EFiled: Dec 04 2017 04:14PM EST
Transaction ID 61421138
Case No. 2017-0862-

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; MICHAEL DOYLE; MATTHEW LOZOW; ADAM FEINSTEIN; TERESA DELUCA; and BRENT TURNER, Defendants, and SURGERY PARTNERS, INC., Nominal Defendant.	C.A. No. _____

VERIFIED CLASS ACTION AND DERIVATIVE COMPLAINT

Plaintiff, Melvyn Klein ("Klein" or "Plaintiff"), brings suit against Defendants H.I.G. Capital, L.L.C.; H.I.G. Surgery Centers, LLC; H.I.G. Bayside Debt & LBO Fund II;[1] BCPE Seminole Holdings LP; Bain Capital Investors, LLC;

[1] H.I.G. Bayside Debt & LBO Fund II, H.I.G. Capital, L.L.C., and H.I.G. Surgery

Bain Capital Private Equity, LP;[2] Michael Doyle; Matthew Lozow; Adam Feinstein; Teresa DeLuca; and Brent Turner.[3]

Plaintiff brings suit individually and on behalf of a class of similarly situated stockholders and also derivatively on behalf of Nominal Defendant Surgery Partners, Inc. ("Surgery Partners" or the "Company"). Plaintiff asserts claims against all Defendants for breaches of fiduciary duty and, in the alternative, against Bain Capital for aiding-and-abetting breaches of fiduciary duty by the other Defendants.

NATURE OF THE ACTION

1. This action arises from a conflicted three-part transaction involving Surgery Partners, the Company's former majority stockholder (HIG) and the Company's current majority stockholder (Bain Capital). On May 9, 2017, the Company entered into three linked transactions (collectively, the "Transactions"), all of which were approved by HIG via written consent:

a. *The NSH Acquisition*. Surgery Partners agreed to acquire National Surgical Healthcare ("NSH") from Irving Place Capital for approximately $760 million.

Centers, LLC are, collectively, "HIG," "H.I.G." or the "HIG Entities."

[2] BCPE Seminole Holdings LP; Bain Capital Investors, LLC; and Bain Capital Private Equity, LP are, collectively, "Bain Capital" or the "Bain Capital Entities."

[3]Doyle, Lozow, Feinstein, DeLuca, and Turner are, collectively, the "Individual Defendants."

b. *The HIG Share Sale.* HIG agreed to sell all of its common shares of Surgery Partners—representing a 54% stake in the Company—to Bain Capital at a price of $19 per share for a total purchase price of approximately $502.7 million (the "HIG Share Sale");

c. *The Bain Capital Share Issuance.* Surgery Partners agreed to issue and sell to Bain Capital 310,000 shares of a newly created class of Series A Preferred Stock (the "Preferred Stock"), at a price per share of $1,000.00 (*i.e.*, a total price of $310 million) (the "Bain Capital Share Issuance").

   The Preferred Stock accrues dividends at a dividend rate of 10% and is convertible to common stock at a price of $19 per share.

   At the time the Transactions were announced, the implied call option provided by the convertible feature of the Preferred Stock was already "near the money" / "in the money." On May 9, 2017, Surgery Partners shares closed at $18.20 per share. On May 10, 2017, after unusually high volume, the stock closed at $20.95 per share—trading up approximately 15% on news of the NSH Acquisition and positive earnings results.

2. In substance, if not form, Bain Capital and HIG were both controlling stockholders as soon as HIG agreed to sell its common stock to Bain Capital. HIG retained de jure control, but Bain Capital became part of a de facto control group. And both Bain Capital and HIG stood on both sides of the Bain Capital Share Issuance.[4] Bain Capital, obviously, wished to pay as little as possible for the Preferred Stock that was being issued. And HIG was incentivized to make the terms of the Bain Capital Share Issuance as appealing as possible for Bain Capital:

[4] *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007) (a "difference in form, which is a product of transactional creativity, should not affect how the law views the substance of what truly occurred, or how the public shareholders' claim for redress should be characterized.").

the more favorable the terms of the Bain Capital Share Issuance, the more money that Bain Capital would rationally be willing to pay HIG for its common shares. In short, Bain Capital and HIG utilized their control over the Company to force the favorable terms of the Bain Capital Share Issuance upon Plaintiff and the Company's other public stockholders.

3. Because of Bain Capital and HIG's non-ratable interest, the Transactions were subject to the entire fairness standard.[5] Yet Defendants failed to ensure that either the process or the price were entirely fair. Notably, an HIG-affiliated director, Christopher Laitala, abruptly resigned from the Board less than a week before the Transactions were announced—giving rise to an inference that he was unwilling to vote to approve them.

4. **The Process Was Unfair.** Despite the obvious conflicts inherent in this related-party transaction, the Company's Board of Directors (the "Board") appears to have imposed no safeguards to protect the interests of Plaintiff and other public stockholders. *First*, the Company's public stockholders were not asked to—

[5] *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, No. CV 9962-VCL, 2016 WL 301245, at *12 (Del. Ch. Jan. 25, 2016) ("The entire fairness framework clearly governs squeeze-out mergers, but Delaware courts also have applied it more broadly to transactions in which a controller extracts a non-ratable benefit."); *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 256 n.14 (Del. Ch. 2006) ("the procedures and terms of a corporate refinancing deserve heightened scrutiny when a controlling stockholder stands to benefit not only from the corporation's reduced cost of capital but also from its indirect interest in the method of refinancing chosen by the board.").

and did not—vote to approve the Transactions; as the majority stockholder, HIG simply approved the Transactions by written consent. *Second*, the Board did not appoint a special committee to negotiate or approve the Transactions. *Third*, the Board failed to secure independent legal or accounting advice. The Company's legal advisor was Ropes & Gray LLP ("Ropes & Gray"), a Boston-based law firm that is highly dependent on its longtime relationship with Boston-headquartered Bain Capital. And, here, Ropes & Gray represented ***both*** Bain Capital ***and*** the Company in connection with the Transactions. Similarly, the Company's accounting advisor, PwC LLP ("PwC"), represented ***both*** Bain Capital ***and*** the Company in connection with the Transactions. *Fourth*, Jefferies LLC ("Jefferies") was the Company's exclusive financial advisor, but does not appear to have issued a fairness opinion. Jefferies was also conflicted because it was providing financing for the Transaction.[6]

5. **The Price Was Unfair.** The unfair process resulted in an unfair price that diluted Plaintiff and other public stockholders. At the time the Transactions were announced, the Preferred Stock had significant option value because the conversion price was already lower than the trading price. Yet Bain Capital also got an extraordinarily favorable dividend rate of 10%—even though the Company

[6] *See generally RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 860 (Del. 2015).

had been able to issue $400 million of senior unsecured notes in March 2016 bearing a rate of just 8.875%.

PARTIES

6. Plaintiff Melvyn Klein is a beneficial owner of Surgery Partners common stock and has continuously been a stockholder of the Company since at least October 1, 2015.

7. H.I.G. Capital, LLC is a Delaware limited liability company. It is a private investment management firm that focuses on private equity, venture capital, debt/credit, real estate and public equity investments.

8. H.I.G. Surgery Centers, LLC is a Delaware limited liability company and is an affiliate of and managed by H.I.G. Capital, LLC.

9. H.I.G. Bayside Debt & LBO Fund II is a Delaware limited partnership and is an affiliate of and managed by H.I.G. Capital, LLC.

10. BCPE Seminole Holdings LP is a Delaware limited partnership and an affiliate of Bain Capital Private Equity, LP.

11. Bain Capital Investors, LLC ("BCI") is the sole member of BCPE Seminole GP LLC ("BCPE GP"), which is the general partner of BCPE Seminole Holdings LP. The information statement filed by Surgery Partners on October 10, 2017 states that "[t]he governance, investment strategy and decision-making

process with respect to investments held by [BCPE Seminole Holdings LP] is directed by the Global Private Equity Board of BCI."

12. Bain Capital Private Equity, LP, is a Delaware limited partnership. It is an investment advisory firm focused on researching and advising on private equity investments, including leveraged acquisitions and recapitalizations, investments in growth companies, turnarounds and traditional buyouts in a wide variety of industries. BCI is the general partner of Bain Capital Private Equity GP LLC, which, in turn, is the general partner of Bain Capital Private Equity, LP.

13. Michael Doyle has been a Director of Surgery Partners since August 2015. He served as Chief Executive Officer of Surgery Partners from April 2015 through September 7, 2017. On September 7, 2017, the Company announced that Doyle would be replaced as CEO by Clifford Adlerz, but would continue to serve on the Board. Prior to serving as CEO of Surgery Partners, Doyle was the CEO of Surgery Center Holdings, Inc., a Surgery Partners subsidiary since 2009.

14. Brent Turner has served as Director of Surgery Partners, Inc. since December 2015. Mr. Turner is currently the President of Acadia Healthcare Company Inc ("Acadia"), and has served as its President since joining Acadia in 2011.

15. Matthew Lozow was a Director of Surgery Partners from April 2015 through August 31, 2017. Lozow joined H.I.G. Capital in 2009 and is a Managing Director.

16. Adam Feinstein has been a Director of Surgery Partners since August 2015. Mr. Feinstein co-founded Vesey Street Capital Partners, L.L.C., a healthcare services private equity fund, in 2014 and has been a Managing Partner since that time.

17. Teresa DeLuca has been a Director of Surgery Partners since September 2016. Dr. DeLuca is an Assistant Clinical professor of psychiatry at the Icahn School of Medicine at Mount Sinai in New York City

18. Nominal Defendant Surgery Partners, Inc. is a Delaware corporation, headquartered in Nashville, Tennessee, providing surgical services across 29 states.

OTHER RELEVANT INDIVIDUALS

19. Christopher Laitala was a Director of Surgery Partners from April 2015 to May 3, 2017, and Chairman from August 2015 to May 3, 2017. Mr. Laitala joined Lindsay Goldberg as a Partner in their New York office in 2016. Prior to joining Lindsay Goldberg, Mr. Laitala served as the Managing Director of H.I.G. Capital in its New York office, which he joined in 2002. On April 27, 2017,

Laitala abruptly informed the Company that he would resign from the Board on May 3, 2017—just six days before the Board voted in favor of the Transactions.

20. Clifford Adlerz has been the CEO of Surgery Partners since September 7, 2017 and a member of its Board of Directors since October 30, 2017. According to the September 8, 2017 Form 8-K announcing his appointment as CEO, Adlerz "provide[d] consulting services to Bain Capital Private Equity, LP," prior to being named as CEO.

21. Christopher Gordon has been a member of the Company's Board of Directors since August 31, 2017. Gordon joined Bain Capital in 1997 and has served as a Managing Director of Bain Capital since 2009. Gordon currently serves as a director of, among other companies, Acadia Healthcare Company, Inc. ("Acadia").

22. T. Devin O'Reilly has been a member of the Company's Board of Directors since August 31, 2017. O'Reilly joined Bain Capital in 2005 and has served as a Managing Director since 2013.

FACTUAL ALLEGATIONS

A. HIG Controlled Surgery Partners Before The Transactions

23. Before the Transactions were announced, HIG was Surgery Partners' controlling stockholder. The Company's annual proxy, filed April 17, 2017, stated that HIG owned 54.2% of the Company's outstanding common stock and

acknowledged that "H.I.G. and its affiliates beneficially own approximately 55% of our outstanding common stock. As a result, H.I.G. could potentially have significant influence over all matters presented to our stockholders for approval, including the election and removal of our directors and change in control transactions. The interests of H.I.G. may not always coincide with the interests of the other holders of our common stock."[7]

24. As noted above, Laitala suddenly resigned less than a week before the Transactions were announced. As a result, at the time the Transactions were announced, the Company's board consisted of five members: Doyle, Lozow, Feinstein, Turner, and DeLuca.

25. Doyle and Lozow could not be independent of HIG. Doyle was a senior officer of the Company who derived his principal income from his employment with the Company. Lozow was a dual fiduciary in his capacity as both a director of the Company and a Managing Director of HIG.

[7] All three HIG Entities were controllers. The April 17, 2017 annual proxy stated that "H.I.G. Surgery Centers, LLC, an affiliate of H.I.G. Capital, LLC ('H.I.G.') holds 26,455,651 shares. The principal business address of H.I.G. Surgery Centers, LLC is c/o H.I.G. Capital, LLC, 1450 Brickell Avenue, 31st Floor, Miami, Florida 33131." The Securities Purchase Agreement for the Bain Capital Share Issuance stated that "the Company has received a written consent delivered by H.I.G. Surgery Centers, LLC and H.I.G. Bayside Debt & LBO Fund II L.P. (collectively, 'HIG'), as holders of a majority of the common stock." The Form 8-K filed on April 27, 2017—announcing Laitala's resignation from the Board—referenced "H.I.G. Capital, LLC, the majority stockholder of the Company."

26. Turner could not be independent of Bain Capital because he was (and is) the President of Acadia and relied for his principal income on his employment with that company. In Turner's role at Acadia, he reported (and reports) to Gordon who is a director of Acadia. At the time the Transactions were announced, Bain Capital was also a significant investor in Acadia.

B. Bain Capital Was A De Facto Controller At The Time That the Bain Capital Share Issuance Was Approved And Is A De Jure Controller Today

27. HIG remained a de jure controlling stockholder until the Transactions formally closed. But Bain Capital became a de facto controlling stockholder as soon as HIG and Bain Capital agreed that HIG would sell its common stock to Bain Capital. Together, they functioned, effectively, as a control group. Having determined that it would sell its common stock to Bain Capital, HIG knew that any dilution caused by the Bain Capital Share Issuance would be suffered solely by public stockholders. And it had a strong economic motivation to make the terms of the Bain Capital Share Issuance appealing to Bain Capital because Bain Capital would, rationally, be willing to pay more for HIG's common stock as the terms of the Bain Capital Share Issuance became more favorable.

28. Bain Capital currently holds approximately 65.7% of the Company's outstanding voting stock. Indeed, on September 8, 2017, BCPE Seminole Holdings

LP filed a Schedule 13D describing itself as "the controlling stockholder of [Surgery Partners.]"

29. The Board currently consists of seven members: Adlerz, Gordon, O'Reilly, Feinstein, DeLuca, Turner, and Doyle.

30. Adlerz and Doyle cannot be independent of Bain Capital because they are full-time employees of the Company who derive their principal income from their employment with the Company.

31. Gordon and O'Reilly cannot be independent of Bain Capital because they are dual fiduciaries in their capacities as Directors of Surgery Partners and Managing Directors of Bain Capital.

32. Turner cannot be independent of Bain Capital because he is the President and a full-time employee of Acadia. In that role, he reports to Gordon who has been a Director of Acadia since 2015.

C. Surgery Partners, HIG, and Bain Capital Agree To The Transactions

33. On May 11, 2017, Surgery Partners filed a Form 8-K announcing that on May 9, 2017, Surgery Partners had entered into the Transactions, which HIG approved by written consent:

> On May 9, 2017, [Surgery Partners] entered into a series of transactions pursuant to which the Company agreed (i) to acquire [NSH] … and (ii) to issue to [Bain Capital] … up to 320,000 shares of preferred stock … to be created out of the authorized and unissued shares of preferred stock of the Company and designated as 10.00%

> Series A Convertible Perpetual Participating Preferred Stock (the 'Series A Preferred Stock') at a purchase price per share of $1,000 … In connection with the Merger and the Preferred Private Placement, the Company also entered into … a Stock Purchase Agreement, by and among the Company, [HIG] … and Bain Capital, pursuant to which H.I.G. has agreed to sell 26,455,651 shares of common stock … to Bain Capital at a purchase price per share of $19.00 in cash … Following the consummation of the Transactions, NSH will be a wholly-owned subsidiary of the Company, and Bain Capital will be the controlling stockholder of the Company.

34. The Form 8-K disclosed further that the Series A Preferred Stock: (i) would be senior to the Company's common stock; (ii) its holders would vote with the common stockholders together as a single class, (iii) the Series A Preferred Stock would be convertible into shares of common stock at a price of $19 per share,[8] and (iv) that, in addition to dividends declared with respect to the common stock, each share of Series A Preferred Stock would accrue dividends daily at a dividend rate of 10%, compounding quarterly. As the holder of all outstanding shares of Series A Preferred shares, Bain Capital would be entitled, voting as a separate class, to elect two directors to the Company's seven-member board. The Form 8-K disclosed that "the Series A Preferred Stock and the Common Stock acquired by Bain Capital and its affiliates in the Transactions will represent approximately 66% of the voting power of all classes of capital stock of

[8] The terms of the Bain Capital Share Issuance provide that the Company may require the conversion of (all but not less than all of the) Preferred Stock, after the second anniversary of the date of issuance, if the volume weighted average closing price (VWAP) of the common stock equals or exceeds $42.00 per share for any twenty out of thirty consecutive trading days.

Surgery Partners." Finally, the terms of the Bain Capital Share Issuance gave Bain Capital significant veto powers. As long as Bain Capital retains 50% of the shares of Preferred Stock issued in the Bain Capital Share Issuance, its affirmative vote is required before the Company can, among other things, declare or pay any dividends other than dividends on the Preferred Stock; enter into a recapitalization, share exchange or merger; increase its indebtedness; enter into any acquisition of stock or assets for consideration in excess of $25 million individually or $125 million in the aggregate in any given year; or modify any provision of the Company's organizational documents that would adversely affects the powers, preferences or rights of the Preferred Stock.

35. A press release attached to the Form 8-K stated that Jefferies served as Surgery Partners' "exclusive financial advisor" while also "providing committed financing for the transaction." The Form 8-K also stated that "Ropes & Gray LLP is serving as legal counsel, and PwC LLP is acting as accounting advisor to Surgery Partners ***and*** Bain Capital Private Equity." (emphasis added).

36. The Form 8-K provided copies of the Agreement and Plan of Merger for the NSH Acquisition, the Securities Purchase Agreement for the Bain Capital Share Issuance, and the Stock Purchase Agreement for the HIG Share Sale. The three contracts demonstrate that the three Transactions were all inter-connected.

37. The recitals section of the Agreement and Plan of Merger for the NSH Acquisition states that "concurrently with the execution of this Agreement (i) as a condition and inducement to the Company's willingness to enter into this Agreement, [Bain Capital] … has entered into a Securities Purchase Agreement with respect to the acquisition of preferred equity securities of [Surgery Partners] … and (ii) … has entered into a Securities Purchase Agreement with respect to the acquisition of common stock of [Surgery Partners]." Similarly, the recitals section of the Stock Purchase Agreement for the HIG Share Sale states "concurrently with the execution and delivery of this Agreement, and as a condition to the willingness of [Bain Capital] to enter into this Agreement, [Bain Capital] and the Company entered into that certain Securities Purchase Agreement … pursuant to which the Company will sell to [Bain Capital] and [Bain Capital] will buy from the Company shares of the Company's 10.00% Series A Convertible Perpetual Participating Preferred Stock[.]"

38. All three of the Transactions were approved by the then-Board (Doyle, Lozow, Feinstein, Turner, and DeLuca). The Stock Purchase Agreement for the HIG Common Share Sale states that Surgery Partners warranted that "the Board has duly adopted resolutions … authorizing and approving each of the Transaction Documents [defined to include the Agreement and Plan of Merger for the NSH Acquisition, the Stock Purchase Agreement for the HIG Common Share

Sale and the Securities Purchase Agreement for the Bain Capital Share Issuance] and the transactions contemplated thereby."

D. The Process Was Unfair

39. "[I]n the seminal *Kahn v. M & F Worldwide Corp.*, our Supreme Court synthesized decades of jurisprudence to lay out the road map by which a controlling stockholder[]" entering a conflicted transaction can earn "the maximum deference our law allows, even at the pleadings-stage." *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litig.*, No. CV 11202-VCS, 2017 WL 3568089, at *1 (Del. Ch. Aug. 18, 2017).

40. Defendants threw that roadmap out the window. The Company's public filings do not mention any special committee. Nor was there a majority-of-the-minority vote. HIG approved the Transactions by written consent and Surgery Partners did not seek a separate vote of the Company's public stockholders. Instead, the Company simply filed an information statement, as required by Section 228 of the Delaware General Corporation Law and NASDAQ Marketplace Rule 5635(b).

41. "Together, the financial—and especially the legal—advisors are critical in ensuring that the independent directors remember their proper role." Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70

BUS. LAW. 679, 684 (2015). Here, the Board failed in its critical task of obtaining adequate, independent advice.

42. Jefferies acted as exclusive financial advisor for the Company. It does not appear to have issued a fairness opinion. Jefferies was highly incentivized to push the Transactions through because it was also providing committed financing for the NSH Acquisition and earned fees for arranging a $1.29 billion senior secured term loan and a $75 million revolving credit facility.

43. More troublingly, Ropes & Gray acted as legal advisor to ***both*** the Company ***and*** Bain Capital in the Transactions. As Ropes & Gray announced in a May 10, 2017 press release:

> **Ropes & Gray Advises Surgery Partners and Bain Capital on Acquisition of National Surgical Healthcare**
>
> …
>
> Ropes & Gray advised publicly held Surgery Partners, Inc. and leading private investment firm Bain Capital Private Equity in the planned acquisition by Surgery Partners of National Surgical Healthcare (NSH) from Irving Place Capital for approximately $760 million. The funding for Surgery Partners' acquisition of NSH will be provided in part by Bain Capital Private Equity, who as part of the transaction is injecting capital in exchange for a preferred security in the company. In conjunction with this transaction, Bain Capital Private Equity will acquire H.I.G. Capital's existing equity stake in Surgery Partners.
>
> The transaction, which was announced May 10, is expected to close during 2017, subject to the receipt of required regulatory approvals and the satisfaction of other customary closing conditions.
>
> Nashville-based Surgery Partners (NASDAQ: SGRY) is one of the largest and fastest growing surgical services businesses in the United

> States. Its combination with NSH will create a diversified inpatient and outpatient surgical provider with a portfolio of 125 surgical facilities, 58 physician practice locations and complementary ancillary services. At closing, the combined business will be one of the leading independent surgical facilities operators in the country, with a strong presence in musculoskeletal programs, including orthopedics, pain and spine, and will operate facilities in 32 states with a network of more than 5,000 physicians.
>
> The Ropes & Gray team representing Surgery Partners and Bain Capital included mergers & acquisitions partner Carl Marcellino (New York), private equity partner Will Shields (Boston), finance partners Byung Choi (Boston) and Stefanie Birkmann (New York), tax partner Adam Greenwood (New York), and business & securities litigation partner David Hennes (New York).

44. There can be little doubt about where Ropes & Gray's true loyalties lie. Bain Capital and Ropes & Gray are both pillars of the Boston establishment and the two firms' destinies have been intertwined for decades. Bain Capital's current general counsel, Sean Doherty, worked for Ropes & Gray for eight years before becoming Bain Capital's first in-house lawyer. As the American Lawyer reported in June 2017—about a month after the Transactions were announced—Kirkland [& Ellis] and Ropes & Gray have long battled with another over the title of becoming Bain Capital's go-to outside firm for transactional work." For example, on October 11, 2017, Ropes & Gray issued a press release announcing that it had "advised Bain Capital Private Equity on its acquisition of NGA UK" and boasted that this was "the fifth deal that Ropes & Gray has advised Bain Capital on in the past two weeks," including Bain Capital's "$18 billion acquisition

of Toshiba's chip business … announced on 28 September, the €2.27 billion sale of Carver Korea to Unilever, which announced on 25 September, and the 49% sale of mushroom producer Yukiguni Maitake to a Japanese food company, which closed on 30 September." Earlier in 2017, Ropes & Gray represented Bain Capital and its portfolio company, Canada Goose, Inc., in a $250 million IPO, represented a Bain Capital affiliate in a $70 million preferred PIPE investment in Dicerna Pharmaceuticals, and represented Bain Capital in its purchase of a controlling stake in MKM, the UK's largest independent builders' merchant.

45. Ropes & Gray presumably secured informed written consent to the conflict. But the decision of the Surgery Partners Board to give that consent is baffling. As Chief Justice Strine has written: "[i]f a bank or law firm has an unusually thick relationship with a likely strategic buyer, it may not be well positioned to help a target run a sales process," and "an advisor cannot simultaneously be the bidder and the target's … advisor without raising legitimate concerns, and therefore subjecting their director clients and the entire process to suspicion and legal risk." *Documenting the Deal*, 70 BUS. LAW. at 688. That is exactly what happened here. (Notably, Bain Capital appears to have recognized the conflict, as it also retained Kirkland & Ellis as separate counsel in connection with the Transactions).

46. The Board made the same mistake with its accounting advisor: PwC provided accounting advice to both Bain Capital and Surgery Partners.

E. The Unfair Process Resulted In An Unfair Price

47. As a result of the unfair process, the Bain Capital Share Issuance diluted Plaintiff and other public stockholders without fair compensation. At the time the Transactions were announced, the Preferred Stock had significant option value because the conversion price was already lower than the trading price.[9] Yet Bain Capital ***also*** got an extraordinarily favorable dividend rate of 10%—even though the Company had been able to issue $400 million of senior unsecured notes in March 2016 bearing a rate of just 8.875%. *Compare with Dalton v. Am. Inv. Co.*, 490 A.2d 574, 576 (Del. Ch. 1985) (where the "prevailing interest rate … was approximately 4 ½% … an annual dividend of 5 ½% guaranteed indefinitely no doubt appeared to be a good bargain.").

48. During the May 10, 2017 earnings call, an analyst expressed some puzzlement over the Company's decision to finance NSH Acquisition through the Bain Capital Share Issuance rather than an issuance of common stock to Irving

[9] *See* Parrino, et al, FUNDAMENTALS OF CORPORATE FINANCE 654 (2011) ("Convertible preferred stock provides another common example of a financial security that has an option associated with it. … If … preferred stock is made convertible into the company's common stock, its value will be greater than [the net present value of projected future dividends] by an amount that equals the value of the conversion option. The company [should] get a higher price for convertible preferred stock because it is selling investors both regular preferred stock plus a conversion option.").

Capital: “did you guys contemplate issuing equity, just straight out equity? Or did Irving -- did the buyers not want equity? Or was it just because of the competitive nature that you had to pay cash? I’m just curious, again, going back to the deleveraging or the opportunity that arose that could have led to a deleveraging.”

49. Doyle’s rambling response suggests, strongly, that the Bain Capital Share Issuance was driven by Bain Capital’s needs, not those of the Company: “On preferred versus common, we looked at the opportunities. And again, the competitive nature of the transaction and the certainty of outcome from our perspective and from the other side’s perspective or -- again, there’s a lot of things that come into play, and it was a pretty complicated process with, as you take a look at us bringing in a new long-term partner in Bain Capital Private Equity, replacing H.I.G., putting in a preferred and acquiring a company. A lot of things to consider, a lot of moving pieces. And from our perspective, we had a clear thought process, strategy on growth going forward. And we just wanted certainty around what this is going to look like as we come to close.”

F. The Transactions Closed and There Were Changes To The Company’s Board and Senior Leadership

50. The Transactions all closed on August 31, 2017. Upon closing, Lozow resigned from the Board and Gordon and O’Reilly were elected to the Board. One week later, on September 7, 2017, the Company announced that Doyle would be

stepping down as CEO but remaining on the Board and that Adlerz would be named CEO and joining the Board as its seventh director.

51. According to a September 8, 2017 Form 8-K filed by the Company, "on September 7, 2017, the Company and Mr. Doyle entered into a consulting services agreement … pursuant to which Mr. Doyle will provide certain consulting services to the Company and its subsidiaries for a period of six (6) months … In exchange, the Company will pay Mr. Doyle an aggregate consulting fee of $275,000" (approximately $45,833 per month).[10] Doyle also entered into a severance agreement, which provides for "the Company's payment of the following: (i) Mr. Doyle's base salary through September 7, 2017, the effective date of his resignation (the 'Resignation Date'), (ii) cash severance in the amount of $550,000, to be paid over a period of twelve (12) months after the Resignation Date in accordance with the Company's normal payroll practices, (iii) a pro rata portion of the annual bonus Mr. Doyle would have earned in respect of the 2017 performance period … had his employment not been terminated, to be paid on the date the Company pays 2017 bonuses generally, but not later than March 15, 2018, (iv) the full amount of Mr. Doyle's COBRA premiums for continued coverage under the Company's group health plans, including coverage for Mr. Doyle's eligible dependents, until the twelve (12) month anniversary of the Resignation

[10] This is generous compensation, given that Doyle's base salary for 2016 was $450,000 (approximately $37,500 per month).

Date (or in lieu of payment of such amounts, reimbursement therefor) and (v) $15,000." "In consideration for the foregoing, Mr. Doyle agreed to certain restrictions on competition for eighteen (18) months following the Resignation Date and certain restrictions on solicitation of customers, employees and consultants for twenty-four (24) months following the Resignation Date."

CLASS ACTION ALLEGATIONS

52. Plaintiff, a stockholder in the Company, brings this action individually and as a class action pursuant to Rule 23 of the Rules of the Court of Chancery of the State of Delaware on behalf of himself and all stockholders of the Company (except the Defendants herein, and any person, firm, trust, corporation or other entity related to or affiliated with any of the Defendants) to redress the Defendants' breaches of fiduciary duties and other violations of law.

53. This action is properly maintainable as a class action.

54. A class action is superior to other available methods of fair and efficient adjudication of this controversy.

55. The Class is so numerous that joinder of all members is impracticable. As of November 9, 2017, there were 48,769,296 shares of the Company's common stock outstanding. Consequently, the number of Class members is believed to be in the thousands and are likely scattered across the United States. Moreover, damages

suffered by individual Class members may be small, making it overly expensive and burdensome for individual Class members to pursue redress on their own.

56. There are questions of law and fact which are common to all Class members and which predominate over any questions affecting only individuals, including, without limitation:

a. whether the Defendants owed fiduciary duties to the Plaintiff and the Class;

b. whether the Defendants breached and continue to breach their fiduciary duties to Plaintiff and the Class; and

c. the extent of the Class' damages.

57. Plaintiff's claims and defenses are typical of the claims and defenses of other class members and Plaintiff has no interests antagonistic or adverse to the interests of other class members. Plaintiff will fairly and adequately protect the interest of the Class.

58. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature.

59. Defendants have acted in a manner that affects Plaintiff and all members of the Class alike, thereby making appropriate injunctive relief and/or corresponding declaratory relief with respect to the Class as a whole.

60. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants; or adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interest of other members or substantially impair or impede their ability to protect their interests.

DERIVATIVE/DEMAND-FUTILITY ALLEGATIONS

61. "The same set of facts c[an] give rise to both" direct and derivative claims (so-called "dual-natured" claims).[11] Dual-natured claims frequently arise in the context of share issuances, such as the Bain Capital Share Issuance, that extract and transfer value from public stockholders to significant insiders. As the Court explained in *Carsanaro*: "[b]ecause the rights that stock carries are relative, the effects of issuing additional stock necessarily will be felt at the stockholder level."[12] And transactions like the Bain Capital Share Issuance, which reallocate rights among stockholders, create "horizontal conflicts among people at the equity level or other people in the capital structure."[13]

---

[11] *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016).

[12] *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 656 (Del. Ch. 2013).

[13] *Montgomery v. Erickson Air-Crane, Inc.*, No. 8784-VCL (TRANSCRIPT) (Del. Ch. Apr. 15, 2014) at 58:11-21; *see also Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006) ("the public (or minority) stockholders also have a separate, and direct,

62. Nonetheless, to the extent Plaintiff's claims are derivative and subject to a demand requirement, demand would be futile because the Board is incapable of making an independent and disinterested decision to prosecute this action. As set forth above, a majority of Board members are conflicted and are therefore not capable of disinterested evaluation of claims arising from the Bain Capital Share Issuance:

a. Adlerz and Doyle cannot be independent of Bain Capital because they are full-time employees of the Company who derive their principal income from their employment with the Company.

b. Gordon and O'Reilly cannot be independent of Bain Capital because they are dual fiduciaries in their capacities as Directors of Surgery Partners and Managing Directors of Bain Capital.

c. Turner cannot be independent of Bain Capital because he is the President and a full-time employee of Acadia. In that role, he reports to Gordon who is a director of Acadia and has been since 2015.

---

claim arising out of that same transaction. Because the shares representing the 'overpayment' embody both economic value and voting power, the end result of this type of transaction is an improper transfer—or expropriation—of economic value and voting power from the public shareholders to the majority or controlling stockholder.").

63. Moreover, this action challenges actions taken by sitting board members—*i.e.*, Doyle, Turner, DeLuca, and Feinstein—for which they face a substantial risk of liability. The presence of a controlling shareholder on both sides of the transaction means that the entire fairness standard applies to the claims against the directors and demand is therefore excused under the second prong of the *Aronson* test. *Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1231 n.47 (Del. Ch. 2001) (Strine, V.C.) ("The complaint pleads particularized facts that suggest that the entire fairness standard of review—rather than the business judgment rule—would apply to the Transactions and that the Transactions might not have been fair. As a result, the complaint satisfies the second prong of *Aronson*."), *rev'd on other grounds*, 794 A.2d 1211 (Del. 2002).

Count I

Individual and Class Claim for
Breach of Fiduciary Duty Against The Individual Defendants

64. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

65. The Individual Defendants owed Plaintiff and the Class the utmost fiduciary duties of care and loyalty.

66. By reason of the foregoing, the Individual Defendants breached their fiduciary duties. In particular, the Individual Defendants violated their fiduciary duties of loyalty and care by agreeing to and entering into the Transactions without

ensuring that the Bain Capital Share Issuance was entirely fair to Plaintiff and other public stockholders.

67. As a result of the foregoing, Plaintiff and the Class have been harmed.

Count II

Individual and Class Claim for Breach of Fiduciary Duty Against The Bain Capital Entities and The HIG Entities

68. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

69. At the time the Transactions were agreed to, both HIG and Bain Capital were effectively controlling stockholders and, as such, owed fiduciary duties to Plaintiff, and the Class.

70. HIG and Bain Capital violated those duties by entering into the Bain Capital Share Issuance, a conflicted transaction that was not entirely fair and which benefitted HIG and Bain Capital at the expense of Plaintiff and other public stockholders.

71. As a result of the foregoing, Plaintiff and the Class have been harmed.

Count III

Individual and Class Claim for Breach of Fiduciary Duty Against The HIG Entities

72. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

73. In the alternative to the breach of fiduciary duty claim asserted against the HIG Entities in Count II, at the time the Transactions were agreed to, HIG was the sole controlling stockholder and, as such, owed fiduciary duties of care and loyalty to the Company's stockholders, including Plaintiff.

74. HIG violated those duties by causing the Company to enter into the Bain Capital Share Issuance, a conflicted transaction that was not entirely fair and which benefitted HIG at the expense of the Company's stockholders by, among other things, diluting their interest in the Company.

75. As a result of the foregoing, the Company's stockholders were harmed.

Count IV

Individual and Class Claim for Aiding-and-Abetting Breaches of Fiduciary Duty Against The Bain Capital Entities

76. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

77. In the alternative to the breach of fiduciary duty claim asserted against the Bain Capital Entities in Count II, Bain Capital aided-and-abetted breaches of fiduciary duty by the other Defendants. "Should [the Court] ultimately determine that [BCPE Seminole Holdings LP and Bain Capital Private Equity, LP] were … controlling stockholder[s] at the time of the Transaction, then this claim will fail

for lack of a 'defendant, who is not a fiduciary,' participating in the breach. However, if [the Court] ultimately find[s] that [the Bain Capital Entities were] not … controlling stockholder[s], … it is conceivable that [they were] … non-fiduciary aider and abettor[s] of the disloyal Board [and HIG.]." *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, No. CV 10557-VCG, 2016 WL 770251, at *13 (Del. Ch. Feb. 29, 2016).

78. Bain Capital was aware of the fiduciary duties of each of HIG and the Individual Defendants.

79. Bain Capital acted with knowledge of HIG and the Individual Defendants' breaches of their fiduciary duties to Plaintiff and the public stockholders of the Company and actively participated in those breaches of fiduciary duties.

80. Bain Capital knowingly aided and abetted HIG and the Individual Defendants' wrongdoing alleged herein and rendered substantial assistance to them.

81. As a result of this conduct, Plaintiff and the other members of the Class have been harmed.

Count V

Derivative Claim for Breach of Fiduciary Duty Against The Individual Defendants

82. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

83. The Individual Defendants owed the Company the utmost fiduciary duties of care and loyalty.

84. By reason of the foregoing, the Individual Defendants breached their fiduciary duties. In particular, the Individual Defendants violated their fiduciary duty of loyalty by agreeing to and entering into the Transactions without ensuring that the Bain Capital Share Issuance was entirely fair to the Company or to Plaintiff and other public stockholders.

85. As a result of the foregoing, the Company was harmed.

Count VI

Derivative Claim for Breach of Fiduciary Duty Against The Bain Capital Entities and The HIG Entities

86. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

87. At the time the Transactions were agreed to, both HIG and Bain Capital were effectively controlling stockholders and, as such, owed fiduciary duties to the Company.

88. HIG and Bain Capital violated those duties by entering into the Bain Capital Share Issuance, a conflicted transaction that was not entirely fair and which benefitted HIG and Bain Capital at the expense of the Company.

89. As a result of the foregoing, the Company has been harmed.

Count VII

Derivative Claim for Breach of Fiduciary Duty Against The HIG Entities

90. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

91. In the alternative to the breach of fiduciary duty claim asserted against the HIG Entities in Count VI, at the time the Transactions were agreed to, HIG was the sole controlling stockholder and, as such, owed fiduciary duties of care and loyalty to the Company.

92. HIG violated those duties by causing the Company to enter into the Bain Capital Share Issuance, a conflicted transaction that was not entirely fair and which benefitted HIG at the expense of the Company.

93. As a result of the foregoing, the Company was harmed.

Count VIII

Derivative Claim for Aiding-and-Abetting Breaches of Fiduciary Duty And Unjust Enrichment Against The Bain Capital Entities

94. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

95. In the alternative to the breach of fiduciary duty claim asserted against the Bain Capital Entities in Count VI, Bain Capital aided-and-abetted breaches of fiduciary duty by the other Defendants. *See Calesa*, 2016 WL 770251, at *13.

96. Bain Capital was aware of the fiduciary duties of each of HIG and the Individual Defendants. Bain Capital acted with knowledge of HIG and the Individual Defendants' breaches of their fiduciary duties to the Company and actively participated in those breaches of fiduciary duties.

97. Bain Capital knowingly aided and abetted HIG and the Individual Defendants' wrongdoing alleged herein and rendered substantial assistance to them.

98. As a result of this conduct, the Company was harmed and Bain Capital was unjustly enriched.

Prayer For Relief

WHEREFORE**,** Plaintiff demands judgment and preliminary and permanent relief, including injunctive relief, in his favor, in favor of the Class, and/or in favor of the Company and against all Defendants as follows:

A. Declaring that this action is properly maintainable as a class action and certifying Plaintiff as Class Representative;

B. Declaring that the Defendants breached their fiduciary duties in connection with the Bain Capital Share Issuance;

C. In the alternative, declaring that the Bain Capital Entities aided and abetted such breaches of fiduciary duty;

D. Awarding monetary damages to the Class and/or the Company, including pre- and post-judgment interest;

E. Awarding Plaintiff the costs and disbursements of this action, including attorneys' and experts' fees;

F. Granting the Company and/or Plaintiff and the other members of the Class such further relief as the Court deems just and proper.

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

/s/ Melissa N. Donimirski
Kurt M. Heyman (# 3054)
Melissa N. Donimirski (# 4701)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300

Counsel for Plaintiff Melvyn Klein

OF COUNSEL:

BLOCK & LEVITON LLP
Jason M. Leviton
Joel A. Fleming
155 Federal Street, Suite 400
Boston, Massachusetts 02110
(617) 398-5600

Dated December 4, 2017