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Case No. 20213-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN A. GENTILE, VICTORIA S. CASHMAN, BRADLEY T. MARTIN, JOHN KNIGHT, and DYAD PARTNERS, LLC,	)	C.A. No. 20213–VCN
Plaintiffs,	)	
v.	)	
PASQUALE DAVID ROSSETTE, and DOUGLAS W. BACHELOR,	)	
Defendants.	)	

<u>PLAINTIFFS' POST-TRIAL REPLY BRIEF</u>

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INTRODUCTION

"[I]t is hard to imagine more faithful fiduciaries than Mr. Rossette and Mr. Bachelor" (AB 17).[1] So defendants would have this Court believe. The reality is very different.

Confronted by a slew of damning documents (largely authored by one or both of them) that portray a SinglePoint on the brink of success in the spring of 2000, defendants in their answering brief dodge and twist and weave to try to avoid the consequences of those documents. Of course, defendants cannot quite admit that the statements in those documents are "lies" or "not the truth,"[2] so they resort to many of the same euphemisms they employed at trial–they were merely "puffing" (AB 17 n.9), being "corporate cheerleaders, who must keep their team's spirits up when Company is under stress" (AB 16) (emphasis in original), using a "morale building technique" (AB 16), and "keeping up a brave front" (AB 18). All of these euphemisms, of course, are merely ways to avoid what defendants really don't want to say–that they have adopted a "believe-me-now-I-was-lying-then" defense.[3] *See ATR-Kim*

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[1]Defendants' Post-Trial Brief (Transaction ID 20247597) is cited as "AB."

[2]Indeed, defendant now make the brash claim that "Mr. Rossette never lied to anyone" (AB 2). For Mr. Rossette's testimony to the contrary (*see* OB 1-2). Of course, defendants also claim that their story is "corroborated by the hard facts, the documents in evidence and extensive testimony from third-party witnesses" (AB 3) and then rely, in the critical areas, almost exclusively on the document-free trial testimony of Mr. Rossette (occasionally supported by the equally document-free testimony of Mr. Bachelor).

[3]Although defendants purport to dismiss the cases concerning fee shifting as not being applicable here (AB 49), they no doubt realize that, if they confess to lying in corporate documents, they will be in real danger of having fees awarded against them (OB 43-49).

Eng Fin. Corp. v. Araneta, 2006 WL 3783520, at *7 (Del. Ch.), *aff'd* Del. Supr., 930 A.2d 928 (2007) (Table) (attached to OB Compendium at Tab 3). All of these also indicate that defendants do not know the difference between the truth and a lie.

Defendants describe the most dramatic of Mr. Rossette's trial claims–that he ordered SinglePoint's bookkeeper, Deborah Rapsis, to deliberately falsify SinglePoint's accounts receivables--as something anyone would have done under the circumstances (*see* AB 1–"desperate times call for desperate measures"). According to them, Mr. Rossette merely "t[oo]k money out of [Rossette's] other business, in the form of cash transfers booked as 'revenues,' to keep the sinking ship afloat a little longer" (AB 1; *see also* AB 38 ("[Mr. Rossette] had to account for the fact [the money] was coming from LeaseNet's accounting system and not a loan from me, *and there was no other explanation for it*" (emphasis added)). Of course, Mr. Rossette never explained why these funds could not have been booked as a loan from LeaseNet, which would seem to be the obvious solution and would have the added advantage of being true.[4] In addition, as Rebecca Kirk explained at trial (Tr. 554-55; 645-46), the SinglePoint financial records are not consistent with Mr. Rossette's testimony, because fabricating an accounts receivable entry only creates fictitious revenue, and does *not* help put cash into the Company.

As we explained in our opening post-trial brief (OB 1 n.1), the only rational

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[4]We are aware that, in defendants' world, it is actually *plaintiffs'* counsel and expert witness who are at fault here, for not earlier discerning Mr. Rossette's alleged "book cooking" and thus forcing him to have to embarrassingly testify about it at trial (*see, e.g.,* AB 38-45). Although we consider this argument to be non-sensical, defendants spend an enormous portion of their brief on it, and thus we analyze it *infra* p. 15-20.

reason for this behavior (assuming it is true) was that Mr. Rossette was trying to deceive someone into believing that SinglePoint's financial situation was better than it actually was. Who that was–S&P, SinglePoint's employees, potential acquirers of SinglePoint–is unknown at this point, and not necessary to determine. What is important is that Mr. Rossette, by his own testimony, does not think it important to limit his statements to the truth. This Court should consider all his testimony in this light.[5]

Another example of defendants' squirming is their attempted explanation of JTX 172, an e-mail of June 18, 2000 from Mr. Rossette to Dan Connell at S&P, which defendants correctly claim "encapsulates the situation nicely" (AB 18). In this e-mail Mr. Rossette told S&P that (1) "things are going very well on our side," (2) "the team is focused and making progress every day," (3) "new prospects are surfacing," and (4) "we have two very interested partners (one letter of intent in hand)" (OB 1, 16-17). At trial, Mr. Rossette testified that he had not been telling S&P the truth here (OB 17).

Mr. Rossette now calls plaintiffs "absurd" for trying to "make even this out at some sort of lie" (AB 18). Instead, Mr. Rossette claims that he was merely "keeping up a brave front even as the Company was within two weeks of missing payroll and collapsing" (AB 18). Of course, he never explains why it was okay to misrepresent to S&P the situation at SinglePoint while simultaneously "begging [S&P] for money he needs to make payroll

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[5]Also surprising is defendants' obvious discomfort with the adjectives we used to describe this act (AB 39). The most serious–that the March 2000 listing of receivables for SinglePoint was "materially false and fraudulent" with respect to E-Invest--was specifically adopted by Mr. Rossette during his re-direct testimony (Tr. 300).

on June 30, 2000" (as Mr. Rossette now claims he was doing in JTX 172) (AB 18).

The final example is something on which plaintiffs spent considerable time in the opening brief, yet defendants ignore almost entirely. At trial, Mr. Rossette claimed that a Feb. 17-19, 2000 e-mail exchange with James Radebaugh (SinglePoint's secretary) in which he agreed to raise the exercise price for SinglePoint's stock from .50 to.75 per share (JTX 125), "contains a series of misrepresentations" (OB 1, 10-11). He also claimed that the increase in price was actually agreed to on January 1, 2000 and that SinglePoint had deteriorated drastically since then, but when questioned by the Court about language in the e-mail inconsistent with this testimony, Mr. Rossette's response ranged from non-sensical to incoherent (OB 11-12).

Defendants never try to defend any of this testimony in their answering brief. Instead, they claim that plaintiffs make too much of JTX 125. They argue that the agreement to raise the exercise price of the stock options meant nothing because they were not indicative of fair market value (AB 16-17) despite Mr. Radebaugh's later statement to employees (in JTX 128) that the increase to $.75 reflected "the positive progress of the company and the increase in shareholder value" (OB 10).[6] Defendants explain that Messrs. Rossette and Bachelor were just being "corporate cheerleaders," trying to keep up

[6]While defendants now claim that the increase in the stock option exercise price was meaningless because they did not perform any "valuation work" (AB 16), just five pages earlier they acknowledge that defendants were "intimately familiar with SinglePoint's financial condition" and were "intimately involved in the day-to-day operation of the company" (AB 11, quoting Tr. 51 (Rossette)). This intimacy certainly gave them the ability to know what SinglePoint was worth, and defendants never denied that at trial.

employees' morale; that it "would have been reckless indeed to tell the Company's employees just how close to failure the Company was" (AB 2, 16-17). Completely apart from the lack of morality shown here,[7] the explanation makes no sense with respect to JTX 125, because it *was not shared with SinglePoint's employees*–it was solely between Mr. Rossette and his friend, Mr. Radebaugh.[8]

ARGUMENT

I. Mr. Bachelor Was Not a "Well-Functioning" Special Committee

As defendants acknowledge, this Court previously determined that they bear the burden of showing the entire fairness of the challenged transactions (AB 24). In denying defendants' motion for summary judgment, this Court rejected their argument that the merger was approved by an independent director, Mr. Bachelor, because he:

> apparently had no independent sources of assistance (legal or financial) to assist him. Because of Rossette's status - controlling shareholder, director, creditor - the ability of Bachelor alone to preserve the interests of the minority shareholders was limited.

Gentile v. Rossette, 2005 WL 2810683, at *8 (Del. Ch.) (attached to OB Compendium at Tab 7). Defendants now ask the Court to revisit this issue and shift the burden of proof to

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[7]According to defendants, it was better to mislead SinglePoint's employees so they did not look for a new job, and thus would be completely surprised when they are laid off.

[8]Defendants also claim that no options were issued at that price (AB 16-17). This appears to be untrue, because the employees whose hiring started the whole e-mail exchange, Messrs. Ciarica and Duldulao, were option holders by April 5, 2000 (JTX 150). Given that they were only hired in January and February 2000, and neither had options as of February 19, 2000 (JTX 125), their options almost certainly were issued at $.75 per share.

plaintiffs, claiming that "[t]he evidence at trial has proved that Mr. Bachelor was an independent, disinterested, fully informed director," and that he essentially acted as a committee with respect to the Debt Conversion and the Cofiniti merger (AB 24-25). Despite their rhetoric, defendants point to no evidence that Mr. Bachelor fulfilled such a role.

The law in Delaware is clear–if a controlling stockholder (such as Mr. Rossette indisputably was here) can show that a transaction was approved by a truly independent special committee, the burden will shift to the challenger to prove that the transaction was not entirely fair. R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations,* § 4.16[A] at 4-120 (3d ed. 2008 Supp.) ("Balotti & Finkelstein"), citing *Kahn v. Lynch Commc'n Sys., Inc.,* Del. Supr., 638 A.2d 1110, 1117 (1994); *see also Kahn v. Tremont Corp.,* Del. Supr., 694 A.2d 422, 428 (1997). "The 'mere existence' of a special committee will not shift the burden, however." Balotti & Finkelstein, § 4.16[A] at 4-120 - 4-121. To obtain the benefit of burden shifting, the defendant "must do more than establish a perfunctory special committee of outside directors" (*Kahn v. Tremont,* 694 A.2d at 429); he must establish "the use of a *well functioning committee* of independent directors." *Id.* at 428 (emphasis added).

For a "well functioning" committee to exist, two factors are required: "(1) "the majority shareholder must not dictate the terms of the transaction and (2) the special committee must have real bargaining power that it can exercise with the majority shareholder on an arms length basis." Balotti & Finkelstein at 4-121, citing *Kahn v. Lynch,* 638 A.2d at 1117. *See also Kahn v. Tremont,* 694 A.2d at 429 (the "committee must function in a manner

which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power 'at an arms-length'"). "Particular consideration must be given to evidence of whether the special committee was truly independent, fully informed, and had the freedom to negotiate at arm's length." Balotti & Finkelstein at 4-121, *quoting Kahn v. Lynch,* 638 A.2d at 1120-21. *See also Kahn v. Tremont,* 694 A.2d at 430 ("It is the care, attention and sense of individual responsibility to the performance of one's duties . . . that generally touches on independence") (citation omitted); *Rabkin v. Philip A. Hunt Chem. Corp.,* Del. Supr., 498 A.2d 1099, 1106 & n.7 (1985) (implying that the burden on entire fairness would not be shifted to plaintiff by the use of an independent committee which concluded its processes with "what could be considered a quick surrender'" to the dictated terms of the controlling stockholder).

If a special committee is not sufficiently independent, the defendants bear the burden of proving entire fairness. Balotti & Finkelstein at 4-121, *citing Kahn v. Tremont,* 694 A.2d at 430.[9] Moreover, where the special committee consists of a single member, "the member should, like Caesar's wife, be above reproach." *Kahn v. Tremont,* 694 A.2d at 430.

Here, SinglePoint's board (which consisted solely of defendants) never formed any sort of committee either with respect to the Debt Conversion or the Cofiniti Merger, and thus never gave Mr. Bachelor any power to deny Mr. Rossette whatever he wanted. In their after-the-fact attempt to create such a committee, defendants note that Messrs. Bachelor and Rossette had no relationship prior to their involvement in SinglePoint

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[9]None of the cases cited by defendants (AB 24-26) disagrees.

and have not maintained a business or personal relationship since the end of SinglePoint (AB 24). However, they never attempt to explain what evidence refutes this Court's prior finding that Mr. Bachelor had no resources to function as an independent committee in the face of Mr. Rossette's control over the transactions. Given Mr. Bachelor's trial testimony (which conceded these points–Tr. 357-58), their silence is understandable. Indeed, in discussing the Debt Conversion, defendants *emphasize* that Mr. Bachelor had no resources to obtain independent advice (AB 11-15).

Defendants offer no specifics as to what Mr. Bachelor did in his alleged role as an independent and informed negotiator regarding the Debt Conversion;[10] indeed, by describing him as an "inexperienced" director (AB 12), they leave the definite impression that he did not know what he was doing. The record supports this impression--Mr. Bachelor did not know there was a previously agreed contractual conversion rate of $0.50 per share when he agreed to allow Mr. Rossette to convert at $0.05 per share (*compare* OB 13 *with* AB 11-15). How can one effectively negotiate when one does not know that his adversary is contractually committed to a conversion price *ten times* what he is now demanding? Defendants' silence here can only mean that they cannot think of an answer.

Similarly, defendants cite no evidence establishing that Mr. Bachelor negotiated anything on behalf of anyone with respect to the Cofiniti merger (*see* AB 11-15, 18-23). Indeed, their own description of the merger negotiations is all about what Mr.

[10]For example, there is no documentary support for *any* negotiations concerning the conversion price, and Mr. Rossette's newly-found memory of some negotiations is directly at odds with his deposition testimony (OB 12-13).

Rossette did, with Mr. Bachelor described as agreeing because times were desperate (AB 18-23). This does not sound like a "well-functioning" committee.

Defendants also argue that Mr. Bachelor's approval of the transactions, even if he did not act as a well-functioning special committee, must mean that defendants' story at trial is true, and their contemporaneous documents are false (AB 25-26). Why else, they ask, would Mr. Bachelor have agreed to the Debt Conversion? Well, one obvious reason is that he had little choice–Mr. Rossette could have elected whoever he wanted as a director (Tr. 357). Moreover, Mr. Bachelor was well-rewarded for his generosity to his boss–Mr. Rossette gave him an additional 340,696 post-reverse split shares of stock (equivalent to 3,406,960 pre-reverse split shares) prior to the merger, plus options for another 214,944 shares (2,149,440 pre-reverse split) (JTX 195), making him by far the second largest stockholder in the Company.[11]

Defendants also ask why, if the S&P deal was as good as they described it in their contemporaneous documents, SinglePoint did not thereafter succeed (AB 25).[12] Well, we don't know–perhaps management was poor, perhaps the market crash cut off the necessary funding, perhaps the timing of the product was wrong. But what is clear from the

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[11]*Compare* JTX 195 (showing Mr. Bachelor with 452,946 shares as of October 16, 2000) *with* JTX 150 (showing him with 112,250 (post-reverse split) shares as of April 5, 2000).

[12]In their section "Facts Proven at Trial," defendants claim that the date of an e-mail (JTX E, Ex. 2) "confirms the Defendants' account of the timing of the discussions between Mr. Rossette and Mr. Connell" (AB 9). The *substance* of the e-mail, however, confirms that even in January, S&P was seriously considering "paying $500,000 to SinglePoint as an advance on royalty"–precisely what they ended up doing.

chronology is that all the things they mention–Mr. Loch's departure, SinglePoint looking for a buyer, and SinglePoint's request for additional funds–indisputably occurred *after* the March Debt Conversion.[13] It is also indisputable that S&P *was* interested in SinglePoint's future–in May 2000 S&P's internal documents continue to show enthusiasm for SinglePoint's product ("S&P has an opportunity to lead the market with cutting edge web-based services as part of Advisor Insight for the Retail Market through a partnership with SinglePoint") (JTX E (Del Johnson Dep.) at Ex. 9), in June 2000 Mr. Connell offered Mr. Rossette an additional $400,000 in financing (JTX 172), and in September 2000 S&P renewed its option to purchase SinglePoint stock (adding an option to acquire Cofiniti stock should the Merger go through) (JTX 210 at Tab 31).

II. SinglePoint's Certificate of Incorporation Does Not Shield Defendants From Liability

While SinglePoint's Certificate of Incorporation contains a limitation of liability clause authorized by 8 *Del. C.* § 102(b)(7), that does not help defendants here. As they acknowledge, such a provision does not shield a director from violations of his duty of loyalty or from acts not performed in good faith (AB 29). Because Mr. Rossette indisputably stood on both sides of the challenged transactions, his duty of loyalty is implicated, and thus this provision has no application to him (AB 29-30).

While Mr. Bachelor was not personally interested in the transactions, he did

[13]Mr. Loch did not leave until June 2, 2000 (JTX 169 at A0429), SinglePoint did not start looking for a buyer until late June (Tr. 260-61), and the request for additional funds from S&P also occurred in June (JTX 172).

not act in good faith in trying to protect the minority stockholders, and thus he too is not protected by the certificate's exculpatory provisions. As explained above, Mr. Bachelor made no real effort to stop Mr. Rossette's plundering of the Company, never knew that the documents being re-negotiated in the Debt Conversion contained a conversion rate and never learned what benefits in the Merger Mr. Rossette had designated for himself. A fiduciary cannot honor his duties to a Delaware corporation by stepping aside and giving the corporation's controlling stockholder free reign over the enterprise. *See ATR-Kim Eng.,* 2006 WL 3783520, at *19 ("Under Delaware law, it is fundamental that a director cannot act loyally towards the corporation unless she tries–*i.e.*, makes a genuine, good faith effort–to do her job as a director. One cannot accept the important role of a director in a Delaware corporation and thereafter consciously avoid any attempt to carry out one's duties.").

III. Defendants Did Not Show that Either Transaction Was Entirely Fair

Defendants' chief liability argument is that, given the circumstances in which SinglePoint found itself, they did the best they could, and thus should not be found liable for their disloyal behavior (AB 26-29). This argument is flawed in numerous respects.

First, no case cited by defendants, and none of which we are aware, holds that a fiduciary's duty of loyalty (including his duty of good faith) is dependent on the circumstances in which a company finds itself. Indeed, the law is to the contrary. *See, e.g., Adlerstein v. Wertheimer*, 2002 WL 205684, at *11 (Del. Ch.) (attached as Ex. A) ("[defendants] argue that SpectruMedix's dire financial circumstances and actual or

impending insolvency justify their actions because, they believe, it was necessary to keep [plaintiff] uninformed in order for them to 'save the Company.' . . . I conclude that these facts do not alter the outcome of the case. *Quite the opposite, it is in such times of dire consequence that the well established rules of good board conduct are most important*."). Second, while defendants complain repeatedly that it is "entirely unfair" to hold them to any sort of recognizable fiduciary standards (AB 27),[14] they never focus on the critical issue with respect to the Debt Conversion: Mr. Rossette *already* had a contractual ability to convert his debt at $.50 per share and *no one* was forcing him to convert at any other price.[15] Delaware fiduciary law is quite simple–if you are a controlling stockholder and want to be on both sides of a transaction, don't get greedy, or you will be found liable. *See, e.g., Bershad v. Curtiss-Wright Corp.*, Del. Supr., 535 A.2d 840, 845 (1987) ("[w]hen a majority shareholder stands on both sides of a transaction, the requirement of fairness is 'unflinching' in its demand that the controlling stockholder establish the entire fairness of the undertaking," thus requiring the controlling stockholder to deal fairly and to pay a fair price). Mr. Rossette got greedy, Mr. Bachelor did nothing to stop him and neither should be allowed to complain that judicial scrutiny of their actions is "unfair."

Third, although defendants claim that they did "the best they could" with

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[14]Where they scoff at the need for separate legal counsel, a legitimate fairness opinion and the manner in which they negotiated the Cofiniti Merger.

[15]While the theoretical basis for the Debt Conversion was the need to clean up the balance sheet, *no one* required Mr. Rossette to do it at any particular price. That was entirely his decision.

respect to the Debt Conversion (AB 14), they cannot explain why, when informing the stockholders that the Debt Conversion had occurred, they did not tell them at what *rate* the debt was converted or how *many* tens of millions of shares had just been given to Mr. Rossette (AB 13-14).[16] Indeed, defendants apparently purposely did not tell stockholders about the conversion rate, explaining that they "acted in the shadow of on-going litigation with Mr. Gentile, knowing full well that he would scrutinize the transaction" (*id.*). So they kept quiet about the critical details because they knew they were going to be closely watched here? This explanation is either non-sensical or a classic acknowledgment of guilt.

Next, with respect to the Merger, defendants claim the price "was also entirely fair, even miraculous" (AB 28). Plaintiffs, however, do not argue with the overall purchase price, but rather with the $1.8 million "put" option that Mr. Rossette alone received. While there is testimony that Mr. Rossette received this put as a creditor, once again the contemporaneous documents tell a different story.

The Repurchase Agreement confirms that it was given to Mr. Rossette, as "the Principal Stockholder," as a "material inducement" for him to cause SinglePoint to enter into the merger transaction (JTX 188 ¶ C). The Information Statement sent to SinglePoint's stockholders in connection with the merger has a heading "Interests of Persons in the Merger other than as Stockholders," which states "stockholders of SinglePoint should be aware that certain directors and officers of SinglePoint have interests in the merger in addition to their

[16]Lacking such an explanation, defendants stick to the theme of their brief--blame plaintiffs for everything–here for failing to ferret out the massive dilution.

investments as stockholders" (JTX 210 at Tab 17). Although this is the obvious place to tell the stockholders about the "put" agreement, if it actually was given to Mr. Rossette in his status as a creditor, it is nowhere mentioned.[17]

Finally, defendants also list the various burdens Mr. Rossette was required to bear to get the Merger completed (AB 28-29). What they don't tell this Court is that: (1) Mr. Rossette either was paid in cash at closing for these payments or had these amounts included in the consolidated promissory note assumed by Cofiniti in the Merger (JTX 210 at Tab 2); (2) Mr. Rossette would have remained as a guarantor of these obligations no matter what; (3) Cofiniti paid Mr. Rossette approximately $355,000 in cash at closing to cover most of his out-of-pocket costs (and he received a promissory note for the remainder) (JTX 191, at 1352 ¶ 5.17 and 1371; JTX 210 at Tab 2); and (4) Cofiniti's agreement to become the obligor on SinglePoint's notes to Mr. Rossette was a significant benefit to Mr. Rossette because Cofiniti appeared to be far more credit-worthy than SinglePoint.

IV. Plaintiffs Are Entitled to an Award of Substantial Damages

A. Defendants Seek to Blame Plaintiffs for Defendants' Own Deception

Defendants' chief argument in their answering brief is that plaintiffs, plaintiffs' counsel and plaintiffs' expert are responsible for not discovering, prior to trial,

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[17]Defendants attempt to avoid the awkwardness they have found themselves in with the value of the "put." If they are somehow right that the "secret" value that Cofiniti ascribed to its stock should be used instead of the arm's length price negotiated in the merger, then the "put" has substantial value (as defendants' counsel and expert acknowledged–OB 33). Defendants' only response–that no one at the time thought that the put had value (AB 47, n17)--is ironic, because no one at the time (at least at SinglePoint) thought that the value of Cofiniti's stock was only $1.86 per share.

that Mr. Rossette allegedly ordered the falsification of SinglePoint's accounts receivable with respect to E-Invest and that this Court should therefore ignore plaintiffs' damage calculations. Given the real facts here, defendants' audacity is breathtaking.

It is indisputable that, at least since August 2007, defendants, *their* counsel and *their* expert all knew that Mr. Rossette was going to testify that he ordered the E-Invest accounts receivable records to be fabricated (Tr. 300-03; 309-10; 797-801). It is also indisputable that, prior to trial, defendants never told any of plaintiffs, plaintiffs' attorneys, plaintiffs' expert, or this Court about their secret. Finally, it is indisputable that Mr. Torchio, even though he *knew* about his client's expected testimony, did *not* change his reliance on SinglePoint's revenue numbers, *precisely* because there was no documentation to support Mr. Rossette's claim (OB 35-36; Tr. 800-01).[18]

At trial, this Court addressed the critical issue of defendants' not disclosing to plaintiffs, prior to trial, the alleged fact that the E-Invest income was fictitious:

> THE COURT: Mr. Carnathan, I do want to hear from you. My concern is that if your side of the equation knew that the financial records had been cooked, and apparently cooked with the full knowledge of Mr. Rossette, and that wasn't disclosed to the other side when you knew they were going to be doing the expert work, which is inevitable in cases like this, then the problem here is not Mr. Rossette; the problem is with you, Mr. Carnathan. And that's why I'm looking for an explanation from you for this, because if you let this matter go forward knowing the books were cooked and didn't disclose it, then we'd have a whole new set of problems to deal with.

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[18]This last fact, which was emphasized in plaintiffs' opening brief, is entirely ignored in the answering brief.

MR. CARNATHAN: Yes, Your Honor. I understand I'm being looked at here; but that's, respectfully to my opponents, just not the case.

THE COURT: Well, explain why it's not the case.

MR. CARNATHAN: It's no surprise to anybody these books are a mess. We've been – we've been running that up the flagpole from Day 1. We've been telling them, you know, that the Standard & Poor's revenues were improperly booked. We thought that the hundred thousand techie settlement was improperly booked. These things were a disaster.

I didn't know what Ms. Kirk's opinion was going to be. And, frankly, I think the – because we'll demonstrate in the coming days, her opinion is implausible but she's focused on this 17-day period between March 10th and March 27th that she claims there was a surge in revenues.

Now, once I realized that, I've been shouting long and hard those revenues were not true and I was going to prove it. And the plaintiffs didn't believe me, they wouldn't listen. And the idea that I kept this hidden from anybody is just – just not so, Your Honor. It just isn't.

THE COURT: *Well, what was done to disclose the receivables*? which, when one looks at the books, the receivables are – are crucial in any kind of financials like this. *What was done to make clear to Mr. Katzenstein's side that that number was wrong*? I mean, do you agree with Mr. Katzenstein that nobody was forthcoming in saying that that number was a cooked number until yesterday?

MR. CARNATHAN: ***The – the precise story didn't come out until yesterday, I agree, Your Honor***, or in my – my brief. But, I mean, at Ms. Kirk's deposition I was beating up on – excuse me; I was going after her about the idea that these were not real receivables. I told them these were not real receivables. They didn't do any further discovery. They didn't ask to bring Mr. Rossette in. They didn't bring Ms. Rapsis back in. They didn't follow up. I was telling them.

> They weren't listening. I don't see how I've – I've failed to disclose anything.

(Tr. at 302-304; emphasis added).

Mr. Carnathan's recollection of Ms. Kirk's deposition was not correct. The word "E-Invest" does not appear in the transcript of her deposition (JTX S). The only discussion of receivables appears at pp. 108-109, relating to the booking of the $500,000 receivable from S&P, which Ms. Kirk acknowledged should be backed out of her calculation (because it was not revenue) (JTX S at 108-09). As plaintiffs' counsel stated at Tr. 305-306, there was no discussion during Ms. Kirk's deposition of any fraudulent book entries.

However, the following exchange between Mr. Carnathan and Ms. Kirk *did* occur during the deposition:

> Q. Prior to today, you did not do anything to ensure that 367-odd thousand dollars was actually revenues as opposed to some sort of income that was improperly booked as revenues?
>
> [Objection omitted]
>
> A. I accepted the financial statements as reported with the adjustments that Mr. Torchio made under the belief that if there were additional adjustments that I should have been notified of, that that would have occurred in Mr. Torchio's report.
>
> Q. Mr. Torchio didn't rely on any of these numbers in his report, did he?
>
> A. Mr. Torchio ends up using revenue figures to, quote, "correct" my analysis in his rebuttal report, and I saw no additional revenue adjustments. I saw additional debt adjustments.

> Q. So you are purporting to rely on Mr. Torchio's rebuttal report to validate your work on your own expert report?
>
> [Objection omitted]
>
> A. As I said in my original report, *I accepted the financial statements as reported by the company*. I don't have access to individuals in the firm that could correct me if they had misbooked their revenue. I believe that their financial statements are accurate, to the best of their knowledge, and that *they would have no reason to incorrectly state their revenue*.
>
> I agree with Mr. Torchio that the prepaid royalties should be deducted from the revenue in the trailing 12 months prior to March 27, 2000. I noted in my report that in my analysis, I accepted those as revenue, and I noted in my rebuttal report that I removed those from the revenue figure. ***If you'd like to direct me to other adjustments that should be made that I'm unaware of and you can confirm that they misbooked some revenue, I'm willing to consider that. Based on the information I had at hand, I believe that I have the correct figures for that period.***

(JTX S at 111-13) (emphasis added).

So Ms. Kirk *directly* told defendants and their counsel that if they could show her that revenue was "misbooked" she would consider that information (*id.* at 113). How easy it would have been to answer her query by mentioning Mr. Rossette's expected trial testimony. But, rather than doing so, defendants chose to withhold this information until trial.

In their brief, defendants again claim they were not trying to hide anything and they were doing all they could to tell plaintiffs about the fraudulent entries--everything,

that is, except actually telling us the alleged real facts. The several examples cited at AB pp. 40-44 are striking for what they do not include: any reference that the E-Invest revenue entries were fictitious, or that Mr. Rossette ordered that they be falsified.

This is not the only instance when plaintiffs' representatives asked a direct question in this area, yet were not given a complete response. As defendants acknowledge at AB 43, the following question and answer occurred during Mr. Rossette's deposition:

> Q: Did the company at any time obtain any revenues from E-Invest for services or products?
>
> A: I don't recall.

It is possible that this answer was accurate when given, and not another example of Mr. Rossette's disdain for the truth. However, if that is so, then at some point before trial Mr. Rossette came up with very different, very specific, recollections about E-Invest, about which he chose to keep silent. Defendants' failure to amend this answer was a violation of Rule 26(e)(2)(B), which states:

> (e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
> . . .
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Ct. Ch. R. 26(e)(2)(B).

Finally, in one of defendants' more brazen efforts at misdirection, they argue that it was *plaintiffs*' duty to ask questions about the fictitious E-Invest revenues, even though *defendants* knew about it, and *plaintiffs* did not (AB 40, n.15). Plaintiffs had every right to rely on financial records prepared by defendants. Section 141(e) of the Delaware General Corporation Law, permits a member of a board of directors to rely in good faith upon corporate records and "such information, . . . reports or statements presented to the corporation by any of the corporation's officers or employees." 8 *Del. C.* § 141(e). If directors can rely upon corporate records, then former stockholders who are suing board members and officers should have the same right of reliance, especially when, after five years of litigation, there was no mention that the entries in question were false. If defendants wish this Court to determine that those records are phony–another example of the "believe-me-now-I-was-lying-then" defense--it is surely their burden to prove that. Because defendants went out of their way to avoid asking anyone prior to trial anything that might support Mr. Rossette's testimony on this point, it certainly looks as though they were worried about what the result of any such questioning might be.

B. Ms. Kirk's Determinations of Value Are Entirely Credible

Defendants also attack Ms. Kirk because she changed her opinion as to SinglePoint's value, thus (according to defendants) rendering all her opinions unreliable (AB 31). This accusation is ironic, because Mr. Torchio also changed his opinions as to value (*infra* p. 25), yet defendants think his opinions should be adopted by this Court.

In reality, Ms. Kirk's *methodology* stayed the same throughout (at least until her supplemental opinion, which necessarily used a different approach). This methodology was based on the use of SinglePoint's revenues (taken directly from its internal financial records), to determine a revenue multiple, and ultimately an Enterprise Value as of March 27, 2000 (OB 36-37). As Ms. Kirk testified at her deposition, she accepted SinglePoint's revenue numbers until she was shown that they were incorrect.

The *results* of Ms. Kirk's analysis did change when she determined that SinglePoint's revenues needed to be adjusted, but what is the surprise in that? The first change was one she noted in her reports–if the payments from S&P were not truly revenue (as they were booked), then they need to be backed out of the analysis (which they were) (Tr. 564-65). A second change proposed by Mr. Torchio–backing out certain revenues because they were allegedly from a legal settlement–was not ultimately adopted by Ms. Kirk because she determined that Mr. Torchio was wrong in his analysis (Tr. 565-66). The third potential problem with the SinglePoint financials–Mr. Rossette's alleged cooking of the books–required special handling because it raised questions as to the reliability of all of the records under Mr. Rossette's control, and resulted in Ms. Kirk's supplemental report.[19]

Defendants also claim that, had Ms. Kirk looked more closely at the E-Invest numbers, she would have realized there were problems with them (AB 39, 44-45).

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[19]Defendants criticize the broad range of values resulting from Ms. Kirk's comparable company analysis (AB 36). Unlike Mr. Torchio, Ms. Kirk acknowledged that it was difficult to find companies truly comparable to SinglePoint, and thus did not use this method as anything other than corroboration (JTX 215).

Unfortunately for defendants, she *did* look at these receivables, and they appeared to be real (Tr. 554-555; 638-44). Indeed, the later write off of *some* of the receivable makes it appear that it was real (because if phony, all would have been written off) (Tr. 645-46).

Finally, defendants criticize the results of Ms. Kirk's analysis, claiming that it rests unjustifiably on a "surge" in revenues (AB 32). But, assuming the accuracy of the defendant-controlled financial statements, those revenues were real, and absolutely should have been used in any analysis (as, indeed, they were used by Mr. Torchio in his analysis (JTX 202 at Ex. 3; *see also* p. 39, n.141)).[20]

C. Defendants Have No Substantive Response to Ms. Kirk's Supplemental Report

In the opening brief, plaintiffs explained that, if the Court is unwilling to base any damage award on SinglePoint's financials (because of Mr. Rossette's testimony), an alternative exists–using the consideration from the Cofiniti Merger (OB 40-41). While defendants had the option of filing their own supplemental damages report, they chose not to do so. Instead, they argue only that, because this analysis increased the damages to

[20]Defendants also criticize Ms. Kirk for her reliance on directions from plaintiffs' counsel. The direction on the use of fair value came from the Supreme Court opinion (AB 34), which is certainly the type of fact that an attorney should tell an expert witness. As for documents (AB 33), while counsel did tell her (correctly) that there were no known concerns about the financial statements at that time (Tr. 551), Ms. Kirk looked to see if others had adopted them, and determined that they had (*Id.*). Counsel passed on his knowledge of the uselessness of the financial forecasts prepared by Mr. Rossette for the Harman Group (gleaned from the appraisal trial)–a determination with which Mr. Torchio agrees (AB 33). Finally, it was Ms. Kirk's assistants at the Analysis Group, not plaintiffs' counsel, who gave her information on the revenue change at SinglePoint (AB 34) (JTX S (Kirk Dep.) at 109).

plaintiffs, it somehow "does not pass the straight face test" (AB 45).

The reality is very different. Although defendants nowhere acknowledge the point, they can hardly complain either about the use of the Merger consideration or adjusting it to account for the negative conditions (both in the equity markets generally and for SinglePoint in particular) between March and October 2000 because that is what Mr. Torchio did (*see, e.g.,* AB 46; Tr. 792-794).[21] Using the Merger consideration does increase the amount of damages, but that should have been obvious to defendants from even a cursory glance at the slides Ms. Kirk used to illustrate her testimony at trial (JTX 215 at 9). Nor should defendants be surprised that the actual value of SinglePoint as of March 27, 2000 (whatever it might be), is likely to be greater than the Merger consideration, because it is now indisputable that SinglePoint was in much worse shape financially in the fall of 2000.[22]

D. Defendants Ignore the Many Fundamental Problems with Mr. Torchio's Analysis

In their opening brief, plaintiffs discussed four fundamental problems with Mr. Torchio's approach: (a) his use of Cofiniti's "secret," undisclosed price of its stock to value the Merger consideration, instead of the price negotiated by the parties at arm's length;

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[21]Mr. Torchio's misuse of that consideration was analyzed in the opening brief, (OB 38-39) and again *infra* p. 24-25.

[22]As we noted in the opening brief, the trial record was mixed on this subject. Mr. Bachelor testified squarely that SinglePoint was much worse off by the Fall, but Mr. Rossette seemed as if he did not want to be pinned down on this subject (OB 17). Defendants' answering brief ends the debate, because it squarely states that SinglePoint's condition had declined by the Fall (AB 19-20). S&P must have agreed, because it lowered the exercise price of its options by 27.1% and 54.4% (Kirk Supplemental Report at 10 and Exhibit 4).

(b) his improper use of a liquidity discount; (c) his improper use of a "joint probability of survival and of accomplishing a timely merger" discount, and (d) his failure to explain rationally why he did not use (at all) the valuation of SinglePoint's stock nearest in time to the date of the Debt Conversion in making his valuation conclusions (OB 38-39). Defendants respond to none of these points, which highlights their inability to support the critical bases for their expert's conclusions.

In particular, although defendants claim that the $5 per share price of Cofiniti's stock that was negotiated by the parties at arm's length[23] (and was included in the escrow agreement (JTX 210 at Tab 6 at A1384), the "put" option (JTX 188 at 1500) and S&P's option (JTX 210 at Tab 31)) should be ignored, and Cofiniti's $1.86 internal valuation of that stock (which was indisputably never communicated to SinglePoint) used instead (AB 36), they offer no authority (legal or economic) as to why that should be so. This would be similar to a homeowner valuing her house at $100,000, but then selling it, in an arm's length transaction to a third party, for $200,000 (without revealing her personal calculations of value). Under Mr. Torchio's analysis, the actual arm's length transaction should be ignored, the private determination of value trumps all, and the fair market value of the house would be only $100,000. That cannot be correct and thus neither can Mr. Torchio. Defendants' failure to find any authority to support Mr. Torchio's eccentric views here is unsurprising, but telling.

Nor do defendants attempt to support Mr. Torchio's use of either of his

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[23]Which is the essential definition of the "fair market value" of an asset. *See* OB 33.

discounts. The legal and factual problems with using them were set forth at OB 38-39, but defendants pretend as if nothing was said. Again, their silence is unsurprising. Without these discounts, Mr. Torchio's valuation (even using the obviously invalid "secret" value of Cofiniti's stock) comes to the same as Ms. Kirk's starting point–$.75 per share (OB 38).

These are all technical (although vital) problems with Mr. Torchio's analysis. The other problem highlighted by plaintiffs–Mr. Torchio's twisting and turning to avoid relying upon the $.75 per share stock option valuation–goes to the heart of whether defendants' valuations were performed in good faith (OB 39). Defendants cannot pretend that they missed this argument–we went out of our way to highlight it, even calling it the "elephant in the room" (*id.*). Defendants, however, ignored our challenge, barely mentioning the option price (AB 16-17), and making no effort to justify Mr. Torchio's complete avoidance of it when constructing his valuation approach. The appropriate consequences to Mr. Rossette of his silence on this point are set forth *infra* p. 30.

Defendants spend little time on Mr. Torchio's own analysis (AB 45-49). Although their brief elsewhere repeatedly makes the point that SinglePoint was in much worse shape financially by the time of the Cofiniti Merger than at the time of the Debt Conversion (AB 19), and they note that Cofiniti dragged out the negotiations to put additional financial pressure on SinglePoint (AB 19, 20),[24] none of these thoughts makes its way into their expert's analysis. Instead, Mr. Torchio substantially *discounts* (*i.e.,* reduces) the Merger consideration (AB 47), which would imply just the opposite of the factual

[24]Which, logically, should have led to a lower purchase price.

record–that SinglePoint was worth much *more* in the Fall. Nowhere do defendants attempt to explain this anomaly (although Mr. Torchio may have been trying to do so with his alternative valuation (Tr. 792-794)).

Defendants also claim that "the value of SinglePoint's equity indeed did drop precipitously between October 1999 [when the $.50 per share debt conversion was adopted] and March 2000" (AB 48), and use this claimed "fact" to buttress Mr. Torchio's conclusions.[25] What they neglect to mention is that this determination has no basis in the documents, and instead is premised solely on Mr. Rossette's unsupported trial testimony.[26]

Surprisingly, defendants continue to place some reliance on Mr. Torchio's comparable company analysis (AB 48). We say "surprisingly," because Mr. Torchio used, as his basis for determining comparable companies, SIC code 7373. This code, however, indisputably includes companies that sell both software and hardware, even though SinglePoint never sold hardware (Tr. 853 (Torchio)). This matters, because "if you're successful in a software company, you're going to have higher margins–incremental

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[25]They also focus on the increase in the Company's debt to Mr. Rossette (AB 37-38). Because Mr. Rossette (already the majority stockholder in SinglePoint) was not requiring actual interest payments on the debt, it had already many of the aspects of equity (Tr. 709 (Kirk)). *See, e.g., In re: SubMicron Sys. Corp.*, 432 F.3d 448, 455-456 (3d Cir. 2006).

[26]As explained in the opening brief (an explanation to which defendants again do not respond), the SinglePoint board determined in January 1999 that $.50 was the fair market value of SinglePoint's stock (JTX 55). In February 2000 Messrs. Rossette and Radebaugh (after agreeing among themselves) told SinglePoint's employees that the new stock option price was $.75 per share, and that the increase from $.50 to $.75 *reflects the positive progress of the company and the increase in shareholder value*" (JTX 128) (OB 39 n.37). This contemporaneous revelation of defendants' belief as to SinglePoint's value directly contradicts Mr. Torchio's reliance on Mr. Rossette's extremely self-serving trial testimony.

margins. Each sale is worth more to you than if you're successful in a software combo hardware company." (Tr. 609-610 (Kirk)).[27]

Finally, defendants attempt to minimize any damage award against them by claiming that it would be a "terrible result" to give any substantial award to plaintiffs (AB 48-49). Legally, defendants cite to no case that supports this argument, and do not respond to plaintiffs' showing to the contrary in the opening brief (OB 41-42).

Factually, defendants' pleas ignore their behavior, which brought us here in the first place. Mr. Rossette could have been satisfied with the already-generous $.50 per share conversion rate, but he got greedy and wanted it all. Mr. Bachelor, whether out of fear for his job or the (justified) expectation that Mr. Rossette would reward him for his acquiescence, let it all happen.[28] At trial, we heard Mr. Rossette claim that his contemporaneous documents and deposition testimony do not tell the truth about what occurred. Why should either defendant receive sympathy for what he did?

E. Defendants Do Not Dispute That An Award of Compound Interest on Any Damage Award is Appropriate Here

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[27]Mr. Torchio's "alternative" damage analysis (AB 49) suffers from most of the same basic flaws as his original analysis–it relies on the "secret" value of Cofiniti's stock (and applies an inappropriate discount to reduce that value further), and pretends that SinglePoint was much, much more valuable in October 1999 than March 2000.

[28]Defendants also claim that Mr. Gentile (presumably the "man" they do not name) "left them holding the bag when times were darkest" (AB 49). This claim certainly was a surprise to Mr. Gentile, as he was *fired* by Messrs. Rossette and Bachelor in the summer of 1999 (Tr. 439; JTX 79; AB 4). Indeed, the repeated attacks on Mr. Gentile (whose conduct is not at issue here) (AB 2-5) indicate an intense personal antagonism toward him by Mr. Rossette, which may have been one of the causes of Mr. Rossette's behavior here.

In the opening brief, plaintiffs requested pre-judgment interest, at the legal rate of 10.5%, compounded monthly, on any damage award made by this Court. Defendants do not respond, thus conceding the point.

V. Because of Mr. Rossette's Bad Faith, He Should Pay the Attorneys' Fees and Costs Incurred by Plaintiffs Here

As explained in detail in plaintiffs' opening brief, Delaware courts will shift fees where there is clear evidence that a defendant conducted litigation in bad faith. Such clear evidence exists where a party has (1) misled the court, (2) altered testimony, (3) falsified records, (4) changed position, (5) relied on evidence or theories that are trivial in comparison to the evidence against the party, or (6) unnecessarily prolonged or delayed litigation (OB 43-47). In addition, a party's pre-litigation conduct may support a finding of bad faith, particularly where it establishes a party's motive to lie under oath to avoid liability (OB 49). Mr. Rossette does not argue with any of this in his answering brief, and thus implicitly concedes that, if these circumstances are present here, fee shifting is appropriate.[29]

Of course, Mr. Rossette does not agree that these circumstances are present here, asserting that plaintiffs' claims "are simply false" (AB 49). As explained in the opening brief, however, Mr. Rossette cannot avoid the reality that he (1) misled this Court at trial when he disavowed numerous contemporaneous documents concerning SinglePoint's

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[29]Defendants also argue that plaintiffs' "devotion of 7 of 49 pages of their opening brief to a claim they should recover their attorney's fees based on their willful blindness to reality simply shows that they now finally realize their claims have no merit" (AB 2). To the contrary, Mr. Rossette's behavior at trial shows that he is very worried that plaintiffs' claims *do* have substantial merit, and that he is desperately trying to avoid a substantial damage award against him.

financial condition in early-mid 2000, altered his sworn deposition testimony and changed his position at trial to convince this Court that SinglePoint was worth substantially less than that reflected in the Company's contemporaneous documents (*see* OB 44), and (2) engaged in egregious pre-litigation conduct (including knowingly converting his debt to equity at a grossly unfair rate and then attempting to cover up what he had done (*see* OB 47-48), thus providing him a motive to lie under oath to avoid a damages award, and negotiating the Cofiniti Merger to obtain a material side benefit for himself alone and then failing to advise other stockholders of what occurred (*see* OB 48)).[30] Indeed, Mr. Rossette's post-trial efforts to justify his conduct are as disturbing as the conduct itself (*see supra* p. 1-5).

Mr. Rossette also does not respond to our showing that he relied on evidence and theories that were trivial or frivolous in comparison to the evidence against him, such as Mr. Torchio's tortured explanation for why he did not rely on the $0.75 per-share stock option exercise price authorized by his clients seventeen days before the valuation date, and defendants' pre-trial assertion that plaintiffs "waived" their right to bring this action even though they never had notice of the key elements of the Debt Conversion (*see* OB 46-47).[31]

CONCLUSION

For the reasons set forth here and the opening brief, plaintiffs request that this

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[30]We do not understand Mr. Rossette's statement that "even if there were any truth" to plaintiffs' assertions about his conduct, "they would amount to a garden variety, albeit vicious attack on Mr. Rossette's credibility" (AB 49). To the contrary, they show that Mr. Rossette lacks any credibility as a witness, which should have numerous effects in this case.

[31]Defendants devote not a word in their answering brief to defending either of these arguments, thus implicitly conceding that neither has a basis in fact or law.

Court determine that defendants breached their fiduciary duties, award plaintiffs damages as set forth in the opening brief, plus pre-and post-judgment interest (and costs), and shift to Mr. Rossette their attorneys' fees and expenses incurred in prosecuting this matter.

July 3, 2008

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