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Case No. 7840-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: THE ORCHARD ENTERPRISES, INC. STOCKHOLDER LITIGATION	))))	CONSOLIDATED C.A. NO. 7840-VCL **CONFIDENTIAL FILING** PUBLIC VERSION FILED December 27, 2013

THE SPECIAL COMMITTEE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs' entire opposition to the Special Committee Defendants' Motion for Summary Judgment is premised on Plaintiffs' "one big lie" conspiracy theory that the Company's stockholders were intentionally misled so that the Dimensional Defendants[1] and Joseph Samberg could profit from the Merger. Plaintiffs claim that each and every Defendant was aware of this grand scheme and played their role to make it happen. Plaintiffs' theory, however, falls apart with respect to the Special Committee Defendants because there is no evidence—not a single email or other communication involving the Special Committee Defendants—showing that any of the Special Committee Defendants acted in bad faith in negotiating, considering, and approving the Merger. Adverbs, adjectives and innuendos are not evidence, and that is all Plaintiffs can muster from the factual record to support their claims. Nor is there any evidence that any of the Special Committee Defendants stood to benefit from this supposed scheme such that they would risk their reputation and potential liability to benefit the Dimensional Defendants and the Sambergs.

Because of this lack of evidence, the best Plaintiffs can do is point to supposed "red flags" that the Special Committee Defendants were allegedly aware of and ignored that showed that the Merger was unfair. But none of those "red flags" come close to showing bad faith; indeed, with respect to many of these supposed "red flags," there is no evidence that the Special Committee Defendants were even aware of them. For instance, Plaintiffs rely (for the first time in the three year history of litigating this transaction) on a single-page, draft calculation from Fesnak's internal work papers that reflected a $4.84 per share value as evidence of the

[1] Defined terms not otherwise defined herein have the meaning assigned to them in the Special Committee Defendants' Answering Brief in Opposition to Plaintiffs' Motion for Summary Judgment.

Special Committee Defendants' bad faith, even though there is zero evidence that this single page was ever shown to the Special Committee or was ever anything more than an internal Fesnak work paper. In fact, all of the evidence proves otherwise.

Absent any real evidence of bad faith, Plaintiffs advance their "one big lie" / bad faith conspiracy theory by relying on a single disclosure in the cover notice to the Proxy Statement that mistakenly stated that the Series A preferred stock liquidation preference was triggered by the Merger. The Proxy Statement, however, is not misleading when it is read as a whole, and a reasonable stockholder of the Company was able to cast a fully informed vote in connection with Merger. Plaintiffs' attempt to twist selected portions of two other disclosures in the Proxy Statement to show that the Company's stockholders were intentionally misled similarly fails because those disclosures, when read in full (not just Plaintiffs' selected portions) and not viewed through the prism of Plaintiffs' fabricated "one big lie" conspiracy theory, are accurate.

Thus, Plaintiffs resort to misrepresenting the factual record and ignoring facts that contradict their positions to attempt to create a factual issue to defeat the Special Committee Defendants' Motion. Plaintiffs, however, fail to identify any evidence to demonstrate that the Special Committee Defendants acted in bad faith or breached their duty of loyalty and, therefore, the Special Committee Defendants are entitled to the protections afforded under 8 *Del. C.* § 102(b)(7). Accordingly, the Special Committee Defendants' Motion should be granted.

ARGUMENT

I. THE SPECIAL COMMITTEE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT UNDER THE COMPANY'S SECTION 102(B)(7) CHARTER PROVISION.

The Special Committee Defendants are entitled to summary judgment under the Company's Section 102(b)(7) charter provision because they are all independent and disinterested and there is no evidence that they acted disloyally or in bad faith. *See, e.g., DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *10-*16 (Del. Ch. Sept. 30, 2013) (dismissing claims against special committee members in the context of a self-dealing transaction where plaintiff failed to allege a non-exculpated breach of fiduciary duty); *In re S. Peru Copper Corp. S'holder Deriv. Litig*., 52 A.3d 761, 787 n.72 (Del. Ch. 2011) ("The entire fairness standard ill suits the inquiry whether disinterested directors who approve a self-dealing transaction and are protected by an exculpatory charter provision . . . can be held liable for breach of fiduciary duties. Unless there are facts suggesting that the directors consciously approved an unfair transaction, the bad faith preference for some other interest than that of the company and the stockholders that is critical to disloyalty is absent. The fact that the transaction is found to be unfair is of course relevant, but hardly sufficient, to that separate, individualized inquiry. In this sense, the more stringent, strict liability standard applicable to interested parties such as [the controlling stockholder] is critically different than that which must be used to address directors such as those on the [s]pecial [c]ommittee.").

A. The Special Committee Defendants Are Independent and Disinterested.

Recognizing the lack of credible evidence showing that any Special Committee Defendants were conflicted during their consideration of the Merger, Plaintiffs attempt to conjure up evidence out of whole cloth to impugn the independence and disinterestedness of the

Special Committee Defendants. The uncontroverted record, however, reveals that Plaintiffs' arguments are meritless.

There is no evidence that Donahue had a disabling relationship with any of the Dimensional Defendants or Joseph Samberg. Donahue's only business connection with any of them prior to the Merger was through his service on the Board. CQ Aff. Ex. 5 at 39:11-40:6, 42:15-21 (Donahue Tr.). In addition, Donahue only had limited social interactions with Joseph Samberg and Arthur Samberg prior to the Merger. *Id.* at 12:22-15:2 (Donahue Tr.). Those minimal contacts are not enough to cast doubt on Donahue's independence.

Nor are Donahue's connections with Jeffery Samberg sufficient to impugn Donahue's independence or disinterestedness. In their Answering Brief, Plaintiffs try to obfuscate the issue by repeatedly (and erroneously) conflating Dimensional with Jeffery Samberg to establish that Donahue had a "prior relationship[]" with the Company's controlling stockholder. PAB at 34. The record demonstrates, however, that Jeffery Samberg's only connection to Dimensional is [redacted][2] (CQ Aff. Ex. 18 at 22:20-23:2 (Stein Tr.)), and there is no evidence that Jeffery Samberg had or currently has any role in the day-to-day operations of Dimensional, JDS Capital Management, or JDS or had or currently has any decision-making authority with respect to any of those entities. Plaintiffs do not dispute that in their Answering Brief.

The relationship between Jeffery Samberg and Dimensional is too attenuated for them to be considered one and the same for purposes of considering Donahue's independence. Simply because Donahue has a personal relationship and business connections in common with Jeffery Samberg, who is a minority, passive investor in the general partner (JDS Capital

[2] JDS Capital Management is the general partner of JDS, the majority owner and manager of Dimensional. CQ Aff. Ex. 3 at 104.

Management) of the entity (JDS) that manages Dimensional, does not establish that Donahue had a "relationship" with Dimensional such that he was unfit to serve as a member of the Special Committee.[3]

Plaintiffs' argument that Donahue is conflicted because his wealth is "tied" to Jeffery Samberg also fails. PAB at 44; *see also* PAB at 14 (Donahue's "co-investments" with Jeffery Samberg "made Donahue's finances [at] least partially reliant on Samberg"). Donahue and Jeffery Samberg simply have invested in the same companies, directly or through [redacted] a large venture capital firm. CQ Aff. Ex. 5 at 21:4-23:23, 24:5-27:6 (Donahue Tr.). In all but one of those investments (Xtify)[4] both Donahue and Jeffery Samberg are passive investors. *Id*. Thus, no reasonable inference can be made that Jeffery Samberg has any influence over Donahue's income such that Donahue's wealth can credibly be said to be "tied" to Jeffery Samberg.

Plaintiffs also fail to cite any evidence showing that, pre-Merger, Donahue had an understanding or an expectancy that he would be a paid consultant for the surviving company post-Merger. The only pre-Merger evidence Plaintiffs cite is one email between Donahue and

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[3] Even if Jeffery Samberg is lumped together with Dimensional, Donahue's relationship with Jeffery Samberg is not enough to show that Donahue was not independent. *See Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000) (finding that plaintiff's allegation that director was controlled and dominated due to fifteen year friendship and business relationship "fails to raise a reasonable doubt that [the director] could not exercise his independent business judgment in approving the transaction"); *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *10 (Del. Ch. Aug. 24, 2004) ("Our cases have determined that personal friendships, without more; outside business relationships, without more; and approving of or acquiescing in the challenged transactions, without more, are each insufficient to raise a reasonable doubt of a director's ability to exercise independent business judgment.").

[4] Donahue serves on the Xtify board of directors along with Jeffery Samberg. Donahue Tr. CQ Aff. Ex. 5 at 27:8-16 (Donahue Tr.). Jeffery Samberg runs Acadia Woods, a venture capital company and the lead investor in Xtify. *Id.* at 30:12-20. Given Donahue's average income level for 2008 through 2011 (between $1.6 and $1.8 million), it is not reasonable to assert that Donahue's wealth is "tied" to Jeffery Samberg simply because Donahue receives director's fees for serving on the Xtify board of directors.

Navin in which Donahue provides Navin targeted advice on how to best operate the Company moving forward and offers his assistance in the future. PAB at 14 (CQ Aff. Ex. 78). In that email, there is no mention of Donahue having an agreement or understanding with Navin or anyone else at the Company or Dimensional that he would be a paid consultant. Plaintiffs also cite to an email from Donahue to Joseph Samberg five days ***after*** the Merger and an email from Donahue to Navin eleven days ***after*** the Merger as evidence of Donahue's consulting expectation. PAB at 14 (CQ Aff. Exs. 79, 81). Once again, there is no mention in either of these emails about Donahue being retained as a consultant or being compensated for his services. Plaintiffs are grasping at straws by relying on these three innocuous emails to demonstrate Donahue's interest in the Merger. The evidence also shows that Donahue was not compensated for the advice he provided Navin and the Company in July, August, and September 2010 following the Merger, CQ Aff. Ex. 82 (October Invoice) (showing that Donahue did not charge for his services until October 2010), [redacted] CQ Aff. Ex. 85 at 15-16.[5] Those uncontroverted facts belie Plaintiffs' contention that Donahue was consulting for the Company (and had an understanding pre-Merger) at the time of the Merger and shortly thereafter, such that he was conflicted in considering the Merger.

Even more strained are Plaintiffs' arguments challenging the independence and disinterestedness of the other four Special Committee Defendants. For instance, Plaintiffs claim

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5 [redacted]

that Dinh lacks independence because he was designated to the Board by Dimensional.[6] PAB at 18, 49. Delaware courts have long recognized that merely alleging that a director was designated by the controlling stockholder is not enough to demonstrate that the director is beholden to the controlling stockholder. *See Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 512 (Del. 2005) ("[I]t is not enough . . . to assert that the [] directors were nominated by Weinstein, the majority stockholder that controlled the outcome of the board election."). Plaintiffs also argue that Dinh lacks independence because he is a friend of The Orchard's former CEO, Greg Scholl ("Scholl"), and has served on a nonprofit board for Jazz at Lincoln Center with Joseph Samberg's father, Arthur Samberg. PAB at 18, 49. Plaintiffs fail to explain, however, why Dinh's friendship with the former CEO of the Company, who resigned 9 months prior to the Merger (CQ Aff. Ex. 3 at 15), renders him conflicted.[7] Nor do Plaintiffs clarify how Dinh serving on the same board of a non-profit with a minor, passive investor in Dimensional renders him conflicted.

Plaintiffs' claim that Peck lacks independence because he had an expectancy to serve as a consultant post-Merger "as reflected by his consulting work in December 2010 and early January 2011" (PAB at 50) is contradicted by the facts. The evidence demonstrates that Stein first approached Peck on December 1, 2010 (more than four months ***after*** the Merger)

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[6] The Proxy Statement disclosed that the Board considered that Donahue and Dinh were designated by Dimensional pursuant to a "one-time right" and subsequently had been re-elected in 2008 by a majority of the Company's stockholders other than Dimensional and that "neither Mr. Donahue nor Mr. Dinh had any prior or other relationships with [Dimensional] and neither holds an ownership interest in or management position with [Dimensional] nor received any compensation by Dimensional for their service." CQ Aff. Ex. 3 at 13.

[7] Even if Scholl is deemed to be aligned with Dimensional, Dinh's friendship with him is not enough to show that Dinh was conflicted. *See Cal. Pub. Emp. Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9 (Del. Ch. Dec. 18, 2002) (observing that an allegation of a lifelong friendship with an interested party is not alone sufficient to raise a reasonable doubt of a director's disinterest or independence); *Benerofe v. Cha*, 1998 WL 83081, at *3 (Del. Ch. Feb. 20, 1998) (noting that an allegation of a longtime friendship was not sufficient to raise a reasonable doubt about a director's ability to exercise his judgment independently of his friend).

about the possibility of consulting for the surviving company based on a recommendation from Donahue and Navin that Peck would be qualified to assist on a one-off consulting project. *See* CQ Aff. Ex. 86, CQ Aff. Ex. 87. Eight days later, on December 9, 2010, Peck provided a short PowerPoint presentation to Stein, Donahue, and Navin containing recommendations to improve certain accounting and financial areas of the business. *See* CQ Aff. Ex. 88. By email dated January 3, 2011, Stein asked Peck if he was available to assist the Company with the improvements referenced in Peck's PowerPoint and to inquire as to the cost for completing those projects, and, on January 4, 2011, Peck responded with a proposed schedule and provided his standard billing rate for performing the requested services. *See* CQ Aff. Ex. 89. A week later, Peck and Stein agreed not to proceed with the proposed project (CQ Aff. Ex. 90), and there is no evidence that Peck was ever contacted again by Stein or anyone else associated with Dimensional or the surviving company about providing consulting services. The record is also bare of any evidence that Peck received any compensation for the short presentation he sent to Stein, Donahue, and Navin on December 9, 2010. Indeed, both Peck and Stein testified that Peck never provided any formal consulting services for the Company. CQ Aff. Ex. 4 at 82:4-11 (Peck Tr.); CQ Aff. Ex. 18 at 36:13-16 (Stein Tr.).

Plaintiffs also claim that Peck had a "sense of 'owingness'" to Donahue because Peck "was a director due to his prior relationship with Donahue in working at KPMG for a decade." PAB at 50. This argument fails for several reasons. First, although Donahue introduced Peck to Stein, Peck was appointed as a director based on his background and experience and only after meeting with Stein and Joseph Samberg to ensure he was qualified. CQ Aff. Ex. 4 at 19:15-19, 20:25-21:4 (Peck Tr.). Second, Plaintiffs fail to demonstrate that Peck's directors' fees were material to him taking into account his net worth and job during his

tenure as a director. Third, Plaintiffs have failed to show that Donahue favored Dimensional, such that Peck would have followed suit.

Finally, Plaintiffs assert that [redacted][8] PAB at 18, 49. Plaintiffs fail to recognize, however, that by approving the Merger, Straka was voting himself out of a job as a director. CQ Aff. Ex. 6 at 153:4-9 (Straka Tr.) ("I, myself, was a minority shareholder. I voted my shares on that logic. ***I also voted myself out of a job as a director, too, and so, if anything, I would have benefited from voting against the deal. My financial interest would have been better served by voting against the deal***.") (emphasis added). In addition, as disclosed in the Proxy Statement, by approving the Merger at $2.05 per share, Straka (and the other Special Committee Defendants) voted to cancel all of their outstanding stock options because the exercise price on those awards was greater than the Merger price. CQ Aff. Ex. 3 at 51 ("[C]ertain of our directors and executive officers were granted stock option awards . . . [t]he exercise price per share of each of the stock options granted by these awards is greater than $2.05 . . . [t]hese stock options will be cancelled immediately prior to the effective time of the merger in accordance with the merger agreement."); *see also id.* at 104-05 (reflecting that Straka held 28,790 stock options prior to the Merger).

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[8] Notably, the cases cited by Plaintiffs to support their argument that Straka's *past* director's fees and other compensation were material to him do not support Plaintiffs' position. *See In re Primedia Inc. Deriv. Litig*., 910 A.2d 248, 261 n.45 (Del. Ch. 2006) (finding that directors were beholden to KKR ***where they were also "Primedia executives and their continued employment depended on the good graces of KKR***") (emphasis added); *In re Emerging Commc'ns, Inc. S'holders Litig*., 2004 WL 1305745, at *39 (Del. Ch. May 3, 2004) (director was conflicted because the controlling stockholder "was the source of [the director's] livelihood").

[redacted] *Id.* at 10:6-11:19. It is reasonable to infer that Straka received significant compensation from Goldman Sachs during those seven years such that he would not have been in a desperate financial position upon leaving Goldman Sachs in 2008. In addition, Straka's average annual household income from all sources for 2008 through 2011 was [redacted] CQ Aff. Ex. 61 at 3.

Plaintiffs do not even attempt to impugn Altschul's independence or disinterestedness.

B. The Evidence Does Not Support Plaintiffs' Claim that the Special Committee Defendants Acted in Bad Faith or Breached Their Duty of Loyalty.

Now that discovery is complete, the record does not support Plaintiffs' claim that the Special Committee Defendants acted in bad faith or in breach of their duty of loyalty during any part of the Merger process.

1. Plaintiffs Still Do Nothing to Undermine the Thorough and Effective Special Committee Process.

Glaringly, Plaintiffs' Answering Brief is almost barren of any arguments attempting to undermine the thorough and effective Special Committee process. Plaintiffs do not

challenge the independence of the Special Committee's legal or financial advisors. Nor do Plaintiffs claim that the Special Committee process was not deliberate and thorough, or that the Special Committee was rushed in its process. It is undisputed that the Special Committee met in formal session 16 times over an eight-month period, including 10 meetings between October 28, 2009 and December 23, 2009. CQ Aff. Ex. 12 at 69:24-70:4 (Dinh Tr.) (observing that the number of Special Committee meetings was "more than the norm"); CQ Aff. Exs. 11, 16, 20, 21, 23-27, 31, 34, 37, 39-41, 46, 50, 62, 63 (Special Committee minutes); *see also DiRienzo*, 2013 WL 5503034, at *10-*16 (in the context of dismissing claims against special committee members reviewing a self-dealing transaction, finding there were no allegations of bad faith and citing favorably to "what actions the Special Committee did take" including, among other things, having "hired reputable outside counsel and a reputable financial advisor" and "met either in person or telephonically, on at least eight separate occasions").

Indeed, Plaintiffs' only substantive criticism of the process is that the Special Committee should not have permitted third party bidders, specifically Roy and [redacted] to communicate early on directly with Dimensional concerning the purchase of Dimensional's shares of the Company's Series A preferred stock.[9]

As described more fully in the Special Committee Defendants' Answering Brief, the Special Committee made a rational, considered decision to direct Roy and [redacted] to communicate directly with Dimensional about purchasing Dimensional's shares of Series A preferred stock. SCDAB at 5-10. This decision was appropriate given the nascent stage of

[9] Plaintiffs note that [redacted] had direct communications with Dimensional from September 22, 2009 through October 12, 2009 without any involvement of the Special Committee. PAB at 16. These discussions between [redacted] and Dimensional, however, occurred prior to the delivery of Dimensional's proposal to the Board on October 15, 2009 and prior to the formation of the Special Committee on October 19, 2009. CQ Aff. Ex. 10.

Roy's and [redacted] expressions of interest to the Company and the form of transactions initially floated by Roy and [redacted] both of which required the approval and involvement of Dimensional. SCDAB at 6 (citing CQ Aff. Ex. 3 at 17; CQ Aff. Ex. 25 at 1 (recognizing that any alternative transaction with Roy would require the agreement of Dimensional); CQ Aff. Ex. 7 at 70:3-7 (Altschul Tr.); CQ Aff. Ex. 5 at 227:12-17 (Donahue Tr.). Critically, Plaintiffs do not point to any evidence demonstrating that the Special Committee's decision negatively impacted the process, particularly when viewed in light of the subsequent negotiations (which were fully disclosed in the Proxy Statement and the Supplemental Proxy) whereby Roy and [redacted] were given every opportunity to present credible, competing bids but never did. SCDAB at 8-10; *see also* CQ Aff. Ex. 3 at 18, 23; CQ Aff. Ex. 55 at 1-2.

The Special Committee also made it clear to all parties involved in the Merger that it was in control of the process. CQ Aff. Ex. 5 at 142:22-144:10 (Donahue Tr.) (immediately after the Special Committee was formed, Donahue met with Stein to outline the process that "the Special Committee felt was best to assess an offer to be presented to Dimensional"). For example, the form of non-disclosure agreement used by the Company for all bidders seeking to perform due diligence required that all communications with the Company be made directly to the Special Committee and prohibited bidders from contacting any director, officer, or employee of the Company without the express consent of the Company, which could be provided only at the direction of the Special Committee. CQ Aff. Ex. 73 at SC0025522 (form NDA provided to [redacted].

2. There Is No Evidence to Support Plaintiffs' Allegations of Bad Faith.

Remarkably, Plaintiffs cannot cite any evidence—not a single email or other communication involving the Special Committee Defendants—that indicates bad faith conduct on the part of the Special Committee Defendants. Rather, Plaintiffs can only point to supposed

"red flags" that they claim should have alerted the Special Committee Defendants to the supposed fact that the Merger was unfair, including (i) a purported $4.84 per share "valuation" created by Fesnak, (ii) an internal management email referencing a $4.10 per share calculation, (iii) the "Preferred Stock Memo" reflecting management's description of the Certificate, and (iv) the fact that two of the Special Committee Defendants possessed "specialized knowledge" of corporate law. PAB at 46-48. But none of these supposed "red flags" come close to showing bad faith because there is either no evidence that they were shown to the Special Committee Defendants or Plaintiffs fail to prove that these "red flags" demonstrate the unfairness of the Merger or the process employed.

a. Plaintiffs Cannot Show Bad Faith Based on the Purported "Valuations" in Fesnak's Work Papers and an Internal Management Email.

Although Plaintiffs are entitled to factual inferences in responding to the Special Committee Defendants' Motion, Plaintiffs take it a step further and misrepresent facts and ignore contrary facts to support their claims. Perhaps the most egregious example is Plaintiffs' recent allegation, presented for the first time in their Answering Brief, that the Special Committee Defendants "consciously disregarded" and failed to disclose a $4.84 per share "valuation" created by Fesnak. PAB at 45, 47. Plaintiffs cite, for the first time during the three-year history of litigating this transaction, to a single page out of Fesnak's internal work papers and make the leap, without any factual support, to claim that this draft calculation was shown to the Special Committee as part of Fesnak's initial valuation presentation at the November 12, 2009 Special Committee meeting. PAB at 9. This undated, single page from Fesnak's work papers is titled "Buyer Scenario with eMusic Synergies and Private Company Cost Savings" and, unlike the dozen or so other versions of this spreadsheet in Fesnak's work papers, does not factor in the

$24.99 million liquidation preference held by the Company's Series A preferred stock and, therefore, results in a per share calculation of $4.84.

But there is zero evidence that this internal Fesnak work paper was presented to the Special Committee at the November 12 meeting or at any other time. Indeed, all of the evidence is to the contrary. The evidence shows that Fesnak circulated its initial set of valuation materials—a 6-page document that included Fesnak's initial DCF model titled "Without eMusic Synergies and Private Company Cost Savings" that deducted the $24.99 million liquidation preference—to Donahue on November 6, 2009, who promptly forwarded it to Peck and Straka and copied Patterson Belknap. CQ Aff. Ex. 91. On November 11, 2009, Donahue circulated those same presentation materials to the other members of the Special Committee as an attachment to his email setting up an in-person Special Committee meeting scheduled for the following day. CQ Aff. Ex. 92. Indeed, the hard-copy notes produced by two of the Special Committee members present at that meeting reflect that those were the only valuation materials presented and discussed by Fesnak at the meeting. CQ Aff. Exs. 93, 94.

In addition, the internal Fesnak work paper cited by Plaintiffs does not contain the legend "Draft – For Discussion Purposes Only – Subject to Revision" that was included on all 6 pages of the preliminary valuation materials that were circulated to the Special Committee for purposes of the November 12, 2009 meeting. CQ Aff. Ex. 92. In fact, that same legend was included on each page of the various draft valuation materials that Fesnak circulated to the Special Committee. *See* CQ Aff. Ex. 92 (email attaching November 12, 2009 presentation materials); Ex. 95 (email attaching November 24, 2009 presentation materials); Ex. 96 (email attaching December 23, 2009 presentation materials); *see also* CQ Aff. Ex. 42 (email attaching March 14, 2010 draft fairness opinion with similar legend as a watermark). Based on Fesnak's

track record, if the one-page, internal Fesnak work paper had been provided to the Special Committee Defendants, it would have contained that legend.

The minutes from the November 12, 2009 meeting offer further support, describing in detail Fesnak's presentation of its valuation materials, "a draft of which had been previously circulated to the members of the Special Committee." CQ Aff. Ex. 27 (November 12 minutes) at 1. There is no mention in the November 12 minutes of any other Fesnak materials being provided to the Special Committee prior to the meeting. In addition, the Proxy Statement contains a 2-page description of Fesnak's presentation at the November 12 meeting, which is consistent with the actual materials that were circulated to the Special Committee on November 11, 2009. CQ Aff. Ex. 3 at 34-36.[10]

Plaintiffs ignore all of this available evidence and rely on a reference in the November 12 minutes to a "general discussion" of potential synergies to claim this internal work paper must have been shown to the Special Committee at that meeting. PAB at 9. But the November 12 minutes do not support that inference. Rather, the reference to "synergies" is contained in a separate paragraph following the paragraphs discussing the presentation materials circulated on November 11, 2009 to the Special Committee. CQ Aff. Ex. 27 (November 12 minutes) at 1.

Indeed, the Proxy Statement provides additional detail, disclosing that after going through Fesnak's valuation materials on November 12, the Special Committee "asked Fesnak to consider several factors in its next presentation . . . [including] to assume that the transaction will

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[10] Notably, copies of each of the presentations made to Special Committee also were publicly filed as exhibits to the Company's and Dimensional's Schedule 13e-3 filed on June 7, 2010. *See* CQ Aff. Ex. 97. The version of the November 12, 2009 presentation publicly filed is identical (complete with legend) to the version circulated to the Special Committee members on November 11 and to the hard-copy versions contained in the Special Committee Defendants' notes from that meeting. *Id.* at exhibit (c)(iii).

result in cost savings to Dimensional as a result of the company being private . . . [and that] the transaction would produce synergies when Dimensional combined the assets of The Orchard with Dimensional's other portfolio companies." CQ Aff. Ex. 3 at 36. The evidence confirms that Fesnak, in turn, presented formal versions of the spreadsheet titled "Buyer Scenario with eMusic Synergies and Private Company Cost Savings" at the next two Special Committee meetings it attended, on November 24 and December 23. CQ Aff. Ex. 95 at SC0050644; CQ Aff. Ex. 96 at FES007329-30. Both of those spreadsheets deducted the $24.99 million liquidation preference. *Id.* In addition, Fesnak's final fairness opinion, presented on March 15, 2010, also included versions of the "with eMusic synergies" scenario that also deducted the $24.99 million liquidation preference, consistent with all of Fesnak's other presentations to the Special Committee. CQ Aff. Ex. 70 at SC0050410.[11]

Accordingly, Plaintiffs' last-minute effort to interject a factual issue by citing to this single page from Fesnak's internal work papers produced by Fesnak in discovery is not supported by the record. *See*, *e.g.*, *Citimortgage, Inc. v. Stevenson*, 2013 WL 6225019, at *1 (Del. Super. Nov. 26, 2013) ("The non-movant cannot create a genuine issue of fact with bare assertions or conclusory allegations, but must produce specific evidence that would sustain a verdict in its favor.") (citing *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003); *Celotex*

[11] Plaintiffs also point to notations in the top corner of the internal work paper containing what appear to be initials and the dates "11/09" and "2/10" as demonstrating that this work paper "was used during SC deliberations [on] '11/09' and '2/10' . . ." PAB at 45. A review of the universe of Fesnak's work papers, however, disproves that theory. Notably, these marks are contained on nearly all of Fesnak's work papers—including emails that were printed out and placed in Fesnak's files—but are ***not*** present on any of the actual valuation materials that were circulated to the Special Committee Defendants and used during Special Committee meetings. *See* CQ Aff. Exs. 92, 95, 96. The more likely inference to be drawn from these marks is that they represent the month and year that Fesnak representatives internally reviewed them or placed them in their file. Indeed, the reference to "2/10" cannot mean what Plaintiffs want it to because the Special Committee did not hold a meeting with Fesnak or otherwise in February 2010.

Corp. v. Catrett, 477 U.S. 317, 324 (1986)); *see also Elite Cleaning Co., Inc. v. Capel*, 2006 WL 4782306, at *6 (Del. Ch. June 2, 2006) (recognizing that a "conclusory and imprecise assertion" is insufficient to create a triable issue of fact, particularly where the record supports the opposite inference). Notably, all five Special Committee Defendants were deposed in this litigation, and Plaintiffs never asked a single question about this supposedly "striking" valuation document. PAB at 9. Similarly, none of the documents produced by any of the Special Committee Defendants included this draft Fesnak work paper.

Likewise, Plaintiffs effort to link the Special Committee to an internal management email between the Company's CFO, Nathan Fong, and the Company's controller, James McCarthy, also fails. In that November 17, 2009 email, Fong calculated the per share value of the common stock by treating the Series A preferred stock on an "as converted" basis to arrive at a $4.10 per share value and expressed his opinion that the Special Committee should reject Dimensional's initial offer. PAB at 10, 45; CQ Aff. Ex. 98. As is clear on the face of the document, however, none of the Special Committee Defendants are copied on that internal management email, *id.*, and there is no evidence that any of the Special Committee Defendants received it. Indeed, Donahue expressly testified when shown that email at his deposition that he had not seen it prior to the litigation, CQ Aff. Ex. 5 at 190:18-22 (Donahue Tr.), and that Fong had never mentioned the contents of the email to him, *id.* at 193:4-10. Plaintiffs, instead, are intentionally vague by claiming that Donahue, in particular, "had access" to Fong's opinions because of his role as a director. PAB at 45. But Plaintiffs offer no authority (because there is

none) that a document can be considered a "red flag" and serve as a basis for finding bad faith if the document was never actually shown to the Special Committee members.[12]

b. Plaintiffs Cannot Show Bad Faith Based on the Preferred Stock Memo and "Specialized Knowledge."

Plaintiffs' other supposed "red flags" prove nothing and only show—consistent with the Special Committee Defendants' testimony and the balance of the disclosures in the Proxy Statement—that the liquidation preference was ***not*** triggered in a transaction with Dimensional and that the Special Committee recognized that the liquidation preference was not triggered by the Merger. For instance, Plaintiffs repeatedly cite to an October 29, 2009 email from Fong attaching a "Preferred Stock Memo" that was prepared by management to describe the features of Section 2(c) of the Certificate. But there is nothing significant about that document. It was sent to Mike Wolfe at Fesnak in response to Fesnak's initial requests for information, which sought, among other things, documentation of the terms of the Series A preferred stock. *See* CQ Aff. Ex. 99 at SC0024962 (list of information requested by Fesnak, including "Series A Preferred Stock Agreement (with terms, preferences, etc.)"). Indeed, Donahue also sent Fesnak a copy of the Certificate the day before, on October 28, 2009, in response to that same request. CQ Aff. Ex. 100.

Plaintiffs try to argue that this document evidences the Special Committee Defendants' bad faith because it shows Donahue and Straka, who were copied on the email, were aware of "'management's interpretation' that a Dimensional minority buyout would not trigger a

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[12] There is no evidence that the Special Committee ever received this October 29, 2009 email, but the Special Committee arrived at the same conclusions at that point in the negotiations—it rejected the Dimensional offer as inadequate and refused to recommend it to the minority shareholders. CQ Aff. Ex. 24 at 2 (October 24, 2009 minutes).

liquidation preference." PAB at 43.[13] The problem Plaintiffs encounter is that, as explained in detail in the Special Committee Defendants' Answering Brief (SCDAB at 11-13), each of the Special Committee members testified that they understood that the liquidation preference was not triggered by the Merger. *See, e.g.*, CQ Aff. Ex. 5 at 213:8-9 (Donahue Tr.); CQ Aff. Ex. 4 at 80:23-81:2 (Peck Tr.); CQ Aff. Ex. 12 at 38:10-39:18, 104:6-106:2 (Dinh Tr.); CQ Aff. Ex. 7 at 111:23-112:3 (Altschul Tr.); CQ Aff. Ex. 6 at 127:12-20 (Straka Tr.). And each member of the Special Committee understood that Fesnak was deducting the $24.99 million liquidation preference as part of its valuation analysis. CQ Aff. Ex. 7 at 111:23-112:3 (Altschul Tr.) ("Well, I don't think that Fesnak was saying that as a matter of contract that the certificate – that this was actually triggered. I think what Fesnak was saying, that it was appropriate to take into account the full preference for the preferred shares as part of this valuation."); CQ Aff. Ex. 5 at 161:14-19, 163:21-164:4 (Donahue Tr.) (confirming his understanding that Fesnak did not opine that the liquidation preference was triggered, but rather that he relied on Fesnak's treatment of the liquidation preference from a valuation perspective). Indeed, the fact that Donahue and Straka saw the "Preferred Stock Memo" in the context of it being communicated to the Special Committee's independent financial advisor only demonstrates their understanding that management was fully cooperating with Fesnak and providing all of the information that Fesnak requested. CQ Aff. Ex. 99 at SC0024962. That undermines rather than supports any claim of bad faith.

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[13] Plaintiffs repeatedly and incorrectly state that the full Board was shown the Preferred Stock Memo at the December 11, 2009 Board meeting, citing to a word document titled "Board Meeting Notes" prepared by Fong that contained a version of the memo. PAB at 18, 28, 44, 45, 47. But there is no evidence that the contents of the Preferred Stock Memo actually were discussed at that Board meeting.

Similarly, Plaintiffs also claim that Dinh, a professor at Georgetown University Law Center with expertise in corporate governance, and Straka, a former associate at Cravath, Swaine & Moore LLP, possessed "specialized knowledge" to aid them in interpreting the Certificate and, therefore, approved the Merger in bad faith because they knew or should have known that the liquidation preference was not triggered in the Merger and should not have been deducted in Fesnak's valuations. PAB at 18, 49. In particular, with respect to Dinh, Plaintiffs cite to "black-letter" law from 1929 for the uncontroverted proposition that preferred stock rights are contractual in nature to claim that "Dinh knew a minority buyout did not trigger the liquidation preference." PAB at 49. But, as noted above, both Dinh and Straka testified that they understood that the liquidation preference was not triggered by the Merger under the terms of the Certificate. CQ Aff. Ex. 12 at 38:10-39:18, 104:6-106:2 (Dinh Tr.); CQ Aff. Ex. 6 at 127:12-20 (Straka Tr.). Moreover, Dinh explained at length why he thought Fesnak's treatment of the liquidation preference was reasonable despite the fact that the liquidation preference was not triggered. CQ Aff. Ex. 12 at 81:23-25 (Dinh Tr.) ("[I]t seems to be perfectly reasonable here in terms of the – in terms of the treatment and the explanation."); CQ Aff. Ex. 12 at 105:8-106:2 (Dinh Tr.) ("Fesnak give us the opinion in how it treats the $25 million is to take it off the top of the valuation of the company. We thought that was reasonable basis for it to exercise judgment and it's, you know – and I think it's fairly straightforward in terms of my thinking, which is that Dimensional already paid for that $25 million through the holding of a Series A and it does not need to pay again. Whereas, a third party would need to pay again in order to extinguish that Series A.").[14]

[14] Contrary to Plaintiffs' claims, the actual value of the liquidation preference was never in dispute or subject to the discretion of the financial advisor, the Special Committee or the Company. For all purposes during the consideration of the Dimensional proposal by the Special Committee, the value of the liquidation preference was fixed at $24.99 million by (Continued . . .)

Plaintiffs again rely on *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745 (Del. Ch. May 3, 2004), even though that case is entirely inapposite. In that case, the Court concluded "with reluctance" that one of the directors, Sal Muoio, was liable for breach of fiduciary duty by having approved a transaction although he "knew, or at the very least had strong reasons to believe, that the $10.25 per share merger price was unfair" because of his "significant experience in finance and the telecommunications sector." *Id*. at *39. However, the Court expressly relied on the fact that Mr. Muoio conceded, based on his experience, that the transaction price was at the low end of the range of fairness and that the special committee could have argued for a higher price. *See id.* ("Informed by his specialized expertise and knowledge, Muoio conceded that the $10.25 price was 'at the low end of any kind of fair value you would put,' and expressed to [his fellow director] his view that the Special Committee might be able to get up to $20 per share from Prosser."). To the contrary, Dinh and Straka repeatedly expressed their belief that the price achieved was fair based on their understanding of the Certificate and Fesnak's analyses. CQ Aff. Ex. 12 at 105:8-106:2 (Dinh Tr.); CQ Aff. Ex. 6 at 127:12-20 (Straka Tr.). Moreover, the Court in *Emerging Commc'ns* also expressly relied on the fact that, although Mr. Muoio's conduct was "less egregious" and did not rise to level of "affirmatively . . . assist[ing]" the controller like the other directors on the committee, "[l]ike his fellow directors, Muoio was also not independent of [the controller]." *Id.* Here, as noted above, Plaintiffs do not

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(. . . continued)

the Certificate. CQ Aff. Ex. 57 at § 2(a). Fesnak did not undertake any "independent valuation or appraisal" of the liquidation preference because the value was fixed by contract. The issue is whether it was a reasonable decision for a financial valuator to deduct this fixed, contractual value of a preferred stock liquidation preference when determining the residual value of the common equity of a company. The Special Committee Defendants believed that Fesnak's decision to do so was reasonable. *See*, *e.g.*, CQ Aff. Ex. 7 at 111:23-112:3 (Altschul Tr.); CQ Aff. Ex. 4 at 80:23-81:2 (Peck Tr.).

have any basis to claim Dinh or Straka lacked independence from any of the Dimensional Defendants or Joseph Samberg.

II. THE SPECIAL COMMITTEE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THEY DID NOT BREACH THEIR DUTY OF DISCLOSURE.

A. The Proxy Statement's Description of Fesnak's Fairness Opinion and its Treatment of the Liquidation Preference Was Accurate.

In an attempt to manufacture a disclosure claim, Plaintiffs attempt to manipulate the disclosures to support their claim that the Proxy Statement advances their "one big lie" and makes clear to the Company's stockholders that the liquidation preference was triggered by the Merger. But, other than the single errant disclosure in the Notice of Annual Meeting (which is addressed at length in the Special Committee Defendants' Opening Brief and Answering Brief (SCDAB at 27-30)), the Proxy Statement accurately describes the treatment of the $24.99 million liquidation preference and the reasons for the Amendment. Indeed, the Proxy Statement explains in detail on page 17 (a section Plaintiffs ignore in their Answering Brief) that:

> The Orchard has a contractual obligation to holders of its Series A convertible preferred stock that requires it under certain circumstances including a transaction resulting in a change of control of The Orchard to pay such holders prior to any amounts being paid to the holders of our common stock a liquidation preference . . . ***Any third party*** proposing to acquire all of our outstanding shares of capital stock, including our shares of Series A convertible preferred stock, must satisfy the contractual obligation to pay to the holders of the Series A convertible preferred stock an aggregate amount equal to approximately $24.99 million in cash before any consideration is paid to the holders of our common stock.

CQ Aff. Ex. 3 at 17. The Proxy Statement goes on to clearly state on page 25 that: "There will be no liquidation payment to the holders of the Series A convertible preferred stock under the merger agreement." *Id.* at 25. That disclosure could not be clearer.

Plaintiffs, however, claim that that language on page 25 only "reinforces the big lie" because it implicitly suggests that the only reason that the liquidation preference is not triggered is because of the Amendment. PAB at 2, 11, 29. But there is no reference to the Amendment in that section at all and, specifically, it does not say that the liquidation preference otherwise would be triggered if not for the Amendment. CQ Aff. Ex. 3 at 25. This disclosure is contained in the "Merger Consideration" of the Proxy Statement to make clear that the Merger would not result in any consideration going to the holders of the Series A preferred stock because the liquidation preference was not triggered by the Merger. Plaintiffs improperly try to apply their self-serving gloss on to an otherwise clear disclosure.

Ironically, Plaintiffs now seek to distance themselves from Chancellor Strine's Appraisal Opinion on the disclosure on page 25 of the Proxy Statement, refuting the point that the Court repeatedly recognized based on that language that the Proxy Statement "made clear" that the liquidation preference was not triggered as part of the Merger. PAB at 11, 29. But Chancellor Strine noted in *three separate* places in the Appraisal Opinion that the Proxy Statement was clear on its face that the liquidation preference was not triggered and, in each instance, cited to the language on page 25 of the Proxy Statement for support. *See In re Orchard Enter., Inc.,* 2012 WL 2923305, at *1 (Del. Ch. July 18, 2012)("[T]he liquidation preference was not triggered by the Going Private Merger, as was indicated by Orchard in the proxy statement in support of the Merger."); *id.* at *5 ("As was made clear by the Proxy Statement, the agreement entered into by Orchard and Dimensional did not provide for any payment to the holders of Orchard's preferred stock (i.e., Dimensional)."); *id.* at *6 ("The Going Private Merger

was not an event triggering the payment of the liquidation preference, as the Proxy Statement made clear.").[15]

Likewise, the disclosures in two separate places in the Proxy Statement that the Amendment was "necessary to permit the transactions contemplated by the merger agreement to be effected" (CQ Aff. Ex. 3, Initial Letter to Stockholders), and that it was "necessary for the merger and the other transactions contemplated by the merger agreement to proceed" (*id.* at 90), make clear that the reason for the Amendment was to permit Dimensional to be able to consent to the non-application of Section 2(c) of the Certificate and permit the transaction to occur. Nowhere in those disclosures (or even in the surrounding paragraphs) is there any mention of the triggering of the liquidation preference as the reason for the Amendment.

Plaintiffs selectively quote from the disclosure on page 90 of the Proxy Statement to claim that it implies the liquidation preference was triggered. PAB at 1, 7, 12. But the disclosure on page 90 was intended to describe Section 2(c) of the Certificate and its features as a provision "requiring the allocation of the consideration for any transaction constituting a 'Change of Control Event' among the holders of the Series A convertible preferred stock and the common stock." CQ Aff. Ex. 3 at 90. The description on page 90 is accurate in that Section 2(c) only permits a transaction that is a "Change of Control Event" if that event involves one of two types of transaction structures, and provides that the $24.99 million liquidation preference is triggered if a "Change of Control Event" that is permitted under Section 2(c) (because it qualifies as one of the two allowable transaction structures) does occur. *Id.* The disclosure on page 90 does not say that a "Change in Control" permitted under Section 2(c) has occurred or will occur

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[15] This should not be surprising to Plaintiffs, whose counsel argued to the Court in the Appraisal Action that "[t]he Proxy Statement ***made clear*** that the liquidation preference was not paid in connection with the Merger," citing to this same language in the Proxy Statement that Plaintiffs now claim is unclear. *See* Petitioner's Post-Trial Brief at 9.

as part of the Merger. Indeed, it says the opposite, stating that the Amendment was needed to make Section 2(c) non-applicable and was "necessary for the merger and the other transactions contemplated by the merger agreement to proceed." *Id*.

In addition, as part of their narrative that the Proxy Statement is "one big lie," Plaintiffs also assert—for the first time in their Answering Brief—that Section 2(c) of the Certificate was a "bar against a minority buyout" intended to protect the common stockholders and that the disclosures in the Proxy Statement somehow misstate the purpose of Section 2(c). PAB at 2, 6-8; *see also id.* at 25 (claiming that the Proxy Statement "falsely suggest[ed] that Dimensional could do a minority buyout where it paid most (or all) of the consideration to itself"). This argument misstates the purpose of Section 2(c) of the Certificate, titled "Certificate of Designations of Series A Convertible Preferred Stock of Digital Music Group, Inc.," which outlines and fixes the rights and preferences of the Series A preferred stock and does not—indeed cannot—grant rights to the common stockholders. CQ Aff. Ex. 100 at SC0027244. Indeed, the resolutions of the board at the beginning of the Certificate make clear that, as a certificate of designations, it was intended to "fix[] the relative rights, preferences, privileges, powers and restrictions" of the Series A preferred stock. *Id.*; *see also* 8 *Del. C.* § 151(g) (permitting the board of directors to fix the rights for separate classes of stock by resolution); *Constellation Energy Partners Management, LLC v. Brunner*, C.A. No. 8856-VCL, at 12 (Del. Ch. Dec. 3, 2013) (TRANSCRIPT) (recognizing that a board's blank check power is "intended to allow the board to create new classes . . . with new rights but is not intended to let the board

vary the rights of existing classes").[16] Indeed, David Altschul, one of the Special Committee members who was on the board of Digital Music Group, Inc. in 2007 at the time the Certificate was drafted, was asked about Section 2(c) and he testified that his understanding of the provision was that it "was put in here as a benefit to the holders of the preference -- of the preferred shares. Because it basically protected them against there being only certain kinds of transactions that would trigger, you know, the preference, and that they had control over whether there would be other kinds of transactions" and that "since it was in here for their protection of the holders of the preferred shares, that they could waive it." CQ Aff. Ex. 7 at 142:18-145:23 (Altschul Tr.). Altschul also explained his understanding of the Amendment, noting that "the reason why there was an amendment . . . [was] in fact explicitly [to] permit the waiver of this prohibition." *Id.*

Importantly, there is no evidence suggesting that the single mistaken disclosure in the Notice was the result of bad faith conduct. In *K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351 (Del. Ch. Apr. 4, 2012), the plaintiffs, like Plaintiffs here, identified a single ambiguous sentence in the defendant's prospectus and argued that the prospectus was, therefore, materially misleading. *Id*. at *11. Although the Court acknowledged that "the sentence arguably is ambiguous and, considering it on its own and drawing every inference in favor of Plaintiffs, could give 'a materially misleading impression of relevant factual circumstances bearing on the fairness of the transaction subject to the vote,'" the Court nonetheless held that the disputed sentence did not render the prospectus materially misleading.

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[16] Notably, as is fully disclosed on page 90 of the Proxy Statement, the Amendment was subject to a vote of a majority of the Company's outstanding shares and a separate class vote of a majority of the holders of the Series A preferred stock. CQ Aff. Ex. 3 at 90. The Proxy Statement clearly stated that "[m]anagement of the Company anticipates that Dimensional Associates will vote all of its shares of common stock and Series A convertible preferred stock in favor of this proposal, and in such an event, the approval of the [Amendment] will be assured." *Id.*

Id. Critically, in so holding, the Court noted that the absence of "any facts from which the Court reasonably could infer that any Defendant acted in bad faith by authorizing the disclosure of one arguably misleading sentence after first authorizing the disclosure of all of the information necessary to render that statement not misleading." *Id*. (emphasis added).

Thus, absent a showing that the Special Committee Defendants' acted in bad faith, the single errant disclosure, at most, implicates the duty of care, and the Special Committee Defendants are exculpated under Article VII of the Charter. *See, e.g., Frank v. Arnelle*, 1998 WL 668649, at *10 (Del. Ch. Sept. 16, 1998) (holding that, where directors are disinterested in the challenged transaction, "alleged disclosure violations simply cannot implicate the duty of loyalty"), *aff'd*, 725 A.2d 441 (Del. 1999).

B. Plaintiffs' Newly Found Disclosure Claims Are Not Actionable.

Plaintiffs also advance for the first time in their Answering Brief disclosure claims related to the supposed "red flags" the Special Committee Defendants were supposedly aware of. Specifically, Plaintiffs argue that the Special Committee Defendants "misrepresented" and "concealed" the purported $4.84 "valuation" in Fesnak's work paper and the $4.10 calculation in Fong's internal email to McCarthy.[17]

As explained *supra* I.B.2., there is no evidence that these two documents were ever shown to the Special Committee Defendants or anyone else on the Board. For that reason alone, Plaintiffs' disclosure claims fail. *See*, *e.g.*, *Pfeffer v. Redstone*, 965 A.2d 676, 686-87 (Del. 2009) ("If the Viacom Directors did not know or have reason to know the allegedly

[17] Plaintiffs do not address the remaining disclosure claims in Paragraph 74 in the Verified Class Action Complaint and, therefore, have conceded those claims for purposes of this Motion. *See* Special Committee Defendants' Opening Brief at 46-48; *see also PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011) ("[A] party waives any argument it fails properly to raise . . ."), *rev'd in part on other grounds*, 67 A.3d 330, 2013 WL 2303303 (Del. 2013).

missing facts, however, then logically the directors could not disclose them."). In fact, the two cases cited by Plaintiffs only reinforce that conclusion. In *In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007), then-Vice Chancellor Strine held that the proxy statement disseminated by the board of the directors was "materially misleading for failing to discuss [conflicting] advice ***given to the board***" by its financial advisor, where the financial advisor "made a detailed presentation" to the board on the matter "a mere month or so beforehand." *Id*. at 75-77. The other case cited by Plaintiffs, *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977), is distinguishable in that it addressed disclosures made by the controlling stockholder in the context of making a tender offer for the minority's shares. *Id.* at 278. But even there, in finding that the tender offer circular's disclosure that the net asset value of TransOcean was "not less than $200,000,000 . . . and could be substantially greater" was incomplete, the Supreme Court expressly relied on the fact that defendants themselves "were in possession of another estimate" that suggested a higher net asset value. *Id*. at 281. Indeed, the Court noted that its "duty was to examine ***what information defendants had*** and to measure it against what they gave . . . In other words, the limited function of the Court was to determine whether defendants had disclosed all information ***in their possession*** germane to the transaction in issue." *Id*. Here, there is zero evidence that the Special Committee Defendants ever received Fesnak's internal work paper reflecting a $4.84 valuation or the $4.10 per share calculation in Fong's internal email to McCarthy.

Likewise, Plaintiffs' suggestion that the Special Committee Defendants should have disclosed that management sent Fesnak the "Preferred Stock Memo" in response to Fesnak's initial information request is not an actionable disclosure claim. PAB at 43. As noted above, the contents of the "Preferred Stock Memo" are consistent with the terms of the Certificate and the message to the stockholders in the Proxy Statement that the liquidation

preference was not triggered. CQ Aff. Ex. 3 at 17, 25, 31. Plaintiffs do not explain how disclosing management's response to Fesnak's informational request—which is consistent with the disclosures in the Proxy Statement—would be material.

CONCLUSION

For the foregoing reasons, the Special Committee Defendants respectfully request that their Motion be granted.

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December 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2013, a copy of the foregoing REDACTED THE SPECIAL COMMITTEE DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT was served via File & Serve*Xpress* upon the following counsel of record:

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