IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN A. GENTILE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 20213-VCN
	)	
P. DAVID ROSSETTE, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' POST-TRIAL BRIEF

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INTRODUCTION

David Rossette and Douglas Bachelor are honorable men. They gave their hearts and souls, and in Mr. Rossette's case a significant portion of his personal wealth, to propping up SinglePoint Financial, Inc. ("SinglePoint" or the "Company") in an increasingly desperate effort to achieve financial viability. When they closed the merger with Cofiniti, they succeeded. But ultimately Cofiniti failed and took with it a fortune of Mr. Rossette's money. For their efforts and years of financial support of SinglePoint, the Defendants have been thanked by suffering twice as many years of litigation as the Company survived.

No one disputes that Mr. Rossette was the sole source of significant financial support for the Company. No one disputes that the Company failed. No one disputes that it never completed a viable product. The crux of the dispute is whether in March 2000 SinglePoint was "looking as good as it ever had," or in its darkest hour.

Cutting through the Plaintiffs' scurrilous rhetoric, the hard facts demonstrate conclusively that SinglePoint was in a terminal nose dive from January 2000 forward and that, far from being unfair to the Plaintiffs, the Defendants achieved nothing short of a miracle by keeping the Company alive and convincing Cofiniti to acquire it as a going concern.

As the cliché goes, desperate times call for desperate measures. The Defendants were desperate in the year 2000, and pulled out all the stops to keep their sinking ship afloat in order to get to the Cofiniti closing. When Mr. Rossette's personal funds were exhausted, he borrowed from friends, then began to take money out of his other business, in the form of cash transfers booked as "revenues," to keep the sinking ship afloat a little longer.

Plaintiffs were desperate at trial, and have cast truth overboard by crying that they were misled somehow during the course of this litigation. They have been told many, many times that this Company had no product, no customers and no revenues. They refused to believe it. The devotion of 7 of 49 pages of their opening brief to a claim they should recover their attorneys' fees based on their willful blindness to reality simply shows that they now finally realize their claims have no merit. The Defendants have been telling them the truth for years; they just refused to listen.

The only untruthful witness who testified at trial in this matter was lead plaintiff John Gentile, who fabricated absurd fantasies about rejecting a $5 million cash offer from Sigma Partners for 20% of the Company in Summer 1997 (a time when the Company was surviving by selling stock to Mr. Rossette for less than $1 per share). Tr. II at 436-38, 442-44, 447-51. Mr. Gentile also lied to his family and friends (the other plaintiffs in this case) when he sold them stock in SinglePoint when the Company was insolvent. Tr. II at 494-97 ("we were running on fumes most of the whole time since '97"). Mr. Gentile to this day is the only person who ever profited from SinglePoint's existence. The other plaintiffs should have sued him, not the Defendants.

Plaintiffs' rhetoric is belied by the facts. Mr. Rossette never lied to anyone. Acting as a cheerleader for demoralized employees by telling them everything is going well is not lying. It's good management. Plaintiffs cannot point to anyone (other than allegedly Ms. Kirk) who ever relied upon the financial statements they claim were "cooked." Cofiniti CFO Steve Martin certainly understood this Company had no revenues, no customers and no product to sell. There is no substance behind Plaintiffs' rhetoric. They called the Defendants liars when they were told there were no revenues. Now they call the Defendants liars for allegedly not telling them there were no revenues.

The only way to make sense of what happened in this case is to credit the Defendants' explanation of the events of late 1999 through the closing of the Cofiniti merger. Their account has the virtue of being corroborated by the hard facts, the documents in evidence, and extensive testimony from third-party witnesses who have nothing to gain or lose in these proceedings.[1] The Court should enter judgment in the Defendants' favor on all counts, and award them their costs and such other and further relief as it deems just.

FACTS PROVEN AT TRIAL

I. SINGLEPOINT'S HISTORY OF COMMERCIAL FAILURE.

There is no need here to belabor the Company's undisputed history of commercial failure prior to April 1999. The important point to understand is that by the time that the Standard & Poor's ("S&P") deal began to unravel in late 1999/early 2000, the Company had already been through multiple prior failures – multiple instances where Mr. Rossette, as the only investor in the Company, had experienced significant "over promising" and "under delivery."

In or about 1996, plaintiff John A. Gentile founded SinglePoint and came to his childhood friend, Mr. Rossette, to fund this technology start up. *See* Tr. II at 445. The vision pitched to Mr. Rossette was to develop some exciting new software based upon "agent technology"; hopes were high. But this vision was overly optimistic and the effort failed. Tr. I at 124-25. Tellingly, Mr. Gentile pretended at trial not to recall the agent technology at all. Tr. II at 457-58 (Mr. Gentile pretends not to know about effort to develop agent technology, while describing Mr. Bachelor as "brilliant and hard-working"); *compare* Tr. II at 465-67

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[1] Plaintiffs suggest in certain footnotes that Defendants should have done still more discovery and somehow compelled out-of-state third-party witnesses to appear at trial. Defendants flew all over the country tracking down witnesses, whose deposition transcripts were admitted into evidence. Plaintiffs are the ones who failed to make their case. At one point in the trial, Plaintiffs actually suggested to the Court that the Defendants had failed to produce all the documents in this case, when the truth of the matter is that the Plaintiffs are the ones who have had possession, custody and control of what corporate records exist since some time in or around 2001, when they acquired them in the appraisal litigation. As the Court knows, both Cofiniti and its law firm went bankrupt thereafter. Plaintiffs simply have refused to accept evidence contradicting their view of the case.

(acknowledging awareness of agent technology and the DARPA proposal, despite calling it a "fiction" minutes earlier).

The Company's second iteration also briefly generated high hopes, when SinglePoint landed some business with CDI and then landed a dedicated service contact with Relevant Information and Training dba Techies.com ("Techies"). Those hopes also crashed hard when Techies terminated the contract and the two companies ended up in an expensive lawsuit. Tr. II at 379 ("It failed. We oversold it.").

In April 1999, when the critical events began, the Company had just lost Techies, its only significant client, and found itself fighting a legal battle without any money in the bank or money coming in. *Id.* at 475. **From April 1999 forward, Mr. Rossette was a one-man financial life support system for SinglePoint. If he pulled the plug at any time, this otherwise terminal patient would have died.** *Id.* at 384.

To make matters worse, at this time of crisis, Mr. Gentile not only failed to help pick up the pieces, he actually obstructed the process and started incurring substantial unauthorized expenses, right at a time when the Company's finances were the most dire they had ever been. *See* Ex. K, Ex. 1 thereto, ¶ 11. In or about June 1999, the Company put Mr. Gentile on administrative leave and relieved him of his duties for the Company. In July 1999, the Company terminated Mr. Gentile as an officer. On July 26, 1999, Mr. Gentile was removed as a Director. Tr. II at 497-501 (Mr. Gentile's garbled account of his departure).

Angry at having been ousted from the Company, Mr. Gentile embarked on a series of lawsuits against the Company and its Directors, beginning by claiming that he was entitled to certain shares of Techies.com stock, received in connection with the aborted contract with Techies.com and subsequent litigation (the "Rhode Island Litigation"). Before year end 1999, the parties were engaged in litigation, which did not settle until September 2001 (shortly followed by the prior appraisal action, then this action). Tr. II at 489-90. Rather than support the struggling Company, Mr. Gentile attacked it.[2]

II. THE REAL HIGH WATER MARK: LATE SUMMER/FALL 1999.

After the Techies debacle, the Company pinned its hopes on a germinal relationship with S&P. Mr. Rossette and Mr. Bachelor moved quickly to sweep up the pieces and re-position the Company to try again. Within days, Mr. Rossette had flown out to Rhode Island to meet with Mr. Bachelor and Mr. Gentile and assess the situation. They determined that the S&P relationship was the only hope the Company had to survive and identified Thomas A. Loch as the person the Company needed to take the helm in order to have a chance to develop S&P. Mr. Rossette immediately flew to New Jersey to meet with Mr. Loch and offer him a job. Tr. I at 145-51. By April 15, 1999, Mr. Rossette had advanced emergency funding of $100,000 so the Company could meet payroll. JX 69, 70.

In or about May 1999, Mr. Loch joined SinglePoint as its President in order to nurture the relationship with S&P. Mr. Loch could see going in just how tenuous SinglePoint's existence was. Tr. I at 150 (Loch said SinglePoint was "very high risk" and demanded Mr. Rossette's personal guaranty of one-year's salary). In order to get him on board, Mr. Rossette gave Mr. Loch his personal guaranty (his word) that Mr. Loch would be employed for at least one year. Tr. I at 150-51; Tr. II at 382 (Mr. Rossette agreed to continue funding the Company if Mr. Loch joined).

2 Mr. Gentile also purportedly could not recall with any clarity why he had agreed to rescind some 30% of his shares in the Company in 1998 or why the Company had "rescinded the rescissions" in January 1999. Tr. II at 478-87. Mr. Gentile also claimed not to recall what became of the 35,000 shares in Techies.com that he fought a two-year lawsuit to obtain. *Id.* at 512-15. Defendants submit that Mr. Gentile uttered few credible words in the courtroom or at his deposition. JX I.

With Mr. Loch as the primary relationship manager, SinglePoint's early efforts to develop the S&P relationship seemed to go very well. Tr. I at 151. In or about early June 1999, SinglePoint presented a "proof of concept" to S&P. *Id.* at 158. A proof of concept is a series of "dummy screens" that shows what the product will do if it is fully developed. *Id.* at 159. The planned product was intended to allow the user to gather investor information about risk tolerance and investment goals and then make investment recommendations, which would be backed up by S&P's exclusive content. *Id.* at 156. At the meeting in or around early June 1999, S&P indicated it was interested in pursuing the project. *Id.* at 159; Tr. II at 384.[3]

From the outset, SinglePoint's management team understood that it would take at least one year's work and several million dollars to develop a functional product. Tr. I at 160-61. The plan was to get S&P to agree to a dedicated development contract, pursuant to which S&P would fund development costs and share the upside of the resulting product (much like the Techies deal had been supposed to work). *Id.* at 161.

During the late summer and fall of 1999, Mr. Loch reported to Mr. Rossette and Mr. Bachelor that SinglePoint would shortly land a dedicated development contract with S&P along those lines. *Id.* at 161-62. In reliance on these representations, Mr. Rossette continued to fund operations at the rate of some $200,000 to $300,000 per month. *Id.* at 162-63 ("I was under the presumption all my money was coming back to me the day we signed the contract.").

Mr. Bachelor, who was running the technology team, also understood that SinglePoint was acting as a "development team for hire." Tr. II at 387-88 ("[W]e were building what they were asking."). In other words, SinglePoint would build what S&P wanted, S&P would pay for

[3] Unbeknownst to S&P, SinglePoint outsourced production of the proof of concept to Javelin Technologies for a fee of some three times what S&P paid to SinglePoint to do the work. Tr. I at 156-57; Tr. II at 383.

their costs, and in the end, they would share the benefits of the resulting application. *Id.* at 388. Mr. Bachelor thought they had an oral agreement with S&P to this effect after they presented the proof of concept successfully. *Id.* at 389. SinglePoint's debt to Mr. Rossette increased rapidly. *Id.*

In or around August 1999, the Company experienced its real "high-water mark" in terms of management's belief that they would succeed. Feedback from S&P (through Ken Ennis) appeared good, and Mr. Loch assured Mr. Bachelor and Mr. Rossette that a deal was imminent. Tr. I at 36-37 & JX 82 (exuberant e-mail Aug. 12, 1999).

III. REALITY HITS HOME IN DECEMBER 1999 AND JANUARY 2000.

A. Late 1999 – Mr. Rossette Discovers That Mr. Loch Is Not Going Do Deliver The Deal With S&P That SinglePoint Has Been Counting On.

As the months dragged on, the debt to Mr. Rossette soared, Mr. Loch failed to deliver the S&P contract, and exuberance rightly faded. Tr. II at 387-88 (Mr. Bachelor thought the technology development was going well, but grew increasingly anxious about the expected deal with S&P). By roughly Thanksgiving 1999 with no S&P deal, Mr. Loch's assurances rang increasingly hollow. Tr. I at 162.

In December 1999, Mr. Rossette insisted on meeting with S&P himself, and arranged to meet with Dan Connell, the new president of the Comstock division of S&P. Tr. I at 166. At the meeting, Mr. Rossette told Mr. Connell that S&P owed SinglePoint $1.5 million for the work to date. *Id.* at 170. Mr. Connell was shocked. *Id.*at 170-71. Mr. Loch had been relying on the words of S&P employee, Ken Ennis, who did not have authority to make such promises. *Id.* at 171-72.

Mr. Connell asked for time to investigate. *Id.* at 173. In a follow up meeting between Christmas and New Year's Eve 1999, Mr. Connell stated that he could see that SinglePoint had done a lot of work, but that he could not get retroactive approval for the project. *Id.* at 175. He said he would "try to come up with an idea as to provide some compensation for the effort." *Id.* at 175. Mr. Rossette told Mr. Connell that S&P owed SinglePoint, and implied that SinglePoint might bring a legal claim. *See id.* at 175.

B. January 2000 – Hope For An S&P Equity Investment Rises And Falls, Leading To Desperate Times For SinglePoint And The Defendants.

January 2000 was turbulent. In early January 2000, Mr. Connell proposed a deal pursuant to which S&P would advance SinglePoint some money, which would have to be repaid, and that would make an equity investment in SinglePoint to cover the balance of the development cost. Tr. I at 177-79; Tr. II at 390-91. They discussed a total investment of $2.5 million. *Id.* S&P required review by its compliance department before it could enter into any contract. *Id.* at 184-85; Tr. II at 393-94. SinglePoint promptly submitted the required write up to S&P's compliance department.

In or around the third week in January 2000, S&P compliance responded, and its reaction was "not good." Tr. I at 185-86; Tr. II a 393-94. Compliance identified a "host of issues" with the planned product. Tr. I at 186. The most significant was that using S&P's "advice engine" in the product posed an "unacceptable risk." *Id.* at 187-91; Tr. II at 395-96. Replacing the advice engine was an enormous problem for SinglePoint, which would cost "north of $1 million" to fix. Tr. I at 191. Mr. Bachelor compared it to "taking the engine" out of a car. Tr. II at 396.

S&P also refused to allow its content to be displayed alongside content from other providers, which was a serious problem from the standpoint of marketing the product. Tr. I at 192. Compliance also informed them the product would have to be scalable up to 5,000 concurrent users, which was ten times its current capability. *Id.* at 193; Tr. II at 396-97.[4] At the time that S&P identified these issues, Mr. Bachelor estimated it would take six to nine months of full-time effort to fix them. Tr. II at 397 (at a burn rate of $200,000-250,000 per month). S&P also told SinglePoint it would have to "host" the product, *i.e.*, create a bulletproof data center. Tr. I at 182-84; Tr. II at 393-98.

At about the same time, Mr. Connell reported that the equity investment proposal was getting "significant blow back" within S&P. Tr. I at 195-96. In late January 2000, Mr. Connell told Mr. Rossette that the proposed equity investment "wasn't going to happen." *Id.* at 199; *see also* Tr. II at 391-92 (Mr. Bachelor's testimony to same effect). By this point, Mr. Rossette's personal ability to fund the Company was also under serious strain. Tr. I at 196.

The testimony and documentary evidence from third party, S&P, confirms Mr. Rossette's and Mr. Bachelor's account of what happened. Contrary to Plaintiffs' contentions, the testimony of the third-party witness S&P Senior Vice President of Finance, Del Johnson, squarely supports the Defendants' account of what happened. Mr. Johnson testified, among other things, that Dan Connell "took the lead" on the relationship between S&P and SinglePoint, and negotiated with Mr. Rossette. JX E at 17, 40 (Mr. Connell negotiated the numbers). Mr. Johnson identified a January 12, 2000 e-mail (Dep. Ex. 2) referencing a "number of meetings and conversations with SinglePoint about commercial terms" and "the possibility of taking an equity position in this software company." JX E at 22. The timing of this e-mail confirms the Defendants' account of the timing of the discussions between Mr. Rossette and Mr. Connell.[5]

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4 The Company later hired Oracle as an outside consultant to estimate the work required to scale up to 5,000 concurrent users, and Oracle estimated $1.4 million. Tr. I at 193.

5 Defendants asked Mr. Johnson whether he was involved in S&P's acceptance of the software but could not recall participating. JX E at 132-34.

The other internal S&P e-mails confirm that by late January, the equity investment was hitting a brick wall at S&P. On January 18, 2000, e-mails among S&P executives reflect that "reality [has] hit home." JX 114. S&P's Jack Zwingli e-mailed: "I have told Ken Ennis to proceed with a <u>joint marketing agreement, not an equity stake</u>. We have delayed responding to SinglePoint long enough, and our appetite for these types of investments is not there." (Emphasis added.) A January 20, 2000 e-mail confirms that S&P would advance SinglePoint $500,000 against royalties and take an option, but it was clear from both the e-mails and Mr. Johnson's testimony that the equity investment was a non-starter. *See* Tr. III at 690-91; JX E at 35 (Del Johnson testified that the gentlemen corresponding on January 20 did not have authority to make an equity investment). Mr. Johnson testified plainly that S&P never did any valuation work on SinglePoint because "it was not worth the time and effort . . . it was better to pursue the commercial arrangement with SinglePoint and not the option arrangement"). JX E at 43-45; *see also id.* at 143-45 (describing what S&P would do if it intended to make an equity investment). For S&P to make an equity investment would have required the approval of Terry McGraw himself; Mr. McGraw was never consulted. *Id.* at 146.

When Mr. Connell told Mr. Rossette that S&P would not make the equity investment, Mr. Rossette told Mr. Bachelor he was finished. Tr. I at 201-02; Tr. II at 392 ("I can't carry the company forward anymore. I don't have the stomach for it."). Mr. Bachelor compared the experience to being in a sailing race and hitting "dead calm," – "the boat is dead." Tr. II at 393, 399 ("we were dead").

IV. FEBRUARY/MARCH 2000: THE DEFENDANTS SALVAGE WHAT THEY CAN WITH S&P IN ORDER TO HAVE A VALUE PROPOSITION WITH WHICH TO TRY AND SELL THE COMPANY.

Over the course of a couple of days in late January/early February 2000, Mr. Bachelor and Mr. Rossette talked about what to do. Tr. I at 201-03; Tr. II at 392-93. Mr. Bachelor and

Mr. Rossette saw themselves as having two choices: (1) "shut the Company down and walk away"; or (2) "try to leverage what value points we had and try to sell the Company." Tr. II at 398. With no product, no customers and no revenue stream, if they shut the Company down, there were no assets to sell. *Id.* at 401-02.

Throughout this time period, Defendants talked every day about the S&P situation, the product issues and the Company's financial state. Tr. I at 196-97. Mr. Bachelor had personally been working 80-hour weeks throughout 1999, and would continue to work those hours through the Cofiniti merger. Tr. II at 393. Both men were "intimately familiar with SinglePoint's financial condition" and were "intimately involved in the day-to-day operation of the company and . . . received regular financial reports." Tr. I at 51. Both men knew that prior efforts to find other investors in SinglePoint had come up empty, stretching back to 1998 when Chris McGrath was running the Company. *Id.* at 127-28; Tr. II at 377-78.

Even though this was "a very desperate time," on a personal and professional level, the Defendants still wanted the Company to succeed. Tr. II at 402. They thought that if they could get a licensing agreement with S&P then they would have something meaningful with which to try and sell the Company. Tr. I at 203-04, 211-12. Mr. Bachelor personally appealed to Mr. Rossette to "hang in there." *Id.* at 204.

A. The Debt Conversion Process: Defendants Plan The Debt Conversion, Contingent On Landing Some Kind Of Deal With S&P, And Follow Proper Procedures To The Best Of Their Ability And Financial Resources.

In order to have any hope of selling the Company, they not only needed to get some kind of deal with S&P, they needed to reduce the Company's debt level. Mr. Rossette did not want to convert his debt into stock in the Company; indeed, he was ready to give up. Tr. I at 70 (offered $.01 per share), 76 ("I started out by telling Doug I didn't want to convert any more debt"), 88-89 ("I had no interest in investing further . . . debt conversion was contingent upon some events occurring”), 97-98 (“I felt it was diminishing my position to collect my cash back” . . . “the loan existed because I didn’t care to own any more equity or be in that position”).

Mr. Bachelor negotiated hard to persuade Mr. Rossette to “hang in there” and continue to fund the Company. Tr. II at 403-06. Mr. Rossette was agreeing to throw good money after bad on the desperate hope that they could survive long enough to find someone to buy the Company. Even then, Mr. Rossette only agreed to convert the debt if they could get some kind of contractual support from S&P, without which the plan to sell the Company was doomed. Tr. I at 88-89; Tr. II at 405-06.

Plaintiffs quibble with Defendants’ efforts, but the record is clear that the Defendants tried to follow best practices before converting the debt.[6] By no later than February 2, 2000, the process had begun as Defendants prepared charts calculating the dilution of the Company’s shareholders by the proposed conversion. Tr. I at 65-66; Tr. II at 367; JX 122.

The Defendants consulted outside legal counsel, John Beavers at Bricker & Eckler. Tr. I at 214-15; Tr. II at 367. John Beavers at Bricker & Eckler was the “only legal resource [they] had.” Tr. II at 318. Mr. Beavers advised the Defendants as to “the procedure to go through to . . . make sure we didn’t skip any steps. Tr. II at 318. They could not afford separate legal representation. *Id.* at 319.

On Mr. Beavers’ advice, the Defendants obtained a fairness opinion from the Harmon Group. Tr. I at 77-80; Tr. I at 215; Tr. II at 319-20. Mr. Rossette had never worked with the Harmon Group before this transaction and has never worked with it since. Tr. I at 216. Mr. Rossette paid on behalf of SinglePoint for the fairness opinion.

[6] Neither Defendant was an experienced Board member. The only other board Mr. Rossette had ever served on at this time was the Board of his other company, Leasenet. Tr I. at 124. Mr. Bachelor had never served on a board of directors before. Tr. II at 371.

In developing its opinion, the Harmon Group was given access to the Company's books. It spent time with the Company president, Tom Loch, and reviewed the Company's product and forecasts. Tr. I at 224-25. The forecasts the Harmon Group used were prepared by Tom Loch. *Id.* at 225. The Harmon Group arrived at $.04 per share as the discounted cash flow value of SinglePoint's stock. JX 160 at A0363. Although no one from the Harmon Group attended the Board meeting to approve the debt conversion, Tr. II at 313-14, a draft of the Harmon Group's opinion was available to the Defendants at the March 27, 2000 directors' meeting. Tr. II at 363; Tr. I at 217-21 (report not finalized until May 4, 2000); JX 160.

The Defendants followed the corporate formalities in holding shareholder and board votes and documenting them in the corporate records. JX 131, 132. They sent notice to the shareholders of a special meeting to approve the increase in the outstanding stock of the corporation. JX 134; Tr. II at 291. Mr. Rossette wrote to the shareholders after the debt conversion and told them it had occurred. JX 152; Tr. II at 292.[7]

The key point here is that SinglePoint was a Company trying to follow best practices **while running on financial fumes**. *See, e.g.*, Tr. II at 417; JX 121; JX 129 (financials show SinglePoint had $1,097.70 in cash at the end of January 2000 and $18,111.09 at the end of February 2000 – all borrowed money). Neither it, nor Mr. Rossette could afford to pay for separate legal counsel for the Company, Mr. Bachelor and himself. Neither SinglePoint, nor Mr. Rossette, could afford to pay for a more extensive fairness opinion. Indeed, in February 2000, Mr. Rossette personally borrowed $130,000 from a friend to make payroll for the Company. Tr.

[7] Mr. Gentile neither attended the shareholder meeting nor made any contemporaneous inquiries concerning the issuance of additional stock or the debt conversion, despite being represented by counsel and engaged in litigation with the Company, Mr. Bachelor and Mr. Rossette at the time. Tr. II at 292-93. None of the other Plaintiffs made any contemporaneous inquiries either. *Id.* at 293.

I at 197, 243-44. Defendants acted in the shadow of on-going litigation with Mr. Gentile, knowing full well that he would scrutinize the transaction. Tr. II at 343-44. Defendants did the best they could under the circumstances.

B. **The Debt Conversion Price: The Only Sensible Conclusion Is That $.05 Was A Fair Price For SinglePoint's Stock.**

Given that: (1) this was the Company's third failure (agent technology, Techies, S&P); (2) the Company had no product and only a dim hope of completing one without a lot more time and money; and (3) the Company was in dismal financial shape and Mr. Rossette was financially strained; as of March 2000, it was difficult to see any value for the common stock. Tr. I at 206-010; Tr. II at 397, 399, 401, 412-13 ($200,000 per month burn rate, 6-12 months best case to complete product, debt to Mr. Rossette now over $3.2 million, lease obligations of $1.6 million, office leases with aggregate future obligations of $700,000). Cofiniti was not on the radar screen; the prospect for the Company to survive long enough to find a merger partner was a slender hope. *See* Tr. II at 350-51; *id.* at 404 (had not been introduced to Cofiniti yet).

Mr. Bachelor agreed to a conversion price of $.05 per share. The Harmon Group confirmed that this was a fair price based upon pie-in-the-sky forecasts by Mr. Loch, which projected income of $3.6 million in 2000 and nearly $23.5 million from product sales in year 2001. Tr. I at 225-27; JX 160 at 30 (showing that even these fanciful projections would have yielded net income of negative $2.46 million in 2000).

The evidence at trial conclusively proved that Mr. Bachelor was a fully informed, independent director, who was himself the second largest shareholder in the Company, and that he approved the conversion. Tr. II at 411, 419. Moreover, Mr. Bachelor was working 80-hour weeks for a salary that was half of what he could have otherwise commanded in the marketplace at the time. Defendants were in litigation with Mr. Gentile and knew their actions would be scrutinized. On a purely self-interest basis, if the S&P deal had really been as wonderful as the Plaintiffs contend, then there would have been no rational basis for Mr. Bachelor to have agreed to dilute his own equity stake in the Company from nearly 19% to approximately 2.2%. JX 122. **At bottom, there is absolutely no explanation for Mr. Bachelor's decision to approve debt conversion, other than to accept as true the Defendants' account of what happened to the Company and the S&P deal.**

C. The Terms Of The S&P Deal Further Confirm The Defendants' Account.

Defendants explained at trial that S&P wanted the Option as a hedge in case SinglePoint used the S&P brand name to "flip the company," but S&P had no intention of making an equity investment or doing any due diligence. Tr. I at 231-32. The terms of the Option and subsequent license agreement confirm this account. Under the terms of the Option and License Agreement, S&P had no obligation to do anything other than advance SinglePoint the original $500,000, which SinglePoint desperately needed to survive, but which was a loan. JX 130; Tr. I at 233; Tr. II at 419 ("[w]e had no other revenue prospects on the horizon at that point").

S&P was under no obligation to accept the software from SinglePoint, and Defendants knew just how unlikely securing acceptance would be. Tr. I at 233-34; Tr. II at 406-07; JX 130 at 3, § 2(a). The license agreement also included a provision relieving S&P of any liability for the work SinglePoint had done to date. Tr. I at 235-36. SinglePoint fought hard over that provision, but in the end S&P told SinglePoint "if you want the 500k, this is what it's got to say." *Id.* at 236. SinglePoint needed the money to make payroll, and needed a value point to offer to third parties, so they "took it." *Id.* at 236-38; Tr. II at 285, 405-06.

D. The Increased Employee Option Price Cannot Be Taken As Fair Market Value.

Plaintiffs rely heavily upon the setting of the employee stock option price at $.75 per share in March 2000, and a few related e-mails. JX 125, 128, 131. Conspicuously absent is any evidence of any valuation work, any statement that it was intended as fair market value, or any options issued at that price (let alone the exercise of any options at that price). *See* Tr. I at 61 ("It's not a statement of the fair value."); *id.* at 238.

The Court does not need to rely upon Defendants' testimony alone in concluding that the option price was not intended as fair market value. Third-party witness, former corporate secretary James Radebaugh expressly testified "it had nothing to do with fair market representation of the value of the company. . . . "it was an anticipated future value of the company. <u>I would say it was a hope</u>." JX D at 76, 77 (emphasis added) ("there was no evaluation presented"), 84 ("that simply is not the case").[8] *See also* Ex. B at 15 (Mr. Bachelor telling Plaintiffs the same thing during a telephone deposition in the appraisal action in 2002).

The e-mails of which Plaintiffs make so much are of even less moment. Corporate officers are corporate cheerleaders, who <u>must</u> keep their team's spirits up when Company is under stress. Announcing a stock option price increase and "positive progress" is a morale building technique and nothing more. Tr I. at 68 ("an e-mail sent from another person

[8] Plaintiffs assert in a footnote that because Mr. Radebaugh did not appear at trial, the Court should infer that his testimony would have been favorable to them. Pl. Opening Br. at 12 n.12. This is not only wrong as a matter of law, it is wrong on the facts. Mr. Radebaugh is an Ohio resident who could not be compelled to appear for trial. Accordingly, Defendants are entitled to rely on his deposition testimony at trial. Ct. Ch. R. 32(a)(3)(B) ("The deposition of a witness…may be used by a party for any purpose if the Court finds:…that the witness is out of the State of Delaware…"). Plaintiffs took Mr. Radebaugh's deposition and had a full and fair opportunity to ask him whatever they wanted to ask. His deposition transcript was admitted into evidence as JX D. Mr. Radebaugh's testimony is not helpful to the Plaintiffs. On the contrary, his testimony is completely consistent with the Defendants' position.

addressing the outstanding morale issues associate with employees and those options"); *Id.* at 238-41.[9] Mr. Rossette and Mr. Bachelor would have been reckless indeed to tell the Company's employees just how close to failure the Company was. *See id.* at 205. When they told Company President Tom Loch how dire things were, his response was to confirm the guarantee of one-year's salary and prepare to leave. *Id.* at 252-53.

It is important to also note that no options were ever actually issued at that price. Instead, after the debt conversion and 10-for-1 reverse merger, the stock option pool was repopulated and options were issued at $.50 – <u>the same effective price as the debt conversion, when one factors in the intervening 10-for-1 reverse split.</u> Tr. II at 331-32; JX 149, 154. As always, the rhetoric about fraud and misrepresentation by Mr. Rossette is merely that – rhetoric.

V. DEFENDANTS PERFORMED A MIRACLE BY SELLING THE COMPANY TO COFINITI.

Keeping the Company alive and closing the Cofiniti deal was nothing short of miraculous and was the direct product of long, hard work by both Defendants and a lot more financial support from Mr. Rossette. *See* Tr. II at 364. By the end, Mr. Rossette was reduced to borrowing money from <u>Cofiniti</u> to make payroll. *Id.* at 351. Is it really any surprise that Cofiniti forced worse terms on Mr. Rossette – <u>as a creditor</u> – at the eleventh hour, when Mr. Rossette's inability to continue to fund operations was disclosed? Contrary to the Plaintiffs' presentation, it is hard to imagine more faithful fiduciaries than Mr. Rossette and Mr. Bachelor.

The only understanding of what happened that makes sense is what the Defendants have been explaining from Day One – this was a desperate Company running on financial fumes,

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[9] One of Mr. Rossette's e-mails, JX 125, refers to agreements by his friends Kunchal and Rinker to buy stock at $2.12 per share. Mr. Rossette admits he was puffing there. Tr. I at 242-43. It is undisputed that no such purchases ever occurred. Indeed, if the fair market value of the stock was that high, then setting a $.75 per share option price would have violated the stock option plan and created immediate tax liability for the employees. *Id.* at 244.

trying to stay alive long enough to be acquired. Exhibit 172 encapsulates the situation nicely. In it, Mr. Rossette e-mails Dan Connell at S&P on June 16, 2000, begging for money he needs to make payroll on June 30, 2000, and still claims "things are going very well on our side." JX 172; Tr. I at 257. Mr. Rossette was keeping up a brave front even as the Company was within two weeks of missing payroll and collapsing. S&P declined to provide any more money, and Mr. Rossette borrowed against his partner draw at LeaseNet in order to make payroll. Tr. I at 257-58. Plaintiffs try to make even this out as some sort of "lie." Pl. Opening Brief at 1. Such contentions are absurd.

A. The Defendants Find Cofiniti And Mr. Rossette Negotiates Hard For The Best Deal Possible, While Under Dire Financial Strain.

Mr. Rossette called upon his former college roommate, Robert Irwin, an expert in technology and financial services and the former CTO of Bank One, to help find an acquisition partner. Tr. I at 258-59. In June 2000, Mr. Irwin located Cofiniti; no other company expressed any interest. *Id.* at 259-61. The parties met at SinglePoint's offices in Cambridge, Massachusetts, and the process began. Tr. II at 420-21.

Mr. Rossette was the primary negotiator for SinglePoint and initially asked for $20 million in cash for the Company. Tr. I at 263; JX O at 19. Cofiniti CFO Steve Martin was the primary negotiator for Cofiniti. Tr. I at 269. Mr. Martin expressly testified that Mr. Rossette pushed hard for cash for SinglePoint's stock, negotiated aggressively and did not negotiate in a self-interested way. JX O at 37, 57-58, 62, 66-67, & JX 6.

On or about July 7, 2000, after several rounds of negotiation, the parties entered into a term sheet, subject to due diligence by Cofiniti. JX 178; Tr. I at 263-64. In the original term sheet, the SinglePoint shareholders were to receive 2,200,000 shares of Cofiniti stock in exchange for the common stock of SinglePoint. JX 178; Tr. I at 265. The SinglePoint shareholders actually received roughly 1 million more shares of Cofiniti stock (subject to escrows) in the final deal. Tr. I at 265; JX 191 at A1313 (3,435,700 shares in final deal).

In contrast, the letter of intent provided that Cofiniti would assume the demand note from SinglePoint to Mr. Rossette as part of the deal. JX 178; Tr. I at 267-68; Tr. II at 287. That note would have allowed Mr. Rossette to demand immediate repayment. *Id.* In the final deal, the note was re-written to defer any payment. JX 190; Tr. I at 268; Tr. II at 286-87. In sum, the terms for SinglePoint's shareholders actually improved over the course of negotiations, while the terms for Mr. Rossette as creditor got worse. Tr. I at 271; Tr. II at 286-87.

Throughout the Cofiniti negotiations, SinglePoint's survival was tenuous. The Defendants cut costs by closing the New Jersey office and laying off eight people. Tr. II at 364;,*id.* at 414. The Company made no sales. *Id.* It could not complete the product to S&P's satisfaction. *Id.* Mr. Rossette and Mr. Bachelor both were considering filing personal bankruptcy petitions. *Id.* at 365. The Company stretched payables and was unable to raise any other capital. *Id.* at 365.

Mr. Rossette personally advanced another roughly $1 million (borrowed against his equity interest in LeaseNet) to the Company between the time of the debt conversion and the closing of the Cofiniti merger to keep the Company afloat. *Id.* at 413. Cofiniti CFO Steve Martin testified that Cofiniti strung out the negotiations in order to put pressure on SinglePoint. JX O at 34-35. They were really putting pressure on Mr. Rossette personally, as he was the sole source of financial support for the Company.

Mr. Bachelor worked 80-hour weeks on a salary that was half of what he could have commanded in the marketplace. Tr. II at 413. By the closing of the merger, Mr. Bachelor was "emotionally and personally damaged . . . on the absolute verge of burnout." *Id.* at 413. When they closed the merger, Mr. Bachelor thought they had finally been successful. *Id.* at 414. Closing this deal was nothing short of a miracle. To punish the Defendants for allegedly delivering a deal that was not "entirely fair" to the Plaintiffs would be a travesty.

B. Cofiniti's Board Reneges On The Agreement To Pay Off The Debts To Mr. Rossette, And Mr. Martin And Mr. Ferguson Come Up With The Challenged Put As An Inducement To Take The Deal.

The challenged Put Agreement, JX 188, was given to Mr. Rossette at the eleventh hour as compensation for Cofiniti's last minute refusal to pay the debt to him as a creditor. Tr. I at 271-72. Mr. Rossette had already signed the target stockholder agreement before the Cofiniti board meeting at which the Board refused to honor the deal to pay off the creditor's debts. *Id.* at 272-73; Ex O. at 44-52. After Mr. Rossette thought they had a deal, and after he had signed the target shareholder agreement, the Cofiniti Board refused to pay the debt, and Mr. Martin and Mr. Ferguson came up with the Put Agreement as a sugar coating for this bitter pill. Tr. I at 275-80; JX O at 42. With a choice between "turn[ing] off the lights and go[ing] home and los[ing] everything" or taking the deal, Mr. Rossette took the deal. Tr. I at 280; *see also* Tr. III at 670 (Plaintiffs' expert Rebecca Kirk testifying that she "would believe that" if Defendants did not take the Cofiniti deal, the Company would have gone under). In the end "everything came [down] to Cofiniti." Tr. II at 364.

Both Mr. Bachelor and Mr. Rossette testified that the Put was forced on Mr. Rossette at the eleventh hour when its Board refused to pay the debts to Mr. Rossette as previously agreed. *Id.*at 425-27 (Mr. Bachelor). Mr. Rossette called Mr. Bachelor and told him about the change in the terms within hours. Tr. II at 427. As Mr. Bachelor explained, "I thought it was going to kill the deal. I thought it was a deal breaker." *Id.* "Basically at the end it was take it or leave it." *Id.* at 428. "I think we had no other option but to shut the company down." *Id.*

The Court does not have to rely upon the Defendants' testimony about the Put. Rather, the testimony of third party witnesses Steve Martin – former Cofiniti CFO – and Marc Ferguson – former Cofiniti chairperson – establish beyond purview that Cofiniti gave Mr. Rossette the Put as an inducement to accept the last-minute refusal to pay off the debts to Mr. Rossette in cash as previously agreed.

In Mr. Ferguson's words:

> Q: During the course of the negotiations to acquire SinglePoint, did Cofiniti ever consider paying the debts to David [Rossette] in cash?
>
> A: The original idea, because we had cash in the bank at the time, was to pay cash primarily, along with stock.
>
> . . . .
>
> Q: And was that ultimately the way the deal was structured?
>
> A: No. It turned out, very late in the negotiations, actually through the demands of my board members, we required the president and business development VP to restrike the deal with Rossette – along with the CFO to restrike the deal with Rossette that the debt, any cash portion would be carried in both earn-out as well as a restructuring of the notes and with a note payable to Rossette.
>
> . . . .
>
> Q: Do you have a memory of a specific board meeting where that change was made?
>
> A: I do. I was furious . . . I thought that the board had directed the business executives of the company to negotiate in good faith the deal as it was originally presented, and then, for negotiating reasons, demanded the change at the last moment.
>
> . . . .
>
> Q: And what, to the best of your recollection, were the new terms?
>
> A: <u>Essentially the acceptance of a note, put. There were options with the put that David could sell back to the company that represented a portion of the cash proceeds or what would have been the cash proceeds, and then the note.</u>

Deposition of Mark Ferguson, July 17, 2007, JX Q, at 23- 26 (emphasis added).

In Mr. Martin's words:

Q: . . . [W]hat were the terms, to the best that you can recall them, that you presented to the [Cofiniti] Board for approval at that meeting, the September 13th meeting?
A: Well, we wanted to acquire for stock only, I want to say, about – about 3 million – 3,000,006 shares of stock at $5 a share, . . . the company wanted to acquire the assets of the company. It had no cash in the transaction. As part of the acquisition, <u>we had agreed to – to pay the creditor the 1.6, 1.7 [million] evidenced by the promissory note. And that was our proposal to – to the Board – to the company.</u>
Q: . . . And so did the proposal contemplate that the note to David would be paid off in cash?
A: Yes.
Q: . . . And how did the Board respond to that proposal?
A: Very negatively.

. . . .

The Board simply said no cash of any kind.

. . . .

Q: So when did you tell David that there would be no cash repayment of the debt of SinglePoint to him?
A: Just after the Board meeting.
Q: And what was his response?
A: . . . David felt that we had duped him. . . . He was livid.

. . . .

Q: So what was the proposal to David to get the creditor back on board?
A: <u>The proposal was to allow David to essentially convert the note to stock. We called it a put agreement</u>, but it was . . . essentially an effort to take the creditor out a year from the acquisition with cash, or sooner if certain funding activities occurred, or if . . . the S&P relationship had value in the marketplace through sales and – and that type of thing.

JX O at 42-48 (emphasis added).

Cofiniti did not even bother to value the Put. *Id.* at 48-49. From its standpoint, it had no cost. Either Cofiniti would go public as planned, in which case the Put would not have any value or Cofiniti would fail, in which case it would never buy the shares. *Id.* at 48-51 ("they and we would have a chance to ride the same rollercoaster in terms of valuation. If it . .. didn't occur, then the value wouldn't be there. . . . I guess I would just say there would be no . . . risk to us.").[10]

In the end, the deal was "take or leave it," and Defendants had to take it. Indeed, Mr. Rossette had to agree to remain personal guarantor on millions of dollars of lease obligations for the Company's offices and equipment, as well as personally paying post-closing costs in the amount of some $200,000. Tr. II at 294-98. When Cofiniti later failed as a going concern, Mr. Rossette was called upon to, and did, make good on his personal guaranties of the lease obligations. *Id.* Plaintiffs complain that no other shareholder received a Put; no other shareholder shouldered <u>any</u> of the financial burdens Mr. Rossette did. He estimates that he personally lost approximately $7 million supporting SinglePoint. *Id.* at 299.[11]

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10 Plaintiffs' expert, Rebecca Kirk, also assigned no value to the Put, testifying that if Cofiniti's stock was worth $5 then valuing the Put "doesn't warrant the effort to do the math." Tr. III at 712-13.

11 In stark contrast, Mr. Gentile received his shares as "founders shares" and never lost a dime of his own money. Indeed, he is the only person to profit from SinglePoint, as he successfully sold shares to his friends and family (the other plaintiffs here) at a time when he knew or should have known that SinglePoint was insolvent and dependent on cash infusions every two weeks from Mr. Rossette to make payroll. *See* JX 72.

ARGUMENT

I. MR. BACHELOR WAS A DISINTERESTED, FULLY INFORMED DIRECTOR WHO APPROVED BOTH CHALLENGED TRANSACTIONS.

The evidence at trial has proved that Mr. Bachelor was an independent, disinterested, fully informed director. Mr. Bachelor and Mr. Rossette had no relationship of any kind prior to their involvement in SinglePoint; indeed, Mr. Rossette and Mr. Gentile were the former childhood friends. Tr I. at 118-19; Tr. II at 372. Mr. Rossette and Mr. Bachelor have not maintained a business or personal relationship since the end of the SinglePoint venture. *Id.*

A. Under The Circumstances Presented – A Small Company With Virtually No Financial Resources – The Approval By The One Independent Director, Mr. Bachelor, Should Be Sufficient To Shift The Burden To Plaintiffs To Prove Unfairness.

As one of two directors, Mr. Bachelor had power to "veto" either the debt conversion transaction or the Cofiniti merger or both. Tr. II at 290-91, 356. He approved both. *Id.* at 410 (debt conversion – "My vote not to approve it would have killed the company"); id. at 423-25 (Cofiniti merger). It is settled that an independent committee's approval will shift the burden. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (approval of an interested merger transaction involving a controlling shareholder "by an independent committee of directors or an informed majority of minority shareholders shifts the burden of proof on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff."); *In re Tele-Communications, Inc. S'holders Litig.*, 2005 WL 3642727, at *8 (Del. Ch. Jan 10, 2006) ("[r]atification of the transaction by disinterested directors or shareholders can have a powerful [burden-shifting] effect."). Defendants recognize that on a summary judgment record, this Court rejected the contention that Mr. Bachelor's approval shifted the burden. *Gentile v. Rossette*, 2005 WL 2810683, at *8 (Del. Ch. Oct. 20, 2005).

Defendants ask the Court to revisit this issue in light of the evidence at trial, which has established that Mr. Bachelor essentially acted as a committee in this context – a small, insolvent company with limited resources. In this context, his approval should shift the burden to the Plaintiffs to prove unfairness. The entire fairness standard is meant to protect minority shareholders, not subject directors in struggling companies to impossible standards.

B. Mr. Bachelor's Approval Proves On The Merits That The Defendants' Account Of The Facts Is True.

Mr. Bachelor himself was the second largest shareholder in the Company, whose personal stake in the Company was diluted from nearly 19% to roughly 2.2% by the conversion. Tr. II at 404-05; JX 122. He was working 80-hour weeks on half of market pay. The only sensible explanation for Mr. Bachelor to approve the conversion is to accept that the Company's alternative was to cease operations, lay off its employees and liquidate its few assets, leaving the shareholders with nothing.

If the S&P deal were truly so wonderful, then in the weeks following the conversion, Mr. Loch would not have left, the Defendants would not have been looking for a buyer for the Company, and Mr. Rossette would not have been begging S&P for more money to make payroll. If S&P was so interested in SinglePoint, it surely would have done some due diligence, infused some further financial support, or taken some more active role in the development of the technology. It never did. The only way to make sense of this situation is to accept the Defendants' account – which is confirmed by the documentary evidence, the third-party testimony and the undisputed facts.

Similarly, Mr. Bachelor approved the Cofiniti merger with full knowledge of the challenged Put. Mr. Rossette called and told him about the change in the terms within hours. Tr. II at 427. As Mr. Bachelor explained, "I thought it was going to kill the deal. I thought it was a deal breaker." *Id.* "Basically at the end it was take it or leave it." *Id.* at 428. "I think we had no other option but to shut the company down." *Id.; see In re Cysive, Inc. S'holders Litig.,* 836 A.2d 531, 550 (Del. Ch. 2003) (approval by a disinterested board committee or a majority of the minority vote is "powerful evidence" of fairness); *Cooke v. Oolie*, 2000 WL 710199, at *13 (Del. Ch. May 24, 2000) (in an interested director vote, even where Section 144 does not apply, a vote of a disinterested director is "strong evidence" to "remove[] the alleged taint of disloyalty" from the proposed transaction, reasoning that if the disinterested director believed that the transaction favored the interested director to the detriment of the other shareholders, he would not have voted in favor of the transaction).[12]

II. MR. ROSSETTE AND MR. BACHELOR SATISFIED THE ENTIRE FAIRNESS STANDARD UNDER THE CIRCUMSTANCES PRESENTED.

Even if the Defendants have to prove entire fairness, they have fully met that burden here. Entire fairness has "two basic aspects: fair dealing and fair price." *Kahn*, 638 A.2d at 1115-16 (citation omitted) (finding merger transaction entirely fair); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1140 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) (same). "The judgment whether a transaction satisfies the fairness test is, however, not a

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[12] Although the circumstance of only two board members – one interested and the other disinterested – may be unusual, that circumstance does not alter the analysis. *See, e.g., In re infoUSA, Inc., S'holders Litig.*, 2007 WL 2419611, at *23 n.74 (Aug. 13, 2007) (in the context of Section 144, granting defendant's motion to dismiss plaintiff's claim to invalidate transaction that the one disinterested board member approved). As Edward Brodsky and M. Patricia Adamski recognized in their treatise *Law of Corporate Officers and Directors: Rights, Duties and Liabilities*, § 3:8:

> [statutes such as Delaware's section 144] permit an affirmative vote by the majority of the disinterested directors, even though the disinterested directors constitute less than a quorum. Under this statutory scheme, if there are three disinterested directors, the affirmative vote of two of them would be sufficient. <u>Indeed, if there were only one disinterested director, the sole disinterested director could theoretically authorize the transaction</u>."

(emphasis added).

bifurcated one but is a single judgment that considers each of these aspects." *Id.*

Entire fairness is context dependent; it is entire fairness <u>under the circumstances</u>. "[A]ny evaluation of a fiduciary's compliance with his duties must consider the circumstances confronting the fiduciary." *Oliver v. Boston Univ.*, 2006 WL 1064169 (Del.Ch. Apr. 14, 2006); *see Cooke*, 2000 WL 710199, at *16 (where corporation faced a severe financial crisis, defendants did not breach fiduciary duty by selling their block of shares at a premium).

SinglePoint, and the Defendants, were in financial crisis throughout the year 2000. *See In re NVF Co. Litig.*, 1989 WL 146237 at *7 (Del.Ch. Nov. 22, 1989) (emergency situation is a factor in determining whether the directors breach their duty of care). It is entirely unfair to expect a Company with $600 in its checking account to hire separate legal counsel for the Company, Mr. Rossette and Mr. Bachelor. It is entirely unfair to expect such a Company to secure a fairness opinion from a first-tier investment banker (which would have cost many times what it could afford). It is entirely unfair to criticize the Defendants' negotiations and closing of the deal with Cofiniti, which were nothing less than heroic under the circumstances. Taking into account the reality of the Company's situation, the process for both the conversion and the merger was entirely fair. *See In re Zenith Elecs. Corp.,* 241 B.R. 92, 109 (Bankr. D. Del. 1999) (process was fair despite lack of a fairness opinion and lack of meaningful negotiations with minority shareholders where company had no equity and no reasonable alternatives to bankruptcy were available).

With regard to price in connection with the conversion, $.05 per share was entirely fair given SinglePoint's financial condition. SinglePoint had no significant assets, an incomplete product, no recurring revenues, and no customers. It was millions of dollars in debt, and its prospects to survive were dim. At the end of the day, $.05 per share was more than fair because the deal included continued support from Mr. Rossette, without which the Company would have collapsed. Mr. Bachelor had to work hard to convince Mr. Rossette to "hang in there."

With regard to the merger, the price was also entirely fair, even miraculous. By October 2000, Mr. Rossette had been reduced to asking Cofiniti for money to make payroll. Tr. II at 351. Mr. Rossette and Mr. Bachelor were considering filing personal bankruptcy petitions. *Id.* at 365. If the Cofiniti deal fell through, SinglePoint was finished. Notably, the consideration to the shareholders increased between the letter of intent and the final deal, and did not change when Cofiniti reneged on the agreement to pay the debt and gave Mr. Rossette the Put instead.

Cofiniti recognized SinglePoint's precarious financial position and strung out the negotiations to force Mr. Rossette to accept lesser terms than he was trying secure. The negotiations were arm's length and stretched over a period of months. The process was entirely fair and the price paid was entirely fair. The Put, by all accounts, including those of third-party former Cofiniti executives, was given to Mr. Rossette as a creditor. Despite the hind sight reconstruction of value, both the Cofiniti executives and Mr. Rossette saw the Put has having essentially no value. It was not considered material consideration at the time; it was a "make up" for the refusal to pay off the debts in cash. "Directors who advance funds to a corporation . . . do not forfeit their claims as creditors merely because of [the] relationship." *Marciano v. Nakash*, 535 A.2d 400, 405 (Del. 1987) (finding "interested" loan transactions fair where "interested directors were not depriving the corporation of a business opportunity but were instead providing a benefit for the corporation which was unavailable elsewhere.") (citation omitted).

Mr. Rossette shouldered enormous burdens to get the Cofiniti deal done by: (1) paying post-closing costs personally; (2) remaining as a personal guarantor of multiple Company obligations; (3) advancing over $1 million in additional funds to keep the Company in business long enough to be acquired, and over $300,000 more after signing the deal to keep the Company in business long enough for the merger to close; and (4) accepting the last minute change in terms for the "repayment" of the Company's debts to him through mere assumption of those obligations by Cofiniti under new, unsecured notes. Not only did the Defendants satisfy their duties to the Company and its shareholders, they exceeded them. *See Kahn*, 638 A.2d at 1115-16 (finding merger transaction entirely fair); *Cinerama*, 663 A.2d at 1139-40 (finding merger entirely fair despite directors' failure to be fully informed, where they apparently obtained the highest price under the circumstances).

III. THE EXCULPATORY CLAUSE IN SINGLEPOINT'S CERTIFICATE OF INCORPORATION, ADOPTED UNDER *8 DEL.C.* § 102(B)(7), RELIEVES THE DEFENDANTS OF ANY LIABILITY FOR THE MONETARY DAMAGES SOUGHT BY THE PLAINTIFFS.

Section 7 of SinglePoint's Certificate of Incorporation, as authorized by *8 Del. C.* § 102 (b)(7), provides: "No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director as a director." This exculpatory clause is limited only by the legal requirement that directors remain liable for violation of the duty of loyalty or acts not in good faith. *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 n.122 (Del.Ch. Nov. 30, 2007) (action alleging breach of fiduciary duty dismissed where alleged breach was nothing other than good faith, erroneous judgment). This provision shields the Defendants from liability for the Plaintiffs' claims.

Because the exculpatory clause shields the Defendants from any liability for good faith violation of the duty of care, and because only Mr. Rossette allegedly profited from the challenged transactions, the inquiry here is a narrow one. The only duty at issue with regard to the claims against Mr. Rossette is the duty of loyalty, and the only question with regard to Mr. Bachelor is whether he acted in good faith. The facts emphatically prove that both men acted in good faith and exceeded any duty of loyalty. *See Union Illinois. v. Korte*, 2001 WL 1526303, at *12 (Del. Ch. Nov. 28, 2001)(transaction subject to entire fairness review, but directors acted in good faith because they acted in response to exigent financial circumstances).

In particular with regard to Mr. Bachelor, the facts at trial should conclusively eliminate any basis for liability in light of the exculpatory clause. At worst, he can be said to have breached his duty of care (and should not be found to have done that). He did not personally profit in any way from the challenged transactions. The exculpatory clause is a complete answer to the claims against Mr. Bachelor.

IV. THE COURT SHOULD DISREGARD THE TESTIMONY OF PLAINTIFFS' EXPERT, REBECCA KIRK, AND ADOPT THE ANALYSIS PRESENTED BY DEFENDANTS' EXPERT, RANK TORCHIO.

Plaintiffs' expert's methodology was made up for the occasion of this case. It fails to satisfy Delaware Uniform Rule of Evidence 702, and Ms. Kirk does not reliably apply her own methdodology or use reliable data as a basis for reaching her conclusions. She looked only at the parts of the record at which Plaintiffs' counsel told her to look. The Court should disregard all of Ms. Kirk's opinions. *Spencer v. Wal-Mart Stores East, L.P., 930 A.2d 881, 889 (Del. 2007)* ("trial courts have a gatekeeping obligation to ensure that all expert testimony is reliable and relevant") (citation omitted); *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 521 (Del. 1999) (citing F.R.E. 702 and adopting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)); *see also Penn Mart Supermarkets, Inc., v. New Castle Shopping LLC*, 2005 WL 3502054, at *14 n.111 (Del. Ch. Dec. 15, 2005) (expert testimony must have "a reliable basis in the knowledge and experience of the relevant discipline.") (quoting *M.G. Bancorporation*, 737 A.2d at 523).

A. Ms. Kirk's Many, Fatally Flawed Opinions Have Been Unreliable From The Start And The Court Should Disregard Them.

As the Court recognized, Ms. Kirk's reliance on inaccurate financials "puts into question her whole methodology." Tr. II at 527. Ms. Kirk agreed at trial that if the "data available is unreliable . . . [y]ou can't use that methodology." Tr. III at 714. *See, e.g., Prescott Group Small Cap, L.P. v. Coleman Co.,* 2004 WL 2059515, at *20 (Del. Ch. Sept. 8, 2004) (rejecting an expert's opinion, holding that "the entire edifice of the . . . valuation rests upon a core factual foundation that is plainly wrong"); *Lane v. Cancer Treatment Ctrs. of Am., Inc.,* 2004 WL 1752847, at *28 (Del. Ch. July 30, 2004) (rejecting the opinions of the expert in an appraisal proceeding that were based on a factual assumption held to be incorrect); *Doft & Co. v. Travelocity.com, Inc.*, 2004 WL 1152338 at *5 (Del. Ch. May 21, 2004) (recognizing that "methods of valuation . . . are only as good as the inputs to the model.")

Recognizing too late that Ms. Kirk's made up methodology was fatally unreliable, Plaintiffs have tried to blame the Defendants for their failures. But the fault is all their own.

The truth is Ms. Kirk's methodology is and always was fatally unreliable, even ridiculous, as she purported to find a surge in value of millions of dollars in just over two weeks. Plaintiffs' assertion that they were justified in relying on a few line items in general ledger in the face of a sea of evidence that the financials were not reliable is also fatal to their position. Ms. Kirk simply did not do a credible job investigating the facts that purportedly formed the basis of her conclusion, and turned a willfully blind eye to overwhelming evidence that contradicted the basis for her opinion. She posited no fewer than five damages opinions before trial; the Court should disregard them all.

1. <u>The Revenue Surge Theory Was Always Fatally Unreliable.</u>

Ms. Kirk's first several opinions were premised on the assertion that the Company's enterprise value somehow surged in a 17-day period between March 10, 2000 and March 27, 2000 because the Company experienced an influx of revenues during this time period. JX 203; *see* Tr. III at 633-34.

In her original report, Ms. Kirk "accepted the financial statements as reported, without any adjustments, including accepting that the $500,000 in prepaid royalties from Standard & Poor's should be considered revenue." Tr. III at 547. Having done nothing to look behind the validity of her use of these financial statements, Ms. Kirk originally opined that the enterprise value of SinglePoint surged from $7.8 million to $23.8 -- **$16 million** – in 17 days between March 10, 2000 and March 27, 2000. JX 203, Exs. D & G thereto; *see* Tr. III at 562-64; *id* at 617. On this basis, she opined that the Plaintiffs' damages were $1.74 million. JX 203; *see* Tr. III at 548; *id.* at 617.

Ms. Kirk's calculations begin with the faulty premise that $0.75 per share was the fair value of SinglePoint's stock on March 10, 2000. Tr. III at 612-13. Ms. Kirk accepted this figure from the SinglePoint board minutes raising the employee stock option price to $0.75, *id.* at 613 – even though there were never any options issued at this price and third-party witness, corporate secretary James Radebaugh, testified that $0.75 per share was <u>not</u> the fair market value of the stock. *Id.* at 683-84. Given that her starting place is contrary to the facts, her whole theory collapses.

But even if the Court were to accept, <u>arguendo</u>, that $0.75 was a proper starting place for her analysis, Ms. Kirk performs financial alchemy to find that the value of the Company more than tripled in the coming 17 days, by multiplying an implied revenue multiple based on $0.75 per share times the allegedly increased revenues in that short time. *Id.* at 561-62. On the one hand, she insists that the Defendants must have intended the $0.75 employee option price to be fair market value, and that all the information about the Company's insolvency problems is "baked into" that number, but apparently assumes that the surge in revenues (assuming for the moment that it was real) was a surprise to the Defendants. *Id.* at 607-08 (risk of insolvency accounted for in option price), *Id.* at 699-700.

Ms. Kirk agreed at her deposition in August 2007 that her theory depended on the premise that SinglePoint's 12-month trailing revenues had in fact increased during this 17-day time period. JX S at 117-19. She was specifically asked, and agreed, that the increase had to: (1) actually be revenue; and (2) come in during the time period between March 10, 2000 and March 27, 2000. *Id.* From the very beginning, she failed to undertake proper investigation of whether the factual basis of her theory had any support.

Ms. Kirk relied not upon an independent examination of the documentation in this case, but upon Plaintiffs' counsel. Tr. III at 551 ("When you [Mr. Jenkins] hired me, we talked briefly about whether it was necessary for me to audit the financial statements. You indicated that there was no concern, or at least no known concerns, about the financial statements at that point in time."). Her allegedly independent examination consisted of noting that others in the past had purportedly relied on the financial statements (even though Cofiniti did months of due diligence, and Steve Martin testified there were no revenues). *Id.* Ms. Kirk similarly rejected a discounted cash flow analysis as a possible methodology, because Plaintiffs' counsel told her to. *Id.* at 615.[13]

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13 Mr. Torchio also rejected a discounted cash flow analysis – but did so without prompting from counsel. There is no dispute that the projections by Thomas Loch, used by the Harmon Group, were pie-in-the-sky fantasies and unreliable. It is telling, however, that even using those projections, the Harmon Group found a $.04 per share fair market value using a discounted cash flow analysis. JX 160.

Presumably Plaintiffs' counsel also instructed her to focus solely on "fair value" rather than fair market value, because the Supreme Court has instructed that fair value be the measure of damages. *See* Pl. Opening Br. at 29 n.28. But before a court reaches a damages analysis, there must be liability, and Mr. Rossette was not obligated to pay "fair value" in order to pay a "fair price" for the shares in March 2000. *See Union Illinois*, 2001 WL 1526303, at *5 ("Fair price 'relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.'"); (expressly rejecting "fair value" as the equivalent of "fair price" for the liability analysis).

Prior to her deposition, Ms. Kirk had never even looked at the general ledger. Tr. III at 633. Indeed, she testified at her deposition that <u>she did not even have access to the general ledger in forming her opinion</u>. *Id.* at 634 (JX S at 109) ("I would have preferred to have access to a general ledger or a contract that was actually signed or some copy of a check that came in, <u>but I didn't have access to any of that information.</u>") (emphasis added). Rather, Ms. Kirk relied upon the "team," *i.e.* Plaintiffs' counsel, who told her "the level of revenue change was consistent with the Fiserv contract coming in during that period." *Id.* This, of course, was completely contrary to the documents that Plaintiffs had in their possession, which included the Fiserv contract, dated May 23, 2000, and which generated revenue of some $100,000. JX 162; JX C at 73-74.

Instead of conducting any real inquiry into the assumptions upon which she based her methodology, Ms. Kirk simply assumed that the February 29, 2000 financial statement was a suitable proxy for the revenues as of March 10, and that the March 31 financial statement was a suitable proxy for March 27. Tr. III at 633-34, 647, 686. From the start she was using documents as the "basis" for her opinion, which together included 14 out of a possible 31 days on which the "revenues" might have been booked, but would not have been properly included even under Ms. Kirk's theory.

Her shoddy factual inquiry also led her to include in her calculations the S&P royalty advance, which she would later concede is not revenue. *Id.* at 617. She claimed to make this change based upon "new information." *Id.* at 547. If she had bothered to look at the financials and the S&P March 2000 License Agreement or the testimony of Del Johnson, this "new information" would not have been news at her deposition.

Ms. Kirk also conceded at her deposition that only recurring revenues should be included in a revenue multiple calculation, but claimed she had no way of telling "conclusively" whether items should be included or not. JX S at 95-97; Tr. III at 628-30. For a time it appeared that a $100,000 litigation settlement had also been booked as revenue, and Ms. Kirk backed that out of her calculations in her Rebuttal Report. Tr. III at 565-66; JX 204. The impact of this adjustment was to <u>increase</u> her calculation of the purported revenue multiple from 18.49 to 24.25. JX 204, JX E thereo; *see* Tr. III at 566. Indeed, Ms. Kirk had so little confidence in her own opinion that in her Rebuttal Report she offers two different conclusions – one with the S&P loan included as revenues ($2,122,729) and one without ($1,191,772), and a purported "median" of Plaintiffs' damages ($1,657,250). JX 204. *See* Tr. III at 619-23.

Before trial, Ms. Kirk changed her opinion again by putting $100,000 <u>back</u> into her revenue numbers, because it turned out it had not been booked as revenues. JX 203. She then opined that Plaintiffs' damages were $1,030,000. *Id.*

In sum, setting aside the challenged revenue issue, Ms. Kirk's shoddy factual investigation and made up methodology led her to offer no fewer than **five** different "expert" opinions of the Plaintiffs' damages prior to trial. Her opinion never had any sound underlying methodology or basis in fact, and should be rejected altogether.

2. Ms. Kirk's Purported "Checks" on Her Primary Methodology Are Equally Flawed.

Ms. Kirk also purported to check her results by using a recognized methodology – looking at revenue multiples for "comparable" companies. Tr. III at 571-72. But her selection of criteria to identify allegedly comparable companies was so poor that she generated a range of multiples so wide as to be meaningless. *Id.*at 571, 574, 703 (range from 0.6 to 213), 704 (range from 2.7 to 439); *compare* JX 216 (Mr. Torchio's comparables for financially distressed firms range from 1.8 to 43.18). Even Ms. Kirk admitted that she could not have confidence in the results of this check. Tr. III at 702 ("not comfortable" with it as primary methodology).

When she looked at the Cofiniti merger as a check, she made the factually unsupportable assumption of accepting the $5.00 per share stated value for the Cofiniti stock, even though the evidence was clear that this too was not the fair market value of Cofiniti's stock. Tr. III at 588. Plaintiffs again attempt to make the $5.00 stated Cofiniti share price versus the $1.86 fair market value reality out as some kind of misstatement issue. Nothing could be farther from the truth. Mr. Rossette battled Cofiniti hard on the stated value and exchange ratio, but Cofiniti held all the bargaining cards and made a "take it or leave it" offer that Defendants had no alternative but to accept. Tr. II at 348-49.

Now the parties find themselves in the alternate universe of the courtroom having financial experts purport to determine fair market value years in the past and with the benefit of hindsight. To give their opinions any validity at all, they must use the actual fair market value, and not simply accept a stated value on the ground that the Defendants said it, so it had to be true. *See* Tr. III at 589-90. When confronted with the hard fact that Cofiniti valued its stock at $1.85 per share, Ms. Kirk offered the bizarre statement that "[t]he important question for me was not the value of Cofiniti at the time. It was the value of SinglePoint." *Id.* at 675-76. Ms. Kirk did not care what the real value was; she would use the stated value no matter what the facts were. Contrary to her position, the consideration to SinglePoint's shareholders was <u>not</u> $2.46 per share; it was approximately .49 shares of Cofiniti stock per share. Cofiniti insisted, from a vastly superior bargaining position, that the stated value be $5.00. In reaching a hindsight estimate of the value of SinglePoint's stock, refusing to consider what Cofiniti's stock was actually worth is sophistry.

Finally, Ms. Kirk asserted that since the conversion rate was set at $.50 in the loan documents dated October 23, 1999, then the Company's enterprise value would have to decline by 90% from October 23, 1999 to March 27, 2000. *Id.* at 705-06. She agreed that "[i]f you could demonstrate that October was a better period than March, and better by 90 percent, then I would agree with you that you could come to the conclusion that [the conversion rate] should be lowered." *Id.* at 707.

The facts, of course, are precisely that – rather than being a "bright period" for SinglePoint, March 2000 was its darkest hour. Ms. Kirk (while contesting the facts) agreed that discovering that S&P would not make an equity investment would be a "material change." *Id.* at 708. Most tellingly, she agreed that a significant increase in the Company's debt – from $1.7 million in October 1999 to $3.2 million in March 2000 would be a problem for the Company "if Mr. Rossette were actually treating debt as debt." *Id.* at 709. Ms. Kirk actually opined that this was not a problem for SinglePoint because Mr. Rossette "[didn't] make them pay their interest payments" and the "debt covenants are pretty loose." *Id.* at 709. In other words, Mr. Rossette was too good to SinglePoint in his capacity as creditor, so he was artificially inflating the value of its stock, and should be punished. This is absurd.

3. <u>The Improperly Booked "Revenues".</u>

As the Court knows, the testimony was clear at trial that there was no surge in revenues in March 2000. Rather, these were funds that Mr. Rossette caused to be transferred from Leasenet to SinglePoint. They were booked as revenues because "[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." Tr. I at 247. The Company had no product to sell and was performing no services for pay. *Id.* at 248. There is no contract with E-Invest among the many documents produced in this case.[14] *See* Tr. II at 409 (never sold anything to E-Invest).

Plaintiffs claim to have somehow been misled, but Mr. Rossette's testimony is entirely consistent with the message the Defendants have been delivering since the beginning: <u>This Company had no product, no substantial service revenues, no customers, and no revenues.</u> Tr. I at 248. This message has been delivered loud and clear by every witness in this case for years. The Plaintiffs have simply refused to believe it, and have disregarded all the evidence contrary to their view of the case. Ms. Kirk in particular relied not upon Mr. Rossette or the massive collection of documents and deposition testimony, but upon Plaintiffs' counsel to tell her what to look at. Tr. III at 551, 615, 633.

Plaintiffs' reaction this testimony, in fact, speaks volumes. They ask the Court to believe Mr. Rossette and Mr. Bachelor have lied about many things, but the Plaintiffs implicitly accept as true (and indeed it is true) that the E-Invest "revenues" never existed, at least not from

[14] Having secured them from the Company during the prior appraisal action before both Cofiniti and its law firm, Brobeck, Phleger & Harrison went bankrupt, Plaintiffs have had all the documents since roughly 2001. *See, e.g.*, Tr. II at 324-26; Tr. III at 625-26.

"application sales." They know and always have known that there was no application to sell and, accordingly, no such revenues. Every witness in this case at every deposition has testified that there was no product, no customers and no revenues. If the Plaintiffs thought they had some line items buried in the general ledger (without any contracts or other documentation to support those line items), then it was their responsibility to cross examine these many witnesses about the E-Invest figures. The Defendants have made their point loudly, consistently and often. Plaintiffs' claim that they were misled and surprised at trial is totally false.

At her deposition in particular, Ms. Kirk was asked multiple questions suggesting that there were no such revenues. *See* Tr. III at 633-34, 649-61. Rather than take all these questions as a sign that she should check her facts more carefully, she concluded that defense counsel was simply trying to "trip her up." *Id.* at 661. Later, despite finding the challenged revenues booked as "application sales," when all the testimony from every witness was to the effect that the Company had no application to sell, Ms. Kirk apparently felt satisfied that she had done enough. *Id.* at 554. She did not even note that the purported sales were booked as being from E-Invest, when she thought they came from Fiserv, and there was no contract with E-Invest anywhere to be found. <u>Ms. Kirk never even looked to see if there was a contract with E-Invest.</u> *Id.* at 647. At bottom, she did not care – <u>did not want to know</u> – what, if any, support there was for the financial information upon which she purported to base her opinion. All that mattered was she found some documents to suggest there were revenues in the 17-day period on which she wanted to base her opinion. *Id.* at 649 ("I didn't really care who the customer was.").

Plaintiffs brandish many rhetorical flourishes about "cooking the books" and "fraud," but Defendants defrauded no one, and Mr. Rossette cheated only himself. Tr. I at 250-51 ("It was free money.") Cofiniti certainly knew perfectly well there were no receivables, customers, products, or revenues, as both Mr. Martin (its CFO) and Mr. Ferguson testified (quoted on next page *infra*); *see also id.* at 248, Tr. II at 352-54 (SinglePoint told truth to Cofiniti). Ms. Kirk purportedly reviewed this testimony, but it apparently made no impression on her. *See* Tr. III at 649-61, 664-65.[15]

Defendants' message, and that of every witness in this case has been uniform from day one, Plaintiffs have simply refused to listen. The Court should consider, for example, the following:

Former SinglePoint President Thomas A. Loch (who was President in March 2000):

Q: Did SinglePoint ever develop a product that was commercially ready while you were president:
A: No.
Q: How close did it come?
A: Not close . . . we never really got a full working – what I would call a beta version of the software working for S&P up to the point that I left the company.

JX P at 30-31 (admitted into evidence as Exhibit P). Plaintiffs failed to ask Mr. Loch a single question about E-Invest. JX P.

Former Cofiniti Chairman, Marc Ferguson:

Q: To what extent was SinglePoint's customer base a factor in Cofiniti's decision to acquire it?
A: There really were few customers at the time, and they represented development in relationships. . . . .
Q: To what extent was SinglePoint's revenue stream a factor in Cofiniti's decision to acquire SinglePoint?
A: Still, again, prospective revenue stream was the only thing that was of interest. Anything historically that was documented or demonstrated to that point was all contract development work to build the product. Perhaps some of it was repeatable, but not much. . . . .

[15] Plaintiffs ask the Court to draw all sorts of inferences from the failure to ask prior witnesses specific questions about these particular line items on the books in prior depositions; but every such failure was theirs, not the Defendants'. If they intended to rely upon the theory they presented at trial, it was their obligation to ask the questions to support that theory, or ferret out problems with it.

JX Q at 29-30. Plaintiffs did not ask a single question about E-Invest. JX Q.

Former Cofiniti CFO, Steven Martin:

Q: So when you reviewed the financial statements, what did you learn about the company?
A: Well, we learned that the company didn't – didn't have any – any revenues. We – we saw the company as a development group.

. . . .

It looked to us as if it was a group of software developers who were – were writing code and in, you know, the early states of developing product with – with no way to get it to the marketplace within their own company. We did not find a – a robust group of salespeople. We didn't find any – any robust marketing effort. What we found was a – what looked like to us a – a client or company-founded development effort supported by David Rossette's personal funds, and that's what we saw.
Q: Did you find any client contract when you did your due diligence?
A: No.
Q: Did they – did the company have any prospects in the pipeline it was trying to develop.

MR. KATZENSTEIN: Objection.

A: We discovered only one, and that was the hope to develop SinglePoint—Standard & Poor's as a buyer of the product.

JX O at 24-25. Plaintiffs did not ask Mr. Martin a single question about E-Invest. JX O.

Mr. Bachelor (as a third-party witness in a telephonic deposition Plaintiffs conducted in the appraisal action in 2002):

> Q: . . . You recall that [the employee stock option price] was raised from $0.50 per share to $0.75 per share because that represented the perceived fair market value of the stock at that time?
>
> MR. HALSTON: Objection.
>
> A: No. In fact, the company was basically insolvent at that time. We had no customers. We had a formative relationship with Standard & Poors. We had incomplete technology that was not signed off by S&P. So we really had no basis for any value in the company at that point other than what, you know, what is potential.

JX B at 15.

> Q: . . . How did the Board of Directors determine that the liquidation value of the common stock was, at best, nominal?

> A: . . . at that point in time, . . . we had no customers, an incomplete set of technology, a high monthly burn rate on expenditures, a high level of debt, and no current views or . . . or no current capital to sustain us. So I think, given all of those questions, the company was in a very exposed position where, if Mr. Rossette did not continue any funding, the company would essentially be liquidated.
>
> . . . .
>
> There was no revenue that had come into the company and significantly increasing debt. So really this company was particularly exposed as a going concern.

JX B at 43-44.

Mr. Rossette

Mr. Rossette's own deposition testimony was precisely the same when examined by Plaintiffs' counsel, back in November 2003:

Q: As of January 1, 2000 what was the company's product or service at that time?
A: The company had no viable commercial product at that time.
Q: Did it have any customers [in January 2000]?
. . .
A: I don't believe the company had a product in which any customer was paying for.

JX C at 63-64 (brief colloquys about definition of terms omitted).

With regard to project work, Mr. Rossette acknowledged at his deposition that the Company had at some point received money for providing services to CDI, Techies.com, and OpTech. JX C at 70-72. But when asked about the year 2000:

Q: Were any of those – were any of CDI, Techies.com or Optech still paying customers as of the year 2000?
A: Not that I can recall.

Id. at 72. Mr. Rossette also acknowledged some revenue, in the amount of approximately $100,000 from a beta test of the SinglePoint Advisor by Fiserv in or around July 2000. *Id.* at 73-74. He also recalled some "miscellaneous billable hour" revenues from a company called ADP in the amount of "less than $25,000." *Id.* at 75-76.

At his deposition, Mr. Rossette identified E-Invest as a "prospect customer," which SinglePoint also asked to make an equity investment, but which declined to do so. *Id.* at 102-03. After Mr. Rossette identified E-Invest as a prospect that declined to invest in SinglePoint, Plaintiffs' counsel asked a broad, opened ended question about revenues from E-Invest during any time period whatsoever:

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

Id. at 104-05. Mr. Rossette gave a careful answer to a question that spanned the entire life of the Company and encompassed any revenue of any kind no matter how small. Given that he had already testified to revenues of "less than $25,000" from ADP, and $100,000 from Fiserv, we may safely conclude he would have recalled nearly $400,000 in revenues in March 2000 from E-Invest. Plaintiffs' counsel asked no further questions on point.

Defendants' Motion for Summary Judgment in September 2004 also repeatedly argued that the Company had no commercially viable product, almost no customers, and no substantial revenues. For example:

> "Throughout its corporate life, SinglePoint Financial, Inc. survived only because Defendant P. David Rossette supported it with repeated infusions of cash, sometimes structured as debt financing and sometimes as equity investments." Defendants' Opening Brief in Support of Their Motion for Summary Judgment ("MSJ Brief") (Trans. ID 4156104 at 1.)

> "Over its four-year lifespan, SinglePoint never developed any commercially viable product or service, and never generated any sustained revenue stream." MSJ Brief at 3.

> "It had found no other funding, had not developed any commercially viable product, and had not generated any product revenue." MSJ Brief at 7 (describing the period following David's 1997 Stock Purchase Agreement).

> "With Mr. McGrath as President, the Company at last generated some revenues through a substantial consulting contract with CDI Corporation. For a period in 1998, the Company's revenues actually exceeded its expenses. Even then,

> however, due to cash flow issues, the Company regularly turned to Mr. Rossette for financing to meet payroll." MSJ Brief at 9.
>
> "After the Techies.com debacle, the Company, once again with no customers, no revenues, no capital, no commercially viable product and no clear business plan, might have closed its doors." MSJ Brief at 12 (describing the period in between the Techies deal and the S&P prospect).
>
> "**Cofiniti realized that SinglePoint had virtually no revenues, an incomplete product, no material customers, no material contracts and could not meet monthly payroll and operating costs from revenues generated through its business**." MSJ Brief at 21 (emphasis added, describing the results of Cofiniti's due diligence).

Thus, despite years of being told repeatedly that SinglePoint had "virtually no revenues, an incomplete product, no material customers, [and] no material contracts," Plaintiffs chose to disregard everything the Defendants have been telling them, and purportedly hung their hats on a nearly $400,000 surge in revenue in mid-March 2000, presumably believing that the Defendants were lying all these years (and apparently the third party witnesses, such as former Cofiniti CFO Steve Martin too).

Indeed, if Ms. Kirk, or Plaintiffs' counsel, had bothered to look, they would have seen in the financials that by May 2000, most of the challenged revenues were reversed on the books. Tr. III at 643-45 ($230,000 written off), 665 (testifying about what Mr. Martin would have seen during due diligence: "He should have seen the $385,000. He would have also seen a subsequent write off of $335,000"). Even under her own methodology, these ephemeral "revenues" cannot qualify as "recurring revenues" properly included in Ms. Kirk's calculations. JX S at 95-97 (admitting revenues must be recurring to count). **The challenged revenues should never have been included in Ms. Kirk's figures, even if they were based on application sales to E-Invest, which they were not.**

Furthermore, when Ms. Kirk finally looked at other documentation in the case after Mr. Rossette testified on day one of the trial, she found "other periods where there choices made . . .

there may have been better choices made in terms of how to classify particular transactions." Tr. III at 603. In other words, when she bothered to look at the documents, she found reason to "question prior transactions." *Id.* If she had approached her analysis with a critical eye, rather than looking for a reason to opine as to a big damages number, the answers were there to be found.

At bottom, Plaintiffs' cries of "foul" are simply an underhanded ploy to salvage a case they should never have brought.

4. <u>The Latest Kirk Opinion.</u>

Incredibly, in her most recent opinion, Ms. Kirk concludes that if she accepts that SinglePoint had no significant revenues in March 2000, then the Company was <u>worth even more than she thought when she believed it had revenues</u>. She actually purports to opine, therefore, the Plaintiffs' damages have <u>increased</u> from \$1.03 per share to \$1.45 per share. This opinion does not pass the straight face test.

Instead, it is emblematic of the Plaintiffs' approach to this case from the outset. Reality has no bearing on their contentions. Given that the Plaintiffs' basis for seeking leave to submit a further opinion is itself a fiction, the Court should not permit the Plaintiffs to file the supplemental opinion. But even if the Court admits it into evidence, the Court should reject Ms. Kirk's latest opinion as a work of fiction as well. *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, at *7 (Del. Ch. Apr. 25, 2002) (expert's "conclusions as to value . . . are so high that they draw into question both his qualifications and his independence.").

B. <u>Mr. Torchio's Methodology Is Sound And His Opinion Is Grounded In Reality And Should Be Accepted By The Court.</u>

Defendants' expert Frank Torchio offered the only reliable financial analysis presented at trial, and the only expert testimony that was grounded in facts. Mr. Torchio determined that the fair market value of SinglePoint's stock was $.05 per share at the time of the debt conversion.[16] Mr. Torchio arrived at this conclusion by using bona fide transactions and peer company multiples. Tr. IV at 742. Mr. Torchio's opinions are well summarized in JX 216.

With regard to the transactional analysis, Mr. Torchio relied upon the October 23, 1999 reduction of the debt conversion option price from $0.75 to $.50 per share, and the Cofiniti merger as two transactions that "book ended" the challenged debt conversion. Tr. IV at 744. The Cofiniti merger, in particular, was highly relevant as an arm's-length transaction in which stock actually changed hands. *Id.* at 746.

1. Mr. Torchio Correctly Concluded That $.05 per Share Was a Fair Price Based Upon the Cofiniti Consideration.

Mr. Torchio looked at both Cofiniti's board minutes and financials in determining that the fair market value of Cofiniti's stock was $1.86 per share at the time of the merger. *Id.* at 748-49; JX 202, 205, 216. $1.86 per Cofiniti share, multiplied by the conversion rate of .492 shares of Cofiniti per share of SinglePoint and the 5.76 million SinglePoint shares outstanding, equals $5.24 million in equity consideration in the merger. Tr. IV at 749. Mr. Torchio then adjusted this figure using a Black-Scholes valuation model to reflect that a substantial number of the shares were escrowed. *Id.* at 750-51.

To this figure, Mr. Torchio added the value of the assumption of the debt to Mr. Rossette and added a further $1.05 million for the value of the Put granted to Mr. Rossette. *Id.* at 751-

[16] "Fair market value" differs from "fair value" in that fair market value properly includes discounts for illiquidity or minority position. *See* Tr. III at 685-86 (Ms. Kirk agrees fair market value includes liquidity discount). *See* David Laro and Shannon P. Pratt, *Business Valuation and Taxes*, Chapters 18, 19 (2005).

52.[17] Adding all those figures together, Mr. Torchio calculates a total consideration in the merger of $9.036 million. *Id.* at 752; JX 216.

In order to work backward from this value in October 2000 to the relevant valuation date of March 27, 2000, Mr. Torchio then made further adjustments. *Id.* at 752-53. He calculated the present value on March 27, 2000 of the October 2000 merger consideration. *Id.* at 753. He added in the value of 20,000 shares of Techies stock at $11 per share. *Id.* at 753. He deducted the debt obligations of SinglePoint as of March 27, 2000. *Id*, at 754-55. Based upon these adjustments he found an equity value of $4.4 million for SinglePoint, or $0.75 per share as of March 27, 2000, "<u>if you knew with a fair degree of certainty that there was going to be a merger as of October</u>." *Id.* at 755 (emphasis added).

Of course, as of March 2000, the Defendants hoped to keep the Company alive long enough to find an acquisition partner, but their prospects were a long way from certain. On the contrary, "everyone considered this company to be insolvent as of March 2000." *Id.* at 757. There was a significant chance the Company would not "make it," would miss payroll, and go bankrupt. *Id.* Mr. Torchio accepted the adjusted value of the Cofiniti consideration -- $0.75 per share – as the positive outcome, where the Company survived, and zero per share as the negative outcome, where the Company failed and went bankrupt. *Id.* at 758.

The conversion rate used by the Defendants, $.05 per share, therefore equates to a probability of success – of survival – of 7% to 10%, depending on whether a marketability discount is applied. *Id.* at 758. Either figure exceeds the probability of survival derived from dividing the Company's last 12-month EBITDA by its burn rate – the methodology

[17] Defendants recognize that when working in hindsight, one accepts the actual value of Cofiniti's stock was $1.86, not $5.00, this leads to a high hindsight valuation of the Challenged Put. But the parties at the time did not see it that way, as both Mr. Martin and Mr. Ferguson clearly testified.

recommended by Professor Damodaran in his textbook, The Dark Side of Valuation. *Id.* at 759-60; JX 216, slides 14-16. Using Professor Damodaran's formula, SinglePoint's likelihood of survival in March 2000 was only 5%, a figure that comports precisely with the experience of the Defendants at the time, and with Mr. Radebaugh's testimony that the $0.75 employee option price was a "hope" of future value. Mr. Torchio's analysis is factually and methodologically sound and should be adopted by this Court.

2. As Mr. Torchio Explained, the October 1999 $.50 Conversion Rate, Adjusted for Reality as of March 2000, also Supports $.05 as the Fair Price.

Between October 1999, SinglePoint not only discovered it was not getting the deal it expected with S&P, but also its debt to Mr. Rossette soared. When the impact of the debt on the enterprise value is included in the calculations, the value of SinglePoint's equity indeed did drop precipitously between October 1999 and March 2000. This analysis also supports the conclusion that $.05 was a fair price in March 2000. JX 216, slides 17-19.

3. Mr. Torchio's Market Checks Confirm His Conclusion.

Unlike Ms. Kirk, Mr. Torchio recognized that SinglePoint's financial distress had to be taken into account in choosing comparable companies. JX 216, slide 22. Mr. Torchio included operating income, revenues and cash balance as criteria and generated a set of comparable companies whose revenue multiples confirm his analysis.

C. If The Court For Some Reason Holds One Or Both Defendants Liable, It Should Adopt Mr. Torchio's Alternative Damages Calculation.

In the event that the Court for some reason makes a finding of liability, the damage award should be modest. This is an equitable proceeding in which this Court has broad discretion to determine fair value in the event it concludes liability should be imposed. *See, e.g., Union Illinois 1995 Inv. Ltd. P'ship v. Union Financial Group, Ltd.*, 847 A.2d 340, 355 (Del. Ch.

2004). It would make no sense to give a substantial award to the Plaintiffs against either Mr. Rossette or Mr. Bachelor. Given the financial peril the Company was in, and the remote chance it would survive, punishing either of them for their efforts and ordering either of them to pay money to a man (and his friends and family)[18] who left them holding the bag when times were darkest would be a terrible result.

From an analytical standpoint, Mr. Torchio offered solidly grounded alternative views. If the Court for some reason awards any damages, it should award the most modest of Mr. Torchio's alternative calculations, approximately $32,418. JX 216, slides 19 & 32; Tr. IV at 791-96. As Mr. Torchio explained at trial, using the two benchmark transactions – the Cofiniti merger and the October 1999 conversion rate, but eliminating any liquidity/marketability discount, yields a figure between $32,000 and $52,000 as the "fair value" of the dilution. Any damage award should be no higher than that. *Id.*

D. <u>Plaintiffs' Request For An Award Of Attorneys' Fees Should Be Rejected.</u>

As explained in detail above, Plaintiffs' cries of "foul" are simply false. But even if there were any truth in them (which there emphatically is not so), they would amount to a garden variety, albeit vicious attack on Mr. Rossette's credibility. None of the cases they cite is remotely comparable. There is simply nothing extraordinary here to support a conclusion of bad faith to justify a fee award. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

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[18] Only Mr. Gentile has standing to challenge the debt conversion; the other Plaintiffs did not own their shares yet in March 2000. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1170 (Del. Ch. 2002).

CONCLUSION

Disinterested, third-party witnesses confirm the key points of the Defendants' account of what happened. With regard to the Company's financial woes – including the total absence of customers, a product or revenues – Mr. Loch, Mr. Martin, Mr. Ferguson and Ms. Rapsis all confirm this was so. With regard to the S&P relationship, Mr. Johnson and the S&P internal e-mails confirm that in January 2000, the equity investment idea rose and fell. Mr. Radebaugh explains that the employee option exercise price was merely a "hope" of future value. With regard to the Challenged Put, Mr. Martin and Mr. Ferguson both confirm that it was given to Mr. Rossette as a creditor after Cofiniti reneged on its promise to pay the debts to him in cash. This is a sorry tale of commercial failure. The Defendants did their level best to succeed, breached no duties of any kind, and have been hounded for years by a man who contributed nothing positive and attacked the Company and the Defendants, even as they were struggling to keep the Company afloat.

The Court should enter judgment in favor of the Defendants, and award Defendants their costs and such other and further relief as the Court deems just.

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