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Transaction ID 49884861
Case No. 6354-VCN

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. ERNST VOLGENAU, JOHN W. BARTER, LARRY R. ELLIS, MILES R. GILBURNE, W. ROBERT GRAFTON, WILLIAM T. KEEVAN, MICHAEL R. KLEIN, STANTON D. SLOANE, GAIL R. WILENSKY, SRA INTERNATIONAL, INC., PROVIDENCE EQUITY PARTNERS LLC, STERLING PARENT INC., STERLING MERGER INC. and STERLING HOLDCO INC., Defendants.	C.A. No. 6354-VCN **REDACTED VERSION** **DATED: March 1, 2013**

REPLY BRIEF IN SUPPORT OF THE SRA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff's Opposition essentially ignores the events from October 2010 through April 2011, when an independent Special Committee ran a competitive auction and go-shop process, resulting in a deal that secured a more than 50% premium for SRA stockholders. Instead, SEPTA devotes much of its narrative to events in early and mid-2010, (Opp'n at 7-21), and post-Merger Agreement events in the summer of 2011, (Opp'n at 22-39), to offer a screed of distorted and irrelevant accusations and insinuations against Dr. Volgenau, Michael Klein, former SRA employees, and others, from which it hopes this Court will ignore the comprehensive, competitive bidding war — a process that no one disputes occurred — and treat it as a grand farce. Plaintiff asks the Court to believe that, in order to benefit Providence, Dr. Volgenau, or Michael Klein's cohorts at the Shakespeare Theatre Company, for unexplained reasons, all the participants were players in an elaborately staged production to make $31.25 ***appear*** to be the highest price the market would bear. The individuals and entities SEPTA would treat as actors are not just members of the Special Committee and its advisors, SRA's other independent directors, Dr. Volgenau, and Providence, but [redacted] other strategic and financial bidders and independent analysts, and fifty firms contacted during the Go-Shop.

To support this theory, Plaintiff misconstrues the governing law and flatly mischaracterizes the evidence:

- ***First***, Plaintiff incorrectly claims that Dr. Volgenau "stood on both sides" of the transaction and argues that the business judgment rule therefore does not apply. There is no evidence to support this assertion: Dr. Volgenau was not affiliated with Providence and had no relationship with Providence before discussions began. In reality, in mergers such as this one — involving a controlling stockholder who does not stand on both sides of the transaction — this Court has repeatedly deferred to the business judgment of the seller's board of directors if the board subjects the merger to the procedural protections of a majority-of-the-minority vote and the recommendation of an independent and disinterested Special Committee. *See In re John Q. Hammons Hotels, Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch.). ***See infra*** **Part I.A.**

- ***Second***, Plaintiff attempts to evade the business judgment rule and argues that the SRA Defendants ran a defective process because Dr. Volgenau purportedly secretly controlled and dominated the Special Committee through Michael Klein. But the record evidence contradicts Plaintiff's theory. SEPTA ignores the affirmative evidence of the robust sale process that occurred, misconstrues the pre-Special Committee and post-sale conduct, and relies on mere disagreements between experts that are unsupported by the record in an attempt to create factual disputes where none exist. ***See infra*** **Part I.B, Part II.**

- ***Finally***, SEPTA concludes that Defendants violated the charter provision requiring "equal" per share payments or distributions, notwithstanding that Dr. Volgenau's rollover shares had a per-share value equal to that paid for cashed-out shares: $31.25. This argument is contrary to the plain language of the charter. In addition, the Board's decision that $31.25 is fair value for SRA shares is protected by the business judgment rule. Plaintiff may not make an end run around the business judgment rule by relitigating valuation claims under the guise of the corporate charter. ***See infra*** **Part III.**

Quite the contrary to the tale spun in Plaintiff's Opposition, as set forth in the SRA Defendants' Opening Brief, the SRA Special Committee, made up of five disinterested and independent directors, led a multi-round, multi-bidder sale process over the course of several months in which Providence, the ultimate winner, was repeatedly rebuffed; ten potential financial and strategic acquirers signed confidentiality agreements and conducted due diligence; five bidders (three financial and two strategic) submitted formal indications of interest; two final bidders engaged in a bidding war yielding a 52.8% premium over the company's unaffected stock price; and not a single topping bid emerged during the subsequent Go-Shop. This indisputable evidence of "***real world valuations, including especially, valuations performed by potential third-party buyers***" are "***the best source of economic information about the value of a company***," and negates Plaintiff's case. *S. Muoio & Co. v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at *18 (Del. Ch.), *aff'd*, 35 A.2d 419 (Del. 2011) (TABLE) (internal quotation omitted) (as in all other quotations, emphasis added). And where the moving party's evidence "negate[s] the opposing party's pleadings" and the opposing party fails to "submit countervailing evidence or affidavits," summary judgment should issue. *Winshall v. Viacom Int'l Inc.*, 2012 WL 6200271, at *8 n.60 (Del. Ch.) (citing *Feinberg v. Makhson,* 407 A.2d 201, 203 (Del. 1979)). In sum, Plaintiff simply cannot meet its burden of affirmatively stating ***facts***, as opposed to innuendo and unreasonable inferences, that might warrant a trial. And the SRA Defendants' Motion should be granted as a result.

ARGUMENT

Plaintiff's Opposition is premised on the erroneous assumption that, as long as Plaintiff can offer some alternative, unflattering narrative to "paint a far different portrait" of this Merger,[1] summary judgment must be denied. (*See* Opp'n at 7.) But "[t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [trier of fact] to return a verdict for that party . . . If the evidence is ***merely colorable, or is not significantly probative*****,** summary judgment may be granted." *Health Solutions Network, LLC v. Grigorov*, 12 A.3d 1154 (Del. 2011) (ORDER) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). "It is settled law in Delaware that where a moving party's [evidence] in support of a Rule 56 motion negate the opposing party's pleadings, the opposing party must submit countervailing evidence or affidavits or judgment may be granted." *Winshall*, 2012 WL 6200271, at *8 n.60 (citing *Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979)). Since the SRA Defendants submitted a well-supported motion for summary judgment, Plaintiff must now produce evidence of disloyalty to create a triable issue of fact. *See McGowan v. Ferro*, 859 A.2d 1012, 1027 (Del. Ch. 2004), *aff'd*, 873 A.2d 1099 (Del. 2005) (TABLE).[2] Plaintiff has failed to do so.

The disparity between SEPTA's accusations and the record evidence is manifest in the topics Plaintiff chooses to ignore. SEPTA does not dispute that SRA formed a Special Committee, that a majority of the directors on the Special Committee were disinterested outside directors, or that the Committee held numerous meetings and calls over a several-month auction process. (*See* Opp'n at 21-22, 28-34; SRA Br. at 6-16.) The Opposition's silence effectively confirms that the Special Committee: (1)

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1 All capitalized terms herein are defined as set forth in the SRA Defendants' Opening Brief unless otherwise noted.

2 SEPTA does not dispute that SRA's charter contains an enforceable exculpatory provision enacted pursuant to DGCL section 102(b)(7). (*See* Opp'n at 80-81.) When such a provision is validly enacted, a plaintiff may "survive summary judgment only by pointing to record evidence creating a genuine factual dispute whether the defendant directors breached their fiduciary duties of good faith or loyalty." *Goodwin v. Live Entm't, Inc.*, 1999 WL 64265, at *6 (Del. Ch.), *aff'd*, 741 A.2d 16 (Del. 1999) (TABLE). Notably, Plaintiff states that the provision is "not applicable" because "Plaintiff's claims . . . arise from Defendants' breaches of their duty of loyalty." (Opp'n at 81.)

repeatedly rebuffed — and denied exclusivity to — Providence, Dr. Volgenau's allegedly preferred bidder; (2) invited numerous financial and strategic bidders to participate in the auction process even though Dr. Volgenau had initially expressed hesitancy about including strategic buyers; and (3) extracted an additional $4 per share over Providence's early indication of interest. (*See* Opp'n at 21-22, 28-34; SRA Br. at 6-16.) The testimony from [redacted] and [redacted] that they were treated fairly but chose not to bid for SRA for reasons having nothing to do with the Special Committee or Dr. Volgenau is entirely unrebutted. (*See* [redacted] Aff.; [redacted] Aff.; Opp'n at 31 n.155.) SEPTA does not dispute that the Merger was recommended and approved by the Special Committee at a price of $31.25 per share, the highest price offered by any bidder, garnering a 52.8% premium over the company's unaffected stock price. (*See* Opp'n at 34; SRA Br. at 10-17.) Nor does SEPTA dispute that fifty potential bidders were contacted during the Go-Shop or that not one of the fifty offered more than $31.25 per share. (*See* Opp'n at 32; SRA Br. at 14-16.) Finally, SEPTA does not dispute that 81.3% of outstanding disinterested shares (and more than 99% of shares actually voted) were voted in favor of the Merger pursuant to a non-waivable majority-of-the-minority condition. (*See* Opp'n at 58, 75; SRA Br. at 16-17.) As discussed in more detail below, where the Opposition does try to grapple with the facts, there is an unbridgeable gap between Plaintiff's characterization of the evidence and the record evidence itself.

By disregarding the real process employed by the Special Committee, and presenting a catalog of mischaracterizations about Dr. Volgenau's supposed "secret control" over that process, SEPTA asks this Court to conclude that this case cannot be resolved at summary judgment. This Court has rejected such requests before and should do so again here. In *In re Western National Corporation Shareholders Litigation*, 2000 WL 710192 (Del. Ch.)[3], stockholders challenged the merger of Western National and its 46% stockholder, American General, by accusing American General of domination and control of the sale process. The Court granted summary judgment because "a thorough and careful reading of a well-

[3] A compendium of key authorities that have not previously been provided to the Court is being filed simultaneously herewith.

developed discovery record and plaintiffs' briefing yields nary a fact that could give rise to a finding of domination and control." *Id.* at *6. The Court clarified that, to survive summary judgment, the plaintiff "must affirmatively state facts — not guesses, innuendo or unreasonable inferences — establishing that American General exercised actual control over Western National." *Id.* (citation omitted). The Court applied that standard to determine that the evidence in the case — evidence that "the Special Committee had the power to say no" to American General and "said it *three* times" — overrode the accusation and innuendo offered in rebuttal, *id.* at *24 (emphasis in original):

> Plaintiffs derisively scoff at this sequence of events as a sham or faux negotiation (repeatedly placing the word negotiation between quotation marks) and argue that the entire exchange between the Special Committee and American General was merely a splendid dance meant only to charm a reviewing court. ***But calling something a sham over and over again does not make it a sham. Plaintiffs would have me defer to shrill invective, and ignore the undisputed record developed during two years of discovery into the circumstances of this merger. Ultimately, I am no more charmed by the carefully orchestrated dance of a special committee than I am by the use of baseless innuendo and unreasonable inferences to bolster a deflated legal theory.*** In this instance, plaintiffs have not pointed to record facts that would lead a court — even a naturally suspicious court — to question the conduct of an independent, disinterested special committee charged with negotiating a third party merger agreement.

Id.

In *In re Sea-Land Corporation Shareholders Litigation*, 642 A.2d 792 (Del. Ch. 1993), *aff'd*, 633 A.2d 371 (Del. 1993) (TABLE), former stockholders alleged that directors breached their fiduciary duties in approving a transaction in which the acquirer funneled disproportionately greater consideration to a significant stockholder of the target company that was also a competing bidder. *Id.* at 794. Plaintiffs argued that the acquirer enlisted the interested chairman-CEO to help scare the competing bidder away by treating it adversarially and discouraging it from topping the acquirer's bid, citing handwritten notes which referred to the need of the acquirer's financial advisor to talk to the chairman and CEO about his "script" for his meetings with the competing bidder. *Id.* at 805. The Court refused to infer that the chairman-CEO had acted to drive away the competing bidder, and further noted that nothing in the competing bidder's deposition testimony evidenced that the chairman-CEO had tried to deter the

competing bidder from making a higher bid. *Id.* Even though the plaintiffs had cited various documents in support of their version of the facts, the Court granted summary judgment for the defendants because plaintiffs' inferences were not "supported by evidence (as opposed to mere assertions or allegations)." *Id.* at 799, 807.

As shown in the SRA Defendants' Opening Brief and below, the record evidence here conclusively demonstrates that the Special Committee said "no" to Providence multiple times: it repeatedly denied Providence exclusivity, even as Providence threatened not to participate further, and pushed Providence to raise its bid significantly. SEPTA offers the same sort of baseless innuendo that the plaintiffs relied on in *Western National* and *Sea-Land* — repeatedly calling Michael Klein a "one man committee" (Opp'n at 2, 25, 32), using quotes to discount that the members of the committee were "independent" and to impugn the "process" used to sell SRA (*id.* at 2, 60), and repeatedly calling the Go-Shop "illusory." (*Id.* at 32, 59, 62, 65.) SEPTA asserts that the Special Committee "fell into the controlling shareholder mindset permitting the interests of Volgenau and the secret agenda of Klein to run roughshod over the interests of public shareholders." (*Id.* at 64.) But simply making the statement does not make it so. There is no evidence that Mr. Klein acted for his or Dr. Volgenau's personal benefit, that the Special Committee members acted disloyally, or that the multi-round, multi-bidder, multi-month auction process the Special Committee oversaw was flawed, much less an elaborate sham.

I. PLAINTIFF CANNOT OVERCOME THE PRESUMPTIONS OF THE BUSINESS JUDGMENT RULE.

A. The Business Judgment Rule Applies Here.

Plaintiff's argument that the Defendants are not entitled to the presumptions of the business judgment rule because Dr. Volgenau "stood on both sides of the transaction" is untenable. Under *Hammons*, when (1) "a corporation with a controlling stockholder merges with an unaffiliated company," and (2) "the minority stockholders of the controlled corporation are cashed-out" while "the controlling stockholder receives a minority interest in the surviving company, the controlling stockholder does not

'stand on both sides' of the merger." *Frank v. Elgamal*, 2012 WL 1096090, at *7 (Del. Ch.) (discussing and quoting the *Hammons* standard). In such a merger, the business judgment rule applies where the transaction is subject to the "robust procedural protections" of a recommendation by a disinterested and independent special committee as well as a non-waivable majority-of-the-minority stockholder vote. *Hammons*, 2009 WL 3165613, at *12-13. This Court has reaffirmed the rule of *Hammons* in several recent decisions involving merger transactions with unaffiliated third parties. *See, e.g.*, *Frank*, 2012 WL 1096090, at *9; *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1033 (Del. Ch. 2012).

Americas Mining Corporation v. Theriault, on which Plaintiff relies heavily to argue that self-dealing transactions are subject to entire fairness review, simply does not apply. (Opp'n at 1.) Unlike the transaction at issue here, the transaction under review in *Theriault* was ***sponsored*** by the controlling stockholder: the controlling stockholder in *Theriault* sought to have the company it controlled purchase 99.15% of a Mexican mining company ***that the same stockholder owned***. *See Theriault*, 51 A.3d 1213, 1219 (Del. 2012); *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 787 (Del. Ch. 2011). The Court employed the standard established in *Kahn v. Lynch Communication Systems Inc.*, 638 A.2d 1110 (Del. 1994), for controlling-stockholder sponsored acquisitions, and neither of the parties even attempted to argue that a standard other than the "entire fairness" standard should apply. *Id.* This case presents a quite different scenario. When the company with a controlling stockholder merges w*ith an unaffiliated company*, "*Kahn v. Lynch Communication Systems* does not mandate that the entire fairness standard of review apply notwithstanding any procedural protections that were used." *Frank*, 2012 WL 1096090 at *7 (citing *Hammons*, 2009 WL 3165613, at *10).

Plaintiff claims that Dr. "Volgenau stood on both sides" of the Merger because Providence was not an "unaffiliated company" as a result of its early, exploratory conversations with Dr. Volgenau prior to the auction process. (*See* Opp'n at 58, 59, n.314.) But this claim is meritless. The controlling stockholder — Dr. Volgenau — "did not make the offer to the minority stockholders" in this case; "an unrelated third party" — Providence — did so. *See Hammons*, 2009 WL 3165613, at *10. SEPTA's

attempt to recast Providence and Dr. Volgenau as "affiliates" fails. Dr. Volgenau and Providence had no prior relationship before Providence's representatives contacted Dr. Volgenau in the spring of 2010. (Volgenau Dep. 45:7-13 (Naylor Ex. 3); Richardson Dep. 36:6-9 (Naylor Ex. 4).) No employee, consultant, or representative of Providence sat on SRA's Board prior to the Merger and Providence in no way controlled SRA's business or affairs. Moreover, Plaintiff does not meaningfully dispute the evidence that Dr. Volgenau met with several other bidders and even agreed to accept an illiquid and uncertain $150 million rollover equity stake to allow [redacted] to submit a bid to compete with Providence. (Klein Dep. 211:16-20 (Naylor Ex. 1).) Dr. Volgenau's only relationship with Providence was the arm's length negotiation for the sale of SRA and he was no more a partner with Providence than he was with other competing bidders.

The *Hammons* Court rejected a similar contention that discussions between potential buyers and the controlling stockholder concerning a deal transformed a "sale" into a "joint venture of some sort" because Mr. Hammons — like Dr. Volgenau here — "had a right to sell (or refuse to sell) his shares," and thus, an acquirer "negotiat[ing] separately" with a stockholder by no means suggested that the stockholder stood "on both sides of the transaction." *See Hammons*, 2009 WL 3165613, at *10 (internal quotations omitted).

Thus, this Court was correct when it predicted that "robust procedural protections may have actually been utilized" in this case "and thus, the transaction may be subject, at common law, to review under the business judgment rule." *Se. Pa. Transp. Auth. v. Volgenau*, 2012 WL 4038509, at *3 n.17 (Del. Ch.) (citation omitted). Because Dr. Volgenau did not stand on both sides of the transaction, the Merger is reviewed under the business judgment rule, if it can meet two conditions — (i) a recommendation by a disinterested and independent special committee, and (ii) a non-waivable vote of a majority of minority stockholders. *Frank*, 2012 WL 1096090, at *8. Both are satisfied here.

B. The Special Committee Was Independent And Disinterested.

It is undisputed that the Merger was recommended by a special committee which oversaw a months-long sale process involving numerous strategic and financial bidders. (*See* Opp'n at 21-22, 29-34; SRA Br. at 6-16.) To discount the approval of the Special Committee, Plaintiff must proffer evidence (not conjecture or innuendo) showing: (1) that members of the board had a "substantial self-interest" in the Merger; ***and*** (2) that "those materially self-interested members either: 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." *Goodwin* , 1999 WL 64265, at *25; *see also, e.g., In re KDI Corp. S'holders Litig.*, 1988 WL 116448, at *7 (Del. Ch.) (finding a special committee was not tainted by inclusion of a single director appointed by a large stockholder in part because the stockholder "had only one representative on the Special Committee," and no evidence existed to show that the director in question "dominated or controlled the other disinterested members.").

Plaintiff falls far short of satisfying these standards. The Opposition effectively acknowledges that four members of the Special Committee were not materially self-interested in the Merger since it cannot effectively attack their substantial credentials and credibility. (*See* Opp'n at 21-25.) And SEPTA makes no meaningful attempt to show there was an undisclosed conflict of interest that tainted the Special Committee's deliberations. Instead, Plaintiff seeks to disregard the approval of the Special Committee based on the unfounded theory that Michael Klein was conflicted and that Dr. Volgenau controlled and dominated the conduct of the Special Committee through Mr. Klein. (*See id.* at 2, 60-66.)

1. Michael Klein Did Not Have A Substantial Self-Interest In The Sale Of SRA To Providence.

Plaintiff incorrectly challenges Mr. Klein's disinterestedness by claiming that Mr. Klein (1) had a "secret self-interest" to satisfy Dr. Volgenau; (2) requested that the Board consider additional charitable donations to be made in recognition of his work on the Special Committee; and (3) approved contingent

and discretionary payments to the Special Committee's advisors, whom he knows from his service on the board of the Shakespeare Theatre Company. (Opp'n at 21-28, 60-63.)

Plaintiff labels Mr. Klein's supposed self-interest a "secret" because it found no evidence that such a self-interest existed. It is undisputed that Mr. Klein had no prior relationship with Dr. Volgenau before joining SRA's Board, (Klein Dep. 15:1-21), and there is no evidence of any business or personal relationship between them other than as directors of SRA. That Mr. Klein has come to know and respect Dr. Volgenau through his service on SRA's Board does nothing to undermine his independence.[4] Undeterred, Plaintiff repeatedly mischaracterizes record evidence to portray Mr. Klein and Dr. Volgenau as scheming conspirators:

- SEPTA asserts that "Klein encouraged Volgenau to exploit his control position." (Opp'n at 18.) But the draft history of SRA that Plaintiff cites actually sets forth how Dr. Volgenau was advised that the Special Committee, not he, would control the process by which SRA was sold. Dr. Volgenau's narrative describes Michael Klein as "trying to do the right thing for shareholders and for me" in chairing the Special Committee. (*See* Apr. 22, 2011 Draft of *SRA History: Idealism and IT Services*, by Ernst Volgenau at Chapter 26: The Big Decision (Naylor Ex. 25).)

- Plaintiff implies that Mr. Klein behaved dishonestly by declining additional compensation of $225,000 merely "for the record," (*see* Opp'n at 25), but there is no evidence to support this claim. On the contrary, the document Plaintiff cites explains that Mr. Klein declined the offer of additional compensation in April 2011 because he thought it was premature. (*See* June 8, 2011 Email (Naylor Ex. 84).)

- Plaintiff suggests that Dr. Volgenau tried to sneak Mr. Klein's request for additional charitable donations past Mr. Keevan and Dr. Wilensky (Opp'n at 35), but the cited email itself shows that Dr. Volgenau forwarded Mr. Klein's memorandum to the members of the Special Committee, rather than to the entire Board, simply because those directors were "most aware of his contributions" on the Special Committee, and also explicitly noted that Dr. Wilensky and Mr. Keevan opposed the request. (June 8, 2011 Email (Naylor Ex. 84).)

- Plaintiff implies that Mr. Klein improperly tipped off Dr. Volgenau's allegedly preferred bidder to [redacted] indication of interest (Opp'n at 29), but the evidence shows that the members of the Special Committee decided to push Providence to raise its price by having Mr. Klein email

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4 *See, e.g., In re Alloy, Inc.*, 2011 WL 4863716, at *9 (Del. Ch.) (longstanding professional and personal relationships between special committee members and interested members of management did not raise a reasonable inference that the special committee members failed to base their decision to approve the merger on corporate merits); *see also State of Wis. Inv. Bd. v. Bartlett*, 2000 WL 238026, at *6 (Del. Ch.) (holding that longstanding business and/or personal relationships between board members and chairman of the board did "not support a conclusion that the . . . directors acted inconsistently with what they believed to be the best interest of [the] shareholders").

Providence to relay that SRA had received an indication of interest for a "price within a stated range (both ends above the number you have mentioned)."[5]

Because Plaintiff cannot point to any ***actual*** self-interest Mr. Klein had in the Merger, let alone any ***material*** self-interest, it manufacturers ***a self-interest that never was***. (*See* Opp'n at 2, 22.) In June 2011, Mr. Klein requested that the Board consider increasing the amount of the charitable donations to be made in recognition of his work as chairman of the Special Committee — ***a request that was not fulfilled***. (*See* SRA Br. at 23; June 8, 2011 Email (Naylor Ex. 84); Affidavit of Michael R. Klein dated February 20, 2012 ¶¶ 5-6 ("Klein Aff.").) Plaintiff suggests that a board member, after the fact, requesting an additional charitable contribution in recognition of what participants considered to be an excellent result, retroactively constitutes a material self-interest in the transaction during the negotiation. Plaintiff cites no authority for this novel proposition. Instead, Plaintiff cites a case in which special committee members actually received payments of $1 million apiece pursuant to a plan that was never disclosed to stockholders. *See In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *4-5 (Del. Ch.). That case has no bearing here, where Mr. Klein's post-hoc request for additional charitable donations was not granted, and his compensation was fully disclosed in the Proxy.

SEPTA seeks to transform the routine and unobjectionable compensation of the Special Committee's advisors into some sort of "secret self-interest" by imagining a grand cabal in which Mr. Klein and his "cronies" at the Shakespeare Theatre Company conspired to treat the Merger as a "piggy bank" for their personal interests. (Opp'n at 2, 27, 38.) But "colorful rhetoric is no substitute for record evidence of bad faith or disloyalty" at summary judgment. *Goodwin*, 1999 WL 64265, at *1. And contingent fees in mergers are "routine," align the interests of the advisors with those of the stockholders,

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5 Dec. 9, 2010 Email from J. Barter and Dec. 9, 2010 Email from L. Ellis, attached as Exhibits 82 and 83 of the Affidavit of Robert B. Gilmore, which is being filed simultaneously herewith. The Transmittal Affidavit of Robert B. Gilmore in Support of the SRA Defendants' Motion for Summary Judgment ("Gilmore Aff."), filed on December 21, 2012, contained Exhibits 1-81. For ease of reference, the Gilmore Affidavit being filed simultaneously herewith begins with Exhibit 82.

and repeatedly have been upheld by Delaware courts.[6] Critically, neither Houlihan's contingency nor Kirkland's discretionary payment was contingent upon doing a deal *with Providence*. (*See* Nov. 19, 2010 Houlihan Retention Agreement (Naylor Ex. 61).)

Here again Plaintiff flatly distorts the record by selective quotation and mischaracterization of Mr. Klein's emails after the Merger Agreement was signed, but before closing, to claim that Kirkland provided a "beneficial service . . . to Providence" during the final stages of the negotiation by uncovering that [redacted] bid was not supported by adequate assurance of financing. (Opp'n at 33.) In reality, Mr. Klein's communication to Providence relates that the Special Committee's "judgment on the merits of what Kirkland contributed was very positive . . . for the process and shareholders" in its role as counsel to the Special Committee. (July 15, 2011 Email from M. Klein (Naylor Ex. 77).) Mr. Klein further states that Providence fortuitously benefited from Kirkland's recognition "late in the diligence process that [redacted] did not actually have authorization of its [i]nvestors to commit the needed capital" because, otherwise, the $31.25 [redacted] bid — a bid with financing risks — may have been accepted. (*Id.*) All stockholders benefited from Kirkland's diligence, of course, since an executed merger agreement that later fell through based on financing contingencies would have surely been disruptive and would have, at least, jeopardized the highest and best offer of $31.25 per share that SRA had received. Thus, Mr. Klein observed that this "was simply one example of a job very well done throughout, with a robust and complicated process." (*Id.*)

Plaintiff's assertion that the possibility that [redacted] could not satisfy closing conditions is "absurd" has no evidentiary basis. (Opp'n at 33.) On the contrary, the significance of this risk was confirmed by the conduct of [redacted] itself. The Special Committee communicated its concern about [redacted] financing contingencies and invited [redacted] to make its highest and best offer. (Mar. 31, 2011

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6 *See In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *23 (Del. Ch.); *see also In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 864928, at *8 (Del. Ch.), *vacated on other grounds*, 2011 WL 885931 (Del. Ch.) (TRIAL ORDER) ("Contingent fees are undoubtedly routine; they reduce the target's expense if a deal is not completed; perhaps, they properly incentivize the financial advisor to focus on the appropriate outcome."); SRA Br. at 24-25.

Special Committee Minutes (Gilmore Ex. 57).) If [redacted] had been easily able to obtain the financing consents it needed, it would have done so. Instead, it withdrew from the process. (Klein Dep. 221:13-222:5.) It is no wonder that the sophisticated independent members of the Special Committee did consider [redacted] financing contingencies a "significant issue" and a "significant consideration." (Barter Dep. 103:17-25; Gilburne Dep. 141:10-18; Klein Dep. 221:13-223:11.) And the question of whether "funding for [a] transaction [has been] arranged" by one of the bidders is an entirely legitimate concern to consider. *See In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *9 (Del. Ch.). Although Klein, in his email, observes that Providence (like all other participants) should be grateful that this course of events did not occur, and surmises that if [redacted] proceeded with a bid subject to a financing contingency, that might have caused Providence to pay more, (July 15, 2011 Email from M. Klein (Naylor Ex. 77)), it does nothing to support Plaintiff's outrageous accusation that "Kirkland chased away Providence's final rival . . . to cap the amount Providence would have to pay." (Opp'n at 2.) Indeed, the series of emails and broader discussion, in which Providence strenuously objects to and negotiates down the bonus Kirkland was paid, proves the point that there was no collusion between the Special Committee, its advisors, and Providence. What is more, Plaintiff fails to offer any evidence from [redacted] or anyone else to support its speculation that [redacted] would have bid more than $31.25, or would have supported any bid with adequate assurance of financing, and does nothing to rebut the undisputed evidence of meeting minutes, deposition testimony, and contemporaneous email confirming the Special Committee's good faith concern about [redacted] ability to fund a transaction — a concern which the Special Committee gave [redacted] the opportunity to address, but which [redacted] chose not to address.

Once the baseless innuendo in the Opposition is brushed aside, a glaring omission in its theory of the case is revealed: Plaintiff identifies no motive for Mr. Klein to tarnish his substantial professional reputation and to incur a significant personal financial detriment all in order to "to deliver a Providence deal to Volgenau." (Opp'n at 2.) Mr. Klein serves on the boards of two publicly traded companies, along with his work with non-profits. (Proxy at E-2 (Gilmore Ex. 4).) He was a partner at Wilmer, Cutler &

Pickering with a distinguished practice in mergers and acquisitions for 30 years, (*id.*), arguing, among other cases, the landmark Delaware Supreme Court case of *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989). Nowhere does SEPTA even attempt to explain what might motivate Mr. Klein to sully the reputation he built over decades in order to somehow benefit Dr. Volgenau. "To create a reasonable doubt about an outside director's independence" there must be evidence "that would support the inference that . . . the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). There is no such evidence here. Mr. Klein had SRA stock options and restricted stock awards in SRA which were cashed out for $1.58 million, at the same $31.25 per share Merger consideration received by SRA's other stockholders. (*See* Pl.'s Resp. and Obj. to SRA's Interrog. No. 48 (Gilmore Ex. 84).) If a buyer was willing to purchase SRA for $43 per share (*see* Opp'n at 39), Mr. Klein could have received more than half a million dollars more than he received when he voted as a director and then as a stockholder to be cashed out at $31.25 per share like every other stockholder. Mr. Klein's equity interest in SRA "aligned him economically with the public shareholders," and incentivized him to obtain the highest possible price for SRA's shares. *See W. Nat'l*, 2000 WL 710192, at *12. Plaintiff's theory, in other words, is that Mr. Klein inexplicably subordinated his financial interest and his professional reputation to a wish and a prayer that he might later be able to persuade the other four independent members of the Special Committee to authorize payments to charities and "cronies." This theory is not only divorced from the record evidence; it is economically irrational.

2. The Special Committee Was Not Dominated By Michael Klein Or Dr. Volgenau.

Even if Plaintiff could show that Mr. Klein had a "material self-interest" in the Merger — which it cannot — it would still need to show that Mr. Klein "dominated the Special Committee and functioned as a de facto one man committee." (Opp'n at 2); *Goodwin*, 1999 WL 64265, at *25. Despite its efforts, SEPTA has found no evidence to support this claim. Instead, a mountain of record evidence refutes it.

All five independent members of the Special Committee testified — and the meeting minutes reflect — that they attended numerous Special Committee meetings and calls, participated in discussions, and reviewed and considered various written materials over a period of multiple months. (*See* Appendix A.)[7] Plaintiff does not even mention the bona fides of the directors who were supposedly duped into supporting the Merger:

- **Miles Gilburne** - Former director and senior vice president of corporate development for America Online, Inc. ("AOL") responsible for strategy, mergers, acquisitions, joint ventures, and different types of new business development; current managing member of ZG Ventures, LLC, a venture capital firm. (Gilburne Dep. 12:15-13:5, 38:2-12; Proxy at E-1 (Gilmore Ex. 4).)

- **John Barter** - Former CFO for AlliedSignal, Inc., now known as Honeywell International, Inc. ("Honeywell"); helped oversee the sale of SSA Global Technologies, Inc. while serving on its board. (Barter Dep. 5:5-15, 18:20-19:8 ; Proxy at E-1 (Gilmore Ex. 4).)

- **W. Robert Grafton** - Former chairman and CEO of Anderson Worldwide; current audit committee chair for CarMax, Inc. and Diamond Rock Hospitality. (Grafton Dep. 10:7-21, 10:24-11:7 (Naylor Ex. 7); Proxy at E-1 (Gilmore Ex. 4).)

- **General Larry Ellis** - Former Commanding General of the United States Army Forces Command; former President and CEO of Point Blank Solutions; previously served on the board of Unitech and helped oversee the sale of Unitech to Lockheed Martin. (Ellis Dep. 10:15-13:5, 13:13-17, 15:8-21 (Naylor Ex. 9); Proxy at E-1 (Gilmore Ex. 4).)

Messrs. Gilburne, Barter, and Grafton, and General Ellis were involved in evaluating and discussing possible alternatives before selecting and compensating the Special Committee's legal and financial advisors.[8] Mr. Barter and General Ellis both provided input on Kirkland's fee agreement. (*See* Nov. 15, 2010 Email from J. Barter and Nov. 16, 2010 Email from L. Ellis (Naylor Ex. 60).) According to Mr. Barter, the Special Committee chose to include a discretionary payment provision in Kirkland's fee

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[7] Appendix A collects deposition testimony, meeting minutes, and written materials considered by the Special Committee, reflecting the substantial involvement of the directors.

[8] Mr. Gilburne testified that the Special Committee hired Houlihan only after considering "a couple of different presentations from different potential advisors" and having "a chance to meet the people, question the people, hav[ing] some follow-up information provided." (Gilburne Dep. 147:1-10.) General Ellis testified that the Special Committee chose Kirkland after discussing an evaluative list of law firms and determining that Kirkland "had the best experience to do the job." (Ellis Dep. 79:12-23, 85:21-86:5.) Mr. Gilburne "knew Kirkland as a firm well for many years, and knew Stamas' reputation," and that "people that he had worked with [] spoke highly of him." (Gilburne Dep. 121:9-17, 124:4-25.)

agreement to "incentivize them to provide the highest quality work." (Barter Dep. 33:19-34:1.) After the sale process ended, the Special Committee members all agreed that Kirkland earned a discretionary bonus because it had done an extraordinary job.[9] But rather than rubber-stamping the amount of the bonus Kirkland requested, Mr. Gilburne explained, the Special Committee "negotiated hard on it" and "intelligently used Providence's reaction to negotiate Kirkland down." (Gilburne Dep. 131:4-23.) Ultimately, the Special Committee members approved a discretionary bonus for Kirkland that was in line with what Mr. Gilburne had seen in his experience as the senior vice president of corporate development in charge of mergers and acquisitions for AOL.[10] And the Special Committee members' engagement in picking and managing their advisors was entirely in keeping with the role they played in deploying their experience and judgment throughout the auction process to obtain the highest price for SRA's stockholders. (*See* SRA Br. at 6-16 (describing active involvement of Special Committee members).)

The active role these Special Committee members played should come as no surprise. As with Mr. Klein, there is no evidence from which it is reasonable to infer that any of these directors "would be more willing to risk [their] reputation[s] than risk the relationship with the interested director." *Beam*, 845 A.2d at 1052. And just as Mr. Klein's financial incentives aligned him with public stockholders, Messrs. Gilburne, Barter, and Grafton, and General Ellis each had stock options and restricted stock awards in SRA which were (collectively) cashed out for $1.89 million at the $31.25 per share price. (*See* Pl's Resp. and Obj. to SRA's Interrog. No. 48 (Gilmore Ex. 84).) A deal at $43 per share (*see* Opp'n at 39), would have conferred an additional $700,000 to those directors. Plaintiff's unsupported theory that the Special Committee was ineffective because Mr. Klein had a "secret self-interest" to depress the

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9 General Ellis thought "that [Kirkland] should have a bonus and that they had earned a bonus based on their performance" because Kirkland had provided "superb" legal advice throughout the process. (Ellis Dep. 97:15-98:4.) Mr. Barter thought that Kirkland had "perform[ed] at the highest level" and done "an extraordinary job." (Barter Dep. 71:1-11.) Mr. Gilburne testified that "there was a general view that the performance was outstanding and the outcome was truly outstanding from a shareholder point of view, and that they were entitled to a meaningful bonus." (Gilburne Dep. 130:19-131:3.)

10 In Mr. Gilburne's experience, "doubling fees plus or minus is not unusual" for high-quality work. (Gilburne Dep. 127:16-25.)

acquisition price not only implausibly assumes that Mr. Klein would take action to his personal economic and professional detriment, but also that four other independent directors would each take the same irrational course as well.

While it is not surprising that as chairman, Mr. Klein invested more time than other members and served as the Special Committee's point person for communications with potential bidders and advisors, he also "regularly reported back to the board and solicited input." (Gilburne Dep. 174:12-17.) "It is well within the business judgment of the Board to determine how merger negotiations will be conducted, and to delegate the task of negotiating to the [allegedly interested] Chairman." *In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *10 (Del. Ch.). "That directors acquiesce in, or endorse actions by, a chairman of the board — actions that from an outsider's perspective might seem questionable — does not, without more, support an inference of domination by the chairman or the absence of directorial will." *In re Nymex S'holder Litig.*, 2009 WL 3206051, at *6 (Del. Ch.). Of course, if Mr. Klein actually controlled the Special Committee, his request for increased charitable contributions would have been fulfilled. That it was not (*see* Klein Aff. ¶¶ 5-6), further underscores that the Special Committee members did not delegate decision-making to Mr. Klein; to the contrary, they were engaged at every level.

Plaintiff also asserts that Dr. "Volgenau had special interests separate from those of the public stockholders" and Dr. Volgenau's interests "were permitted to dominate the Special Committee process" (Opp'n at 64) and takes issue with the fact that "the Special Committee permitted the interested chairman to have unmonitored access to bidders and during these meetings." (Opp'n at 31 n.155.) As an initial matter, Dr. Volgenau — in his capacity as controlling stockholder — was plainly entitled to vote his shares against a transaction if he so chose. *See Hammons*, 2009 WL 3165613, at *14. As such, he was entitled to his own views about whether he would support a merger or not, and was free to express them in public or private with whomever he pleased. Delaware law does not prohibit an independent special committee from considering the preferences of a controlling stockholder or permitting a controlling stockholder to have unmonitored meetings with potential bidders. *See In re John Q. Hammons Hotels,*

Inc. S'holder Litig., 2011 WL 227634, at *8 (Del Ch.) (finding no unfairness in controlling stockholder's unmonitored meetings with potential bidders described in *Hammons*, 2009 WL 3165613); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd* 663 A.2d 1156 (Del. 1995) (chairman and largest stockholder's unmonitored meetings were not found to evince unfairness). Delaware law thus reflects the common-sense notion that a special committee can and should consider the receptiveness of a controlling stockholder to potential buyers. As General Ellis explained, "permitting Dr. Volgenau private meetings with bidders or potential bidders was in the shareholders' best interests" because "if [the Board] were to consummate an agreement, we'd have to have his buy-in; so it just made sense." (Ellis Dep. 123:25-124:14.)

With these considerations in mind, the independent Special Committee members carefully designed a sale process to maximize stockholder value. Even assuming for the sake of argument that (as Plaintiff contends) Dr. Volgenau preferred Providence over other potential suitors, the Special Committee repeatedly exercised its independence by saying "no" to Providence and opening the auction process to Providence's competitors. For example, the Opposition does not dispute that the Special Committee:

- rejected Providence's early indication of interest of $27.25 per share;
- repeatedly denied Providence's requests for exclusivity, causing Providence to withdraw from the process at one point;
- issued a January 25, 2011 press release confirming SRA had retained Houlihan to review acquisition proposals (*see* Gilmore Ex. 38);
- invited [redacted] into the sale process even though Dr. Volgenau had initially expressed concerns about strategic bidders;
- granted exclusivity only to [redacted], a bidder that was competing with Providence; and
- extracted an additional $4.00 per share over Providence's early $27.25 indication of interest.

(*See* Opp'n at 28-34; SRA Br. at 6-16.) Such "adversarial conduct bespeaks independence, and confirms the arm's length nature of the bargaining process." *Muoio*, 2011 WL 863007 at *15.

What is more, the indisputable facts regarding the Special Committee's independence and energy put the lie to SEPTA's overarching theory of the case, that somehow Dr. Volgenau secretly selected his supposedly preferred bidder, Providence, and dominated the Special Committee and the sale process to ensure that Providence was the winner. SEPTA cannot point to any evidence to support its wild theories that Dr. Volgenau, or anyone acting on his behalf, somehow interfered in the process by attempting to block or thwart competing bidders, *see infra* Part II.A. Instead, the record evidence shows that Dr. Volgenau respected and deferred to the Special Committee, engaged positively with multiple bidders besides Providence, and agreed to a rollover that was personally disadvantageous in order to maximize stockholder value. (*See* Opp'n at 28-34; *see also* SRA Br. at 6-17, 20-27.)

C. The SRA Stockholders' Proxy Voting Was Fully Informed.

Plaintiff also cannot avoid the fact that the overwhelming majority of minority stockholders approved the Merger. SEPTA asks this Court to disregard the overwhelming stockholder approval of 81.3% of outstanding disinterested shares (and more than 99% of shares voted) because the Proxy failed to disclose details concerning: (1) early meetings between Dr. Volgenau and SRA management with Providence; (2) former SRA executives working with Providence; (3) the Special Committee and advisors' compensation; (4) [redacted] reasons for withdrawing; and (5) Dr. Volgenau's rollover. (Opp'n at 73-74.) While Plaintiff attempts to dig up details that it passes off as disclosure violations, such details are either immaterial, have already been disclosed, or mischaracterize the record.

As an initial matter, SEPTA has waived the disclosure claims it asserts in the Opposition. None of the disclosures alleged in the Opposition are asserted in the Second Amended Complaint, a pleading which conceded that Plaintiff's disclosure claims were moot except for disclosures regarding Dr. Volgenau's meetings with bidders and Houlihan's supposed conflicts — disclosures that were then mooted before the Merger closed. (2d Am. Compl. ¶¶ 96-104; July 8, 2011 Sched. 14A (Gilmore Ex. 1.) It is well settled that "[a] plaintiff cannot use [its] briefing to rewrite [its] complaint." *Morgan v. Cash*, 2010 WL 2803746, at *8, n.64 (Del. Ch.) (rejecting claim that defendant acquirer had knowingly

participated in co-defendant directors' disclosure violations where such claim was not alleged in the complaint but in plaintiff's answering brief to acquirer's motion to dismiss); *see also McGowan v. Ferro*, 2002 WL 77712, at *4 n.27 (Del. Ch.) (granting motion to dismiss aiding and abetting claim where plaintiff failed to allege critical facts in the complaint and only raised such facts in its brief). Although Plaintiff had months to amend its operative complaint to include the disclosure violations it now claims are material, it never did so.

Moreover, to succeed on a disclosure claim a plaintiff cannot carry its burden to show a "substantial likelihood" that the alleged omission "significantly altered the 'total mix' of information made available," *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), unless it shows that the putative undisclosed information is either "inconsistent with, or otherwise significantly differs from, the disclosed information." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172-74 (Del. 2000). Plaintiff must demonstrate the information it seeks to have disclosed would have "***differed materially from what the stockholders actually received***." *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 927 (Del. Ch. 1999). Delaware law does not require that companies "bury the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking," *TSC Indus.,* 426 U.S. at 448-49, or provide "a play-by-play description of every consideration or action taken by a Board." *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 511-12 (Del. Ch. 2010).

1. Plaintiff's Quibbles Regarding Dr. Volgenau And SRA Management's Meetings With Providence Are Immaterial.

Plaintiff incorrectly contends that the Proxy statement was "highly misleading with respect to Volgenau's and [management's] meetings with Providence prior to the Special Committee process." (Opp'n at 74.) In particular, Plaintiff claims the Proxy is misleading in its description of the substance of certain meetings, including one meeting in which Providence provided Dr. Volgenau a presentation on "go-shop" periods, as well as in its omission of certain meetings from the Proxy. (*Id.*)

The Proxy does disclose early, exploratory discussions with potential bidders as well as a robust months-long auction process including meetings Dr. Volgenau and management had with Providence. (*See* Proxy at 18-19 (Gilmore Ex. 4).) Plaintiff does not explain why the additional information about the content of those meetings is material and could not even be bothered to identify the meetings that were supposedly omitted. (Opp'n at 74.) Thus, SEPTA has failed to show that additional disclosure about these meetings would be "inconsistent with, or otherwise significantly differ[ent] from, the disclosed information," *Skeen*, 750 A.2d at 1172-74, or to establish how additional details would be anything more than the sort of "play-by-play description" and minutiae that Delaware law does not require to disclose. *In re Cogent*, 7 A.3d at 511-12; *see also In re Sauer-Danfoss Inc. S'holders Litig.*, 2011 WL 2519210, at *16 (Del. Ch.) (supplemental disclosure concerning a conversation between the special committee and its advisors was not material); *In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 30 (Del. Ch. 2004), *judgment entered sub nom.*, 2004 WL 5389603 (Del. Ch.) (TRIAL ORDER) ("nondetailed descriptions" of preliminary letters of interest were immaterial and did not have to be disclosed). Neither the number of allegedly undisclosed meetings, nor the content of the meetings, in any way alters the total mix of information already provided in the Proxy. And SEPTA knows this; SEPTA deposed Dr. Volgenau, Mr. Klein, and Ms. Richardson before the stockholder vote, revealing all of the information about these meetings that they now claim should have been included in the Proxy. Yet, Plaintiff withdrew its motion for preliminary injunction and allowed the stockholder vote to proceed. There can be no more telling indicator that additional details about meetings in which Dr. Volgenau and management participated contain no information material for that vote.

2. Information Concerning Former SRA Executives Is Trivial And Does Not Suffice As The Basis For A Disclosure Claim.

The contention that former SRA executives' discussions with Dr. Volgenau and Providence should have been disclosed is similarly unavailing. (*See* Opp'n at 73-74.) How such discussions, most of which took place long before the auction process began, alter the total mix of information is

unfathomable. Former SRA executives were, of course, free to work with whatever companies they chose as independent consultants. The fact that they chose to consult for Providence is irrelevant because Plaintiff identifies no evidence of contact with Special Committee members during the auction process. No reasonable stockholder could find the handful of discussions between former SRA executives and Dr. Volgenau and Providence to be material in deciding how to vote. *See O'Reilly*, 745 A.2d at 927 (finding that plaintiff failed to allege evidence that omitted information was material).

3. Information About The Special Committee And Its Advisors' Compensation Was Fully Disclosed Or Immaterial.

Plaintiff manufactures two alleged omissions regarding compensation, neither of which even comes close to information that a reasonable investor would consider important in deciding how to vote. ***First***, Plaintiff argues that the Proxy should have disclosed that Mr. Klein allegedly "expect[ed]" and "demand[ed]" additional compensation after the Merger Agreement was signed. (Opp'n at 73.) But the Proxy fully discloses Mr. Klein's compensation. (*See* Proxy at 60 (Gilmore Ex. 4).) Although Mr. Klein requested an additional charitable contribution, he never pursued it beyond a single post-hoc email request, and the request was rejected without Mr. Klein's participation in, or even awareness of, deliberation on the issue. (*See* Klein Aff. ¶¶ 5-6.) There is no evidence whatsoever that Mr. Klein had any expectation of additional compensation that was tied to a deal *with Providence*. SEPTA's argument amounts to a claim that a proxy must affirmatively disclose directors' unrealized future hopes. For obvious reasons, Delaware law does not require proxy statements to state something that did not happen. *See In re Lukens, Inc., S'holders Litig.*, 757 A.2d 720, 736 (Del. Ch. 1999) (proxy need not disclose why a company or its financial advisors "chose ***not*** to take particular courses of action" or "did ***not*** take other steps or follow another process") (emphasis in original), *aff'd sub nom.*, *Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (TABLE); *see also In re Vitalink Commc'ns Corp. S'holders Litig.*, 1991 WL 238816 (Del. Ch.) (rejecting Plaintiff's argument that directors disclose a negative event — i.e. "non-canvassing" the market), *aff'd sub nom. Grimes v. John P. McCarthy Profit Sharing Plan,* 610 A.2d 725 (Del. 1992)

(TABLE). Plaintiff resorts to innuendo and argument, rather than evidence, that somehow Mr. Klein's purported expectation of additional compensation implicates a quid pro quo or understanding that Mr. Klein would do the bidding of Dr. Volgenau in derogation of his fiduciary duties. There is absolutely no evidence to support this far-fetched theory.

Second, Plaintiff alleges that "the Proxy is silent with respect to the contingent aspects of Kirkland's compensation." (Opp'n at 73.) However, Plaintiff again mischaracterizes the record. Unlike the Special Committee's arrangement with Houlihan, under which Houlihan was paid based on the transaction value as of the closing date of the merger (Proxy at 38 (Gilmore Ex. 4)), there was no contingent aspect to Kirkland's fees. The arrangement with Kirkland provided that, in light of its agreement to discount its hourly billing, the Special Committee may consider, in its discretion, to pay Kirkland a bonus after the process was concluded, in light of experience. (*See, e.g.*, Ellis Dep. 93:13-18.) Information about such a routine bonus would offer little utility to stockholders, and simply inundate them with useless information. *See Clements v. Rogers*, 790 A.2d 1222, 1245 (Del. Ch. 2001); *In re Cogent*, 7 A.3d at 511-12. Plaintiff did not — and cannot — meet its burden to show that the undisclosed information would somehow significantly alter the total mix of information available.

4. All Material Information Concerning [redacted] Withdrawal From The Bidding Process Was Disclosed.

Plaintiff also attempts to discount the overwhelming support of disinterested stockholders by claiming that it was not informed by the disclosure of "[redacted] decision to leave the [auction] process." (Opp'n at 74.) But the Proxy explains that "[[redacted]] indicated that it was withdrawing its proposal and would no longer participate in the process." (Proxy at 27 (Gilmore Ex. 4).) Nothing more is required. SRA certainly does not have an obligation to disclose in its Proxy the internal reasons each bidder considered in deciding to leave the auction process — nor could it. *See Klang v. Smith's Food & Drug Ctrs., Inc.*, 1997 WL 257463, at *13 (Del. Ch.), *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").[11] And here, again, is information that Plaintiff obtained prior to the stockholder vote and did not see as important enough to warrant injunctive relief.

Nor was SRA required to disclose Klein's off-the-cuff supposition that, if [redacted] had not dropped out, it "would have paid more or forced Providence to do so." (Opp'n at 74.) As noted above, *see supra* Part I.B.1, Mr. Klein opined that if [redacted] had offered to pay more than Providence, such a transaction may never have materialized, as [redacted] did not actually have the necessary authority under its relevant partnership agreement to assure financing to consummate a potential transaction. (*See* Klein Dep. 221:13-223:11; *see also* July 15, 2011 Email from M. Klein (Naylor Ex. 77).) In any case, SRA is under no duty to include "opinion or possibilities" or "characterize the course of events in a negative manner" in the proxy. *Goodwin*, 1999 WL 64265, at *20; *Seibert v. Harper & Row, Publishers, Inc.*, 1984 WL 21874, at *6 (Del. Ch.) (Proxy materials "need not include opinion or possibilities, legal theories or plaintiff's characterization of the facts. Corporate officials are not required to draw inferences, engage in 'self-flagellation' or speculate as to alleged improper motives.") (citations omitted).[12]

5. "How" The Special Committee Evaluated Dr. Volgenau's Rollover In Light Of The Equal Treatment Provision Of the Charter Is Not A Material Fact.

Finally, Plaintiff argues that the Proxy fails to disclose "information regarding ***how*** the Board determined that the Merger conformed to the equal treatment requirements of the Certification of Incorporation." (Opp'n at 74.) But the Proxy did disclose that Dr. Volgenau contributed $150 million in SRA stock in exchange for non-cash consideration of equal value of $150 million:

> [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

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[11] *Cf. State of Wis Inv. Bd. v. Bartlett,* 2000 WL 238026, at *8 (Del. Ch.) (the "board's judgment that it would have been futile to pursue [a certain] offer . . . is not a misleading partial disclosure. . . . The proxy disclosed the underlying material fact of the offer and the decision not to pursue it").

[12] *See also Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997) (no duty to self-flagellate); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 111 (Del. Ch. 2007) (same); *In re MONY Group*, 853 A.2d at 682 (same); *Khanna v. McMinn,* 2006 WL 1388744, at *29 (Del. Ch.) (same).

> 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.

(Proxy at 57 (Gilmore Ex. 4).)

And so Plaintiff's real claim — that SRA should have disclosed some theory or question about how Dr. Volgenau's rollover shares could be considered unequal — suffers from the same infirmity that plagues its other claims: it fails to identify a ***material*** undisclosed fact. To do so "it is not enough simply to pose questions that are not answered in the proxy statement." *In re Lukens*, 757 A.2d at 736; *see also Loudon*, 700 A.2d at 14; *Margolies v. Pope & Talbot, Inc.*, 1986 WL 1514 (Del. Ch.). The proxy is not required to state "legal theories." *In re MONY Grp.*, 853 A.2d at 682 (internal quotation omitted). And a corporation is certainly not required to disclose legal theories with which it disagrees. *Ash v. LFE Corp.*, 525 F.2d 215, 220 (3d Cir. 1975). Yet here, SEPTA takes precisely these wrong turns: it poses questions as to how the Special Committee considered compliance with the charter provision and theorizes that it did not. All that a corporation is required to disclose in the proxy are ***material facts*** — not questions or legal theories — which SRA did.

The picayune details Plaintiff seeks to include in this Proxy are a far cry from the omissions by defendants in other cases accused of "partial disclosure." *See, e.g., Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1281 (Del. 1994) (finding narrative of company's merger negotiation incomplete because it did not mention a competing, rejected $275 million proposal to acquire a portion of the company).[13] "Delaware law does not require that the proxy statement include plaintiffs' characterization

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[13] *See also Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (holding that disclosure regarding tender offer was incomplete where it failed to disclose net asset value estimate that was worth more than minimum amount disclosed in tender offer and authorization price prior to tender offer); *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254 (Del. Ch. 2003) (where defendants sought to amend bylaws in order to discourage hostile takeover bid by plaintiff, court held that defendants' disclosures were affirmatively misleading by not mentioning plaintiff specifically as justification for adopting amendments).

of the special committee process." *Hammons*, 2009 WL 3165613, at *15. Yet that is what SEPTA has asked that SRA do here and that is no reason to vacate the fully informed stockholder approval.

D. Plaintiff Makes No Attempt To Argue That There Is Any Evidence Suggesting That A Trial Is Necessary If The Business Judgment Rule Applies.

Where the business judgment rule controls — as it does here — the Court must presume that the corporate directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). It is axiomatic that "a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'" *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 954 (Del. 1985) (quoting *Sinclair Oil Corp. v. Levien,* 280 A.2d 717, 720 (Del. 1971)). Because Plaintiff does not attempt to overcome the business judgment rule's presumption, the Court should grant the SRA Defendants' Motion for Summary Judgment as to Counts I and II.

II. EVEN IF THIS COURT APPLIES ENTIRE FAIRNESS REVIEW, THE EVIDENCE DEMONSTRATES THE FAIRNESS OF SRA'S PROCESS AND SALES PRICE.

Even under an entire fairness analysis, SEPTA would bear the burden of proving unfairness as long as the Merger was "negotiated and approved by an independent committee of directors ***or*** an informed majority of the minority" stockholders. *See Muoio*, 2011 WL 863007, at *9 (internal quotations omitted). As set forth above, the business judgment rule applies here because ***both*** conditions are met. But even if the Court were to determine that either the Special Committee or the majority-of-the-minority vote was ineffective, SEPTA would bear the burden of proof. *Id.*

A. There Is No Genuine Issue Of Material Fact That The Sale Process Was Fair.

1. The Special Committee's Sale Process Was Entirely Fair And Fulfilled The Duty Of Loyalty.

Plaintiff's theory of unfairness appears to hinge on the assertion that strategic bidders were treated unfairly and discouraged from bidding, but that is a wholly fictional assertion. Plaintiff does not rebut [redacted] sworn testimony that its "interactions with SRA's management and advisors and Dr.

Volgenau did not deter [redacted] from submitting a bid for SRA" but instead "deepened [redacted] admiration and respect for SRA, its people, and its values," or that "SRA's and [redacted] interactions were exemplified by a spirit of cooperation, openness, professionalism, and mutual respect." ([redacted] Aff. ¶ 13; *see* Opp'n at 31 n.155.) Nor does SEPTA rebut [redacted] sworn testimony that "[a]t all times, [redacted] was treated with the utmost respect and consideration by Dr. Volgenau, SRA's management, and Houlihan Lokey" or that "[t]he actions of Dr. Volgenau, SRA's management, and Houlihan Lokey in no way dissuaded [redacted] from submitting a bid for SRA." ([redacted] Aff. ¶ 11; *see* Opp'n at 31 n.155.)

To read the Opposition, one would assume that withdrawing bidders were frustrated with the sale process. Not so. Rather, the record evidence shows that sophisticated private equity firms and government contractors each independently came to another conclusion: the price for SRA was too high given the trends in the market for government services contractors. (Feb. 14, 2011 Email from [redacted] (Gilmore Ex. 46) (noting that [redacted] were not "buyers at a premium to where the market is today" and "[w]e just don't see getting to the 'growth' multiples likely to win the day given what we learned about the business."); Mar. 21, 2011 Houlihan Presentation (Gilmore Ex. 47) (noting that [redacted] decided not to proceed because of their unwillingness to meet SRA's expected valuation and that [redacted] withdrew, citing concerns about SRA's ability to meet its future growth projections).)

SEPTA claims that "[redacted] would have stayed in and either outbid or increased the price paid by Providence but for Kirkland." (Opp'n at 33.) But Plaintiff presents no testimony ***from*** [redacted] about [redacted] intentions or the way [redacted] was allegedly mistreated. The "production of weak evidence when strong is available can lead only to the conclusion that the strong [evidence] would have been adverse. Silence then becomes evidence of the most convincing character." *In re W. Nat'l*, 2000 WL 710192, at *19 (quoting *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939)). And that silence is all the more deafening in this case because SEPTA did not just decline to depose [redacted] to determine the validity of the theories it espouses in this litigation; ***it declined to obtain any discovery from any third***

party that bid on SRA. This Court is being asked to infer that third party bidders were somehow shunned during the SRA sale process; but SEPTA was careful in this litigation not to ask those bidders if that actually happened.

Having chosen not to depose a [redacted] representative, Plaintiff now presents a far-fetched theory that Kirkland concocted a pretextual reason to knock [redacted] out of the process. (*See* Opp'n at 33-34.) This theory is based on nothing more than a "sour grapes" letter from [redacted] chairman after he had lost the auction and Plaintiff's unsupported claim that "[t]he notion that [redacted]. . . could not satisfy closing conditions is, on its face, absurd." (*See* Opp'n at 33.) And as noted above, *see supra* at Part I.B.1, the significance of the concern about [redacted] financing contingency is confirmed by the conduct of [redacted] itself and by the judgment of sophisticated independent members of the Special Committee. And this Court has also recognized that where there is a question as to whether the "funding for the transaction [has been] arranged" by one of the bidders, "[a]n independent and disinterested board . . . is not absolutely required to treat all bidders equally." *See In re Novell*, 2013 WL 322560, at *9 (citing *In re Fort Howard Corp. S'holder Litig.*, 1988 WL 83147, at *14 (Del. Ch.)).

2. Dr. Volgenau's Conduct As A Controlling Stockholder And Director Was Entirely Fair And Did Not Violate The Duty Of Loyalty.

As set forth in his brief, Dr. Volgenau — as a stockholder — was entitled to vote his shares as he saw fit. (*See* Volgenau Br. at 23-24; *Hammons*, 2009 WL 3165613, at *14.) But even though Dr. Volgenau had the right as a controlling stockholder to block a transaction with a strategic bidder (or any bidder for that matter), there is no dispute of fact that ***he did not do so***:

- The strategic bidders who chose to meet with Dr. Volgenau after receiving diligence materials — [redacted] and [redacted] — testified that Dr. Volgenau treated them with respect and in no way deterred them from submitting a bid for SRA. (*See* [redacted] Aff.; [redacted] Aff.)
- After meeting Dr. Volgenau, [redacted] was not deterred from submitting a bid for SRA. (*See* Volgenau Dep. 168:12-169:15 (describing his meeting with [redacted] as "very positive" and testifying that he was "very favorably impressed" with [redacted]); Mar. 31, 2011 Special Committee Minutes (Gilmore Ex. 57) (reflecting [redacted] final bid).)

- Similarly, Dr. Volgenau had preliminary discussions with [redacted] and such discussions did not dissuade [redacted] from making a bid. ([redacted] Meeting Notes (Gilmore Ex. 7); Volgenau Dep. 44:9-45:2; Dec. 1, 2010 Letter from [redacted] (Gilmore Ex. 24); Klein Dep. 151:7-152:1.)

- Strategic and financial bidders — including [redacted] — chose to withdraw because of SRA's business prospects, without ever having met Dr. Volgenau. (Mar. 21, 2011 Houlihan Presentation (Gilmore Ex. 47).)

Plaintiff concedes that "the Board was generally aware Volgenau had had 'preliminary' discussions with Providence," (Opp'n at 19), but later inexplicably refers to those discussions as "secret" (Opp'n at 59), and grossly mischaracterizes the directors' testimony by claiming that "the directors testified they were ***unaware*** those discussions included providing confidential SRA information and were of a substantive nature concerning equity roll, management structure and incentives, go-shop provisions and price." (Opp'n at 19.) The cited testimony says nothing of the sort, and certainly does not rebut testimony from numerous directors that they were aware that confidential information had been provided to Providence before the Special Committee was formed and that the Special Committee encouraged Dr. Volgenau to have those kinds of conversations. (*See* SRA Br. at 5 n.5, 31 n.42 and accompanying text). Simply put, "Plaintiff[] make[s] much of the fact that [Dr. Volgenau] communicated with [Providence] prior to the formation of the Special Committee, but that does not provide an inference of bad faith." *In re BJ's Wholesale Club*, 2013 WL 396202, at *10.

Plaintiff cites market rumors and Houlihan's draft "Script for Initial Strategic Buyer Contact" (Naylor Ex. 70) to support its claim that there was a "clear message that Volgenau had fixated on financial buyers." (Opp'n at 31.) Plaintiff presents no evidence that Dr. Volgenau or the Special Committee had any responsibility for the market rumors. (*See id.*) In any event, the market rumors are rumors: second-hand gossip purportedly based on anonymous sources, and are inadmissible hearsay. (*See* Del. R. Evid. 801-802.) Houlihan's script for contacting strategic buyers speaks for itself — it is additional evidence that Dr. Volgenau's emphasis on SRA's "name, values, and culture" did not prevent the Special Committee from instructing its financial advisor to invite strategic bidders into the process. (*See* Naylor Ex. 70.)

Plaintiff also takes aim at the fact that Dr. Volgenau communicated with Dr. DiPentima after the Special Committee was formed. (Opp'n at 32.) However, as more fully set forth in Providence's Reply Brief, Dr. DiPentima's testimony about those conversations confirms that Dr. Volgenau did not breach any duty of loyalty, divulge any confidential information, or otherwise compromise the fairness of the Special Committee process.

Plaintiff claims that Dr. Volgenau made a "special concession" to Providence in agreeing to the non-recourse promissory note (*see* Opp'n at 32), but cannot rebut the fact that Dr. Volgenau also made an arguably more material "special concession" to [redacted] in agreeing to increase his rollover commitment from $100 million to $150 million. (Klein Dep. 211:16-20; Mar. 28, 2011 Special Committee Minutes (Gilmore Ex. 54).) As to Plaintiff's claim that Dr. Volgenau "took steps to undermine [redacted] bid," (Opp'n at 32), Dr. Volgenau did nothing more than [redacted] (*See* Mar. 31, 2011 Email from S. Glover to G. Stamas (Naylor Ex. 78).) Not surprisingly, Plaintiff cites no case law for the novel proposition that providing a Special Committee with publicly-available information about a matter under consideration could somehow compromise the fairness of a sale process.

Finally, Plaintiff suggests that Dr. Volgenau was somehow obligated to tell the Special Committee that the Go-Shop "was illusory" based on information Providence had provided to him a year earlier. (Opp'n at 32.) This Court has held repeatedly that go-shop periods are effective market tests, even without a pre-signing auction process like the one that occurred here. *See*, *e.g.*, *Kohls v. Duthie,* 765 A.2d 1274, 1285 (Del. Ch. 2000). Providence had no role in or control over the go-shop in this case, and the historical data that it compiled regarding go-shops does not establish that this or any other go-shop was a sham. The data that Providence compiled regarding go-shops, simply put, is beside the point.

3. Neither Dr. Sloane Nor The Other Board Members Breached Their Fiduciary Duties.

Plaintiff's half-hearted claim that Dr. Sloane — SRA's ***former*** CEO ***who left SRA after the Merger closed*** — concealed efforts to facilitate Dr. Volgenau's self-interest in a transaction with Providence defies common sense and is thoroughly rebutted by evidence cited in Plaintiff's Opposition and the SRA Defendants' Opening Brief, and does not merit additional discussion here. (*See, e.g.*, Opp'n at 10-11; SRA Br. at 5-6.) Similarly, Plaintiff's effort to prevent dismissal of Mr. Keevan and Dr. Wilensky — SRA's independent directors who did ***not*** serve on the Special Committee — from this litigation has no merit. Plaintiff cites *Sample v. Morgan*, 914 A.2d 647, 669 (Del. Ch. 2007) for the proposition that Mr. Keevan and Dr. Wilensky should be judged together with the members of the Special Committee "at this stage in the proceedings," (Opp'n at 67), but *Sample* was decided on a motion to dismiss, not a motion for summary judgment. In *Sample*, the complaint alleged facts which created an inference that the purportedly independent directors had breached their fiduciary duties, and the Court declined to dismiss them from the suit. 914 A.2d at 662, 669. That case has no bearing here, where Plaintiff's only references to the evidence related to Mr. Keevan and Dr. Wilensky demonstrate that they exercised independent judgment and due care in discharging their fiduciary duties.[14]

B. There Is No Dispute of Material Fact That The Price Of $31.25 Per Share Was Fair.

1. The Record Evidence Establishes That The $31.25 Per Share Price Falls Within The Range Of Fair Value.

There is no evidence that the merger consideration of $31.25 per share was unfair. "A fair price does not mean the highest price . . . that a fiduciary could afford." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd* 663 A.2d 1156 (Del. 1995). Instead, "[w]hen conducting a fair price inquiry as part of the entire fairness standard of review, the court asks whether the transaction

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14 *See* Opp'n at 23-24, 35 (relaying that Mr. Keevan and Dr. Wilensky opposed increasing the amount of the charitable contributions to be made in recognition of Mr. Klein's work on the Special Committee). Like the other directors and officers, Dr. Sloane, Mr. Keevan, and Dr. Wilensky shared the same economic incentives to obtain the highest price for SRA. (*See* Proxy at 61-62 (Gilmore Ex. 4).)

was one that a reasonable seller, under all circumstances, would regard as within a range of fair value." *Muoio*, 2011 WL 863007, at *16 (internal quotations omitted).

SEPTA has not — and cannot — point to *factual* evidence indicating that a "reasonable seller" would regard $31.25 as an unfair price. (*See* Opp'n at 67-71.) "The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch.). "[R]eal world valuations, including especially, valuations performed by potential third-party buyers" are "the best source of economic information about the value of a company." *Muoio*, 2011 WL 863007, at *18 (internal quotations omitted).

The real-world evidence supporting the fairness of the SRA sale price is ample and undisputed. There is no disputing that prior to the execution of the Merger Agreement, the Special Committee had contact with 31 different potential acquirers, not one of which bid more than $31.25 per share, (SRA Br. at 38-39), that, following the signing of the deal, not a single one of the fifty potential buyers that Houlihan contacted during the Go-Shop offered a topping bid, (*id.* at 39), and that withdrawing bidders made clear that one of the reasons for their decision was that they believed that the price would be too high at a time when the government contracting sector was declining, (*id.* at 12). The Opposition does not dispute that numerous third-party analysts supported the determination of $31.25 per share as a fair price and the merger was recommended by Glass Lewis and ISS. (*Id.* at 16.) All parties agree that the 52.8% premium over the unaffected trading price that SRA stockholders were paid for their shares was larger than typical in a market that has been continuing to contract to this day. (*Id.* at 41.)

2. A Disagreement Between Experts Does Not Preclude Granting Summary Judgment.

Instead of relying on factual evidence, Plaintiff hinges its fair price argument on an expert, suggesting that a battle of the experts in and of itself precludes a grant of summary judgment — no matter what the experts may say or how far afield their opinions may be from the factual record in the case. (*See*

Opp'n at 68-71.) Courts have not taken such a blanket approach. Instead, courts have readily granted summary judgment where the record evidence reveals no genuine issue of fact for trial, even though experts may disagree. *See Daniels v. State*, 120 F. Supp. 2d 411, 427 (D. Del. 2000) ("[T]o the extent that Plaintiff and Defendant's experts disagree . . . , the Court concludes that this disagreement is insufficient as a matter of law to preclude summary judgment."); *see also Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv*., 1996 WL 506906 (Del. Ch.), *aff'd*, 692 A.2d 411 (Del. 1997) (TABLE) (considering parties' competing valuation expert reports and granting motion for summary judgment); *McLaughlin v. Dover Downs, Inc.*, 974 A.2d 858, at *2 (Del. 2009) (TABLE) (affirming trial court's holding that expert's opinions "lack[ed] sufficient probative value to raise a genuine issue of material fact." (internal quotations omitted)). If a disagreement between expert witnesses was the only hurdle to overcoming summary judgment, all non-movants would introduce expert opinions for such a purpose. Instead of litigation-generated opinions, this Court should look to the ***facts*** demonstrating that $31.25 per share was a fair merger price here, which as noted above, are ***undisputed***. (*See* Section II.B.1, *supra*.)

3. The Valuation Opinion of Plaintiff's Purported Expert Does Not Undercut the Fairness of the Merger Consideration.

Even if the Court considers the opinions offered by Plaintiff's purported valuation expert, SEPTA fares no better in defeating summary judgment. As demonstrated in Exhibit 1 to the SRA Defendants' Motion for Summary Judgment, Mr. Hurley's opinion is an off-the-charts valuation that, at $41 to $45 per share, ***is at least 34% higher than any actual bid for SRA and reflects a mammoth 110% premium (or greater) over SRA's unaffected stock prices.*** Mr. Hurley's opinion implies that dozens of potential buyers who previously looked into acquiring SRA left nearly $600 to $840 million in value on the table by not making a topping bid over Providence. (*See* Cornell Rebuttal Report at 6 (Gilmore Ex. 78).) This "extreme variation from the pack" renders Mr. Hurley's analysis unreliable, *see Muoio*, 2011 WL 863007, at *19 (internal quotation omitted); *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, at *7-8 (Del. Ch.), and cannot plausibly question the fairness of the merger consideration here.

While Plaintiff quibbles with Professor Cornell's approach, (*see* Opp'n at 68-70), such criticisms are an attempt to divert the Court from Plaintiff's inability to defend Mr. Hurley's approach. First, Mr. Hurley abandoned opinions in his report, such as (1) the value of SRA would be $2 per share higher if tax benefits of amortizing goodwill were taken into account, and (2) that the auction process was tainted, or as he termed it, "window dressing." (*See* SRA Br. at 43.) Second, Mr. Hurley fails to "triangulate a value range" in accordance with Delaware law, *Muoio*, 2011 WL 863007, at *20; *Gray*, 2002 WL 853549, at *7, thereby skewing his valuation results. (*See* SRA Br. at 44.) Third, Mr. Hurley skews his precedent transactions and DCF analyses so as to render his valuation meaningless. (*See id.* at 45.) In his precedent transactions analysis, Mr. Hurley uses software companies instead of federal government contractors to assess the acquisition price for SRA (a company with approximately 1% of its revenues from software sales) — a mistake made all the more apparent by the downturn in the federal contracting market that was starting to take effect in 2011 and continues to this day. (*See* Jim Tankersley & Marjorie Censer, *General Dynamics Blames $2 Billion Loss On Defense Cuts*, Washington Post, Jan. 23, 2013 (Gilmore Ex. 85; Ylan Q. Mui, *Economy Shrinks As Federal Spending Cuts Trump Private Sector's Growth*, Washington Post, Jan. 30, 2013 (Gilmore Ex. 86.).) And in his DCF analysis, Mr. Hurley decided not to apply a size premium, contrary to commonly-accepted valuation practice, a decision which on its own accounts for a significant portion of Mr. Hurley's inflated valuation conclusion. (*See* SRA Br. at 45-46.) Overall, Mr. Hurley's valuation conclusions are not based on credible evidence that could create a material of issue of fact.

Plaintiff also seems to take issue with the Special Committee's financial advisor, Houlihan, for changing its valuations during the course of the auction process. (*See* Opp'n at 50-52, 70.) However, "revisions" to a financial advisor's analyses over time "are not inherently wrongful" and do not suggest a breach of fiduciary duty. *See In re Novell*, 2013 WL 322560, at *12. Rather, the evidence showed that Houlihan had good reasons for making changes it did to its analyses, such as ensuring that appropriate

comparable government contractors were included in its valuations. (*See* Schwickerath Dep. 83:10-13 (Naylor Ex. 13).)[15]

III. THE SRA DEFENDANTS AND DR. VOLGENAU DID NOT BREACH ANY DUTIES BY AGREEING TO HAVE DR. VOLGENAU PAID, IN PART, IN NON-CASH CONSIDERATION.

A. The Non-Cash Consideration Paid To Dr. Volgenau Had Equal Per-Share Value To The $31.25 Cash Consideration And Is Protected Under The Business Judgment Rule.

The SRA Defendants' decision to calculate the cash and non-cash consideration in this Merger according to the same $31.25 per share price, in compliance with the SRA charter, is fully protected by the business judgment rule. Plaintiff's Opposition effectively concedes that if $31.25 is a fair price, then Dr. Volgenau received equal consideration to that of minority stockholders. (*See* Opp'n at 79 (arguing that Dr. Volgenau's roll-over equity was worth more than $31.25 "because the Volgenau roll-over shares were pegged to the Merger price of $31.25 per share but the actual fair value of SRA shares was greater than $31.25").) SEPTA assumes public stockholders have been underpaid in order to reach the conclusion that Dr. Volgenau was overpaid.

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[15] Similarly, Mr. Hurley's attacks on Professor Cornell's valuation opinion are not evidence of unfairness. Instead, such criticisms are baseless and often have little practical impact. For example, Plaintiff attempts to gin up a potential issue of material fact based on Professor Cornell's use of a valuation date as of execution of the merger agreement as opposed to consummation of the Merger (*see* Opp'n at 48, 68). However, in non-appraisal actions, damages are determined by measuring the value "the board would have approved absent a breach of duty," which as alleged in Plaintiff's operative Complaint, would be when the merger agreement was executed. *See, e.g.*, *Ryan v. Tad's Enterprises, Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996), *aff'd*, 693 A.2d 1082 (Del. 1997); (2d Am. Compl. ¶ 1). But even putting the law aside, the different valuation dates here "do not make a meaningful difference in terms of the overall valuation conclusions." (*See* Cornell Rebuttal Report at 30 (Gilmore Ex. 78).) If anything, Prof. Cornell's DCF valuation would have ***decreased*** as of the date of consummation of the Merger. (*See id.* at 30-31.) In addition, Prof. Cornell's DCF assumptions, such as his inclusion of a size premium, are supported by Delaware law and certainly do not establish evidence of unfairness. *See, e.g.*, *Cede & Co. v. JRC Acquisition Corp.*, 2004 WL 286963, at *8 (Del. Ch.). Finally, Plaintiff's allegation that Prof. Cornell's precedent transactions and comparable companies analyses are inappropriate, (*see* Opp'n at 48), is remarkable, given that Mr. Hurley does not even perform a comparable companies analysis and relies on companies outside of the government contracting sector.

There is no dispute that the non-cash portion of Dr. Volgenau's stock was calculated using precisely the ***same*** per share price as the cash consideration that was paid to ***all*** stockholders (including Dr. Volgenau) in this Merger. (Proxy at 57 (Gilmore Ex. 4); Hurley Report at 64-65 (Gilmore Ex. 79); 2d Am. Compl. ¶ 76.) As such, the payments complied with SRA's charter requirement that Class A and Class B Stockholders receive "equal per share payments or distributions," a clause which permits merger consideration of different forms so long as payments are of equal value. (*See* May 29, 2002 Am. & Restated Certificate of Incorporation, Article 4, Section A.9 (Gilmore Ex. 81); Volgenau Br. at 27-31.) Tellingly, Plaintiff does not argue that "equal" must mean "identical in form." In fact, SEPTA hardly addressed the language of the charter provision at all, simply concluding in a footnote that the language is "clear and must be given its plain meaning." (*See* Opp'n at 79 n.377.)

Moreover, there can be no evidence-based dispute that Defendants acted with "good faith and in the honest belief that [their] actions were in the stockholders' best interests" in approving the payment of non-cash consideration to Dr. Volgenau that the business judgment rule requires. *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1033 (Del. Ch. 2012) (internal quotation omitted). Plaintiff can point to no factual evidence that Defendants acted with "conscious" disregard of the charter — conduct this Court suggested is necessary for breaches of the duty of loyalty. *Se. Pa. Auth. v. Volgenau*, 2012 WL 4038509, at *3 n.16 (Del. Ch.) (citing *Hampshire Grp., Ltd. v. Kuttner*, 2010 WL 2739995, at *2 (Del. Ch.) for the proposition that "consciously" causing the corporation to violate the law may constitute a breach of loyalty). For example, there is no evidence demonstrating that Dr. Volgenau sought, or the SRA Defendants approved, a premium to be paid to Dr. Volgenau as the controlling stockholder of SRA.[16] If

[16] *Cf. In re Delphi Fin. Grp. S'holder Litig*., 2012 WL 729232 (Del. Ch.) (finding a claim stated against defendants for amending a charter to permit payment of a control premium to a controlling stockholder).

anything, the consensus among SRA directors was precisely the opposite: that Dr. Volgenau receive a worse deal than other stockholders.[17]

The SRA Defendants' "good faith" and "honest belief that [their] actions were in the stockholders' best interests" is confirmed by Dr. Volgenau's willingness to take risk-bearing non-cash consideration for a portion of his shares, which allowed [redacted] and Providence to ***increase*** the price per share of cash payments to SRA stockholders. There are two significant facts that Plaintiff does not meaningfully dispute. ***First***, Dr. Volgenau increased his rollover commitment from $100 million to $150 million for both Providence and [redacted] in order to keep both potential buyers — especially [redacted] — in the bidding process.[18] Dr. Volgenau was particularly "enthusiastic about continuing the dialogue" with [redacted] if "their price was right." (Volgenau Dep. 164:21-23, 169:13-15.) The Special Committee members recognized that Dr. Volgenau's rollover would greatly benefit the minority stockholders, noting that generally, a controlling stockholder's rollover participation in a leveraged buyout is "something that the buyer[] insist[s] on," which "help[s] the rest of the shareholders, not vice versa." (Gilburne Dep. 86:13-24.) That is why Mr. Klein credited Dr. Volgenau's willingness to receive non-cash consideration with ***increasing*** the cash consideration received by public stockholders by between $.75 and $1.25 per share. (Klein Dep. 213:9-24.)

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17 *See*, *e.g.*, Gilburne Dep. 202-203 ("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 . . . because he was getting a promissory note that was highly risky to the tune of 30 million."); Mar. 30, 2011 Meeting Minutes (Gilmore Ex. 55) ("The special committee . . . concluded that the arrangement was structured to require Dr. Volgenau to bear the downside risk of any failure . . . to realize sufficient proceeds from the disposition of [Era and GCD].").

18 *See* Volgenau Dep. 173:19-24 ("There was one additional concession requested through the special committee to me, and that consisted of the amount that I would roll over into either entity, whether it was [redacted] or Providence, and both parties wanted me to roll over $150 million worth of my stock."); Klein Dep. 211:13-24 (noting that because the $100 million rollover "didn't work for [redacted]," Mr. Klein went to Dr. Volgenau to "persuade[] him to consider increasing his commitment . . . , which enabled [redacted] to proceed in the bidding process").

Second, the fact that Dr. Volgenau agreed to a $30 million non-recourse promissory note similarly pushed the bidding price higher, allowing Providence to bid at least "50 cents more per share." (Richardson Dep. 161:7-17; *see also* Mar. 30, 2011 Special Committee Meetings Notes (Gilmore Ex. 55).) The note was a "rotten deal" for Dr. Volgenau, giving him "no upside but only a risk," as it was contingent upon the sale of two largely unsuccessful SRA subsidiaries. (*See* Volgenau Dep. 170:13-171:13; Klein Dep. 213:21.) Yet, "his willingness" to agree to the guarantee resulted in a higher price for stockholders. (Klein Dep. 213:19-24.) Plaintiff does not dispute this course of dealing evidence; instead, Plaintiff ignores this uncontroverted evidence altogether. (*See* Opp'n at 77-80.) Understandably, the Opposition does not argue that Dr. Volgenau's non-recourse promissory note was as valuable as the equivalent in cash, *id.*, since the loan is likely to cost Dr. Volgenau at least $13 million. (*See* May 10, 2012 SRA International, Inc. Amended Form S-4 at 40 (Gilmore Ex. 87).)

At bottom, then, SEPTA's claim — unsupported by citation to evidence — that "the SRA Board members made no effort to comply with the Certificate of Incorporation in approving the Merger," (*see* Opp'n at 80), does not withstand scrutiny. By negotiating top dollar for SRA and calculating the consideration to be paid to SRA Class A and Class B stockholders according to that price, the SRA Defendants did comply with the SRA Charter. The Board's decision to treat Dr. Volgenau's non-cash consideration and cash payments equally is entitled to the same deference this Court affords other business decisions that are subject to the "robust procedural protections" that were utilized in this case.

B. The Charter-Based Claim Fails Because Plaintiff Has Not Adequately Demonstrated Damages.

The other critical infirmity with Plaintiff's charter-based claim is its reliance on litigation expert testimony to the exclusion of contemporaneous fact evidence. It is Plaintiff's burden to prove that it has suffered damages. *See Se. Pa. Transp. Auth. v. Volgenau*, 2012 WL 4038509 (Del. Ch.). SEPTA cannot meet that burden here. ***First and foremost***, the evidence is not meaningfully in dispute that Dr.

Volgenau's willingness to accept non-cash consideration *increased* the per share cash payments to minority stockholders. (*See* Part III.A, *infra*.)

Second, SEPTA relies entirely on Mr. Hurley's flawed valuation that Dr. Volgenau's rollover shares were not worth $31.25 but rather "at least $65.51 per share," (*See* Opp'n at 53, 79),[19] a theory that ignores the most probative, factual evidence and "real world valuations" of SRA. *Muoio*, 2011 WL 863007, at *18. If true, the record would show that Dr. Volgenau bargained aggressively to get the highly valuable new SRA shares and that Providence resisted. But the opposite is true. Dr. Volgenau was reluctant to roll over his shares, but decided to do so in order to allow Providence and [redacted] to bid higher. (*See* Section IV.A, *supra*.) And it worked. SRA's stock had been trading in the $20 range before any takeover speculation began, meaning that the $31.25 purchase price represented a ***52.8% premium***, a premium that is indisputably higher than average. (SRA Br. at 39.) To suggest that shares trading in the mid-$20s should actually be worth $40 or $50 more is irreconcilable with "objective market reality." *See Van De Walle*, 1991 WL 29303, at *17. Mr. Hurley's opinion that Dr. Volgenau obtained value by the mere fact that his percentage interest in the new privatized SRA was higher than the percentage he held in the Company prior to the Merger, (*see* Hurley Report at 7 (Gilmore Ex. 79)), is not tied to the real world. Mr. Hurley's calculations implying that somehow Dr. Volgenau's stake in the new company was worth more than the shares that he rolled over "is entirely dependent on erroneously inflating the value of SRA shares to $41 to $45 at the time of the transaction," (Schwickerath Rebuttal Report at 31(Naylor Ex. 18)), and it fails for the same reason.

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19 Mr. Hurley actually theorized that Dr. Volgenau's shares were worth ***up to $73 per share***. (Hurley Report at 67-68 (Gilmore Ex. 79).) Likely in an effort to downplay the patent unreasonableness of this conclusion, Plaintiff characterizes Mr. Hurley's opinion as valuing the shares at "at least $65.51." (Opp'n at 53.)

CONCLUSION

For these reasons, the SRA Defendants' Motion for Summary Judgment should be granted.

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