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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MELVYN KLEIN, Plaintiff, v. H.I.G. CAPITAL, L.L.C.; H.I.G. SURGERY CENTERS, LLC; H.I.G. BAYSIDE DEBT & LBO FUND II; BCPE SEMINOLE HOLDINGS LP; BAIN CAPITAL INVESTORS, LLC; BAIN CAPITAL PRIVATE EQUITY, LP, Defendants, and SURGERY PARTNERS, INC., Nominal Defendant.	C.A. No. 2017-0862-LWW PUBLIC VERSION FILED AUGUST 16, 2021

OPENING BRIEF OF DEFENDANTS
H.I.G. CAPITAL, LLC, H.I.G. SURGERY CENTERS, LLC,
AND H.I.G. BAYSIDE DEBT & LBO FUND II
<u>IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT</u>

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Defendants H.I.G. Capital, LLC, H.I.G. Surgery Centers, LLC, and H.I.G. Bayside Debt & LBO Fund II, LP (collectively, "HIG"), respectfully submit this brief in support of their Motion for Summary Judgment.

INTRODUCTION

This case concerns three related transactions in which Surgery Partners, Inc. (the "Company") issued $310 million in preferred stock (the "Preferred") to Bain Capital, LP ("Bain"); the Company used the proceeds of the Preferred to help fund its acquisition of National Surgical Healthcare, Inc. ("NSH"); and Bain purchased HIG's 54% controlling stake in Surgery Partners (collectively, the "Transactions"). Plaintiff's theory is that HIG caused Surgery Partners to issue the Preferred on terms unduly favorable to Bain in exchange for Bain's purchase of HIG's shares, and that the Company's common shareholders sustained damages as a result. Plaintiff's claim for damages was tenuous from the start, given that Surgery Partners' stock price ***increased*** approximately 20% over the two day period in which the Transactions were announced. But Plaintiff's theory has now been fully discredited through expert discovery. In an extraordinary exchange during deposition, Plaintiff's damages expert, James Canessa, was forced to admit that he has no valid support for his conclusion that the Preferred was mispriced, and his credibility was badly damaged as well. Plaintiff is left with no viable claim for damages.

Mr. Canessa admitted that he constructed his valuation model, which he uses to claim that Surgery Partners underpriced the Preferred by approximately [redacted] based on a publication that was updated 15 years ago to no longer recommend his approach. To make matters worse, Mr. Canessa also admitted he was aware of that fact when he wrote his expert report, but that he nevertheless misleadingly cited an outdated edition of that publication to create the impression that his approach is generally accepted, never advising opposing counsel, or the Court, that it is not. Relying on his improper model, Mr. Canessa vastly overvalued the Preferred by assuming Bain would receive a guaranteed return of no less than [redacted] (and as much as over [redacted]). This is not the first time Mr. Canessa has presented this Court with a dubious valuation. Earlier this year, then-Chancellor Bouchard rejected a valuation by Mr. Canessa in another matter as "unreliable" and "illogical." *Dieckman v. Regency GP LP*, 2021 WL 537325, at *45, *47 (Del. Ch. Feb. 15, 2021). Mr. Canessa's error here is far worse – he not only applied an unreliable valuation methodology, but cited outdated authority to misleadingly suggest a valid basis for doing so.

In contrast to Mr. Canessa's discredited analysis, the finding by HIG's expert, Professor David Smith, that the terms of the Preferred fall within the heartland of the terms of comparable transactions, stands unrefuted. Professor Smith applied a modified Black-Scholes formula – using inputs with which Mr. Canessa largely agrees – to compare the implied yield for the Preferred with the implied yield for 16 comparable transactions. That analysis revealed that the Preferred has an implied yield fully in line with the implied yields for similar transactions, and that the Preferred was therefore reasonably priced. Mr. Canessa never challenged that finding, though he had the opportunity to do so, and admitted in deposition that he has no basis to refute it.

Professor Smith's unchallenged finding that the Preferred was reasonably priced also comports with the objective evidence. Surgery Partners' stock price jumped a statistically significant 15% in the first day of trading following announcement of the Transactions, and nearly 20% over the two day period in which all of the details of the Preferred were disclosed. Mr. Canessa agrees that the market for Surgery Partners' stock was efficient. Yet not a single analyst or institutional investor – and Surgery Partners had many of both – expressed any negative view of the Preferred, as they surely would have if, as Mr. Canessa claims, the Company had given away [redacted]. As one analyst put it, the market "applauded" the deal, including the Company's use of the Preferred to achieve leverage neutrality in the NSH acquisition. While Plaintiff has manufactured grounds to criticize the Preferred in hindsight, the market's real-time reaction confirms it was a highly successful transaction for Surgery Partners, and certainly not a source of damages for the

Company's common shareholders, who, even Mr. Canessa admits, saw "very good returns on their investment." Ex. 64, Canessa Dep. Tr. at 51:13-18.

For the above reasons, HIG is entitled, at a minimum, to summary judgment on the question of damages. There are also compelling grounds for summary judgment on liability. Mr. Canessa testified that HIG had no economic incentive to cause Surgery Partners to issue the Preferred. As such, there was no conflicted transaction, and no basis for application of the entire fairness standard of review. Even if that were the applicable standard, the evidence demonstrates that the deal process, if not perfect, was in no way tainted by HIG's sale of its controlling stake to Bain. Notwithstanding Plaintiff's speculation at the motion to dismiss stage, the evidence now conclusively shows that no HIG-affiliated director was involved in negotiating the terms of the Preferred; HIG exerted no pressure on Surgery Partners to issue the Preferred on terms unduly favorable to Bain; and Surgery Partners' board of directors (the "Board") acted to advance the Company's interests, not HIG's, by entering into the Transactions on the terms that it did. Not only was the deal process fair, the Preferred was priced on terms highly favorable for minority shareholders, as the market reaction confirms.

In the end, Plaintiff's attack on the Preferred is divorced from the real world benefits enjoyed by the same investors Plaintiff claims to represent. Even if the Board did not check every procedural box (*e.g.*, forming a special committee, securing a fairness opinion, etc.), it achieved terms so favorable for the Company's shareholders that the market responded with a 20% increase in share price, and analysts found themselves "surprised" and "pleased" that such a deal was even possible. Ex. 36, SP-00054329. Surgery Partners' management served the Company's common shareholders well, and there is no basis for liability or damages.

BACKGROUND

On May 9, 2017, Surgery Partners, an operator of outpatient surgical facilities, announced a three part transaction: (1) the Company issued $310 million in convertible preferred shares to Bain; (2) the Company used the proceeds of the Preferred to help finance its acquisition of NSH, another outpatient medical services provider; and (3) Bain purchased HIG's common shares in Surgery Partners, thus acquiring HIG's 54% controlling stake in the Company. Ex. 71, Press Release, Surgery Partners to Acquire National Surgical Healthcare from Irving Place Capital (May 10, 2017); Ex. 70, SRGY – Q1 2017 Surgery Partners' Inc. Earnings Call Transcript (May 10, 2017), at 5. The market responded favorably when the Transactions were announced, with Surgery Partners' share price increasing approximately 20% over the relevant two-day trading period, from May 10th to May 11th.

Plaintiff nevertheless filed a Complaint, on December 4, 2017, asserting direct and derivative claims against HIG, Bain, and certain of the Company's individual officers and directors. Dkt. 1, Complaint ("Compl."). Plaintiff alleged that HIG caused the Company to issue the Preferred on terms unduly favorable to Bain, in exchange for Bain overpaying HIG for its shares. Compl. ¶ 2. Plaintiff claimed that HIG breached its fiduciary duty of loyalty to the Company's minority shareholders, and that Bain aided and abetted that alleged breach. Compl. ¶¶ 90-98.

In an order issued on December 19, 2018, this Court granted in part, and denied in part, Defendants' motions to dismiss. Dkt. 48, Memorandum Opinion ("Mem. Op."). The Court dismissed Plaintiff's direct claims against all defendants, and dismissed all claims against the remaining individual defendant, Surgery Partners' CEO during the relevant period, Mike Doyle.[1] Mem. Op. at 45. The Court declined, however, to dismiss Plaintiff's derivative claims against HIG and Bain. The Court reasoned the Complaint adequately alleged that the Preferred was a conflicted transaction subject to entire fairness review, because Bain paid HIG a non-ratable benefit in the form of a "control premium" when it purchased HIG's majority stake in the Company. Mem. Op. at 37-39.

Since the Court's ruling, the parties have completed extensive fact and expert discovery, including producing nearly 500,000 documents (including third-party

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1 On April 17, 2018, Plaintiff voluntarily dismissed claims against Dr. Teresa DeLuca and Adam Feinstein, two of the Company's directors. Dkt. 32. And on September 17, 2018, the Court approved the parties' stipulation to dismiss two more director defendants, Matt Lozow and Brent Turner. Dkt. 46.

productions), taking and defending 20 party and third-party fact witness depositions, exchanging opening and rebuttal expert reports, and completing expert depositions. The evidence confirms that Surgery Partners negotiated and approved the terms of the Preferred without undue influence from HIG, and that the Transactions were highly beneficial to the Company and its common shareholders.

A. The Transactions

Surgery Partners was founded in 2004, and became one of the largest and fastest growing outpatient surgical service providers in the country. Ex. 67, Surgery Partners 2016 Form 10-K at 1. HIG invested in Surgery Partners in 2009, and subsequently took the Company public through an IPO, on October 1, 2015, at an offering price of $19 per share. Ex. 1, HIG_0000001, at -003. Following the IPO, HIG retained approximately 54% of the Company's common stock. *Id*. The largest individual shareholder was Mike Doyle, with approximately 6.3% of the outstanding shares. *Id*.

In September 2016, the Board authorized Mr. Doyle to engage Citigroup Global Markets ("Citi") and Jefferies LLC ("Jefferies") as financial advisors to gauge market interest in a strategic transaction [redacted]

[redacted][2] Ex. 2, SP-00000092, at -093. One of the firms the bankers approached was Bain, which responded that, [redacted] it "would be open to exploring alternative forms of a transaction." Ex. 3, SP-00167648, at -652.[3] Bain followed up with an initial term sheet, on November 12, 2016, proposing a multi-part transaction consisting of: (i) Bain's purchase of HIG's ownership stake in the Company, (ii) Surgery Partner's acquisition of NSH, and (iii) Bain's investment in a preferred security to help fund the NSH acquisition. Ex. 5, Bain_00076637, at -638.

One of the HIG-affiliated directors, Mr. Lozow, participated in negotiations with Bain for its purchase of HIG's controlling stake in the Company. HIG sought [redacted] per share, but Bain refused to pay more than $19, and, by early December 2016, HIG agreed to the $19 price. Ex. 6, HIG_0001002, at -004. In the weeks that followed, Mr. Doyle, with support from the Company's CFO, Ms. Sparks, and its financial advisors, Jefferies and Citi, led the negotiations between Surgery Partners

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[2] At that time, the Company had a five-person Board, consisting of Mr. Doyle, Adam Feinstein, and Brent Turner, and two HIG-affiliated directors, Chris Laitala and Matt Lozow. The Board grew to six members, with the addition of another independent director, Dr. Teresa DeLuca, at the end of September 2016.

[3] The Board also received a response from [redacted], which indicated interest in acquiring the Company for a price per share between $16.50 and $17. The Board believed the [redacted] bid undervalued the Company and unanimously agreed it was not in the best interests of Surgery Partners [redacted]. Ex. 4, SP-00000270, at -271.

and Bain over the terms of the Preferred. Ex. 52, Sparks Dep. Tr. at 108:24 – 109:20, 155:17 – 24; Ex. 53, Doyle Dep. Tr. at 294:15 – 295:3. Multiple witnesses, including Mr. Doyle and the lead negotiators from Bain, testified that neither of the HIG-affiliated directors, Mr. Lozow and Mr. Laitala, had any role in those negotiations. Ex. 53, Doyle Dep. Tr. at 48:22 – 49:11; Ex. 43, O'Reilly Dep. Tr. at 256:8 – 257:3; Ex. 52, Sparks Dep. Tr. at 108:24 – 109:6; Ex. 54, Gordon Dep. Tr. at 127:23 – 128:10; Ex. 51, Kaplan Dep. Tr. at 213:3 – 22; Ex. 49, Lozow Dep. Tr. at 235:13 – 236:12, Ex. 47, Laitala Dep. Tr. at 260:7 – 261:10.

Between early December 2016 and mid-January 2017, Surgery Partners and Bain exchanged eight versions of the term sheet.[4] The deal terms changed substantially over that period, with Surgery Partners securing several key concessions from Bain. Ex. 53, Doyle Dep. Tr. at 308:13 – 309:8. For instance, in its term sheet on December 8, 2016, [redacted] Surgery Partners also introduced a "payment in kind" provision ("PIK,") pursuant to which the

[4] Ex. 6, HIG_0001002, at -004-07 (Dec. 4, 2016); Ex. 7, Bain_00135155, at -156-59 (Dec. 16, 2016); Ex. 8, JEFF00164268, at -269-73 (Dec. 21, 2016); Ex. 9, Bain_00135165, at -167-81 (Dec. 24, 2016); Ex. 10, Bain_00130949, at -958-62 (Jan. 2, 2017); Ex. 11, Bain_00035953, at -955-59 (Jan. 12, 2017); Ex. 12, HIG_0010335 (Jan. 13, 2017); (, SP-00277269, at -278-82 (Jan. 17, 2017).

Company would pay dividends through a mix of cash and preferred shares (Ex. 7, Bain_00135155, at -157; Ex. 53, Doyle Dep. Tr. at 307:23 – 308:18), a perpetual term, callable after 5 years, and a "forced conversion" right. Ex. 9, Bain_00135165, at -178; Ex. 53, Doyle Dep. Tr. at 305:23 – 307:6. [redacted] minimizing any increase in Surgery Partners' already high leverage, which exceeded 6x. Ex. 50, Chopra Dep. Tr. at 189:12 – 190:6.

The Board was presented with the deal terms on January 17, 2017, with Mr. Lozow and Mr. Laitala recusing themselves [redacted] Ex. 14, SP-00000212, at -213. The independent directors unanimously approved the deal terms (*id*. at -214), and Mr. Doyle signed the term sheet for Surgery Partners on January 24, 2017. Ex. 15, SP-00170813, at -818. A week later, however, on February 1, 2017, Bain advised the Board it was withdrawing its offer to purchase HIG's control stake as agreed in the final term sheet, but was still willing to proceed with the acquisition of NSH and the Preferred. Ex. 16, Bain_00036287, at -288-89. [redacted]

[redacted] "discontinue discussions with Bain," Ex. 17, SP-00000070, at -071, and the Board decided unanimously to do so. *Id.*[5]

Approximately three months later, on May 1, 2017, Bain contacted Mr. Doyle to re-engage in discussions with Surgery Partners on the same terms previously agreed to in January. Ex. 24, SP-00166475, at -476-77. Bain explained it was again interested in proceeding because NSH had become available on substantially more attractive terms than before, and that Bain was "ready to move as expeditiously as possible to achieve an exceptionally accelerated path forward." *Id.* at -477. The Board met three times, on May 6, 8 and 9, to evaluate the Transactions. Ex. 25, SP-00000016, at -016-17; Ex. 28, SP-00000073, at -074-75; Ex. 30, SP-00000171, at -171-72. [redacted] the proposed deal structure would "help the Company remain leverage neutral." Ex. 28, SP-0000073, at -074. The Board also reasoned it would benefit the Company to have Bain as its new controlling shareholder – a "world-class shareholder with long-standing track record of success." Ex. 32, SP-00000278, at -281. At the meeting on May 9, 2017,

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[5] [redacted] also expressed interest in acquiring HIG's majority stake at $19 per share. Ex. 19, HIG_0002916, at -920. Mr. Laitala and Mr. Lozow did not participate in Board discussions involving [redacted] Ex. 20, SP-00000215; Ex. 21, SP-00000068; Ex. 23, SP-00000012.

the independent directors unanimously approved the Transactions. Ex. 31, SP-00000027, at -030-35. The minutes reflect that Mr. Lozow, the one remaining HIG-affiliated Board member at that time, did not participate in the vote.[6] *Id*. at -027. [redacted]. Ex. 27, Bain_00036922, at -923-24.

After market close on May 9, Surgery Partners filed its Form 8-K reporting an earnings miss for 1Q 2017, Ex. 68, Surgery Partners Form 8-K (May 9, 2017); *see also* Ex. 63, Bain_00019334 (analyst characterizing May 9 earnings as "miss"), and before markets opened on May 10, the Company issued a press release announcing the Transactions. Ex. 29, Bain_00132518, at -519. Surgery Partners held an earnings call that morning, addressing both the earnings miss and the Transactions. Ex. 69, 1Q 2017 Earnings Call Tr. at 3-4. Surgery Partners shared key terms of the Preferred with analysts, including that it was a "preferred convertible stock" of approximately $300 million (*id*. at 5), convertible to Surgery Partners common stock at $19 per share (4% above the $18.20 closing price on May 9) (*id.* at 12), with a five-year term, and "around a 10%" dividend rate. *Id*. at 11.

[6] Mr. Laitala announced his resignation from the Board on April 27, 2017, as long planned, because he had left HIG to begin a new position with another private equity firm. Ex. 47, Laitala Dep. Tr. at 259:10 – 24, 262:4 – 16.

The Company filed a Form 10-Q after market close on May 10, with additional details of the Transactions, including that Bain would purchase HIG's equity stake in the Company at $19 per share. Ex. 69, Q1 2017 Surgery Partners Form 10-Q at 19.

The Transactions garnered an overwhelmingly positive reaction from the market. On May 10, Surgery Partners' stock price closed at $20.95, a 15.1% gain from the closing price on the prior trading day. Ex. 44, Surgery Partners Stock Price Tracker, at 5; *see also* Ex. 58, Smith Rpt. ¶ 45. On May 11, the Company's stock price closed at $21.95, another 4.8% increase. Ex. 44, Surgery Partners Stock Price Tracker, at 5; *see also* Ex. 58, Smith Rpt. ¶ 49. Analysts reported favorably on all three components of the Transactions.[7] They observed that the market "applauded" the Transactions (Ex. 36, SP-00054329), including because Surgery Partners had used the Preferred to structure the NSH acquisition to be "leverage-neutral" (Ex. 33, Bain_00019321, at -321-322), and to bring in Bain as a "health-care savvy partner" (Ex. 35, SP-00048637, at -637, -639). Analysts also reported favorably on HIG's sale of its controlling stake, because it "push[ed] out the overhang" from HIG's long-

[7] *E.g.*, Ex. 33, Bank of America Analyst Report, Bain_00019321; Ex. 34, Barclays Analyst Report, Bain_00019304; Ex. 40, Citi Analyst Report, Bain_00003378; Ex. 37, Goldman Analyst Report, Bain_00019342; Ex. 39, KeyBanc Analyst Report, JEFF00043043; Ex. 36, Raymond James Analyst Report, SP-00054329; Ex. 38, Solebury Report Summary, Bates SP-00056994; Ex. 35, RBC Analyst Report, SP-00048637.

standing majority ownership of the Company. Ex. 33, Bain_00019321; Ex. 35, SP-00048637, at -639.

Not a single analyst report indicated any concern whatsoever with the terms of the Preferred.

B. The Expert Opinions

The parties' exchanged opening and rebuttal expert reports in March and May 2021, and completed expert depositions at the end of July.

1. Valuing the Preferred

Plaintiff's expert, Mr. Canessa, valued the Preferred using a "binomial model" incorporating a "risky debt rate" that, according to Mr. Canessa, would account for the risk of "default." Ex. 56, Canessa Rpt. ¶ 68. Mr. Canessa advised that he based his model "on the framework largely set forth in the textbook *Options, Futures & Other Derivatives* by Professor Hull" (the "Hull text"). *Id.* ¶ 34. Mr. Canessa claimed the Preferred was undervalued by approximately [redacted] (representing [redacted]% of the Company's [redacted] total market capitalization). In his deposition, however, Mr. Canessa made numerous admissions undercutting his findings.[8]

[8] HIG reserves its right to move for Mr. Canessa to be precluded as an expert at trial, on the appropriate schedule set forth by the Court for the filing of *Daubert* motions in its Order on June 8, 2021, in the event Plaintiff's claim for damages has not then been resolved through summary judgment.

Most glaring, Mr. Canessa admitted that his cited edition of the Hull text, the Fifth edition, is not current; that, starting with its Sixth edition, the Hull text stopped recommending the use of a binomial model with a risky debt rate as a valuation tool; that he was aware when he drafted his report "that the latter editions of the Hull textbook … no longer had the language that [he] was using" as support for his valuation; and that he nevertheless failed to acknowledge Hull's change in guidance in his written report, which he understood would be submitted to the Court. Ex. 64, Canessa Dep. Tr. at 640:2-20, 651:14-21, 654:2-655:11, 656:2-25. In other words, Mr. Canessa, by his own admission, intentionally based his valuation model on an outdated version of the Hull text, without advising the Court that he was doing so, because he knew the current version of the Hull text no longer supports his chosen methodology. *Id.* at 649:12-650:3, 654:2-655:25.

Mr. Canessa made several additional admissions further undercutting his findings, including the following:

- Mr. Canessa conceded that Surgery Partners' stock traded in an efficient market, Ex. 56, Canessa Rpt. ¶ 39; that the Company's stock price increased by a statistically significant amount following announcement of the Transactions (Ex. 64, Canessa Dep. Tr. at 57:22-58:14); and that none of the many analysts who reported on the Transactions, or any of the Company's institutional investors, voiced any concern with the terms of the Preferred. *Id.* at 78:16-25, 87:8-15, 88:4-19, 119:13-21, 129:9-15.

- Mr. Canessa admitted that, in every scenario he accounts for in his binomial model, he assumes Bain is guaranteed to receive at least [redacted] at an assumed eight-year maturity date, and as much as over [redacted], notwithstanding that there are numerous scenarios in which any payment to Bain, let alone at those elevated levels, would be exceedingly unlikely. Ex. 64, Canessa Dep. Tr. at 287:9-288:17, 289:11-291:17, 296:9-22, 317:10-319:2.

- Mr. Canessa admitted that he failed to account for the dilution to Surgery Partners' common shares if Bain were to exercise its conversion option, and testified that his "damages" estimate was therefore inflated by [redacted] (both defense experts report that Mr. Canessa's admitted mistake actually inflated his valuation by [redacted]). *Id.* at 346:2-349:2, 354:9-16; Ex. 61, Smith Rebuttal Rpt. ¶ 40 & n.57; Ex. 60, Lehn Rebuttal Rpt. ¶ 44.

- Mr. Canessa admitted that private placement discounts are standard to account for the illiquidity of a private security like the Preferred, but conceded he did not make that standard adjustment to his valuation. Ex. 64, Canessa Dep. Tr. at 363:11-364:10, 366:10-17.

The analysis by HIG's expert, Professor Smith, unlike the valuation by Mr. Canessa, is unrefuted in several key respects. Professor Smith performed an event study demonstrating that Surgery Partners' stock price rose by statistically significant levels in the first day of trading after the Transactions were announced, and over the cumulative two day period in which all the terms of the Preferred were disclosed. Ex. 58, Smith Rpt. ¶ 13. Mr. Canessa does not dispute those findings, and his own event study also indicated a statistically significant increase in the

Company's share price. Ex. 64, Canessa Dep. Tr. at 54:11-55:2, 57:22-58:14. Mr. Canessa claims, however, that the increase is attributable to investor reaction to the NSH acquisition, and would have been substantially greater if not for supposed investor dissatisfaction with the terms of the Preferred. *Id.* at 66:11-18. As Professor Smith points out in his opening report, however, and as Mr. Canessa admitted in deposition, none of the Company's many analysts or institutional investors expressed any concern with the terms of the Preferred, as would be expected if those terms were as unfavorable for the Company as Mr. Canessa contends. *Id.* at 77:10-78:25, 119:13-21, 129:9-15; *see also* Ex. 58, Smith Rpt. ¶¶ 14, 52-59.

Professor Smith also performed a valuation using a modified Black-Scholes model to calculate the implied yield of the Preferred as compared to the implied yield for 16 comparable transactions. Ex. 58, Smith Rpt. ¶ 86 & Appendix G. Using inputs with which Mr. Canessa largely agreed (Ex. 59, Canessa Rebuttal Rpt. ¶¶ 73-74 & Table 17), Professor Smith found that the implied yield for the Preferred fell within the range of implied yields for comparable transactions, and that the Preferred was therefore reasonably priced. Ex. 58, Smith Rpt. ¶ 86. Mr. Canessa never refutes that finding: he testified that he had not "dug in" or evaluated Professor Smith's analysis (Ex. 64, Canessa Dep. Tr. at 503:16-505:8), even though it was fully set out in Professor Smith's expert report, and thus cannot refute Professor Smith's finding that the implied yield of the Preferred was at or near the median of the implied yields for comparable transactions. *Id*. at 506:24-507:16, 512:10-515:4.

Using a different valuation methodology, Bain's expert, Professor Lehn, reached the same conclusion as Professor Smith – *i.e.*, that the "$310 million price paid by Bain falls within a reasonable range of values for the Preferred Stock." Ex. 57, Lehn Rpt. ¶ 11. Professor Lehn calculated the enterprise value of Surgery Partners before and after the Transactions were announced, and confirmed that the amount paid by Bain for the Preferred was consistent with the increased value of the Company. *Id.* ¶¶ 28-29, 39-40. Professor Lehn also agreed with Professor Smith that the market reaction to the Transactions, including the absence of negative analyst commentary, strongly indicates that the Preferred was fairly priced. *Id.* ¶¶ 21-22, 25.

Finally, Professor Smith and Professor Lehn both tested the reliability of Mr. Canessa's model by applying it to other preferred investments to see if it generated valuations consistent with how those investments were priced—an analysis Mr. Canessa tellingly did not perform. Professors Smith and Lehn found that Mr. Canessa's model consistently and significantly overvalues preferred equity. Ex. 61, Smith Rebuttal Rpt. ¶¶ 45-47 & Ex. 9; Ex. 62, Lehn Suppl. Rebuttal Rpt. ¶ 6 & Tables 1-2. Mr. Canessa himself conceded that his model would generate [redacted] in so-called "damages" even if the terms of the Preferred were modified to include the median dividend rate and conversion premium from comparable transactions (Ex. 64, Canessa Dep. Tr. at 409:8-15, 410:19-23), and that his model would still report approximately [redacted] in damages even if the Preferred were modified with "outlier" terms unusually favorable to the Company, *id.* at 426:11-427:25.

2. H.I.G. Share Sale

Professor Smith established that the 4.4% premium Bain paid for HIG's controlling stake in Surgery Partners was economically reasonable. Ex. 58, Smith Rpt. ¶ 93. Professor Smith analyzed academic literature and conducted empirical analysis and found that sale of control typically occurs at a premium equal to or greater than the premium Bain paid to HIG. *Id.* ¶¶ 90-92. Specifically, Professor Smith identified academic literature supporting control premia of 19.6% and 20% (*id.* ¶ 90), and calculated a median control premium of 18.8% through his empirical analysis (*id.* ¶ 92).

Mr. Canessa does not dispute that control sales typically occur at a premium—in fact, he testified they "invariably" do. Ex. 64, Canessa Dep. Tr. at 372:12-25. Mr. Canessa nevertheless speculates that, if not for the sale of its shares to Bain, HIG would have sold its shares in block trades, which typically occur at a discount. Ex. 56, Canessa Rpt. ¶¶ 143, 158. But Mr. Canessa contradicted his own theory that HIG was overpaid when he testified that HIG could have foreseen the positive market reaction to the Transactions, and could have held onto its shares until after the NSH acquisition was announced and sold into the secondary market at a ***higher*** price—even accounting for Mr. Canessa's estimated marketability discount—than the price it received from Bain. Ex. 64, Canessa Dep. Tr. at 227:12-25, 228:10-20, 231:8-12, 233:10-24, 236:2-237:7.

ARGUMENT

A court will grant summary judgment where the moving party demonstrates that there is "no genuine issue as to any material fact," *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), and that it is thus entitled to judgment as a matter of law, Ct. Ch. R. 56(b), (c). "[S]ummary judgment is appropriately granted even where 'colorable . . . or [in]significantly probative [evidence]' is present in the record, if no reasonable trier of fact could find for the plaintiff on that evidence." *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995) (alterations in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). Further, summary judgment may be granted in whole or in part. Ct. Ch. R. 56(b) ("A party against whom a claim, counterclaim, cross-claim or declaratory judgment is asserted may . . . move . . . for a summary judgment in the party's favor as to all or any part thereof.").

I. HIG Is Entitled To Summary Judgment On The Issue Of Damages

Plaintiff's damages expert, Mr. Canessa, in his written report, purported to find, based on his use of a "binomial model" to value the Preferred, that Surgery Partners under-charged Bain by approximately [redacted] Ex. 56, Canessa Rpt. ¶¶ 2, 121. As detailed below, however, it was revealed during deposition that Mr. Canessa knowingly based his model on an outdated text that no longer supports his approach, and that Mr. Canessa, by using his improper model, failed to account for the undisputed risk to Bain that it would not be paid on its investment. As a result, Mr. Canessa's valuation is entirely unreliable, and cannot support an award of damages. *See Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *35 (Del. Ch. Sept. 4, 2014) ("[T]he inadequacy of Plaintiffs' explanation for how they were harmed reduces the Court's confidence that they were. The Reorganization was accretive to Plaintiffs and the Court has no basis to make a responsible estimate of damages. Thus, no damages are justified."); *Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *20-25 (Del. Ch. Mar. 21, 2018) *as revised* (Mar. 22, 2018), *aff'd*, 210 A.3d 705 (Del. 2019) (finding that plaintiff failed to provide evidence to support compensatory damages or rescissory damages, and awarding $1 in nominal damages); *Oliver v. Bos. Univ.*, 2006 WL 1064169, at *25 (Del. Ch. Apr. 14, 2006) (assigning nominal damages where "the only harm suffered by the Plaintiffs was a procedural one").

A. Plaintiff's Expert's Valuation of the Preferred Cannot Be Credited

Mr. Canessa attempted to bolster his valuation of the Preferred by claiming, in his written report, that he had based his model on the Hull text. Ex. 56, Canessa Rpt. ¶ 34. In a remarkable exchange during his deposition, however, Mr. Canessa was forced to admit that he had cited an outdated edition of the Hull text (the Fifth edition rather than the current Tenth edition) (Ex. 64, Canessa Dep. Tr. at 639:18-640:15, 650:7-24), and that he did so intentionally because he knew, though he gave no indication of this critical fact in his report, that the Hull text no longer recommends the binomial model for which Mr. Canessa cited Hull's earlier edition. *Id.* at 640:2-20, 641:10-642:4, 645:25-646:10, 650:4-24, 651:14-21, 654:2-656:25. Mr. Canessa's sleight of hand, exposed through deposition, means that his binomial model, notwithstanding his misleading citation to the Hull text in his report, is not "'generally considered acceptable in the financial community.'" *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *43 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015) (citation omitted).

Mr. Canessa's binomial model is not generally accepted for good reason – it cannot generate a reliable valuation. Mr. Canessa's model values the Preferred by purportedly calculating the return Bain would be expected to receive across hundreds of hypothetical scenarios keyed to potential movements in Surgery

Partners' stock price over time. In every single scenario, however, Mr. Canessa assumes that Bain is guaranteed to receive payment, either through Bain's conversion of its Preferred shares to common stock or because Surgery Partners exercises its redemption option, of at least [redacted] at year eight (with the possibility of payment, in a small number of scenarios, exceeding a trillion dollars). Ex. 64, Canessa Dep. Tr. at 287:24-288:17, 289:16-290:18, 317:10-319:19. Mr. Canessa makes these assumptions notwithstanding that he recognizes there are numerous scenarios – for instance, were Surgery Partners' stock price to fall significantly – in which Bain would be unlikely to be paid anything at all. *Id.* at 296:9-22, 628:2-631:6. This mode of analysis, *basing his valuation on the unrealistic assumption that Bain is guaranteed a substantial return on its investment in all scenarios*, leads inevitably to overvaluation of the Preferred.[9] *See ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *32, *38-39 (Del. Ch. July 21, 2017) (rejecting expert valuation that did not reflect "reality," and "relied on an

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[9] The bias towards overvaluation in Mr. Canessa's model is borne out when it is applied to other preferred equity investments. Both defense experts applied Mr. Canessa's model to value other such comparable investments, and, *in every instance*, that model generated a finding that the instrument had been substantially underpriced. Ex. 61, Smith Rebuttal Rpt. ¶¶ 45-47 & Ex. 9; Ex. 62, Lehn Suppl. Rebuttal Rpt. ¶ 6 & Tables 1-2. Mr. Canessa himself admitted that his model, if applied to hypothetical versions of the Preferred adjusted to include median price terms, or even terms better than the median from the standpoint of the issuing company, still finds "damages." Ex. 64, Canessa Dep. Tr. at 409:8-410:23.

extraordinary number of assumptions"), *aff'd*, 184 A.3d 1291 (Del. 2018); *Neal v. Ala. By-Prods. Corp.*, 1990 WL 109243, at *9 (Del. Ch. 1990) (valuation methods "are only as good as the inputs to the model"), *aff'd*, 588 A.2d 255 (Del. 1991).

Mr. Canessa's "fix" for this problem is to assign a "risky debt rate" to the Preferred (Ex. 64, Canessa Dep. Tr. at 620:25-621:6, 622:14-623:13), which Mr. Canessa claimed in his opening report is recommended by Hull. Ex. 56, Canessa Rpt. ¶ 35 & n.44. Actually, that is the exact approach Hull abandoned approximately 15 years ago, starting with his Sixth edition. And Mr. Canessa knew it. Ex. 64, Canessa Dep. Tr. at 649:13-18 ("I was aware that the latter editions of the Hull textbook -- I think the one that I had looked at was probably the 6th edition -- no longer had the language that I was using."); *see also id.* at 640:2-20, 651:14-21, 654:2-656:25. Mr. Canessa admitted he was aware, when he drafted his report, that the Hull text now requires an analyst to "estimate probabilities of default, estimate recovery rates and all those types of things" in order to accurately account for the risk of non-payment. *Id*. at 641:22-642:4. Indeed, Hull recommends, from his Sixth edition onwards, incorporating at each point in time a scenario in which stock price declines to zero and the issuer defaults, and applying a recovery rate to cash flows in each such scenario so that the holder is not assumed to get paid in full. Ex. 72, J. Hull, *Options, Futures, and Other Derivatives* 521–22 (6th ed. 2006). Mr. Canessa testified it was not feasible to make the necessary estimates of default risk and recovery rate to reliably apply such a model to the Preferred.[10] Ex. 64, Canessa Dep. Tr. 649:19-650:3. Rather than acknowledge in his report that the Preferred could not be accurately modeled, Mr. Canessa disregarded the updated Hull text and relied on outdated authority as support for his use of a form of modeling, no longer recommended by his own cited author, that was bound to overvalue the Preferred.

Mr. Canessa's reliance on the Hull text would be misguided, even beyond the fact that the current edition no longer supports the use of a binomial model with a risky debt rate, given that Hull formerly recommended that approach specifically for the valuation of convertible debt. Ex. 63, Canessa Dep. Tr. at 239:13-25; *see also* Ex. 56, Canessa Rpt. ¶ 32 n. 36 (citing Hull, 5th edition, pp. 652-654, which is a chapter headed "27.6 CONVERTIBLE BONDS"). Debt instruments are fundamentally different from preferred equity since debt carries a fixed maturity, whereas preferred equity is a perpetual investment with no guarantee of repayment. As both defense experts agree, Mr. Canessa's model inflates his estimated value of the Preferred because it assumes full repayment to Bain in every scenario, at an assumed five or eight year maturity, even as Surgery Partners' stock price approaches zero. Ex. 61, Smith Rebuttal Rpt. ¶¶ 38-39; Ex. 60, Lehn Rebuttal Rpt.

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[10] HIG's expert, Professor Smith, and Bain's expert, Professor Lehn, agree with that view, which is why, rather than attempting to model the Preferred, both used alternative approaches to valuation. *See* Ex. 65, Smith Dep. Tr. at 142:4-143:16, 146:16-147:11; Ex. 66, Lehn Dep. Tr. at 115:4-116:2.

¶¶ 45-47. When pressed during deposition, Mr. Canessa could only identify a single study applying any type of model to value preferred equity; admitted that he did not use that model in his own valuation; and admitted that he did not apply the adjustment the authors of that model require to account for the perpetual nature of preferred equity. Ex. 64, Canessa Dep. Tr. 250:3-8, 254:13-16, 258:3-13, 265:15-268:5. It is clear that Mr. Canessa's model, if it were still valid for any purpose, is not equipped to reliably value the Preferred. *Le Beau v. M. G. Bancorporation, Inc.*, 1998 WL 44993, at *7-8 (Del. Ch. Jan. 29, 1998) (rejecting expert's "capital market" approach for assessing fair value, because the respondents failed to establish that this was an accepted methodology for the purposes of valuing bank holdings companies, as distinguished from other types of enterprises), *aff'd in part, remanded in part on other grounds*, 737 A.2d 513 (Del. 1999).

This is not the first time Mr. Canessa has presented this Court with a faulty valuation, though it is the most egregious. *See Dieckman*, 2021 WL 537325. In *Dieckman*, Mr. Canessa purported to value units of a company by applying a discounted cash flow analysis using a dividend discount model, and comparing it to the value of the units based on the closing stock price. *Id.* at *43. In a decision earlier this year, then-Chancellor Bouchard rejected Mr. Canessa's analysis as "unreliable" and "illogical." *Id.* at *45, *47. As the Court explained, "Canessa failed to provide a valid rationale for valuing the Merger consideration based on DDM-to-market comparison," rendering his opinions unreliable because, in an "apples-to-oranges comparison," he "attempts to equate two different standards of value." *Id.* at *45, 47 (citation omitted). More troubling for present purposes, the Court criticized Mr. Canessa specifically because he failed to "provide any authority from finance literature to support his methodology" (*id.* at *43) – a criticism Mr. Canessa perhaps had in mind when, just one month after *Dieckman* was decided, he submitted his opening report in this case, in which he misleadingly cited to Hull's Fifth edition as supposed "authority from finance literature" supporting his approach.

The defects in Mr. Canessa's valuation go beyond the fundamental problem that he applied an unreliable methodology. Mr. Canessa also admitted that he failed to make a necessary adjustment to his valuation to account for the dilution to Surgery Partners' common shares that would occur if Bain were to convert the Preferred. Ex. 64, Canessa Dep. Tr. at 346:2-349:2, 347:11-348:10, 348:18-349:2, 354:9-16. Mr. Canessa says his admitted error caused him to overvalue the Preferred by [redacted] (*id.* at 346:2-349:2, 347:11-348:10, 348:18-349:2, 354:9-16), but both defense experts agree that Mr. Canessa's mistake actually inflated his valuation by [redacted] (Ex. 61, Smith Rebuttal Rpt. ¶ 40 & n.57; Ex. 60, Lehn Rebuttal Rpt. ¶ 44). Mr. Canessa also acknowledged that private placement discounts are standard to account for illiquidity; that the Preferred is a private security; and that he nevertheless failed to apply a discount here.[11] Ex. 64, Canessa Dep. Tr. at 363:3-364:10, 366:10-17, 369:9-20, 370:4-20.

In sum, Mr. Canessa used an unreliable valuation model – not recommended in the current edition of his own cited authority – guaranteed to overvalue the Preferred by failing to account for the risk to Bain that it would not be paid on its investment (or that it would be paid any amount less than [redacted] As in *Dieckman*, Mr. Canessa's approach is unsupported by the "finance literature," and his valuation is "unreliable" and cannot be credited. *Dieckman*, 2021 WL 537325, at *43, *47; *see also Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1155 (Del. Ch. May 18, 2006) (rejecting expert valuation where the expert's "testimony concerning his valuation report . . . led to serious suspicions regarding its reliability").

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[11] Mr. Canessa claimed no such adjustment is required under Delaware law, though he was unable to cite authority to support that view. Ex. 64, Canessa Dep. Tr. at 364:11-366:9. It appears Mr. Canessa was referring to the statutory standard for determining fair value in appraisal cases under 8 Del. C. § 262(h). In the present context—a non-appraisal derivative action—courts have taken marketability discounts into consideration in determining fair price. *See Union Ill. v. Korte*, 2001 WL 1526303, at *7 (Del. Ch. Nov. 28, 2001) (applying marketability and minority discount in non-appraisal derivative action in evaluating the fairness of a stock issuance); *see also Emerald Partners v. Berlin*, 2003 WL 21003437, at *31 (Del. Ch. Apr. 28, 2003) (applying a 50% marketability discount to "an illiquid, high-risk, speculative minority equity investment" is appropriate when determining fair price in entire fairness case), *aff'd,* 840 A.2d 641 (Del. 2003) .

B. The Valuation by HIG's Expert Is Unrefuted, and Confirms the Preferred was Reasonably Priced

In contrast to Mr. Canessa's discredited binomial model, the core valuation analysis by HIG's expert, Professor Smith, stands unrefuted. In his opening report, Professor Smith detailed his approach, in which he applied a modified Black Scholes model to 16 preferred equity investments; used the face price of those investments as an input and solved for the implied yield; and compared the yield for the Preferred with the yield for the other preferred investments. Ex. 58, Smith Rpt. ¶¶ 64, 70, 80-84. Professor Smith found that the implied yield for the Preferred was solidly within the range of the implied yields for the comparable transactions, thus confirming that the price terms for the Preferred were reasonable. *Id.* ¶¶ 85-86 & Exs. 5A & 6A.

Despite having Professor Smith's report and work papers as of March 12, 2021, when the parties exchanged opening expert reports, Mr. Canessa did not include any analysis in his May 7th rebuttal report suggesting that Professor Smith was incorrect in concluding that the Preferred was priced consistently with comparable transactions.[12] In his deposition, Mr. Canessa acknowledged that he

[12] Mr. Canessa's main two criticisms of Professor Smith's analysis miss the point. Mr. Canessa argues (i) Professor Smith was calculating a discount rate (not an implied yield), and that his calculation for the Preferred, of approximately [redacted], was implausibly high (Ex. 59, Canessa Rebuttal Rpt. ¶ 85), and (ii) Professor Smith made "algebraic errors" that, if corrected, would have increased that [redacted] figure even higher (*id.* ¶ 89). Professor Smith made clear in his deposition that he was in fact

performed no such analysis, though he "could have," and that he has no basis to refute Professor Smith's finding. Ex. 64, Canessa Dep. Tr. at 503:16-505:8, 506:24-507:16, 512:10-515:4.

Thus, while Mr. Canessa's valuation has been discredited and is unusable (*see* Section I.A. *supra*), Professor Smith's finding that the Preferred was reasonably priced stands unrefuted, and therefore supports a finding that Surgery Partners' minority shareholders sustained no damages. *See Ross Holding*, 2014 WL 4374261, at *1, *22 n.195 (holding that "plaintiffs were not damaged," in part, because they "largely agree[d]" with the opposing expert's analysis, and "direct[ed] the Court to no expert testimony countering [that expert]'s work"); *Pers. Touch Holding Corp. v. Glaubach*, 2019 WL 937180, at *22 (Del. Ch. Feb. 25, 2019) ("[Defendant] did not submit any expert opinion (or even lay testimony) to counter [plaintiff's expert's] opinion. The court thus credits [plaintiff's expert]'s testimony . . . .").

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calculating a yield, and that his calculations were correct. Ex. 65, Smith Dep. Tr. at 297:14-298:24. But the more salient fact, which Mr. Canessa has never tried to refute, is that Professor Smith applied his model consistently across transactions, and that – regardless of what Mr. Canessa views as a realistic discount rate – all of the comparable transactions generated similar results and the terms of the Preferred are therefore consistent with the terms of preferred equity investments generally.

C. Extensive Evidence Corroborates the Unrefuted Finding by HIG's Expert that the Preferred was Reasonably Priced

Unlike Mr. Canessa's implausible finding that the Preferred was mispriced by approximately [redacted] (or nearly [redacted]% of Surgery Partners' total market capitalization), Professor Smith's finding that the Preferred was reasonably priced is consistent with the market reaction. It is unrefuted that the price for Surgery Partners common stock jumped nearly twenty percent over the two days in which the details of the Preferred were publicly disclosed. Numerous authorities stand for the unsurprising proposition that the market's objective reaction to newly disclosed information provides a reliable indication of whether a disputed transaction was reasonably priced. *See*, *e.g.*, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 369 (Del. 2017) ("[A] well-informed, liquid trading market will provide a measure of fair value superior to any estimate the court could impose." (citation omitted)); *id.* at 370 ("For many purposes no formal theory of value is needed. We can take the market's word for it." (quoting Richard A. Brealey et al., Principles of Corporate Finance 13 (2008))); *Glob. GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 509 (Del. Ch.) *Global GT LP v. Golden Telecom, Inc.*, 993 A.2d 497, 509 (Del. Ch.) ("[I]f market evidence were to be considered, the weight of the evidence suggests that the market believed that [Buyer] was getting a bargain. . . . More importantly, [Buyer]'s stock rose substantially from $22.31 per share at the time that rumors about the proposed merger were leaked in July 2007 to $41.98 on December 21, 2007, the day that the Merger Agreement was announced, although the overall market remained relatively stable."), *aff'd*, 11 A.3d 214 (Del. 2010). By that measure, there can be no serious doubt that Surgery Partners' investors, who even Mr. Canessa concedes enjoyed "very good returns" when the Transactions were disclosed, Ex. 64, Canessa Dep. Tr. at 51:13-18, sustained no damages at all.

Mr. Canessa admits Surgery Partners' stock trades in an efficient market (*id.* at 43:19-44:5, 66:19-23), but strains to suggest that the market reaction can nevertheless be disregarded as irrelevant. Mr. Canessa emphasizes that the Preferred was disclosed together with the other Transactions (*i.e.*, the Company's acquisition of NSH and Bain's purchase of HIG's shares), and claims that those transactions would have resulted in an even greater stock price increase if not for supposed investor dissatisfaction with the terms of the Preferred.[13] *Id*. at 66:11-18. But Mr. Canessa's speculation runs up against the reality of the extensive analyst commentary describing the Transactions, including specifically the Preferred, in glowing terms. *See Glob. GT LP*, 993 A.2d at 509 (looking to the reaction of market

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[13] Mr. Canessa also points to the Company's revenue announcement, after market close on May 9, 2017, which he claims investors would have perceived as "neutral or positive," and thus could also account for the stock price increase on May 10. Ex. 56, Canessa Rpt. ¶ 137 & n. 171. But Surgery Partners reported *an earnings miss*, which, Mr. Canessa admits, is well understood to cause stock price declines, not increases. Ex. 64, Canessa Dep. Tr. at 191:24-192:6.

analysts as evidence of fair price); *Dieckman*, 2021 WL 537325, at *33 ("The positive market reaction to the Merger's announcement corroborates its fairness to Regency. . . . Shortly after the announcement, numerous analysts reported that the Merger was positive for Regency.").

Analysts were unanimous in their positive view of the Transactions. Across numerous reports, analysts praised the NSH acquisition as highly accretive for Surgery Partners,[14] and commented favorably on Bain replacing HIG as controlling shareholder, thus removing the "overhang" associated with a long-time equity holder.[15] Analysts also complimented the Board as "wise" for using the Preferred to fund the NSH acquisition to achieve "leverage neutrality,"[16] and bringing in Bain

[14] Ex. 34, Bain_00019304, at -306 ("From a financial standpoint, the transaction is accretive to earnings with meaningful synergies…."); Ex. 35, SP-00048637 (acquisition "offers compelling near-term accretion and long-term opportunities").

[15] Ex. 33, Bain_00019321 ("Bain buying out H.I.G. pushes out overhang"); Ex. 35, SP-00048637 ("Bain Capital's participation … remov[es] the overhang from the exit of original private equity sponsor, H.I.G. Capital").

[16] Ex. 35, SP-00048637, at -639 ("SGRY was wise in structuring the deal to be leverage neutral. Bain Capital will provide $300MM in convertible preferred financing (likely a 5-year term with 10% coupon and a $19 strike price)"); Ex. 40, Bain_00003378 ("Importantly, the deal, financed by a combination of debt and equity from Bain Capital will be leverage neutral."); Ex. 39, JEFF00043043 ("As part of the transaction, Bain Capital will provide up to $320 million of preferred convertible notes (convert at $19/share), which allows the deal to be neutral to SGRY's leverage ratio.").

as a "health care savvy" partner.[17] This analyst response simply cannot be reconciled with Mr. Canessa's claim that Surgery Partners so badly mis-priced the Preferred that it gave away approximately [redacted] to Bain.

Mr. Canessa himself identifies analyst coverage as a key indicator of whether a stock trades in an efficient market, and recognizes that Surgery Partners had an average of nine dedicated analysts. Ex. 56, Canessa Rpt., Appendix A at A-6. Mr. Canessa also recognizes it is an analyst's job to report on developments of potential interest to investors, which would include the [redacted] giveaway that Mr. Canessa claims occurred here. Ex. 64, Canessa Dep. Tr. at 77:15-78:15. Mr. Canessa's self-serving answer to the undeniable fact that multiple analysts commented favorably on the Preferred, without a single one reporting any problem with its terms, is that all of the Company's analysts, unlike himself, "failed to roll up their sleeves." *Id.* at 119:22-120:18. The defense experts offer a far more convincing explanation: The Preferred was good for investors, just as the market and the Company's analysts and its institutional investors concluded.

The extreme disconnect between Mr. Canessa's opinion and the real world market reaction to the Transactions goes beyond analyst commentary. Mr. Canessa

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[17] Ex. 35, SP-00048637 (noting that "Bain Capital's participation brings a new, healthcare-savvy partner" and that "[n]ew capital partner removes overhang, brings strong healthcare experience").

also identifies the presence of institutional investors as an indicator of an efficient market, and acknowledges that Surgery Partners had an unusually high concentration of such investors. Ex. 64, Canessa Dep. Tr. at 84:16-88:15. Mr. Canessa also recognizes that institutional investors, given their sophistication, would have been well equipped to identify a [redacted] giveaway, and would have been "upset" were that to occur. *Id*. at 87:2-7. Yet he had to admit that he is unaware of a single one of Surgery Partners' institutional investors who voiced any concern with the terms of the Preferred. *Id*. at 87:8-15, 88:4-10.

Finally, Mr. Canessa's effort to treat the Preferred and the NSH acquisition as two distinct transactions, and to suggest that the market liked the latter but not the former, fails for the added reason that those Transactions were not distinct at all. Rather, as Mr. Canessa testified, the Transactions were "interrelated" – Surgery Partners acquired NSH with funding from the Preferred. *Id*. at 46:2-6, 108:4-14, 527:20-528:3. Mr. Canessa also recognizes that those related Transactions resulted in a net benefit to the Company. *Id*. at 527:9-19, 533:20-534:7. Importantly, he could not identify any plausible alternative mode of financing that would have enabled Surgery Partners to go forward with the NSH acquisition, and secure that net gain for itself and its investors, on better terms than it was able to achieve through the Preferred. *Id*. at 537:5-22, 539:2-8, 549:19-550:3, 696:10-697:23. Here, again, the analyst response speaks volumes – Raymond James was "surprised" and "pleased" that Surgery Partners was able to "pull off" the Transactions, specifically because it appeared unlikely the Company could find a source of financing, like the Preferred, that would permit it to move forward given its highly leveraged capital structure. Ex. 36, SP-00054329-335, at -329.

In sum, Surgery Partners' management, by successfully negotiating the Preferred as a means of financing the NSH acquisition, achieved a substantial benefit for the Company and its investors, and certainly did not damage them. Thus, even if Plaintiff were to prevail on liability, there would be no basis for a finding of damages. *See Ravenswood Inv. Co.*, 2018 WL 1410860, at *19, *25 ("After carefully reviewing the record, I am satisfied that there is no legal or evidentiary basis to grant a remedy to the Company beyond nominal damages [of $1.00]."); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *51 ("the unfair Recapitalization was nonetheless effected at a fair price" and "it would be inappropriate to award disgorgement, rescissionary, or other monetary damages"); *Ross Holding*, 2014 WL 4374261, at *1 ("The Court finds that defendants did not demonstrate the entire fairness of the [transaction] …. However, the Court also concludes that plaintiffs were not damaged by the conversion as the value of their units nominally increased.").

HIG is entitled, at a minimum, to summary judgment on the issue of damages.

II. HIG Is Also Entitled To Summary Judgment On The Issue Of Liability

In its order on Defendants' motions to dismiss, the Court credited Plaintiff's allegations at the pleading stage, and, on that basis, found that the Transactions were "presumptively" subject to the entire fairness standard of review. Mem. Op. at 3. It is well settled that this initial presumptive finding is not binding at later stages of the litigation. *See Frank* v. *Elgamal*, 2014 WL 957550, at *17 (Del. Ch. Mar. 10, 2014) ("The Court is not necessarily bound now, at the summary judgment stage, to that earlier statement on the then-appropriate substantive standard of review."). "The procedural standard for a motion for summary judgment is altogether different from that for a motion to dismiss," and it is therefore "certainly possible that, because the Defendants may now present evidence, the Court's determination of the appropriate substantive standard of review may be different." *Id.*; *see also In re CBS Corp. S'holder Class Action & Derivative Litig*., 2021 WL 268779, at *32 n.361 (Del. Ch. Jan. 27, 2021); *Orman v. Cullman*, 794 A.2d 5, 31 (Del. Ch. 2002) ("Further discovery is necessary to determine whether the facts—as they truly existed at the time of the challenged transaction, rather than those accepted as necessarily true as alleged—are sufficient to rebut the business judgment rule presumption and to trigger an entire fairness review.").

As set forth below, *see* Section II.A. *infra*, the evidence does not support Plaintiff's allegations of a conflicted transaction, and the Preferred therefore is not subject to entire fairness review, but must instead be analyzed under the business judgment rule, which is easily satisfied on the facts here. Further, as demonstrated in Section II.B. *infra*, even under entire fairness review, HIG would be entitled to summary judgment based on overwhelming evidence that the deal process, and, most importantly, the price terms of the Preferred, were entirely fair – indeed, highly favorable – for Surgery Partners' minority shareholders.

A. The Transactions Should Be Evaluated Under the Business Judgment Rule

As this Court recognizes, "controlling stockholders are not automatically subject to entire fairness review when a controlled corporation effectuates a transaction. Rather, the controller also must engage in a conflicted transaction for entire fairness to apply." Mem. Op. at 36 (quoting *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *6 (Del. Ch. Dec. 11, 2017)). Crediting Plaintiff's allegations, then-Chancellor Bouchard held that the Complaint described a conflicted transaction insofar as HIG allegedly received a "unique or 'non-ratable' benefit" in the form of the premium Bain paid for HIG's controlling stake in the Company. Mem. Op. at 37. It is now clear, however, from the evidence and from Mr. Canessa's admissions, that HIG did not receive a benefit at the expense of Surgery Partners and was not operating under a conflict.

Mr. Canessa testified it was against HIG's economic interests for Surgery Partners to issue the Preferred, which leaves no basis to subject that Transaction to the heightened scrutiny reserved for self-dealing by controlling shareholders. *See Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 285 (Del. Ch. Jan. 29, 2021) ("The purpose of controlling stockholder liability is to make sure that controlling stockholders do not use their control to reap improper gains through unfair self dealing or other disloyal acts." (citation omitted)). Specifically, Mr. Canessa – in his effort to minimize the importance of the stock price increase after announcement of the Transactions – opined that the deal participants would have foreseen that stock market reaction, and, if anything, would have expected the price to jump even higher if not for investor dissatisfaction with the terms of the Preferred. Ex. 64, Canessa Dep. Tr. at 227:12-25, 228:10-20, 231:8-12, 233:10-24, 235:20-237:7. Having staked out this position, Mr. Canessa was forced to admit that [redacted] *Id.* at 233:10-24, 236:2-237:7. Indeed, Mr. Canessa had separately opined that HIG would have been able to sell its shares at a 4 or 10% [redacted]. *Id.* at 231:8-12, 233:10-24. Thus, even crediting Mr. Canessa's opinions, [redacted], which means HIG had no conflict that would have caused it to force Surgery Partners to do so. With no "actual conflict[] of interest," there is no basis for entire fairness review. *See In re Trados Inc. S'holder Litig.,* 73 A.3d 17, 44 (Del. Ch. 2013) (entire fairness review arises "when the board labors under actual conflicts of interest").

Even putting aside Mr. Canessa's admission, the evidence has neutralized Plaintiff's earlier theories as to why HIG was supposedly conflicted in connection with the Transactions:

First, Plaintiff claimed HIG was paid an "inflated" price of $19 per share, in comparison to the market price of $18.20, for its controlling interest in the Company. Mem. Op. at 37 (citing Compl. ¶ 1). But the evidence demonstrates that this 4% premium was standard, and, if anything, less than controllers ordinarily receive. Mr. Canessa himself testified that controlling shareholders are "invariably" paid a control premium. Ex. 64, Canessa Dep. Tr. at 370:12-21. And he did not challenge the finding by HIG's expert, Professor Smith, that the 4% premium paid by Bain is below the average and median for comparable change-of-control transactions. Ex. 58, Smith Rpt. ¶¶ 88-93.

This conclusion comports with extensive precedent holding that control premiums are proper, including premiums far greater than the one here, and that the receipt of such a premium therefore does not give rise to the sort of conflict triggering entire fairness review. *See In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *2 (Del. Ch. Aug. 18, 2017) (applying the business judgment rule to grant defendant's motion to dismiss claim that controlling shareholder "leveraged her position as controller to secure greater consideration for herself than was paid to the other stockholders"); *In re CrimsonExpl. Inc. S'holder Litig.*, 2014 WL 5449419, at *7 (Del. Ch. Oct. 24,2014) (applying the business judgment rule to grant defendants' motion to dismiss claim that controlling shareholder "caused the Company to be sold for a grossly inadequate price and received significant side benefits not shared with the minority common stockholders"); *see also Abraham v. Emerson Radio Corp.*, 901 A.2d 751, 761-62 (Del. Ch. 2006) ("Put simply, pure control premium envy is not a cognizable claim for a minority stockholder . . . ."); *In re Sea-Land Corp. S'holders Litig.*, 1987 WL 11283, at *5 (Del. Ch. May 22, 1987) ("A controlling stockholder is generally under no duty to refrain from receiving a premium upon the sale of his controlling stock."); *Mendel v. Carroll*, 651 A.2d 297, 305 (Del. Ch. 1994) ("[I]t is widely understood that buyers of corporate control will be required to pay a premium above the market price for the company's traded securities"); *Wilmington Sav. Fund Soc'y, FSB v. Foresight Energy LLC*, 2015 WL 7889552, at *9 n.3 (Del. Ch. Dec. 4, 2015) ("[A] number of studies have found that control premia in mergers and acquisitions typically range between 30 and 50%.").

The ruling in *Martha Stewart* is instructive. In that case, the plaintiff alleged that the defendant, Martha Stewart, in connection with the sale of her self-named company, used her position as controlling shareholder to secure "side deals," not available to minority investors. 2017 WL 43568089, at *1-2. The Court dismissed the complaint under the business judgment rule. The Court found that Stewart had no conflict, among other reasons, because the terms of the acquisition improved for the company and its shareholders after Stewart had secured her side benefits; Stewart's side deals, which included an employment contract, were not "markedly more lucrative" than her pre-merger benefits; and it was the acquiring company, not Stewart, that initiated negotiations between the two. *Id.* at *12. As in *Martha Stewart*, Plaintiff here alleges that HIG used its control to leverage superior terms for its sale of its majority stake. And as in *Martha Stewart*, the deal terms for the Company improved after HIG negotiated its control premium[18]; the control premium paid to HIG was not unduly "lucrative," but was standard; and it was the buyer, Bain,

[18] As detailed in Section II.B.1, *infra*, numerous deal terms improved for Surgery Partners during negotiations. Among other things, the Company negotiated for a coupon rate lower than Bain proposed; a perpetual term instead of a fixed maturity; and callability after five years. Ex. 50, Chopra Dep. Tr. at 189:12 – 190:6. Mr. Canessa conceded that several deal terms improved for the Company after Bain and HIG settled on a $19 share price. Ex. 64, Canessa Dep. 437:24-438:20, 439:7-10, 441:2-443:13, 444:23-445:77.

that initiated the negotiations for HIG's shares. Ex. 3, SP-00167648, at -651-62; Ex. 5, Bain_00076637, at -638.

Second, Plaintiff speculated in his Complaint that HIG, because it was nearing the end of its investment horizon, was under pressure to liquidate its investment in Surgery Partners, thus motivating it to condition the Company's issuance of the Preferred on Bain's purchase of its common shares. Mem. Op. at 37. Here, again, the evidence contradicts Plaintiff's theory. Every HIG witness testified, with no evidence to the contrary, that there was no such pressure, including because investment horizons are routinely extended. Ex. 45, Schwartz Dep. Tr. at 43:24 – 44:21; Ex. 49, Lozow Dep. Tr. at 209:5 – 10; Ex. 47, Laitala Dep. Tr. at 153:10 – 22; Ex. 48, DeLuca Dep. Tr. at 68:22 – 69:1; *see also* Ex. 41, HIG_0015415. Courts frequently reject this "need for liquidity" theory as justification for entire fairness review. *See Crimson*, 2014 WL 5449419, at *19 (finding "unconvincing Plaintiffs' contention that Oaktree was motivated by a need for liquidity," and citing authority "suggest[ing] that for liquidity to be a driving motivation, there would need to be circumstances involving a 'crisis, fire sale' of the company."); *In re Merge Healthcare Inc.*, 2017 WL 395981, at *8 (Del. Ch. Jan. 30, 2017) ("A simple interest in selling stock on the part of the controller, by contrast, is insufficient to demonstrate divergent interests. In order for such a situation to constitute a disabling conflict, a controller must not only seek liquidity but the circumstances under which she does so must be akin to a 'crisis' or a 'fire sale' to 'satisfy an exigent need.'" (citation omitted)); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012) (holding that controlling stockholder's desire for liquidity of his control position posed no conflicting interest requiring review under entire fairness standard); *GAMCO Asset Mgmt. Inc. v. iHeartMedia Inc.*, 2016 WL 6892802, *17-18 (Del. Ch. Nov. 23, 2016), *as revised* (Nov. 29, 2016), *aff'd*, 172 A.3d 884 (Del. 2017) (holding that controlling stockholder's desire for liquidity of his control position was a "far cry from the 'very narrow circumstances' where this Court will find that an arms-length transaction with a third party yielded the kind of unique benefit to a controller that would justify entire fairness review.").

In sum, HIG had no conflict. Like controllers generally, it was entitled to sell its shares at a premium. Its sale to Bain therefore does not trigger entire fairness review. *Martha Stewart*, 2017 WL 3568089, *2 ("Having failed to plead a conflict between Stewart and the minority stockholders, the appropriate standard of review is the business judgment rule"). Moreover, there can be no serious dispute that the Transactions pass muster under the business judgment rule. *See In re Crimson*, 2014 WL 5449419, at *9 (the business judgment rule "posits a powerful presumption in favor of actions taken by directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be attributed to any rational business purpose.") (citation and internal quotations omitted). It was, at a minimum, rational for Surgery Partners to issue the Preferred to secure funding for the Company's acquisition of NSH. Even Mr. Canessa concedes the Transactions were a net positive for the Company, Ex. 64, Canessa Dep. Tr. at 380:18-381:19, and that it was reasonable for Surgery Partners' Board to use the Preferred as a means to avoid increasing the Company's leverage [redacted] *Id*. at 537:5-22, 539:2-8, 549:19-550:3, 558:2-18, 698:9-17. The Court already rejected Plaintiff's suggestion that Surgery Partners' CEO, Mr. Doyle, acted for any purpose other than to promote the Company's interests when he negotiated the terms of the Preferred (Mem. Op. 44-45), and there is no evidence to support any different finding now. *See Trados*, 73 A.3d at 76 (declining to infer bad faith as a basis to overcome the business judgment rule).

B. Even If Entire Fairness Were The Applicable Standard, HIG Would Be Entitled To Summary Judgment

Even if this action were governed by the entire fairness standard, summary judgment would be warranted. "A determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability." *Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) ("an initial judicial determination that a given breach of a board's fiduciary duties has rebutted the presumption of the business judgment rule does not preclude a subsequent judicial determination that the board action was entirely fair, and is, therefore, not outcome-determinative *per se*"). "The concept of fairness has two basic aspects: fair dealing and fair price," but "the test for fairness is not a bifurcated one[.] . . . [A]ll aspects of the issue must be examined as a whole[.]" *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). Within that framework, price may be "the preponderant consideration" outweighing other features of the transaction. *Id.* at 711.

Extensive authority stands for the proposition that, even where a deal process is flawed, a finding of entire fairness is warranted if the deal was fairly priced. *See, e.g.*, *Emerald Partners v. Berlin*, 2003 WL 23019210, at *28 n.94 (Del. Dec. 23, 2003) ("[t]he process imperfection identified here was not of sufficient gravity to preclude a finding of fair dealing in this merger"); *Trados*, 73 A.3d at 76 ("Although the defendant directors did not adopt any protective provisions, failed to consider the common stockholders, and sought to exit without recognizing the conflicts of interest presented by the Merger, they nevertheless proved that the transaction was fair."); *Frederick Hsu Living Tr. v. Oak Hill Cap. Partners III, L.P.*, 2020 WL 2111476, at *36 (holding that company's cash accumulation strategy was entirely fair even though "[t]he traditional indicators of fair dealing were [] lacking"). As these rulings demonstrate, the entire fairness standard recognizes that "perfection is not possible, or expected as a condition precedent to a judicial determination of entire fairness." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1179 (Del. 1995).

The deal process that led to Surgery Partners' issuance of the Preferred was fair, even if imperfect. Moreover, Plaintiff's criticisms of that process cannot obscure the fact that the Preferred was fairly priced, and that its terms, when considered "as a whole," *Weinberger*, 457 A.2d at 711, were overwhelmingly favorable for the Company and its minority shareholders.

1. The Deal Process was Fair

"A fair dealing analysis addresses how the transaction was timed, initiated, structured, negotiated, disclosed, and approved." *Emerald Partners* 2003 WL 21003437, at *22 (citing *Weinberger*, 457 A.2d at 711). Across all those factors, and certainly "balancing" them, *Cinerama*, 663 A.2d at 1179, the deal process was fair.

Timing: The timing of the Transactions is consistent with a fair process. Plaintiff's theory that HIG was under pressure to sell its shares in Surgery Partners because of the investment horizon in the applicable partnership agreement is not true – as discussed, *supra*, multiple witnesses testified that HIG had no pressing liquidity need, and investment horizons are routinely extended. *See* Section II.A, *supra*. And extensive authority holds that a controller's supposed need for liquidity, in all but the most rare and extreme circumstances, does not support a claim for breach of duty. *Id.*

Far from indicating a "fire sale," the evidence demonstrates that HIG negotiated a price for its shares as of early December 2016 (Ex. 6, HIG_0001002, at -004), and waited, without participating in the negotiations for the Preferred, until Surgery Partners and Bain separately worked out its terms. Ex. 15, SP-00170813. When the Transactions finally did move forward, it was not because HIG applied pressure to rush the process; rather, it was because Bain approached Surgery Partners, without HIG's prompting, because an opportunity had emerged to purchase NSH on better terms than before. Ex. 24, SP-00166475, Ex. 53, Doyle Dep. Tr. at 313:10 – 18; Ex. 43, O'Reilly Dep. Tr. at 227:16 – 228:3; Ex. 51, Kaplan Dep. Tr. at 184:8 – 185:4. And when it came time to deliberate and vote, the one remaining HIG-affiliated director, Mr. Lozow, recused himself [redacted], Ex. 30, SP-00000171, and a unanimous board of independent directors approved the Transactions, Ex. 31, SP-00000027, at -030-035.

In sum, the timing of the Transactions was driven by market factors, and was in no way "manipulated" by HIG to benefit itself at stockholder expense. *See Cinerama*, 663 A.2d at 1172 (finding no "unfair timing issues" where there was no indication that "a fiduciary manipulated the timing of a transaction to benefit itself at the stockholders' expense.").

Initiation of Transactions: The Transactions were initiated in a manner indicating a fair process. HIG did not enter the market in search of an opportunity to dispose of its shares to the exclusion of other investors. Just the opposite: Surgery Partners' board, by unanimous vote, assigned its financial advisors [redacted] The possibility of an alternative approach, in which Bain would purchase HIG's shares and invest in the Preferred to provide financing for the NSH acquisition, emerged only because Bain proposed it: Bain introduced that structure, first in correspondence to the Surgery Partners board on October 28, 2016 (Ex. 3, SP-00167648, at -652), and then in its initial term sheet two weeks later (Ex. 5, Bain_00076637, at -638). Bain did so, not because of any pressure from HIG, but because it viewed Surgery Partners as an attractive investment. Ex. 26, Bain_00150828, at -830-836 & -875-876; Ex. 46, Feinstein Dep. Tr. at 140:19 – 142:15; Ex. 43, O'Reilly Dep. Tr. at 227:16 – 228:3; Ex. 45, Schwartz Dep. Tr. at 121:1 – 12; Ex. 53, Doyle Dep. Tr. at 313:10 – 18.

That it was not HIG that proposed the sale of its shares strongly refutes any suggestion of unfair process. *See Martha Stewart*, 2017 WL 3568089, at *12 (rejecting breach of fiduciary duty claim based on allegations that individual defendant secured collateral benefits for herself in connection with sale of controlled company, in part, because it was the buyer, not the controller, "who insisted upon and initiated the negotiations").

Structure of Transactions: The Transactions were structured to maximize the benefits to Surgery Partners. Mr. Canessa concedes the Company received a "net benefit" from the Transactions. Ex. 64, Canessa Dep. Tr. at 527:9-13, 533:20-534:7 As he also recognizes, those Transactions were interrelated – Surgery Partners relied on the Preferred to finance the NSH acquisition, and it secured Bain as a partner through its purchase of HIG's common shares. *Id*. at 46:2-6, 107:18-108:14, 527:20-528:3. Both of those things – the NSH acquisition and securing Bain as a partner – were beneficial and added value to the Company. *Id*. at 380:24-5, 678:18-682:2. Thus, Surgery Partners successfully structured the Transactions to achieve multiple objectives benefiting its common shareholders.

That comes through loud and clear from the analysts. As detailed *supra* (*see* Section I.C.), numerous analysts commented favorably on all aspects of the Transactions, and on the Board's ability to secure the Preferred as an essential piece of the puzzle. Analysts found the Company "wise" in how it structured the Transactions. Ex. 35, SP-00048637, at -639. Multiple reports praised the NSH acquisition, and the Preferred specifically because it made that acquisition possible by avoiding an increase in the Company's already high leverage. Ex. 33, Bain_00019321, at -321-322, Ex. 40, Bain_00003378, at -378, -381; Ex. 39, JEFF00043043. Analysts were "pleased" and "surprised" that the Company was able to "pull off" the multi-part deal Plaintiff is now second guessing. Ex. 36, SP-00054329.

Negotiation of Transactions: The Transactions were negotiated to serve the Company's interests. While the Court credited Plaintiff's allegation at the pleading stage that HIG-affiliated directors participated in negotiating the terms of the Preferred (Mem. Op. at 39), the evidence now demonstrates otherwise. Numerous witnesses testified that neither HIG-affiliated director, Mr. Lozow or Mr. Laitala, had any role in negotiating the Preferred. Ex. 53, Doyle Dep. Tr. at 48:22 – 49:11, 294:15 – 295:3, 299:10 – 300:7; Ex. 43, O'Reilly Dep. Tr. at 256:8 – 257:3; Ex. 52, Sparks Dep. Tr. at 108:24 – 109:6; Ex. 54, Gordon Dep. Tr. at 127:23 – 128:15; Ex. 51, Kaplan Dep. Tr. at 213:3-24.

The negotiations were led by Surgery Partners' CEO, Mr. Doyle, who – as the Company's second largest shareholder – had interests aligned with the interests of the minority shareholders. *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 366 (Del. Ch. 2008), *as revised* (June 24, 2008) ("[a] director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders."); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010) (holding that the CEO's "material" ownership of company stock gave him a "motivation to seek the highest price"). Every witness who participated in negotiating the terms of the Preferred, including Mr. Doyle and the leaders of Bain's deal team, Mr. Kaplan and Mr. Gordon, testified that the negotiations were conducted at arm's length. Ex. 53, Doyle Dep. Tr. at 288:15 – 24; Ex. 52, Sparks Dep. Tr. at 156:1 – 6; Ex. 51, Kaplan Dep. Tr. at 213:19–22; Ex. 54, Gordon Dep. Tr. at 127:15–22; Ex. 47, Laitala Dep. Tr. 261:7–10. That is powerful evidence of fair process. *See Cinerama*, 663 A.2d at 1172 ("This Court has held that arm's-length negotiation provides 'strong evidence that the transaction meets the test of fairness.'" (citation omitted)).

There is simply no support for Plaintiff's speculation that HIG caused Surgery Partners to give Bain the terms it wanted on the Preferred to induce Bain's purchase of HIG's shares at a premium. Mr. Doyle negotiated aggressively for the Company, securing numerous key concessions along the way. *See Emerald*, 2003 WL 21003437, at *24 (holding that challenged transaction was entirely fair, in part, because "defendants have affirmatively proved beyond serious question the vigor and adversarial quality of the negotiations"). Among other things, Surgery Partners introduced callability and "PIK" features; rejected Bain's proposal for a ten-year maturity date; [redacted]. Ex. 7, Bain_00135155, at -157; Ex. 13, SP_00277269, at -

278-82.[19] Surgery Partners secured those terms after HIG and Bain had already negotiated a $19 purchase price for HIG's shares. Ex. 64, Canessa Dep. Tr. at 435:17-437:9, 438:13-445:7. That is the exact opposite of what one would expect if, as Plaintiff alleges, HIG was pressing the Company to capitulate to Bain so that HIG could command a higher price for its shares. *See Martha Stewart*, 2017 WL 3568089, at *2 ("the consideration Sequential offered to MSLO stockholders actually increased after negotiations with Stewart began. Under these circumstances, it is not reasonably conceivable that Plaintiffs can prove their claim that Stewart engaged in a conflicted transaction through which she caused injury to the minority stockholders by diverting merger consideration to herself.").

Disclosure to Directors/Shareholders: The terms of the Preferred were fully disclosed to the Company's independent directors, who voted unanimously – after three board meetings in less than a week to give final consideration to the Transactions – to approve its terms. Ex. 31, SP-00000027, at -030-035. Moreover, the one HIG-affiliated director who was still on the Board was recused from that vote. *Id*. at -027. Thus, all of the voting directors were independent and, as they

[19] That the terms of the Preferred were not a giveaway to Bain is further confirmed by the fact that [redacted] Ex. 27, Bain_00036922, at -923-924.

testified without evidence to the contrary (Ex. 46, Feinstein Dep. Tr. at 136:23 – 137:23; Ex. 42, Turner Dep. Tr. at 174:13 – 24; Ex. 48, DeLuca Dep. Tr. at 143:3 – 8, 144:19 – 23; Ex. 53, Doyle Dep. Tr. at 288:2-14, 294:15 – 295:3, 298:9 – 14), "motivated in the transaction, appropriately, to promote the best interests of the shareholders." *Cinerama*, 663 A.2d at 1175.[20] And while there was no majority of the minority shareholder vote, the market reaction makes clear what investors thought of the Transactions – they "applauded" the deal. Ex. 36, SP-00054329.

The fact that Surgery Partners did not take certain measures – such as forming a special committee, securing a majority-of-the-minority shareholder vote, or obtaining a fairness opinion – does not change that the Transactions were fairly negotiated. A "fair process" does not require a perfect process. *Cinerama*, 663 A.2d at 1179. Courts have frequently found entire fairness notwithstanding similar "flaws," where it is clear that investors' interests were adequately served. *Id.* (finding fair process despite absence of a market check); *see also Dieckman*, 2021

[20] One of Plaintiff's principle arguments at the motion to dismiss stage was that Surgery Partners and Bain were both represented by the same counsel, Ropes & Gray. The evidence now shows that Ropes & Gray did not represent Bain. Ex. 42, Turner Dep. Tr. at 72:7 – 72:20; Ex. 51, Kaplan Dep. Tr. at 81:21 – 82:11; Ex. 55, Marcellino Dep. Tr. at 11:14 – 12:5; Ex. 54, Gordon Dep. Tr. at 15:3 – 6; Ex. 43, O'Reilly Dep. Tr. at 26:23 – 27:5; Ex. 49, Lozow Dep. Tr. at 25:10 – 16. The Board's access to sophisticated deal counsel is another factor weighing in favor of a finding of entire fairness. *See Cinerama*, 663 A.2d at 1175 ("We agree that the Court of Chancery could properly consider the Technicolor directors' reliance on special legal counsel as a factor supporting fair dealing in an entire fairness analysis").

WL 537325, at *27 ("In my opinion, although the process certainly was not ideal, Defendants met their burden to demonstrate that the Merger was fair and reasonable to the Partnership."); *Emerald*, 2003 WL 21003437, at *21 ("although the process leading up to the merger was in some respects flawed," including the lack of a special committee and the involvement of non-independent directors in deal discussions, "the defendants nonetheless, have established that the merger was the product of fair dealing."); *Alidina v. Internet.com Corp.*, 2002 WL 31584292, at *7 (Del. Ch. Nov. 6, 2002) ("There is no automatic requirement that the board employ a special committee to perform this evaluation, especially when a majority of the board is disinterested and independent."); *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 599 (Del. Ch. 1986) ("The presence of such factors [including an independent board committee] typically constitute indicia of fairness; their absence, however, does not itself establish any breach of duty."); *Seagraves v. Urstadt Property Co.*, 1996 WL 159626, at *5 (Del. Ch. Apr. 1, 1996) ("A board is not legally required to utilize an independent negotiating committee or obtain[] an investment banker fairness opinion."). For all of the reasons discussed above, the interests of Surgery Partners' minority stockholders were well served, as confirmed by the market's emphatic approval of the Transactions.

2. The Preferred was Fairly Priced

Even if Plaintiff were correct that the deal process was "unfair," this would stand as exactly the kind of situation – which is not uncommon – in which a finding of entire fairness would still be warranted based on price. *See, e.g.*, *Trados*, 73 A.3d at 76 (holding that, notwithstanding flaws in the process, the transaction was "entirely fair" because minority shareholders had the equivalent in value of what they had before the disputed transaction); *see also Oliver v. Boston Univ.*, 2006 WL 1064169 (holding there was "*no* process to protect the interests of the minority shareholders," but evidence of fair price demonstrated "the only harm suffered by the Plaintiffs was a procedural one"); *Ravenswood Inv. Co.*, 2018 WL 1410860, at *17 (holding that "Defendants failed to prove fair process," but awarding only nominal damages); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *51 (holding that even with "grossly inadequate process employed by the Defendants," awarding "disgorgement, rescissionary, or other monetary damages" would be inappropriate because the price was fair).

As discussed in Section I, *supra*, Surgery Partners issued the Preferred on reasonable terms, as demonstrated by the market's enthusiastic response to the Transactions; numerous analysts commenting favorably on the Preferred, with no suggestion it was mispriced; the absence of any challenge by the Company's institutional investors to the terms of the Preferred; the unrefuted finding by

Professor Smith that the Preferred had a similar implied yield, and was thus priced similarly to, comparable investments; and Mr. Canessa's reliance on an outdated and unreliable valuation model as his basis to claim damages.

In sum, there are numerous compelling indications that the Preferred was entered into on terms "that a reasonable seller, under all of the circumstances, would regard as within a range of fair value." *Ross Holding*, 2014 WL 4374261, at *21 (citation omitted). The Preferred was fairly priced, and HIG has demonstrated the "entire fairness" of the Transactions.

CONCLUSION

For the above reasons, HIG is entitled to summary judgment on all claims, and, at minimum, on the issue of damages.

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CERTIFICATE OF SERVICE

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