.
[25] Gilburne testified that the Company was "beginning to lose important recompetes . . . that historically we wouldn't have lost before." Naylor Aff. Ex. 10 (Gilburne Dep.) at 110. He further testified that: "It was my concern that we were in the part of the value chain where price was becoming the key differentiator in an increasingly undifferentiated service environment." *Id*. at 194.

leveraged buy-out ("LBO"), which would, in theory, provide stockholders with a substantial premium to SRA's current stock price and afford Volgenau a better opportunity to preserve the Company's values and culture. But, as Volgenau acknowledged in his book, once he (and the Board) made the decision to sell SRA, the eventual acquirer might very well be a strategic competitor.[26]

E. *The Early Meetings with Providence*

SEPTA asserts that Providence aided and abetted the SRA Directors' breach of fiduciary duty. In support of this theory, SEPTA points to Providence's retention of DiPentima, a former CEO of SRA, Volgenau's friend, and a paid consultant to SRA,[27] to exploit Volgenau's trust in DiPentima to effectuate a deal. Similarly, the Plaintiff contends that Ted Legasey ("Legasey"), also a former senior SRA executive and friend of Volgenau, was recruited to persuade Volgenau to sell the Company to Providence.[28] In the spring of 2010, after an initial meeting between DiPentima and Volgenau, in which DiPentima raised the idea of an LBO,[29] Julie Richardson, the CEO of Providence, and other Providence employees

[26] Naylor Aff. Ex. 25 (Draft of Volgenau's Book) at 230-31.
[27] DiPentima was a paid consultant to SRA throughout Providence's pursuit of SRA. Naylor Aff. Exs. 106-109. While this conflict is perhaps troubling, there is no indication that DiPentima's role as an advisor to Providence conflicted with his position as a consultant at SRA.
[28] SEPTA also claims that the Board was unaware that these former employees, and then-current consultants of SRA, were working on behalf of Providence to achieve a buyout of SRA. Providence may have also retained Wolf Den Associates, LLC, as a paid consultant to SRA, to aid in Providence's due diligence efforts. *See* Naylor Aff. Exs. 127, 144-45.
[29] During this meeting DiPentima informed Volgenau that he was working as an advisor to Providence and described a possible LBO transaction with Providence that would retain the SRA

began meeting with Volgenau and the senior management of SRA to discuss a possible buyout. These meetings involved preliminary discussions about the possibility of Volgenau's participating in the acquired company, indicative price points, and the importance of maintaining the value and culture of SRA.[30] During this time Volgenau inquired about Providence's ability to obtain the necessary financing and whether a go-shop would disrupt the sale to Providence if an agreement could be reached.[31] Providence provided research to Volgenau showing that it was highly unlikely that a topping bidder would emerge during the go-shop period.[32] SRA shared proprietary information with Providence pursuant to a confidentiality agreement and SRA management developed various LBO scenarios. As discussions ensued, Volgenau was not only amenable to a transaction with Providence, but he also seemed to have significant interest in completing a deal with it.

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name and structure, permit him to restore the culture of honesty and service, and allow him to retain a position on the board of the new entity. Naylor Aff. Ex. 8 (DiPentima Dep.) at 65-68.

[30] *See, e.g.*, Naylor Aff. Ex. 5 (Nadeau Dep.) at 94, 101, 146; Ex. 3 (Volgenau Dep.) at 101-103; Ex. 4 (Richardson Dep.) at 40-51.

[31] Naylor Aff. Exs. 105, 126.

[32] Naylor Aff. Exs. 46-47.

F. *The Study Team*

At the same time as Volgenau was in discussions with Providence, on May 3, 2010, the Board formed a "study team" to assess the strategic alternatives for SRA. The study team included Volgenau, Klein, Gilburne, and Grafton. Notably, Klein encouraged Volgenau to exploit his particular interests as a controlling stockholder.

> 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?[33]

The study team hired CitiGroup to provide advice on strategic alternatives; it opined that a significant acquisition would best maximize the Company's long-term value because it would lead to "more technology and higher profits."[34]

Consistent with that advice, SRA made a serious attempt to acquire Lockheed Martin's Enterprise Integration Group ("EIG") during the summer and fall of 2010. Although Volgenau supported SRA's attempted acquisition of EIG, he also had a desire to continue talks with Providence, even though the acquisition would either postpone or preclude any deal with Providence.[35] Legasey, on behalf

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[33] Naylor Aff. Ex. 25 at 229 (quoting Klein).
[34] Naylor Aff. Ex. 3 (Volgenau Dep.) at 127; Ex. 50 at 2385. The Plaintiff emphasizes that CitiGroup's analysis predicted that an LBO would not be the most value maximizing strategy. That analysis was based on CitiGroup's estimation that an LBO would only generate a per share price of $23.50 to $27, while a strategic acquisition could potentially increase the value of SRA's stock to as high as $32 per share.
[35] Naylor Aff. Exs. 130-32.

of Providence, tried to persuade Volgenau not to pursue the EIG acquisition and warned that Providence would no longer be interested in acquiring SRA.[36] Nonetheless, SRA proceeded with its bid, but ultimately lost out to Veritas Capital ("Veritas"), which purchased the EIG unit for $815 million.

G. *The Formation of the Special Committee and Other Indications of Interest*

Following the failed EIG bid, Volgenau and the Board turned its attention again to Providence. During an October 27, 2010, study team meeting, Volgenau indicated that Providence was the only potential bidder that had ever interested him and that it was committed to maintain the Company's values and culture.[37] With Volgenau's tacit endorsement of Providence, Klein suggested that the Board form an independent special committee, which it did the following day (the "Special Committee").[38] The Special Committee, which was comprised of Klein, as chair, along with Gilburne, Grafton, Barter, and Ellis,[39] was charged with evaluating,

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[36] Richardson testified that Providence recognized that SRA "had moved completely in a different direction" in pursuit of EIG and that SRA "was discontinuing any work efforts or work stream related to" Providence. Naylor Aff. Ex. 4 (Richardson Dep.) at 94-95.
[37] Naylor Aff. Ex. 149.
[38] Gilmore Aff. Ex. 16 (Minutes of the October 27, 2010 Study Team Meeting).
[39] There is some dispute whether the Special Committee members volunteered or whether they were selected by Volgenau. *See* Naylor Aff. Ex. 7 (Grafton Dep.) at 93-94. Grafton testified that "Dr. Volgenau proposed the committee members and the chair and gave each director an opportunity to comment . . . ." He later clarified:

> I think that Mr. Klein, Mr. Gilburne, Mr. Barter and myself were proposed by Dr. Volgenau. There was a discussion then of the committee. I think Dr. Volgenau at that point asked the other board members whether any wanted to be on the committee. . . . General Ellis asked to be on the committee, and Ms. Wilensky and Mr. Keevan did not volunteer. *Id*.

soliciting third-party interest in, and negotiating potential strategic transactions.[40] The Special Committee's mandate also included an express authorization to hire its own advisors.[41]

The Special Committee hired a financial advisor, Houlihan Lokey Capital, Inc. ("Houlihan"), and legal counsel, Kirkland & Ellis LLP ("Kirkland"), to assist it in its evaluation of potential strategic transactions. SEPTA asserts that both Houlihan and Kirkland were hired because of their prior professional and personal relationships with Klein. According to Klein, they were selected because they had no prior experience with SRA and they were well qualified.[42] Volgenau was also instructed that he should not have "any further discussions with Providence [or any other bidder] except as may be approved and coordinated by the Committee . . . ."[43]

Although not fatal to the independence of the Special Committee, Volgenau's selection of the majority of the committee's members was not "the best practice." *In re Fort Howard Corp. S'holder Litig*., 1988 WL 83147, 14 Del. J. Corp. L. 699, 720 (1988) (noting that it was not the best practice to have the interested CEO handpick the members of the special committee).

40 The Special Committee was authorized to "(i) to evaluate, review and consider, and if the Committee deems appropriate, solicit third-party interest in, potential strategic transactions . . ., (ii) establish and direct the process and procedures . . ., (ii) discuss and negotiate the terms of any potential strategic transactions . . . , (iv) recommend [or not recommend] to the Board the approval and adoption of a specific strategic transaction . . ., and (v) take such other actions as the Committee may deem necessary . . . ." Naylor Aff. Ex. 137 (Minutes of the October 28, 2010 SRA Board meeting).

41 *Id*. ("The Committee is authorized to hire . . . independent legal, financial and other advisors . . . .").

42 Naylor Aff. Ex. 1 (Klein Dep.) at 128-130.

43 Gilmore Aff. Ex. 19 (Minutes of the November 9, 2010 Special Committee meeting).

On November 22, 2010, Houlihan and Klein met with representatives from Providence. During the meeting Klein informed Providence that SRA had decided not to undertake a formal sale process and that Providence's initial $28 per share expression of interest was insufficient to start formal discussions. On behalf of the Special Committee, Klein also rejected Providence's request for exclusivity, but permitted it to conduct further due diligence.[44]

As the Special Committee awaited Providence's formal bid, on December 1, 2010, Serco, a strategic competitor, proposed a transaction at a higher price range ($29-$31 per share) than Providence's initial indication of interest. In an email dated December 9, 2010, Klein advised Providence of the superior offer, but noted that "Ernst has fended off numerous interested parties over the past years and had every intention to continue to do that while we await your proposal."[45] Klein testified that his email was intended to elicit a higher offer from Providence that would start the process at $30 per share or more.[46] However, on December 29, 2010, Providence submitted a bid of $27.25 per share.[47]

Not surprisingly, the Special Committee viewed Providence's preliminary expression of interest as insufficient to start the negotiation process with

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[44] Gilmore Aff. Ex. 4 (Proxy) at 20.
[45] Naylor Aff. Ex. 65.
[46] Naylor Aff. Ex. 1 (Klein Dep.) at 152-53.
[47] Gilmore Aff. Ex. 26 (Minutes of the December 30, 2010 Special Committee meeting).

Providence.[48] Consequently, the Special Committee determined that "it was appropriate to explore and assess additional third-party interest . . . in a potential strategic transaction with the Company."[49] Accordingly, in early January 2011, the Special Committee decided to solicit five financial buyers: The Carlyle Group ("Carlyle"), TPG Capital ("TPG"), Kohlberg Kravis & Roberts (KKR"), Veritas and Bain Capital ("Bain"), as well as continue discussions with Serco.[50] A sixth financial sponsor—Hellman & Friedman—was later added to the mix. Although the Board was generally aware that strategic acquirers in theory had the potential to pay more for SRA,[51] Grafton testified that the reason that the Special Committee declined initially to solicit other strategic acquirers was in order to safeguard confidential and proprietary information and avoid "leaks into the marketplace."[52]

By mid-January, however, the markets began to speculate that SRA had received acquisition proposals. After Sloane cancelled his appearance at a January 6 investor conference, SRA's stock price rose 19 percent in one week

[48] Naylor Aff. Ex. 7 (Grafton Dep.) at 130.
[49] Gilmore Aff. Ex. 27 (Minutes of the January 6, 2011 Special Committee meeting).
[50] Naylor Aff. Ex. 7 (Grafton Dep.) at 132-33; Gilmore Aff. Ex. 27 (Minutes of the January 6, 2011 Special Committee meeting).
[51] While this may have been the conventional wisdom, recent history had proven otherwise: SRA had recently lost out to Veritas, a financial buyer, in acquiring EIG from Lockheed Martin.
[52] Naylor Aff. Ex. 7 (Grafton Dep.) at 133 (noting that the Special Committee was concerned about "leaks into the marketplace that we were trying to potentially sell ourselves, as well as we wanted to keep any proprietary or confidential company information very close to the vest, and once you start giving it to competitors, you lose control of it.").

based on rumors that SRA was for sale.[53] Moreover, word leaked erroneously that Serco had submitted, and SRA had rejected, a $2 billion offer to buy SRA.[54] As a result of the ensuing publicity, much of which was negative,[55] Serco withdrew its preliminary offer and terminated discussions with SRA.

On January 25, 2011, SRA confirmed publicly that it had received "a series of inquiries regarding the company's willingness to consider offers" and therefore, SRA had retained Houlihan to provide advice. Although the press release cautioned that "the retention of advisors does not reflect a decision that the company is or should be for sale," by then it was clear that SRA was entertaining acquisition offers.

In light of the newfound publicity and the ensuing expressions of interest, the Special Committee sought to open up the bidding process to other strategic sponsors to extract the maximum possible value for SRA.[56] To his credit, Volgenau consented.[57] To address Volgenau's concerns, however, the Special Committee established a bifurcated process in which it would exclusively address issues of price and certainty while Volgenau would meet with strategic acquirers to

[53] Gilmore Aff. Ex. 34 (January 10, 2011 news article).
[54] Naylor Aff. Ex. 67.
[55] Naylor Aff. Ex. 1 (Klein Dep.) at 152, 179-80.
[56] Gilmore Aff. Ex. 39 (Minutes of the February 2, 2011 Special Committee meeting).
[57] As will be discussed in more detail below, Volgenau's view of strategic buyers seemed to change over time as he met with various suitors. Contrary to his original opinion, Volgenau "learned that strategic acquire[r]s could, in fact, produce, preserve, and were so inclined to preserve the main values and culture, and for that matter, franchise value of the firm, because they believed it had value." Naylor Aff. Ex. 3 (Volgenau Dep.) at 73.

discuss his "humanistic concerns."[58] Thus, in February and early March, Volgenau met alone with strategic and financial sponsors to learn more about them and to discuss his desire that "SRA's name, values and culture be preserved."[59]

On February 4, 2011, Houlihan contacted three other strategic bidders: The Boeing Company ("Boeing"), CGI, and Hewlett Packard ("HP"), and one additional financial buyer: GTCR LLC ("GTCR").[60] Another strategic bidder—L-3 Communications Holdings, Inc. ("L-3")—also contacted Houlihan to express interest in a potential transaction.[61] During the due diligence process, strategic and financial sponsors signed confidentiality agreements and conducted due diligence on SRA—which included access to a confidential data room and meetings with the senior management of SRA.[62] Ultimately, for various reasons, all but two of the potential bidders chose either not to join the sale process or to submit a formal offer for the Company.[63]

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[58] Naylor Aff. Ex. 70.
[59] Naylor Aff. Ex. 71 (Form 8-K) at 2.
[60] Gilmore Aff. Exs. 41-44; Ex. 40 (Minutes of the February 21, 2011 Special Committee meeting).
[61] Gilmore Aff. Ex. 45.
[62] Gilmore Aff. Ex. 4 (Proxy) at 21.
[63] GTCR, having learned about the "business components and drivers of growth" of SRA from meetings with Houlihan, withdrew simply because it believed that it would not be competitive on price. Gilmore Aff. Ex. 46. Similarly, Bain, Hellman & Friedman, and L-3 also withdrew because of their unwillingness to meet SRA's expected valuation. Gilmore Aff. Ex. 47 (Draft of a March 21, 2011 Houlihan Presentation). Other bidders declined to proceed for internal reasons. CGI, based in Montreal, withdrew because it had concerns that it would be difficult to finance the transaction, to integrate SRA while it was simultaneously digesting a recent acquisition, and to obtain the United States government's approval. Aff. of Claude Séguin ¶ 10. Likewise, Boeing withdrew because of a combination of factors, including its financial

H. *The Multi-Round Bidding Contest Between Veritas & Providence*

With all of the remaining suitors having dropped out of the bidding process, Veritas and Providence became engaged in a multi-round bidding contest.[64] On March 18, 2011, Providence submitted an offer to purchase SRA for $30 per share. Two days later, Veritas made a written offer for the same amount, but conditioned it on Volgenau's increasing his rollover amount from $100 million to $150 million. Volgenau agreed to do so. He also agreed to the same rollover amount for Providence, if it desired.[65]

By March 30, the $30 per share deadlock was broken when Veritas improved its offer to $31 per share and Providence increased its offer to $30.50. However, on the evening of March 30, 2011, Providence made two new proposals to increase its bid to $31 per share or higher. First, Providence made an offer "consisting of $30.50 plus a contingent amount equal to the proceeds (if any) received from the sales of two of the Company's subsidiaries, [Era Systems LLC ("Era")] and [Global Clinical Development ("GCD")], [both of which were]

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assessment of SRA and its ability to generate an attractive return in a declining government services industry. Some bidders, such as Boeing and Carlyle, had serious reservations concerning SRA's future growth and profit margins. Gilmore Aff. Exs. 47, 52. Notably, Boeing's efforts highlight the seriousness with which it considered acquiring SRA. Boeing retained legal, financial, and accounting advisors to conduct its due diligence. That effort included 16 diligence calls, 7 diligence meetings, 341 diligence requests, and 119 employees and advisors accessing SRA's data room. Gilmore Aff. Ex. 52.

[64] Both Veritas and Providence had agreed with Volgenau that he would roll approximately $100 million of his equity into the newly formed company. Gilmore Aff. Ex. 54 (Minutes of the March 28, 2011 Special Committee meeting).

[65] *Id*.

currently being marketed."[66] Second and alternatively, Providence offered to increase the purchase price to $31 per share if Volgenau would "agree as part of his [$150 million] rollover commitment to provide a $30 million non-recourse loan to Providence, which loan would be repaid" only if the Company realized sufficient proceeds from the sale of the two subsidiaries being marketed.[67] Importantly, with respect to the second proposal, the Special Committee concluded that Volgenau would not be receiving "any additional economic benefit under the loan if the proceeds of such subsidiary sales were to exceed $30 million."[68] Volgenau consented to the second proposal even though, in Volgenau's words, "it was a rotten deal for me" because "there was no upside and all downside, and [Era and GCD] we knew were risky."[69]

On the same day and shortly after Providence's latest proposals were discussed by the Special Committee, Veritas increased its bid to $31.25 per share

[66] Gilmore Aff. Ex. 55 (Minutes of the March 30, 2011 Special Committee meeting). Both Era and GCD were two poorly performing SRA subsidiaries that were then being marketed. GCD was a contract research organization and Era was a supplier of advanced surveillance technology and flight tracking solutions. *See* Naylor Aff. Ex. 1 (Klein Dep.) at 47, 218; Ex. 5 (Nadeau Dep.) at 64-65.

[67] Gilmore Aff. Ex. 55 (Minutes of the March 30, 2011 Special Committee meeting).

[68] *Id*.

[69] Naylor Aff. Ex. 3 (Volgenau Dep.) at 170-71. Before closing, "[t]hings had gotten a lot worse" at GCD because a "major contract got cancelled" and thus it became obvious that GCD was going to [be sold] for "nominal, if any, value." Naylor Aff. Ex. 1 (Klein Dep.) at 217-18. Similarly, the bids for Era were described as "disappointing." Naylor Aff. Ex. 4 (Richardson Dep.) at 170. Subsequent events proved that neither subsidiary produced sufficient funds to repay Volgenau. On September 30, 2011, SRA sold GCD for less than $0.1 million after transaction costs. Coen Decl. Ex. 6. On November 21, 2011, SRA sold portions of Era for $13.3 million. *Id*. As of December 31, 2011, Volgenau had received $12 million in cash on the non-recourse note, and SRA expected to pay only $17 million on the note. Coen Decl. Ex. 7.

and requested exclusivity in negotiations until the next business day.[70] During the meeting to discuss Veritas' latest proposal, the Special Committee voted to negotiate exclusively with Veritas until 3:00 p.m. the following day. Efforts to finalize the transaction documents stalled, however, as the advisors to the Special Committee—specifically, Kirkland—identified a potential issue related to Veritas' contractual ability to finance the transaction and to obtain the necessary partnership approvals.[71] As the exclusivity period ended, Providence raised its bid to $31.25 per share. With both bidders deadlocked again, the Special Committee requested each bidder to submit its best and final offer by 5:00 p.m.[72] Apparently frustrated by the Special Committee's conduct in dragging the process along, Veritas instead withdrew its $31.25 bid, leaving Providence, which declined to make a higher offer, as the only remaining bidder.

During the March 31, 2011, Board meeting, the Special Committee unanimously recommended to the Board that SRA accept Providence's offer. Houlihan opined that the $31.25 per share offer was fair. Kirkland summarized the terms of the proposed transaction, which included a 30-day go-shop provision, a $28.2 million breakup fee during the go-shop (*i.e.*, 1.5 percent of the deal value), a $47 million termination fee after the go-shop (*i.e.*, 2.5 percent of the purchase

[70] *See* Gilmore Aff. Ex. 56 (Minutes of the March 30, 2011 Board meeting); Naylor Aff. Ex. 1 (Klein Dep.) at 221.
[71] Naylor Aff. Ex. 1 (Klein Dep.) at 221.
[72] Gilmore Aff. Ex. 57 (Minutes of the March 31, 2011 Special Committee meeting).

price), and a reverse breakup fee of $112.9 million. The Merger was also subject to a majority of the minority vote that was not waivable by the Special Committee. Except for Volgenau who abstained, the Board voted unanimously to approve the merger agreement and to recommend the Merger to SRA's stockholders.

During the go-shop, Houlihan solicited 50 potential bidders, including 29 strategic sponsors and 21 financial buyers.[73] No bidders emerged with an additional offer. The definitive proxy statement was mailed to stockholders on June 15, 2011. SRA made supplemental disclosures after the Plaintiff claimed that the proxy had omitted material information relating to Volgenau's meetings with four potential buyers and Houlihan's relationship with Providence. On July 15, 2011, SRA's minority stockholders approved the merger with 81.3 percent of the total outstanding minority shares (99.7 percent of the total minority voting shares) voting in favor of the Merger.[74] The Merger, valued at $1.88 billion, closed on July 20, 2011. SRA stockholders received $31.25 per share in cash, which represented a 52.8 percent premium over SRA's stock price on December 31, 2010.[75]

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[73] Naylor Aff. Ex. 2 (Antenucci Dep.) at 148-49; Gilmore Aff. Ex. 61 (Go-Shop List).
[74] Gilmore Aff. Ex. 68 (Final Report of the Inspector of Elections).
[75] Gilmore Aff. Ex. 69.

II. CONTENTIONS

The Defendants contend that there is no triable issue of material fact about whether the business judgment rule applies because robust procedural protections were used to effectuate the Merger. Even if the business judgment rule does not apply, the Defendants assert that they are still entitled to judgment under the entire fairness standard. In response, SEPTA contends that there are disputes of material fact precluding (a) the application of the business judgment rule and (b) the Court from granting the Defendants' summary judgment motions. First, SEPTA asserts that Volgenau stood on both sides of the transaction. It also attacks the independence or disinterestedness of certain Special Committee members. SEPTA contends that Klein was self-interested because he harbored a secret desire to receive a significant bonus in return for orchestrating a transaction with Volgenau's allegedly preferred bidder—Providence. SEPTA further maintains that Volgenau, with the help of Sloane, dominated the Special Committee process through his initial discussions with Providence and by having unauthorized contact with bidders after the Special Committee was formed. In addition, SEPTA argues that the Special Committee advisors were self-interested and intentionally sought to derail Veritas' bid. It further asserts that the stockholders were not fully informed of all material facts when they overwhelmingly approved the Merger. Second, the Plaintiff contends, and offers expert testimony in support, that the

Merger price was unfair. The Defendants respond by arguing that the facts proffered by SEPTA are immaterial and the evidence in the record shows that the Merger price was fair. The Defendants, in addition, contend that the Court need not resolve the differing opinions of the experts because the fairness of the Merger price was confirmed by a robust and lengthy sale process and the Board reasonably relied upon Houlihan's fairness opinion.

Count III alleges that Providence aided and abetted the SRA Directors' breach of their fiduciary duties. The Plaintiff asserts that Providence knowingly participated in the SRA Directors' breach of their fiduciary duties because of its hiring of former SRA employees and its alleged "partnership" with Volgenau. In response, the Defendants contend that there is no dispute of material fact that the SRA Directors breached their fiduciary duties or that Providence knowingly participated in such a breach. Count IV asserts that the SRA Directors breached their duty of loyalty by approving the Merger in violation of SRA's certificate.[76] SEPTA contends that Volgenau received greater consideration in the Merger than did the minority stockholders and that the Board did not even attempt to adhere to the charter's equal treatment provision. The Defendants have countered by asserting that the record indisputably shows that the SRA Directors did not

[76] Compl. ¶ 122.

knowingly disregard the equal treatment provision or believe that Volgenau was receiving greater consideration in the Merger.

III. ANALYSIS

A. *The Summary Judgment Standard*

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[77] "[E]ven where 'colorable . . . or [in]significantly probative [evidence]' is present in the record, [summary judgment is appropriately granted] if no reasonable trier of fact could find for the plaintiff on that evidence."[78] The Court views the evidence in the light most favorable to the nonmoving party and assumes the truth of uncontroverted facts set forth in the record.[79] "When the moving party shows that no genuine issue of material fact exists, 'the burden shifts to the nonmoving party to substantiate its adverse claim by showing that there are material issues of fact in dispute.'"[80] If the burden shifts to the nonmoving party, summary judgment is appropriate "where that party fails to make a sufficient showing on any essential element of its case."[81]

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[77] Ct. Ch. R. 56(c).

[78] *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) (quoting *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249-50 (1986) (alterations in the original except for the first alteration)).

[79] *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *9 (Del. Ch. Oct. 2, 2009).

[80] *Id*. (quoting *Conway v. Astoria Fin. Corp*., 837 A.2d 30, 36 (Del. Ch. 2003), *aff'd*, 840 A.2d 641 (Del. 2004)).

[81] *Id*.

B. *A Note on In re MFW Shareholders Litigation*

As an initial matter, the Court's recent decision in *In re MFW Shareholders Litigation* ("*MFW*")[82] illuminates many of the procedural protections at issue in this case. For the first time, the Court addressed the question whether, and under what conditions, a merger between a controlling stockholder and its subsidiary could be reviewed under the business judgment rule, as opposed to the entire fairness standard. The Court held that the business judgment rule could apply if all of the following conditions were satisfied: (1) the controlling stockholder at the outset conditions the transaction on the approval of both a special committee and a non-waivable vote of a majority of the minority investors; (2) the special committee was independent, (3) fully empowered to negotiate the transaction, or to say no definitively, and to select its own advisors, and (4) satisfied its requisite duty of care; and (5) the stockholders were fully informed and uncoerced.[83]

In concluding that this structure would benefit minority stockholders, the Court explained:

> [S]tockholders get the benefits of independent, empowered negotiating agents to bargain for the best price and say no if the agents believe the deal is not advisable for any proper reason, plus the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them.[84]

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[82] 67 A.3d 496 (Del. Ch. 2013).
[83] *Id*. at 501-02, 514-16.
[84] *Id*. at 503.

The Court further reasoned that, because these procedural protections had the effect of replicating an arms' length transaction, they had a "cleansing" effect on the transaction that justified judicial review under the deferential business judgment rule.[85]

Unlike *MFW*, which involved a controlling stockholder on both sides of the transaction, this case involves a merger between a third-party and a company with a controlling stockholder. Despite SEPTA's attempt to show otherwise, Volgenau is not a buyer in this transaction. As a seller, his interest is generally aligned with that of minority stockholders to the extent that he receives equal consideration for his shares. But as this Court has observed before, a controlling stockholder may, even in this context, inappropriately influence the outcome of the sale process:

> [I]t is . . . true that [a controlling stockholder] and the minority stockholders [are] in a sense competing for portions of the consideration [that the third-party is] willing to pay to acquire [the company] and that [the controlling stockholder] . . . could effectively veto any transaction. In such a case it is paramount . . . that there be robust procedural protections in place to ensure that the minority stockholders have sufficient bargaining power and the ability to make an informed choice of whether to accept the third-party's offer for their shares.[86]

Hammons sets forth the procedural protections necessary for a third-party transaction involving a controlling shareholder to qualify for review under the business judgment rule: (1) the transaction must be recommended by a

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[85] *Id*. at 501.
[86] *Hammons*, 2009 WL 3165613, at *12.

disinterested and independent special committee, (2) which has "sufficient authority and opportunity to bargain on behalf of minority stockholders," including the "ability to hire independent legal and financial advisors[;]" (3) the transaction must be approved by stockholders in a non-waivable majority of the minority vote; and (4) the stockholders must be fully informed and free of any coercion.[87]

C. *The Standard of Review: Entire Fairness or Business Judgment?*

As a threshold issue, the parties dispute whether the Court should review the Merger under the entire fairness standard or the business judgment standard. SEPTA contends that entire fairness is warranted because Volgenau stood on both sides of the transaction. In response, the Defendants urge the Court to apply the business judgment rule because the transaction was subject to robust procedural protections, namely, a non-waivable majority of the minority vote and a disinterested and independent Special Committee.

1. Did Volgenau Stand on Both Sides of the Merger?

The Plaintiff's assertion that Volgenau stood on both sides of the Merger is based both on Volgenau's desire to preserve the culture and values of SRA and his rollover of equity into the merged entity. According to the Plaintiff:

> Volgenau and his interest were the reasons the sale process started. . . By engaging as he did with Providence and then foisting it upon the

[87] *Hammons*, 2009 WL 3165613, at *12 n. 38. The procedural protections are of no avail if the controlling stockholder engages in "threats, coercion, or fraud." *Id.*; *see also Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012).

> Board as the only buyer that had ever interested him, he placed himself knowingly and willfully in the shoes of a buyer in this Merger.[88]

SEPTA further contends that Volgenau had a "heavy influence" on the sale process through his selection of the Special Committee members, by steering the process away from strategic sponsors, and by having contact with Providence, despite explicit instructions not to do so.[89] Volgenau's relationship to Providence was underscored, the Plaintiff asserts, by the fact that Providence, in a presentation to lenders, referred to Volgenau as its partner and highlighted its special relationship with him.[90]

The contention that Volgenau stood on both sides of the transaction is not supported by the factual record or Delaware law. First, the record discloses no prior affiliation between Volgenau and Providence. In fact, they had no relationship before the spring of 2010 when Volgenau and representatives of Providence first met to discuss a potential transaction.[91] Moreover, Volgenau's conversations with Providence in which a leveraged buyout was preliminarily

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[88] Pl.'s Br. 59.
[89] *Id*. at 21, 59.
[90] *Id*. Richardson's reference to Volgenau as Providence's partner occurred after the merger agreement had been signed. *See* Naylor Aff. Ex. 29. Thus, this fact is not material evidence that Volgenau and Providence had been affiliated or that Volgenau was a partner in the sense that he stood on both sides of the transaction.
[91] That Volgenau previously had prior relationships with certain Providence representatives is not enough to establish a material affiliation.

discussed did not somehow magically transform Volgenau into an affiliate of Providence.

Second, under Delaware law, "[w]hen a corporation with a controlling stockholder merges with an unaffiliated company, the minority stockholders of the controlled corporation are cashed-out, and the controlling stockholder receives a minority interest in the surviving company, the controlling stockholder does not 'stand on both sides' of the merger."[92] The *Hammons* court rejected a similar contention that a controlling stockholder's retention of an equity interest and other benefits created a "joint venture of some sort" or a "recapitalization."[93] As in *Hammons*, where an unrelated entity made an offer to the Special Committee representing minority stockholders,[94] Providence, an entity unaffiliated with SRA, made offers to, and negotiated with, SRA through a disinterested and independent Special Committee that represented the interests of the minority stockholders. Volgenau, who had the right to vote or not to vote his shares, did not become a buyer in the Merger because he engaged in separate discussions with Providence regarding his humanistic concerns.

Third, the Plaintiff's assertion that Volgenau foisted upon the Special Committee and the Board his preferred and only buyer, and then dominated the

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[92] *Frank*, 2012 WL 1096090, at *7 .
[93] *Hammons*, 2009 WL 3165613, at *10.
[94] *Id*.

Board to effectuate that transaction, is belied by the record. Importantly, the Plaintiff has failed to dispute materially that the Special Committee executed a robust process in which all interested bidders were afforded an equal opportunity to buy SRA.

Accordingly, because there is no genuine issue of material fact as to whether Volgenau did not stand on both sides of the transaction, the Merger will be reviewed under the business judgment standard to determine if it satisfies the test set forth in *Hammons*.

2. <u>Was the Special Committee Disinterested and Independent?</u>

The Plaintiff attempts to discount the independence and disinterestedness of the members of the Special Committee by asserting that (a) Klein had a secret motivation to deliver a deal with Providence to Volgenau—who was self-interested in the Merger; and (b) the Special Committee was dominated by Volgenau and Klein. Each of these contentions is addressed below.

The business judgment rule is a "presumption that in making a business decision, the directors of a corporation act on an informed basis [*i.e.*, with due care], in good faith and in the honest belief that the action taken was in the best interests of the company [*i.e.*, loyally]."[95] Accordingly, there is a presumption that

[95] *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *24 (Del. Ch. Jan. 25, 1999), *aff'd*, 741 A.2d 16 (Del. 1999) (internal quotation marks omitted) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989)).

directors are independent under Delaware law.[96] To rebut the business judgment rule on grounds of self-interest, the plaintiff must establish, first, that a director had a "material self-interest in the challenged transaction. Evidence of mere self-interest is not enough. Rather, there must be evidence of a substantial self-interest suggesting disloyalty . . . ."[97] Thus, directors may not "expect to derive any personal financial benefit from [the transaction] in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[98]

Second, as to the self-interested directors, the Plaintiff must show that they:

> a) constituted a majority of the board; b) controlled and dominated the board as a whole; or c) i) failed to disclose their interests in the transaction to the board; ii) and a reasonable board member would have regarded the existence of their material interests as a significant fact in the evaluation of the proposed transaction.[99]

Thus, the "mere presence of a conflicted director or an act of disloyalty by a director, does not deprive the board of the business judgment rule's presumption of loyalty."[100] Independence "means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous

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[96] *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
[97] *Goodwin*, 1999 WL 64265, at *25 (citation omitted).
[98] *Aronson*, 473 A.2d at 812.
[99] *Goodwin,* 1999 WL 64265, at *25.
[100] *Id*.

considerations or influences."[101] To rebut the presumption of independence, a plaintiff must demonstrate that the directors are "beholden" to the self-interested parties or "so under their influence that their discretion would be sterilized."[102]

(a) *Was Klein Self-interested in the Merger?*

First, the Plaintiff's contention that Klein had a secret interest in pleasing Volgenau is based in part on his undisclosed expectation that he would receive a significant bonus for his work with the Special Committee. On February 3, 2011, the Board set the Special Committee compensation at $75,000 for Klein and $37,000 for the other members.[103] At Volgenau's urging, when the Board approved the merger agreement during a March 31, 2011, Board meeting, it again changed the Special Committee compensation to $75,000 for each member and an additional $150,000 for Klein. However, Klein declined the additional compensation, explaining later that he did so because it was "premature."[104] As a result, the Board elected to make a charitable contribution of $150,000 to two charitable organizations supported by Klein.[105]

On June 8, 2011, however, Klein sent Volgenau a memorandum in which he expressed disappointment over the meager compensation offered to him for his

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[101] *Aronson*, 473 A.2d at 816.
[102] *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).
[103] Naylor Aff. Ex. 80 (Minutes of the February 3, 2011 SRA Board meeting). The Board determined initially that $25,000 for the members and $50,000 for Klein was appropriate compensation. Naylor Aff. Ex. 56 (Minutes of the November 9, 2010 Board meeting).
[104] Naylor Aff. Ex. 84.
[105] Naylor Aff. Ex. 82 (Minutes of the March 31, 2011 SRA Board meeting).

eight months of work directing the sale process and in light of the nearly $30 million in fees and expenses paid to outside advisors for their help in effectuating the Merger.[106] Klein wrote that, based on his previous experience as the chair of a special committee at a different company, a more reasonable amount of compensation would have been at least $1.3 million, payable to two charities with which Klein is affiliated.[107]

SEPTA contends that Klein, in addition to enriching himself, was likewise interested in rewarding his professional associates. It points out that Klein had a close professional relationship with Kirkland's lead transactional attorney—George Stamas ("Stamas"). Both Klein and Stamas had been partners at the same law firm and both were then serving as directors on the Shakespeare Theatre Company board.[108] As the chair of the Special Committee, Klein negotiated with Kirkland for a ten percent discount in fees in exchange for a "significant" bonus if a "terrific economic outcome" was achieved.[109] After the Merger was completed, Klein then attempted to secure a $2 million bonus for Kirkland.[110] Due to vigorous opposition from Providence, the Special Committee eventually agreed to reduce

[106] Naylor Aff. Ex. 84.
[107] *Id.*
[108] Naylor Aff. Ex. 59. Klein had also retained Kirkland before on behalf of another special committee that he had chaired. Naylor Aff. Ex. 87 at SEPTA00502.
[109] Naylor Aff. Ex. 60. In Klein's view, a significant bonus entailed an amount "equal to the billed fees or a multiple thereof." *Id.*
[110] Naylor Aff. Ex. 89.

Kirkland's bonus to $1 million.[111] Finally, along with Klein and Stamas, Houlihan's lead banker was also a donor and board member of the Shakespeare Theatre Company.[112] SEPTA similarly contends that Houlihan was incentivized to steer the process to a completed transaction, regardless of the merits of the deal, because the majority of its compensation was contingent upon SRA's entering into a deal.[113]

Perhaps Klein had an interest in pleasing Volgenau, as one friend might have for another, but Klein was clearly independent of Volgenau. There is no evidence that Klein was beholden to, or controlled by, Volgenau or that they had any personal or business relationships outside of, or prior to, their interaction on the SRA Board. That Klein encouraged Volgenau to determine the future of SRA while he remained in a position to do so may be peculiar, but it does not suggest that Klein was dominated by Volgenau.[114] Moreover, although Klein informed Providence of Serco's superior offer, the reason that Klein did so is disputed. The Plaintiff, of course, speculates that Klein was somehow helping Providence by

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[111] Naylor Aff. Exs. 77, 90.

[112] Naylor Aff. Ex. 57. SEPTA also complains that the Special Committee allowed SRA's long-time banker, CitiGroup, to advise Providence.

[113] Naylor Aff. Ex. 61 (Houlihan Lokey Engagement Agreement). The Plaintiff further alleges that Houlihan manipulated its fairness opinion to make the Merger price seem fair. Pl.'s Br. 50-52. Revisions to a financial advisor's analyses "are not inherently wrongful." *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *12 (Del. Ch. Jan. 3, 2013). Even if the revisions were questionable, they were not so irrational that the SRA Directors had to have known that the fairness opinion was flawed.

[114] It does suggest that Klein was looking out for the interests of Volgenau.

tipping it off to Serco's offer. But Klein's email to Providence does not show that he was favoring Providence. Rather, the evidence shows that Klein, on behalf of the Special Committee, intended to elicit a higher offer from Providence.[115]

More troubling is Klein's request to Volgenau for additional compensation.[116] Although the request occurred after the merger agreement had been signed, Klein's email revealed that he had an expectation, based on previous experience, that he should or would receive substantial compensation contingent upon a completed merger and a favorable outcome.[117] Because of his experience, it is likely that Klein anticipated a possible bonus well before the merger agreement was signed. Yet Klein never disclosed that expectation to the Board until just a few days before the proxy was sent to stockholders.

The Defendants emphasize that Klein's request was rebuffed and the actual compensation he received was customary and fully disclosed. Directors serving on a special committee are entitled to reasonable compensation for their efforts. As a

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[115] Perhaps the evidence that comes closest to showing that Klein favored Providence on behalf of Volgenau was Klein's disclosure that Volgenau intended to fend off Serco (as he had done with all other interested parties) while SRA waited for Providence's offer. Naylor Aff. Ex. 65.

[116] *See Perlegos v. Atmel Corp.*, 2007 WL 475453, at *16 n.119 (Del. Ch. Feb. 8, 2007) ("[S]pecial committees have not been viewed as 'independent' where, . . . , members' independence was materially affected because they stood to benefit in some form. . . .

[117] Klein had clearly formed that expectation in his mind as of March 31, 2012 when he declined the additional $150,000 offered to him by the Board for his work on the Special Committee. He wrote later that he believed the compensation then was premature.

general rule, a director's financial interest in his or her fees is not disqualifying unless those fees are substantial.[118]

Klein's subjective expectation of a possible bonus—substantially in excess of the amount originally approved or ever contemplated by the Board—raises a serious question regarding Klein's motivation for completing a deal. SEPTA cites *In re Tele-Communications, Inc. Shareholders Litigation*[119] for the proposition that the compensation of a special committee member that is "contingent, ambiguous, or otherwise uncertain, raises a triable issue of material fact as to what each member anticipated in the event the Special Committee approved the transaction."[120] In *Goodwin*, two directors' subjective expectancy of future employment after a change in control was "sufficient evidence to generate a triable issue of fact" regarding whether the potentially self-interested directors' "expectations constituted a material interest in the merger not shared by the stockholders."[121] In contrast, the Court also held that a third director's subjective expectancy in a future consulting agreement with the financial buyer did not create a triable issue of fact whether the "[director] had a material self-interest in the

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[118] *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1169 (Del. 1995); *see also Orman v. Cullman*, 794 A.2d 5, 42 n. 62 (Del. Ch. 2002) (noting that generally directors' fees do not establish a material interest, but warning that the "Court's view of the disqualifying effect of such fees might be different if the fees were shown to exceed materially what is commonly understood and accepted to be a usual and customary director's fee.").
[119] 2005 WL 3642727 (Del. Ch. Dec. 21, 2005).
[120] *Id.* at *5.
[121] *Goodwin*, 1999 WL 64265, at *25.

merger[,]"[122] notwithstanding that the director and the buyer had negotiated over the agreement during the sale process. In so holding, the Court explained that the plaintiff had not alleged that the "potential sums [the director] would have received from the consulting agreement would have, in the context of his annual income and net worth, been of such value to have made it difficult for him to examine the merger on the basis of its merits to [the company's] stockholders alone."[123]

Klein may have had, at all times, an unremitting focus to obtain the highest reasonably attainable price. His desire for personal aggrandizement may not have affected adversely his conduct as the chair of the Special Committee. Perhaps his intention to seek a bonus formed only after he realized the significant disparity between his compensation and the compensation of the advisors to the Special Committee. Klein admittedly regarded his role in the outcome as invaluable and second in importance only to Volgenau's.[124]

But Klein may have also been influenced by other desires. If he believed that a significant bonus was likely to depend upon a completed deal, he may have been less aggressive in negotiating with Providence and Veritas.[125] It is also

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[122] *Id*. at *26.

[123] The Court also observed that the director was then a senior partner at a California law firm and had served on boards of other companies. *Id*. at 26.

[124] Naylor Aff. Ex. 84.

[125] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 780 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012) (noting that a director may not have "consciously [given] in" but he "was less than ideally situated to press hard" given his representation of a significant stockholder and his role as member of the special committee).

possible that Klein may have been subtly motivated to favor Volgenau's interest because he knew that a significant bonus was dependent upon receiving Volgenau's consent. Indeed, when Klein pressed his case for why he was deserving of a substantial reward, he specifically referred to completing a deal with the buyer that would retain SRA's name, values, and culture and "least adversely affect SRA's family of long time employees."[126]

If Klein were any other member of the Special Committee, there would be concern over whether his self-interest in the outcome affected the sale process. Although he was not a "de facto one man committee," Klein clearly had a predominant role in the negotiations. In a merger involving a controlling stockholder, the "composition of the special committee is of central importance" because it represents the interests of the minority stockholders.[127] The independence of each member is the "*sina qua non* of the entire negotiation process."[128] Especially in a case where the special committee is composed of only one director, the standard of independence requires that the member, "like Caesar's wife, to be above reproach."[129] Similarly, Klein's independence and disinterestedness is of central importance to the functioning and cleansing effect of the Special Committee.

[126] Naylor Aff. Ex. 84.
[127] *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145-46 (Del. Ch. 2006).
[128] *Id*. at 1146.
[129] *Id*. (internal quotation marks omitted).

Unlike in *In re Tele-Communications, Inc.*, where the board approved a plan in advance to "reasonably compensate the Special Committee,"[130] the Board here never approved a plan upfront to compensate the Special Committee members on a contingent basis, nor did it grant Klein's request.[131] In that respect, Klein's post-merger agreement request may have been merely wishful thinking, but that does necessarily mean that Klein's interest in the Merger was not material to him.

The subjective standard is used when determining whether a director's financial self-interest in a merger is material.[132] Ordinarily, the prospect of receiving $1.3 million would be material,[133] but Klein specifically requested that the entire bonus go to two charities with which he was affiliated. Thus, in order to find that Klein had a material self-interest in the Merger, the Court would have to conclude that, had the bonus been distributed to Klein's affiliated charities, he would have materially benefited in some way from donating the money. Although Klein serves as a board member on his affiliated charities, there is no evidence in the record that Klein would have received any backdoor remuneration, measured in dollars or accolades, for a donation made because of him.

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[130] *In re Tele-Commc'ns, Inc.*, 2005 WL 3642727, at *5.

[131] Klein may not have been granted his request, but it appears as if some Board members were in favor of it. In fact, Providence's strong objection to Klein's bonus appears to be the reason it was denied.

[132] *See Orman*, 794 A.2d at 24 n.48.

[133] *See Orman*, 794 A.2d at 31 (noting that it would be "naïve to say, as a matter of law, that $3.3 million is immaterial").

That Klein wrote a well-thought-out memorandum to explain why he was deserving of the bonus would suggest that it was material to him. However, that is not enough to raise a triable issue of material fact or rebut the presumption that Klein is independent. The Plaintiff has failed to set forth other facts showing that the requested bonus would have been material to him. Klein's request that the bonus be paid to charity, rather than to himself, strongly suggests that the monetary payment was not material to him.[134] Perhaps Klein sought the donation to obtain accolades or enhance his prestige. That type of interest is not easily measured, and SEPTA has not proffered any facts in support of that theory. Without more, the Court declines to conclude that there is a dispute of material fact that Klein had a material self-interest in the Merger.

Equally important to that conclusion is that there is no other evidence in the record that Klein was otherwise self-interested in the Merger or favored Volgenau's alleged interest in a deal with Providence. Indeed, that both Providence and Veritas complained that the Special Committee was dragging the process along is perhaps some evidence that Klein was not less aggressive in the negotiations to ensure that a deal was completed. Moreover, Klein's memorandum

[134] The record reflects that Klein had been a partner in a major law firm, currently sits on the board of two companies, had received millions of dollars from his service as a director, and, received, in the Merger, millions of dollars for his SRA shares. Gilmore Aff. Ex. 4 (Proxy) at E-2.

suggests that he would have likely requested a bonus regardless of whether a deal was done with Providence or some other buyer.[135]

The Plaintiff has also failed to proffer evidence that Klein's interest infected the Special Committee as a whole. The Special Committee's legal and financial advisors were not tainted by their relationship with Klein or by their compensation structure.[136] They were rationally selected because of their location, competence, and lack of any prior relationship to SRA.[137] Klein's effort to compensate Kirkland for a job well done was not inconsistent with his fiduciary duties, especially because Kirkland's discretionary bonus was contemplated by the terms of Kirkland's engagement.[138] Furthermore, Kirkland's identification of a potential

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[135] Klein's request for at least $1.3 million far exceeded what the Board had ever contemplated and what Kirkland had advised was customary. Naylor Aff. Ex. 81 (chart prepared by Kirkland showing special committee member's compensation packages, none of which exceeded $108,250). This type of request or expectation raises serious concerns about the objectivity of a special committee member. One can easily imagine how this practice, if adopted, could be fraught with potential abuse, especially when it is not disclosed to shareholders and directors who might have thought such significant compensation material; if nothing else, it likely would have generated envy.

[136] *See In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch. May 20, 2011) ("Contingent fees for . . . advisors . . . are somewhat 'routine' and previously have been upheld by Delaware courts. Moreover, a sale process is not unreasonable under *Revlon* merely because a special committee is advised by a financial advisor who might receive a large contingent success fee, even if the special committee is considering only one bidder.") The Plaintiff cites *In re Tele-Communications, Inc. Shareholders Litigation* for the proposition that contingent payments to a financial advisor of the special committee create a "serious issue of material fact[.]" 2005 WL 3642727, at *10. In that case, however, the contingent fee was for $40 million, while here, Houlihan stood to receive an estimated contingent fee of $8.4 million (of a total $10 million in compensation) and Kirkland received a discretionary bonus of $1 million. Gilmore Aff. Ex. 4 (Proxy) at 38.

[137] *See* Naylor Aff. Ex. 10 (Gilburne Dep.) at 121, 124.

[138] Without more, the Court declines to conclude that this is a material fact showing that Klein was purposely trying to enrich Kirkland. It is well within the business judgment of a Board to

issue with Veritas' need to obtain partnership consents to finance its proposed merger does not imply that Kirkland or Klein was favoring Providence. Indeed, there is no evidence in the record that the Special Committee's concern (or Kirkland's concern) was pretextual. In fact, the record contains ample evidence that the Special Committee (including Klein) would have voted in favor of either Veritas or Providence given the value of the bids on the table.

In summary, the Court concludes that there is no genuine issue of material fact as to whether Klein had a material self-interest in the Merger. Furthermore, there is no triable issue of material fact that any interest of Klein did not infect the process and deliberations of the Special Committee.

(b) *Did Klein or Volgenau Dominate the Special Committee?*

SEPTA further asserts that the Special Committee was dominated or controlled by Klein or Volgenau. However, there is no basis in the record for either assertion. With respect to Klein, the record does not imply that Klein was a "de facto one man committee."[139] To be sure, Klein, as chair of the committee, functioned as its leader and played a predominant role in the negotiations. Yet, Gilburne testified that Klein "regularly reported back to the board and solicited

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determine appropriate compensation for advisors. The prior relationships between Klein and the representatives of Kirkland and Houlihan are not sufficient evidence to raise a question of material fact as to whether Klein was willing to risk his reputation to enrich other individuals with whom he sat on the Shakespeare Theatre Company board.

[139] Pl.'s Br. 2.

input."[140] The record shows that the Special Committee members were involved in the sale process and deliberations. They attended numerous Special Committee meetings and calls, participated in discussions, and voiced their views on various issues. To cite one specific example, all of the Special Committee members participated in the selection and compensation of the committee's legal and financial advisors.

With respect to Volgenau, SEPTA asserts that he had "special interests separate from those of the public stockholders" and those interests "were permitted to dominate the Special Committee process."[141] There is no dispute that Volgenau's interests in the Merger were addressed by the Special Committee through the establishment of a bifurcated process in which Volgenau met with interested bidders. That decision was reasonable given that Volgenau, as the controlling stockholder, had the right to vote his shares as he wished. In that way, Volgenau's interest in preserving SRA's values and culture influenced whether a transaction might be possible. But the Plaintiff fails to cite any material evidence that Volgenau dominated the Special Committee process to achieve a transaction with Providence.

As evidence that Volgenau's influence infected the Special Committee process, the Plaintiff points to how Volgenau had unauthorized discussions with

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[140] Naylor Aff. Ex. 10 (Gilburne Dep.) at 174.
[141] Pl.'s Br. 64.

Providence after the formation of the committee.[142] The record, however, reflects that these limited, incidental contacts were harmless.[143] SEPTA further contends that Volgenau's acceptance of a promissory note in exchange for a higher bid favored Providence. While his acceptance of the note helped Providence match Veritas' bid, it was also in the best interest of the minority stockholders because, ultimately, it forced Veritas to increase its offer. Moreover, Volgenau had previously agreed to increase his rollover amount from $100 million to $150 million to allow Veritas to increase its offer.

In addition, SEPTA argues that Volgenau sought to undermine the competing bid from Veritas by sending an unflattering article about Veritas' chairman to Klein and the Special Committee. But this is not the type of behavior that one could reasonably characterize as an underhanded attempt to influence the sale process. Volgenau was merely relaying information he had obtained about Veritas to the Special Committee. Finally, the Plaintiff contends that the go-shop

[142] Naylor Aff. Exs. 133-36 (emails of Providence representatives). These emails note that representatives of Providence had spoken with Volgenau on various occasions. However, none of them provides material evidence that Volgenau was interfering with the Special Committee's process or negotiating with Providence on price.

[143] Klein and Stamas met with Volgenau to discuss the "appropriate interaction [he should have] with proposed bidders." Gilmore Aff. Ex. 20 (Minutes of the November 9, 2010 Special Committee meeting). Volgenau testified that: "They told me that I would – that I could not engage in the negotiation process and that I would have limited information about what the special committee was doing and that I could not interfere in the special committee process." Naylor Aff. Ex. 3 (Volgenau Dep.) at 142, 150, 164. In one instance where Providence communicated an increased offer to Volgenau, he "dutifully related" the offer to the Special Committee. Naylor Aff. Ex. 1 (Klein Dep.) at 168. DiPentima testified that: "Once the special committee was formed and took over the process, Dr. Volgenau was very, very careful about any discussions about the process." Naylor Aff. Ex. 8 (DiPentima Dep.) at 268.

was, in effect, a sham because Volgenau had been assured that there were no instances of a disruptive bid emerging from a go-shop where the company being sold had a controlling stockholder.[144] This fact, however, does not establish that the go-shop was a sham or that Volgenau was disloyal or dominated the Special Committee.

In contrast to the immaterial evidence and unsupported assertions proffered by the Plaintiff, the record has ample substantive evidence that Volgenau did not dominate the Special Committee to force a transaction with Providence. It bargained hard against Providence, forcing it to increase its bid from \$27.25 per share to \$31.25 per share. Moreover, the Special Committee repeatedly rejected Providence's requests for exclusivity and even granted exclusivity to Veritas. It solicited a plethora of other financial and strategic sponsors to participate in the bidding process, even though Volgenau had initially expressed concerns about strategic buyers.

In conclusion, there is no dispute of material fact that the Special Committee functioned independently of Volgenau and Klein or that Klein was self-interested. Thus, the Merger was recommended by a disinterested and independent special committee. The record also establishes that the Special Committee was fully functioning and had authority to select its advisors freely. Moreover, it had the

[144] Pl.'s Br. 32.

authority to recommend or not to recommend any transaction. The record also reflects that the SRA Directors were fully informed and exercised due care in approving the Merger.[145] Thus, there is no triable issue of material fact that they did not breach their duty of care in negotiating and recommending the Merger.

3. Was the Merger Approved by a Non-waivable Majority of the Minority Vote?

A fully informed, non-waivable majority of the minority vote affords minority stockholders the ability to protect themselves from an unfair deal by vetoing a transaction. When combined with an independent and disinterested special committee that functions as a bargaining agent empowered to negotiate for the highest price reasonably attainable, minority stockholders in a third-party transaction are afforded robust protections justifying review under the business judgment standard. But in order for a majority of the minority vote to be effective, stockholders must be fully and accurately informed. Although SEPTA does not dispute that the Merger was subject to a non-waivable majority of the

[145] In the context of a merger, the duty of care requires that a director "act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to stockholders." *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985), *overruled on other grounds by Gantler v. Stephens*, 965 A. 2d 695 (Del. 2009). Director liability is predicated on the concept of gross negligence. *Id*. Gross negligence has been defined as "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006) (internal quotation marks omitted). SEPTA has not set forth any material evidence showing that the SRA Directors were uninformed or acted with gross negligence in negotiating and approving the Merger. To the contrary, the record shows that the Board was informed and exercised due care in approving the Merger.

minority vote,[146] it nonetheless contends that the minority stockholders were not fully informed.[147] In response, the Defendants argue that SEPTA has waived its disclosure claims. They further assert that the proxy was not misleading and did not omit material facts.[148]

SEPTA contends that SRA omitted material information from the proxy or made misleading disclosures therein. First, it complains about the lack of disclosure regarding Volgenau's meeting with Providence before the formation of the Special Committee, particularly, DiPentima's role in the preliminary discussions.[149] Similarly, it contends that the proxy should have disclosed that Volgenau knew that the go-shop was unlikely to produce a topping bid and that Volgenau and Sloane kept Providence apprised of SRA's bid for EIG.[150]

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[146] *See* Pl.'s Br. 72-75; Gilmore Aff. Ex. 4 (Proxy) at 2.

[147] SRA submitted the preliminary proxy statement to the SEC on April 18, 2011. SEPTA claimed that the preliminary proxy contained material omissions regarding, among other things, Volgenau's meetings with potential bidders and Providence's relationship with Houlihan. Some of the Plaintiff's initial disclosure allegations were mooted by SRA's definitive proxy statement, Compl. ¶ 104, which was sent to stockholders on June 15, 2011. On July 8, 2011, SRA made supplemental disclosures to address the Plaintiff's additional concerns. Among other things, the proxy contained a detailed history of the Merger and the Board's recommendation to vote in favor of the transaction. On July 15, 2011, SRA's minority shareholders approved the Merger, with approximately 81.3 percent of the outstanding disinterested shares (99.7 percent of the total disinterested voting shares) approving the transaction. Gilmore Aff. Ex. 67 (July 15, 2011 SRA Press Release).

[148] Reply Br. in Supp. of the SRA Defs.' Mot. for Summ. J. 19. The Court need not address the Defendants' waiver argument.

[149] In addition, the Plaintiff contends that the substance of the meetings between Volgenau and Providence was misleadingly portrayed by the proxy.

[150] Pl.'s Br. 74.

Second, the Plaintiff asserts that the proxy fails to discuss fully Klein's expectation and demand for additional compensation and the allegedly "contingent" aspect of Kirkland's compensation.[151] Third, SEPTA contends that the proxy should have disclosed why Veritas decided to withdraw its bid. Fourth, it contends that the proxy omitted material information relating to how the Board determined that the Merger conformed to the equal treatment provision in SRA's charter or why the Board allowed Volgenau to obtain consideration different from what the minority stockholders received. Fifth, and finally, the Plaintiff asserts that the proxy failed to disclose that CitiGroup, which advised Providence in the Merger, had been previously advising SRA's study team.[152]

Under Delaware law, directors of a Delaware corporation "are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[153] The Plaintiff has the burden of showing that an omitted fact is material.

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the

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[151] *Id*. at 73.
[152] *Id*.
[153] *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (internal quotation marks omitted). When the board makes partial disclosures, it is obligated to provide stockholders with an "accurate, full, and fair characterization." *Id*. at 1280.

> reasonable investor as having significantly altered the total mix of information made available.[154]

Importantly, Delaware law does not require that companies "bury the shareholders in an avalanche of trivial information."[155] Nor does it require a "play-by-play description of every consideration or action taken by a Board.[156]

First, the Plaintiff claims that the proxy contained misleading statements and omitted material information regarding the exploratory meetings between Volgenau (and SRA management) and Providence. The proxy discloses an overview of those discussions but, according to SEPTA, it lacks important details. It is not obvious, and the Plaintiff has not explained, why disclosure of DiPentima's role in those meetings would have been important to a reasonable shareholder in deciding how to vote.[157] Similarly, that Volgenau was informed by Providence that the go-shop was unlikely to result in a topping bid is not a fact that would significantly alter the total mix of information made available. Finally, SRA's decision to update Providence on its bid for EIG is not particularly surprisingly or noteworthy given that Providence had expressed an interest in acquiring the Company. This type of play-by-play disclosure would not have been important to a reasonable stockholder. In addition, the Plaintiff has not shown

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[154] *Zirn v. VLI Corp*., 621 A.2d 773, 778-79 (Del. 1993) (internal quotation marks omitted) (quoting *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976)).
[155] *TSC Indus., Inc.*, 426 U.S. at 448-49.
[156] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 511-12 (Del. Ch. 2010).
[157] The fact that DiPentima is a former executive of SRA does not necessarily make his participation in the preliminary discussions material to a shareholder in deciding how to vote.

what meetings were omitted or explained why those meetings or the contents of those meetings were material.[158] Thus, there is no dispute of material fact that the stockholders were adequately informed of the early meetings between Providence and Volgenau.

Second, should the proxy have disclosed Klein's expectation of additional compensation after the merger agreement was signed, even though he never received it? Importantly, the proxy fully and accurately discloses the compensation that Klein actually received and notes that it was not contingent upon the completion of the Merger.[159] Under these circumstances the disclosure of Klein's wishful thinking is not likely to alter significantly the total mix of information available to shareholders.[160] Moreover, SRA need not disclose why it declined Klein's request because that plainly risks inundating stockholders with unnecessary information.[161] The Plaintiff also complains about SRA's failure to disclose Kirkland's bonus, but it has failed to explain why Kirkland's discretionary compensation would have been material to a reasonable shareholder. Unlike the contingent compensation of a financial advisor, who opines on the fairness of a

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[158] *See* Pl.'s Br. 74.
[159] Gilmore Aff. Ex. 4 (Proxy) at 60.
[160] If Klein's expected bonus had been material to him, it likely would have been material to a reasonable shareholder.
[161] *See In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (noting that "requiring disclosure of every material event that occurred *and* every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless.").

transaction, which shareholders rely upon in deciding how to vote, the reasons for disclosing a legal advisor's compensation are not as clear.[162] In this case, Kirkland's compensation was arguably discretionary. Accordingly, failure to disclose Kirkland's bonus did not deprive shareholders of a material fact.

Third, SEPTA asserts that the shareholders should have been informed of why Veritas, at the last minute, left the auction process. The proxy only discloses that "[Veritas] indicated that it was withdrawing its proposal and would no longer participate in the process."[163] According to Veritas, it withdrew because it believed that the Special Committee had been dragging it along by repeatedly causing it to bid higher with the mistaken belief that the process was about to be concluded.[164] One problem with the Plaintiff's complaint is that it would require SRA to disclose the subjective beliefs, opinions, and statements of a third-party involved in the bidding process.[165] To require this type of disclosure generally would risk disclosing speculative, inaccurate, and useless information. In this case, the disclosure of this information would not have been important to a reasonable

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162 *See In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011) ("Stockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction.").

163 Gilmore Aff. Ex. 4 (Proxy) at 27.

164 Naylor Aff. Ex. 53.

165 *See Klang v. Smith's Food & Drug Ctrs., Inc.*, 1997 WL 257463, at *13 (Del. Ch. 1997), *aff'd*, 702 A.2d 150 (Del. 1997) (no duty to disclose "where the omitted material was in the form of vague allegations provided to the Board by a third party").

stockholder. Thus, the Court is not persuaded that SRA failed to disclose a material fact or that the shareholders were not fully informed in this regard.[166]

Fourth, the Plaintiff contends that SRA should have disclosed "information regarding how the Board determined that the Merger conformed to the equal treatment requirements" in SRA's certificate.[167] This "tell me more" type of disclosure, however, is not likely to be important to a reasonable investor because the proxy discloses the material, pertinent facts: that the Board believed Volgenau was receiving compensation equivalent to that received by other stockholders and what Volgenau actually received.[168]

The Plaintiff's disclosure claim here relates to its assertion that the Board failed to adhere to the equal treatment provision. In effect, it contends that SRA should have disclosed information that would have shed light on whether the Board properly determined whether Volgenau's consideration from the Merger

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[166] The Plaintiff also claims that shareholders should have been informed of Klein's assessment that Veritas would have paid more or forced Providence to do so had Kirkland not discovered the issue with Veritas' need to obtain certain partnership consents. This after-the-fact assessment is not a material fact. SRA had no duty to disclose possibilities of what might have happened. *See Seibert v. Harper & Row, Publ'rs, Inc.*, 1984 WL 21874, 10 Del. J. Corp. L. 645, 655 (Del. Ch. 1984) (Proxy materials "need not include opinions or possibilities.").

[167] Pl.'s Br. 74.

[168] Gilmore Aff. Ex. 4 (Proxy) at 57 [T]he Volgenau Rollover Trust committed to contribute, immediately prior to the consummation of the merger, an aggregate amount of 4,800,000 shares of our Class B common stock to Holdco (the equivalent of a $150 million investment based upon the per share merger consideration of $31.25) in exchange for (i) certain equity securities of Holdco with an aggregate value of $120 million and (ii) a promissory note issued by Holdco in favor of Dr. Volgenau in an original principal amount of $30 million, repayable solely from the proceeds (if any) of certain contemplated subsidiary divestitures by the Company.").

was equivalent to what other stockholders received. However, this type of disclosure is generally not required under Delaware law.[169]

Finally, the failure to disclose that CitiGroup had previously advised the study team and was now advising Providence did not deprive a reasonable shareholder of a material fact. The Court is not persuaded that this relationship poses a conflict of interest or would be of particular importance to a reasonable shareholder in deciding how to vote on the proposed transaction.

In sum, the Special Committee was comprised of independent and disinterested directors, and the stockholders were fully informed when they approved the Merger in a non-waivable majority of the minority vote.[170] Thus, the Court will review the Merger under the business judgment standard.

D. *Did the SRA Directors Breach Their Fiduciary Duty of Loyalty?*

Count I alleges that the SRA Directors breached their fiduciary duties of loyalty and care in connection with the sale of the Company to Providence. Specifically, the Complaint alleges that the SRA Directors failed to conduct a "reasonable and independent process[,]" "obtain the best price available for the stockholders[,]" and "disclose material information" in the proxy statement.[171] The

[169] *See In re Lukens Inc.*, 757 A.2d at 736 ("it is not enough simply to pose questions that are not answered in the proxy statement"); *In re MONY Gp., Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004) (noting as a general rule that proxy materials are not required to state opinions, possibilities, or legal theories).
[170] There is no evidence or allegation of coercion.
[171] Compl. ¶ 26.

Court has already determined that the Plaintiff's disclosure claims raise no triable issue of material fact. Thus, the Court need only address the price and process claims.

Because the SRA Directors "acted with due care, in good faith, and in the honest belief" that they were acting in the best interests of the Company, the directors' decisions are entitled to "great deference" and the Court will not "invalidate the decision[,] . . . examine its reasonableness . . . [or] substitute [its] views for those of the board if the [directors'] decision can be 'attributed to any rational business purpose.'"[172] Thus, the "claims against the Defendants must be dismissed unless no rational person could have believed that (1) the Merger was favorable to [SRA's] minority stockholders"[173] and (2) the Board's decisions relating to the Merger were made with a business purpose.[174]

The Plaintiff asserts that the Merger price of $31.25 was inadequate and unfair. In support of that claim, SEPTA offers expert opinion that the fair value of

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[172] *Paramount Commc'ns Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 n. 17 (Del. 1994) (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)).
[173] *MFW*, 67 A.3d at 514.
[174] The so-called *Revlon* duty requires that the board of directors "secure the best value reasonably attainable for its shareholders . . . ." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010). Even if *Revlon* applied, the result would be the same. *See, e.g., McMullin v. Beran*, 765 A.2d 910, 920 (Del. 2000); *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (holding that any attempt to auction the company would have been futile because the majority stockholder could have thwarted any effort to do so); *Hammons*, 2009 WL 3165613, at *9; *Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994).

SRA's shares as of the Merger's closing date was $41-$43 per share.[175] It also attempts to criticize and rebut the Defendants' expert's opinion and Houlihan's fairness opinion, both of which concluded that the Merger price was fair. However, none of these contentions, or the facts supporting them, raises a triable issue of material fact under the business judgment standard.

The Merger was effected at a 52.8 percent premium over the Company's unaffected stock price and was the highest price that any party was willing to pay after a six month public sale process and a thirty-day go-shop. During the sale process, approximately ten financial and strategic acquirers signed confidentiality agreements and conducted due diligence; five parties (three financial buyers and two strategic sponsors) submitted formal indications of interest, and Veritas and Providence engaged in a multi-round bidding contest. From Providence's initial indication of interest of $27.25 per share, the Special Committee negotiated with Providence and Veritas for a higher price, eventually accepting Providence's "best and final offer" of $31.25 per share. Houlihan contacted roughly 50 potential buyers during the go-shop, none of which submitted a topping bid. Moreover, Houlihan, which the Board reasonably relied upon, opined that the Merger price was fair. Finally, 81.3 percent of the total outstanding shares not owned or controlled by Volgenau voted in favor of the Merger. In light of these undisputed

[175] Pl.'s Br. 39; Naylor Aff. Ex. 19 (Hurley Report) at 51.

facts, the Court can easily conclude that there is no triable issue of material fact that a rational mind could have believed that the Merger price was fair. Thus, the Defendants are entitled to judgment on the fair price claim.

With respect to the Plaintiff's process contentions, there is no triable issue of material fact that the decisions made by the Special Committee and the Board were attributable to a rational business purpose. The Board wisely and properly decided to form a special committee when Providence emerged as a serious bidder.[176] The decision to bifurcate the sale process to facilitate Volgenau's approval of the Merger was not only rational, but practical in light of his controlling interest. For the reasons discussed above, the Plaintiff's criticisms of the Special Committee, including that Klein and Volgenau dominated or controlled it, present no triable issue of material fact. In short, the SRA Directors' conduct was clearly rational and guided by independent and qualified advisors. Even under enhanced scrutiny, there is no evidence that the SRA Directors acted unreasonably or that their actions were inconsistent with their fiduciary duties to act in the best interest of SRA's shareholders and to obtain the highest price reasonably attainable. Accordingly, the Court will not substitute its judgment for that of the SRA Directors, whose actions can plainly be attributed to a rational business purpose.

[176] The Special Committee's judgment to pursue financial buyers initially in order to safeguard proprietary information was a rational business decision.

E. *Did Volgenau and Sloane Breach their Fiduciary Duty of Loyalty by Engaging in Self-Dealing?*

Count II alleges that Volgenau breached his fiduciary duty of loyalty by "opportunistically and secretly planning to take private the Company at a bargain price."[177] Count II further asserts that Sloane, as CEO, breached that same duty "by using his position to encourage and facilitate the Buyout."[178] The Court will first examine the allegations against Volgenau, before turning to the contentions directed to Sloane.

1. Did Volgenau Engage in Self-Dealing?

The Plaintiff's allegations against Volgenau can be summarized and broken down into four components: that Volgenau (1) would only agree to a merger with a financial buyer; (2) orchestrated a preordained deal with Providence; (3) dominated the Special Committee; and (4) received more money than minority stockholders from the Merger.

First, the Plaintiff's case against Volgenau rests in part upon his admittedly negative disposition to strategic buyers. In response, the Defendants have set forth substantial evidence that Volgenau was willing to sell his shares to a strategic sponsor once he became more acquainted with them. Indeed, Volgenau testified that his feelings toward strategic sponsors changed as it became more apparent that

[177] Compl. ¶ 26.
[178] *Id*.

they respected SRA's values of honesty and service and would retain those values following a successful acquisition. Whether there is a question of material fact rests largely on whether Volgenau's transformation was real and whether Volgenau's interest dominated the sale process.

As an initial matter, Volgenau's interest in preserving SRA's "name, values, and culture" was not necessarily inconsistent with shareholder value or the duty to act in the best interest of the Company. Delaware law recognizes that a company's unique culture may increase stockholder value and may warrant protection under certain circumstances.[179]

Importantly, the Plaintiff has failed to point to any evidence showing that Volgenau or his emphasis on high ethical values dissuaded a party from bidding. In contrast, the Defendants have submitted affidavits from representatives of two strategic bidders (Boeing and CGI) that considered purchasing SRA. The Boeing representative reported that "Volgenau did not deter Boeing from submitting a bid for SRA."[180] The CGI representative testified that Volgenau was "sincerely interested in pursuing a potential strategic transaction with CGI," and "never

[179] *See Paramount Commc'ns, Inc. v. Time Inc.*, 1989 WL 79880, at *4 (Del. Ch. July 14, 1989) *aff'd*, 571 A.2d 1140 (Del. 1990); *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (noting that the corporate culture may be worthy of protection, especially where it reasonably promotes stockholder value).

[180] Aff. of John Meersman ¶¶ 12-13. The Boeing representative also averred 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." *Id*. at ¶ 11.

indicated that he was unwilling to sell to CGI or any other strategic bidder."[181] The record also reflects that Volgenau met with both strategic and financial buyers and that the Special Committee treated the bidders equally. Moreover, the evidence shows that all of the strategic sponsors dropped out for various reasons not related to Volgenau, including internal factors and a concern that an attractive return could not be achieved in light of the current market conditions in the government services industry.

Second, there is no material evidence in the record that Volgenau orchestrated a preordained deal with Providence that the Special Committee merely rubber-stamped. As set forth in greater detail above, Volgenau's early meetings with Providence did not render a deal with Providence a *fait accompli*. Quite the opposite, Volgenau had no control over the sale process once SRA "started down the road of exploring the possibilities of selling."[182] As the Special Committee entertained offers from other interested buyers, Volgenau agreed to "not interfere in the issue of price" and not "impose conditions on prospective bidders."[183] There is no evidence in the record that Volgenau violated this

[181] Aff. of Claude Séguin ¶¶ 9, 11.
[182] Naylor Aff. Ex. 1 (Klein Dep.) at 32.
[183] *Id*. at 136.

understanding. Finally, Providence withdrew temporarily from the bidding process in February 2011 because "we felt like we were a bird in the hand."[184]

Third, as discussed above, there is no evidence that Volgenau dominated the Special Committee. Just because a controlling stockholder has the ability to veto any transaction does not necessarily impair the special committee process.[185]

Fourth, the Plaintiff asserts that Volgenau engaged in self-dealing because he received greater per share consideration than the minority stockholders from the Merger. The Plaintiff's contention is based primarily on its assertion that SRA's purchase price was "unfair" and that a fair price of SRA was worth at least $41-$43 per share.[186]

Under SRA's certificate, Volgenau was entitled to receive "equal per share payments or distributions" for his Class B shares. As Volgenau explained, "[The] intention at the time . . . was for the Class B holders not to receive any preferential price for their shares."[187] There is no evidence in the record that Volgenau, or the Special Committee on his behalf, ever consciously attempted to obtain more money than the minority stockholders from the Merger. To the contrary,

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[184] Naylor Aff. Ex. 4 (Richardson Dep.) at 146; *see* Gilmore Aff. Ex. 75.

[185] *Hammons*, 2009 WL 3165613, at *4.

[186] *See* Pl.'s Br. 52-55. SEPTA also asserts that Volgenau received certain other benefits from the Merger, not obtained by other stockholders. Among other things, these benefits include tag-along rights, registration rights, preemptive rights, continued employment as Chairman, and an explicit commitment from Providence to preserve SRA's culture of honesty and service. Naylor Aff. Ex. 101 (Stockholder Agreement).

[187] Naylor Aff. Ex. 3 (Volgenau Dep.) at 14-15.

Volgenau's acceptance of a risky $30 million non-recourse promissory note is some evidence that Volgenau sacrificed his economic position for the minority stockholders. Most importantly, it is undisputed that the Board, including Volgenau, believed that his proceeds from the Merger were equal to or less than that received by minority stockholders. The Board rationally made that conclusion based on valuing Volgenau's differing forms of compensation to equal approximately $31.25 per share. Accordingly, Volgenau is entitled to judgment on Count II.

2. Did Sloane Disloyally Facilitate Volgenau's Alleged Self-Dealing?

The Plaintiff asserts that Sloane "facilitated Volgenau's efforts to structure an LBO with Providence"[188] by, among other things, participating in the exploratory meetings between Providence and Volgenau and keeping Providence informed of SRA's efforts to acquire EIG. Because Volgenau did not engage in self-dealing or breach his fiduciary duties of loyalty and care, Sloane could not have facilitated such conduct. Moreover, the record lacks any material evidence that Sloane breached his fiduciary duties. Accordingly, Sloane is entitled to judgment as to Count II.

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[188] Pl.'s Br. 60.

F. *Did the SRA Directors Breach their Duty of Loyalty by Approving a Merger that Violated SRA's Certificate of Incorporation?*

Count IV of the Complaint alleges that the SRA Directors breached their duty of loyalty by approving the Merger in violation of the "equal treatment" provision in SRA's charter. That provision reads: "[u]pon the merger . . . of the Corporation . . . holders of each class of Common Stock will be entitled to receive *equal per share payments or distributions* . . . ."[189] The Plaintiff asserts that Volgenau violated that provision in two ways: first, by receiving different forms of consideration; and second, because he received, through his rollover interest, greater consideration than the public stockholders. The latter assertion is based primarily on the Plaintiff's contention that SRA was worth more than $31.25 per share at the time of the Merger.[190]

Contrary to SEPTA's position, the plain language of the equal treatment clause plainly permits differing forms of consideration.[191] Under SRA's charter, the word "payments" is consistently used to refer to monetary compensation,[192] while the term "distributions" typically is associated with the distribution of

[189] Coen Decl. Ex. 31 (Charter) at § A.9 (italics added).
[190] Pl.'s Br. 77-80.
[191] *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006). "[C]ertificates of incorporation are contracts, subject to the general rules of contract and statutory construction . . . [I]f the charter language is clear and unambiguous, it must be given its plain meaning." *Id.*
[192] *See* Coen Decl. Ex. 31 (Charter) at 13 ("payment of such expenses incurred by the Indemnitee"), 14 ("indemnification payments to an Indemnitee" and "indemnification payments to the Corporation"); *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013) (contracts are to be construed "as a whole and give effect to every provision if it is reasonably possible").

securities. The common usage of these terms may encompass other forms of consideration.[193] The use of the word "or" shows that either form of consideration is acceptable. Moreover, the word "equal" does not require identical forms of consideration.[194]

This reading is also consistent with the underlying purpose of the equal treatment clause.[195] The creation of class B stock for Volgenau was intended both to preclude him from receiving a premium for his shares and to protect against a hostile takeover; there is no evidence in the charter or the record that it was intended to prevent him from receiving a different form of consideration. Finally, as the Defendants persuasively argue, this interpretation comports with the public policy of facilitating efficient transactions.[196]

The second issue is a closer question. In their depositions, the SRA Directors could not recall if the Board ever specifically discussed whether Volgenau's rollover interest was equal on a per share basis to the consideration

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[193] *See* Coen Decl. Ex. 31 (Charter) at 3 ("Dividends and other distributions may be declared and paid on the Common Stock"), ("distributions consisting of other voting securities of the Corporation"), ("distributions consisting of securities convertible into, or exchangeable for, voting securities of the Corporation").
[194] Merriam-Webster defines "equal" as "of the same measure, quality, amount, or number as another." Equal Definition, Merriam-Webster's Dictionary, *available at* http://www.merriam-webster.com/dictionary/equal (last visited July 25, 2013).
[195] Because the equal treatment provision is unambiguous, the Court need not examine extrinsic evidence. But if it did, the evidence in the record supports the plain meaning of that clause.
[196] Br. in Supp. of Def. Dr. Ernst Volgenau's Mot. for Summ. J. 30-31.

received by the public stockholders.[197] The Plaintiff seizes upon this fact to assert that the SRA Directors acted disloyally by consciously disregarding their duty or by knowingly violating positive law.[198]

However, at the time of the Merger, the Board understood that Volgenau was receiving equal or less consideration than the minority shareholders.[199] The merger agreement was structured such that Volgenau's rollover stock (4.8 million shares) was equivalent to $150 million based on the $31.25 per share purchase price that all stockholders received.[200] As reflected in the proxy, the Board understood that Volgenau's interest in the new entity would not exceed $150 million. Houlihan had conducted a contemporaneous valuation that

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[197] Naylor Aff. Ex. 6 (Sloane Dep.) at 61-62; Ex. 10 (Gilburne Dep.) at 200-01; Ex. 7 (Grafton Dep.) at 184-85; Ex. 9 (Ellis Dep.) at 128-29; Ex. 3 (Volgenau Dep.) at 15-16.

[198] *See In re Walt Disney Co. Derv. Litig*., 906 A.2d 27, 66-67 (Del. 2006); *Se. Pa. Transp. Auth.*, 2012 WL 4038509, at *3 n.16 ("a decision to cause a corporation to take an act in violation of its certificate of incorporation would appear analogous to a decision to cause the corporation to take an illegal act."). The type of bad faith necessary to qualify as a conscious disregard for one's responsibilities was recently addressed in *Allen v. Encore Energy P'rs, L.P.*, 2013 WL 3803977, at *7 (Del. 2013) (noting that this type of bad faith conduct lies between subjective bad faith and gross negligence).

[199] *See* Gilmore Aff. Ex. 4 (Proxy) at 57; Naylor Aff. Ex. 10 (Gilburne Dep.) at 202-03.

> Q: Is it your understanding that Dr. Volgenau received more per share, less per share, or the same per share consideration than all the other shareholders of SRA?
> A: Less.
> Q: Can you explain why?
> A: . . . The portion of his stock that the buyers insisted he roll over into the acquisition, he received a number of rollover shares at the same price as the cash being paid for shares. But the $30 million he provided in the promissory note, he got inferior consideration to the value of the shares than all the other shareholders did, because he was getting a promissory note that was highly risky to the tune of $30 million. *Id*.

[200] Coen Decl. Ex. 41 (Volgenau's Revocable Trust Letter Agreement) at ¶ 1, Ex. A; Gilmore Aff. Ex. 4 (Proxy) at 57.

confirmed that $31.25 was a fair price for each share of SRA stock. When Providence proposed the $30 million non-recourse note to Volgenau, the Special Committee specifically determined that Volgenau's economic benefit from the note would be capped at $30 million.[201] Thus, despite not formally addressing the matter, the evidence shows that the Board believed that Volgenau received equal or less consideration than the minority stockholders.

While the actual value of an SRA share at the time of the Merger may very well be a dispute of material fact, the Plaintiff is seeking precision in a practice (*i.e.*, the valuing of enterprises) that defies exactness. Consistent with this reality and the deference typically afforded directors, the question is whether the Board's business judgment was both rational and made in good faith.

There is no genuine issue of material fact that the Board acted rationally when it assumed that Volgenau's rollover interest was equal to or less than $150 million.[202] Houlihan had opined that the Merger price was fair and, after a

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[201] Gilmore Ex. 55 (Minutes of the March 30, 2011 Special Committee meeting).

[202] Volgenau also received certain rights or benefits from the Stockholders Agreement. He became the Chairman of the new SRA and obtained a commitment from Providence to uphold and preserve the values of honesty and service. However, most of the rights he received relate to his minority interest in the new SRA and serve to protect that interest. Neither the Plaintiff nor the Defendants attempted to value these benefits.

The inherent difficultly in valuing these rights would make it difficult for the Board to determine whether Volgenau was receiving greater consideration than other shareholders. One would be hard pressed to calculate the value of Providence's commitment to maintain certain values. A rational mind could have believed that Volgenau's rights under the Stockholders Agreement were defensive in nature, and thus, necessary to preserve his rollover interest. Perhaps most troubling is Volgenau's position as Chairman of the new SRA. As a significant equity holder in the new SRA, Volgenau's position on the board is likely a consequence of his robust sale process, no higher bid had emerged. The Plaintiff has not pointed to any evidence showing that the SRA Directors believed that Volgenau's rollover interest exceeded that amount. In fact, because the note had considerable risk and no upside, the Board generally believed that Volgenau was receiving less consideration. Accordingly, there is no dispute of material fact that the SRA Directors did not consciously disregard a known duty or intentionally violate the charter. The Defendants are therefore entitled to judgment on Count IV.

G. *The Duty of Care and SRA's Exculpatory Provision*

Even if the SRA's Directors had not satisfied their duty of care, the presence of an exculpatory provision authorized by 8 *Del. C.* § 102(b)(7) in SRA's charter exculpates them from money damages arising from a breach of their duty of care because they acted loyally and in good faith. Accordingly, the SRA Directors are entitled to summary judgment on the Plaintiff's duty of care claims on that basis as well.[203]

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equity holdings and a benefit to Providence (which holds two of the three seats on the board). Under these circumstances, the Board could have rationally believed, in good faith, that Volgenau received no greater consideration on a per share basis than what the minority shareholders received from the Merger.

[203] SEPTA has argued that the duty of care claims cannot be dismissed because entire fairness is the applicable standard, and thus, "a determination that the director defendants are exculpated from paying monetary damages can be made only *after the basis* for their liability has been decided." *Emerald P'rs v. Berlin*, 787 A.2d 85, 94 (Del. 2001). Given that the Court has held that the business judgment rule is the proper standard of review, the Plaintiff's argument fails.

H. *The Aiding and Abetting Claim*

The Plaintiff asserts in Count III that Providence aided and abetted the SRA Directors' breach of their fiduciary duties. An aiding and abetting claim turns on "proof of scienter of the alleged abettor."[204] The Plaintiff bears the burden to show that: (1) the SRA Directors owed a fiduciary duty to SEPTA; (2) the SRA Directors breached that duty; (3) Providence "knowingly participated in the breach;" and (4) the Plaintiff suffered damages "from the concerted action of the [SRA Directors] and [Providence]."[205] Because the SRA Directors did not breach their fiduciary duties, Providence is entitled to judgment on the Plaintiff's aiding and abetting claim.

Even if the record contained a material fact supporting a breach of fiduciary duty by the SRA Directors, the record does not contain facts evidencing that Providence knowingly participated in such a breach. The following, undisputed evidence collectively demonstrates that Providence was an arms-length bidder.[206]

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[204] *Binks v. DSL.net, Inc.*, 2010 WL 1713629, at *10 (Del. Ch. Apr. 29, 2010).

[205] *Id*. "Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach. Under this standard, a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting . . . ." *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).

[206] *See In re Frederick's of Hollywood, Inc. S'holder Litig.*, 1998 WL 398244, at *3 (Del. Ch. July 9, 1998), *aff'd sub nom*. *Malpiede*, 780 A.2d 1075 ("This Court has consistently held that evidence of arm's-length negotiation with fiduciaries negates a claim of aiding and abetting, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.").

- There no evidence in the record that Providence and SRA, during their initial meetings, hatched a plan for Providence to "opportunistically" acquire SRA at a bargain price.[207]

- Instead of pursuing a possible transaction with Providence, Volgenau and the Board approved the formation of the strategic study team to assess the strategic options available to SRA.[208]

- SRA pursued the acquisition of Lockheed Martin's EIG, notwithstanding the fact that Providence indicated that it would not pursue an acquisition of SRA if it acquired EIG.[209]

- From July to mid-October 2010, discussions between Providence and SRA ceased as SRA attempted to buy EIG.

- The Special Committee refused to commence negotiations with Providence at their initial indication of interest of $27.25 and $28.50 per share.[210]

- The Special Committee's initial strategy was to extract from Providence a high bid that it could use as a floor to commence an auction process.[211]

- The Special Committee repeatedly declined requests for exclusivity, causing Providence to withdraw from the auction for a short period, and repeatedly forced Providence to increase its bid.[212]

- SRA entered into exclusive negotiations with Veritas on the last day before the submission of the final bids.[213]

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[207] Compl. ¶ 2,
[208] Gilmore Aff. Ex. 4 (Proxy) at 18; Naylor Aff. Ex. 3 (Volgenau Dep.) at 47, 50, 58.
[209] Naylor Aff. Ex. 4 (Richardson Dep.) at 94, 98, 101, 105; Ex. 3 (Volgenau Dep.) at 126-32.
[210] Gilmore Aff. Ex. 4 (Proxy) at 20-21; Naylor Aff. Ex. 4 (Richardson Dep.) at 120-21.
[211] Naylor Aff. Ex. 1 (Klein Dep.) at 125-27.
[212] Naylor Aff. Ex. 1 (Klein Dep.) at 149, 199; Gilmore Aff. Ex. 4 (Proxy) at 24; Naylor Aff. Ex. 4 (Richardson Dep.) at 144 ("We really felt like we were sort of being used in the process, to get higher . . . bids from others . . . .").
[213] Gilmore Aff. Ex. 4 (Proxy) at 27; Naylor Aff. Ex. 4 (Richardson Dep.) at 164-65.

The Plaintiff has not refuted this evidence or otherwise shown that there is a dispute of material fact.[214] Providence, therefore, is entitled to judgment on Count III.

IV. CONCLUSION

As does *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. Providence's acquisition of SRA was recommended by a fully functioning, independent special committee that was empowered to negotiate on behalf of the minority stockholders. It had the ability to hire independent advisors and not recommend a transaction. Fully informed shareholders voted overwhelmingly in favor of the Merger in a non-waivable majority of the minority vote.

SEPTA's challenge to the Merger falls short because there is no triable issue of material fact as to whether the SRA Directors' breached their fiduciary duties. The Board's decisions were rational (and reasonable) and made in good faith. Accordingly, the Defendants are entitled to judgment on all counts.

An implementing order will be entered.

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[214] With respect to the Plaintiff's charter claim, it has not proffered any evidence that Providence was aware of the "equal treatment" provision in SRA's charter, let alone that the Board was potentially violating it. *See In re John Q. Hammons Hotels Inc.*, 2011 WL 227634, at *7 (Del. Ch. Jan. 14, 2011) (court found no knowing participation where purchaser negotiated at arm's-length and believed that he was paying the controlling stockholder "less per share than the $24 per share received by the minority stockholders").