

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County

The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701

RECEIVED

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Opinion No. 4810, (S.C. Ct. App. filed March 23, 2011) **S.C. Supreme Court**

Brian P. Menezes,.....Petitioner,

v.

WL Ross & Co. LLC, Wilbur, L. Ross, Jr., Michael J. Gibbons,
David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B.
Duerk, WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P.,
WLR Recovery Associates II LLC, and WLR Recovery
Associates III LLC,.....Respondents.

Brian P. Menezes's Petition for Rehearing
Pursuant to Rule 221(a), SCACR

Brian P. Menezes ("Menezes") hereby petitions this Court pursuant to Rule 221(a), SCACR, for a rehearing of the matter decided by Opinion No. 27254 issued on May 22, 2013 ("Opinion"). The Court's Opinion dismissed Menezes' claims against the Respondents based upon the SCI Board's pre-Release vote to approve the merger. The basis of the petition is that, in addition to dismissing Menezes' claims against the Respondents in their capacities as *board members*, the Court's Opinion improperly dismissed valid claims Menezes has against the *controlling shareholder* for actions that occurred *after* Menezes signed the Release. In other words, even if accrual of the cause of action for Claim II (against board members) occurred on August 29, 2006, it does not follow that accrual of the cause of action for Claim I (against the

controlling shareholder) occurred before the controlling shareholder voted on the merger on October 20, 2006.

The Court also improperly held that this issue was not preserved for appellate review, when in fact this issue was argued to the circuit court and was in fact properly preserved. Respectfully, the Opinion as it now stands leaves no recourse for Menezes against the Respondents even though he properly pled and preserved a post-Release cause of action. The point is best illustrated by the following statement found on page 24 of the Opinion:

[U]nlike the plaintiff in *Aidinoff*, Petitioner challenges an original decision, that of the SCI Board to adopt the terms of the merger with FITG. Petitioner does not challenge later, separate acts, such as the propriety of the shareholder vote approving the merger.

That statement is incorrect. As will be discussed in detail below, Menezes did and continues to challenge the controlling shareholder vote and other later and separate acts of the controlling shareholder.

The SCI Board's vote approving the merger before Menezes signed the Release is separate and distinct from the controlling shareholder vote to approve the merger after the release was signed. In other words, the SCI Board's August 29, 2006 vote is not the only factual basis for the claims in this case. The Court should be aware that the SCI Board and the controlling shareholder are not one and the same: the SCI Board consisted of: (1) Ross, (2) Gibbons, (3) Storper, (4) Gorga, and (5) Tessoni; whereas, the controlling shareholder¹ consisted of: (1) WL

¹ Controlling shareholder is a term used to describe an individual, entity, or combination of both that own directly or beneficially a controlling interest in a company. *See Blaustein v. Lord Baltimore Capital Corp.*, 2013 WL 1810956, *11 n.56 (Del. Ch. April 30, 2013) (“Under Delaware law a controlling shareholder generally exists when he or she owns over 50% of the voting power of the corporation or ‘exercises control over the business and affairs of the corporation.’ Control is not limited to a single shareholder. ‘Delaware case law has recognized that a number of shareholders, each of whom individually cannot exert control over the corporation (either through majority ownership or significant voting power coupled with formidable managerial power), can collectively form a control group where those shareholders

Ross & Co. LLC, (2) WLR Recovery Fund II, L.P., (3) WLR Recovery Associates II LLC, (4) WLR Recovery Fund III, L.P., (5) WLR Recovery Associates III LLC, (6) Wax, (7) Ross, (8) Gibbons, and (9) Storper. Six of the nine persons/entities comprising the controlling shareholder did not sit on the SCI Board and therefore did not vote to approve the merger on August 29, 2006. The Opinion has released claims against all of them for conduct that had not occurred when the release was executed.

After SCI's Board voted in favor of the merger, that merger could not have closed until the controlling shareholder voted on October 20, 2006. Moreover, the announcement of the SCI's Board's approval of the merger did not relieve the controlling shareholder of its fiduciary duties to the minority shareholders. Further, as detailed in the pleadings below, after Menezes signed his release, the controlling shareholder was confronted with material information that should have caused it to vote against the merger. Accordingly, the controlling shareholder's approval of the merger on October 20, 2006 was a breach of its fiduciary duties, and is a separate and independent claim in this case. Menezes has challenged that vote. (See Brian P. Menezes Affidavit, ¶¶ 3 & 7 (incorporated herein and attached pursuant to Rule 240(c)(3), SCACR.)

These issues were not mentioned or discussed at any length in the briefing before this Court because they took place after Menezes signed the Release. Accordingly, Menezes assumed that this Court's Opinion would not hold that the controlling shareholder's conduct post-Release could be released. See Petitioner's Reply Brief, pp. 19-22; *see also Gardner v. City of Columbia Police Dep't*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) (noting that a release applies to "all claims and demands due at the time of execution").

are connected in some legally significant way-e.g., by contract, common ownership, agreement, or other arrangement-to work together toward a shared goal.'") (internal citations omitted).

I. The Pleadings

This case was briefed and argued on essentially legal grounds; accordingly, a review of the pleadings filed in this case, *and the amended pleadings filed after the circuit court entered the subject Order of dismissal, which have not been previously discussed with this Court* (Menezes Affidavit, Exhibit A), should prove to illuminate the basis for the Court's apparent misapprehension regarding the scope of the legal claims and issues in this case.

April 4, 2008 Complaint:

- First Cause of Action: Breach of Fiduciary Duty: Controlling Shareholder (emphasis added) (R.p. 31).
 - “WLR and Ross breached their fiduciary duties to the minority stockholders of SCI . . . as follows:
 - “by proposing the Merger **and then allowing it to close notwithstanding the financial condition of FITG** (emphasis added); (R.p. 31; ¶ 99(a)).
 - “by allowing the representation at the Merger closing that the MAC [material adverse condition] Clause condition was satisfied”; (R.p. 32; ¶ 99(f)).
 - “by failing to call off or renegotiating the merger (or cause it to be called off or renegotiated) because of the financial condition of FITG”; (R.p. 32; ¶ 99(g)).
 - “by allowing the debt previously held by FITG to be transferred to the Combined Company and/or allowing that debt to be converted into preferred stock”; (R.p. 32; ¶ 99(i)).
 - “by allowing or causing the renegotiation [of] SCI’s credit facility and/or obtaining \$100 million of additional preferred stock in connection therewith.” (R.p. 32; ¶ 99(j)).
- Predicate Allegations:
 - The disastrous financial condition of FITG in the second half 2006 did not become known until the Combined Company issued its 10-K on April 24, 2007. That document provided financial information for the first half of 2006 and, separately, for the second half of 2006. In addition, the documents included “segment” information on the business that had been SCI and FITG as if they were still separate companies. (R.p. 20, ¶ 50).
 - The 10-K segment information showed that FITG had a net income of negative \$3.4 million in the first half of 2006, which amounted to a loss of approximately \$130,000 per week. While not good, that was not news. It had been disclosed publicly in the Prospectus in September 2006. (R.p. 20, ¶ 51).

- What was new and shocking was the disclosure regarding FITG's losses in the second half of 2006. In that period, FITG's net income was negative \$49 million[.] That amounted to a loss in the second half of 2006 of \$1.9 million each week, and more than \$8 million each month[.] (R.p. 20, ¶ 52).
- Upon information and belief, the Defendants, particularly Ross, Wax, and Gorga by virtue of their positions at FITG and on its Board, knew or should have known prior to the Merger on October 20, 2006, of the losses and reduction of shareholder equity that FITG was experiencing. (R.p. 22, ¶ 59).
- Defendants could easily have cancelled the Merger (even if they had control of both sides of the deal – control of both SCI and FITG) based on the “MAC Clause” in the Merger agreement. Pursuant to that clause, it was a condition to closing the Merger that
 - there shall have been no changes other than changes contemplated by the merger agreement, in the business, operations, condition (financial or otherwise), assets or liabilities of [F]ITG and its subsidiaries (regardless of whether such events or changes are inconsistent with the representations and warranties of [F]ITG set forth in the merger agreement) that, individually or in the aggregate, had had or would reasonably be expected to have a material adverse effect with respect to [F]ITG. . . . (Prospectus, p. 83. emphasis added.) (R.pp. 23-24, ¶ 67).
- Notwithstanding the information that they knew or should have known regarding the deterioration of FITG's business, and notwithstanding that non-deterioration was a condition precedent to the Merger, Defendants allowed the Merger (which benefited them enormously) to proceed and be consummated, thereby violating their fiduciary duties to the minority shareholders including plaintiffs. (R.p. 24, ¶ 68).
- Indeed, on information and belief, Defendants even allowed an affirmati[ve] representation to be made as part of the closing of the Merger on October 20, 2006, to the effect that the condition in the MAC Clause was satisfied. Upon information and belief, Gorga, as CEO of FITG, made that representation. (R.p. 24, ¶ 69).
- With these losses in income and decrease in shareholder equity, FITG was not worth the \$167 million in consideration that SCI gave for it. Indeed, FITG was probably worth even substantially less than the \$80 million book value implied in the 10-K as of December 31, 2006. (R.p. 24, ¶ 70).
- Failing to take into account the losses of FITG prior to the Merger on October 20, 2006, resulted in the stockholders of FITG including the Defendants receiving far more than fair value for assets they controlled at the direct expense of the minority stockholders of SCI including Plaintiff who received far less than fair

value in return and had their voting rights substantially further diluted. (R.p. 25, ¶ 74).

- New Credit Facility. As a result of the Merger and/or the decline [of] FITG during the period surrounding the Merger, the Combined Company was forced to negotiate a new credit facility to replace the former credit facilities of SCI and FITG. The negotiations were consummated on December 29, 2006. The new facility was announced on January 11, 2007. (R.p. 25, ¶ 75).
- The terms, conditions and credit availability of the new facility were less favorable than the credit arrangements it replaced. Further, the lender required a minimum of \$100 million in commitments of new equity capital from the majority shareholder WLR. (R.p. 25, ¶ 76).
- On March 2, 2007, WLR and Ross and the Combined Company entered into an agreement that WLR's new capital contribution would be in the form of the purchase of preferred stock. This preferred stock included a cumulative dividend (effectively an interest rate) of 7.5% per year and was convertible into common stock of the Combined Company. The conversion price was set at the book value as of December 31, 2006. WLR also receive[d] an automatic premium of 33% in additional common stock if the conversion t[ook] place in connection with a future Public Offering of company stock, as it logically would (in order for WLR to take advantage of the premium). (R.p. 26, ¶ 77).
- Aside from having terms that were inappropriate and unfair to SCI's minority stockholders, this additional preferred stock further diluted the SCI minority stockholders including Plaintiff and damaged their economic interests and voting rights. (R.p. 26, ¶ 78).
- Debt for Equity Swap. As shown in the 10-K, by the time of the Merger WLR had injected [] cash of \$68 million into FITG, with \$31 million being injected between July 2 and October 20, 2006, and probably in fact between September 22 and October 20, 2006. (See Paragraphs 64-65 above.) As noted above, the loan from WLR to FITG took the form of unsecured subordinated notes drawing interest at the low rate of 4.78% per year. Considering FITG's actual financial condition, this unsecured, subordinated debt was basically worthless. With the Merger, however, WLR caused the debt to be transferred to the Combined Company and thereby caused it to have value at the expense of the SCI minority shareholders. (R.p. 26, ¶ 79).
- In any event, on March 8, 2007, WLR and Ross and the Combined Company entered into an agreement that WLR could exchange the \$68 million in unsecured subordinated notes (this enormous debt owed to it by FITG) for preferred stock in the Combined Company. This preferred stock had the same terms as that received by WLR in connection with the new credit facility: a cumulative dividend of 7.5% per year, convertible into common stock based on book value as of December 31,

2006, and an automatic 33% premium in additional common stock if the conversion t[ook] place in connection with a Public Offering which it logically would. (R.p. 26, ¶ 80).

- And like the preferred stock issued in connection with the new credit facility, aside from having terms that were inappropriate and unfair to SCI's minority stockholders, this additional preferred stock diluted even further the SCI minority stockholders including Plaintiff and damaged their economic interests and voting rights. (R.p. 27, ¶ 81).

October 10, 2011 First Amended Consolidated Complaint (This complaint is attached to

Menezes Affidavit as Exhibit A, and will be short cited hereafter as, "FACC.")

- "Causes of Action 1 and 1A – Breach of Fiduciary Duty – **Controlling Shareholder** – Against WLR, Ross, Gibbons, Storper, Wax." (FACC, p. 72)
 - "WLR, along with Ross, Gibbons, Storper and Wax, through their ownership and control of WLR was the controlling shareholder of SCI and, under Delaware law, had fiduciary duties (including loyalty, due care, and good faith) to SCI and the minority stockholders including Plaintiffs. *See Gentile v. Rossette*, 906 A.2d 91 (Del. Supr. 2006)." (FACC, ¶638). (In FACC n.2 at p.8, "WLR" includes defendants WLR Recovery Fund II, WLR Recovery Associates II, WLR Recovery Fund III, and WLR Recovery Associates III, along with the WLR individual defendants, Ross, Storper, Gibbons, and Wax.)
 - "Each of these Defendants, directly or indirectly through their companies, affiliates, or employees, breached their fiduciary duties to SCI and the minority stockholders including Plaintiffs in the respects alleged in the Complaint [below], and as more specifically enumerated in Paragraphs 595.A-595.CC [below]." (FACC, ¶640).
- **Predicate Allegations:**
 - On October 1, 2006, nearly three weeks before the Merger closed, Ross emailed Gorga regarding FITG's "discouraging weekly report" which show[ed] him that the remainder of 2006 would be "terrible" and commenting that "it seems less and less intelligent to commit vast sums based on lon[g] term forecasts from businesses that continually miss their short term budgets." (FACC, ¶175).
 - Gorga replied to Ross, noting the "difficult market" FITG is experiencing in "many of our businesses." (FACC, ¶176).
 - Finally, an FITG internal email string made the same point as Ross above, but more graphically. (FACC, ¶177).
 - Lynn Guest wrote James Payne on October 12, 2006: "... September was a Disaster. We lost \$680,000 in the month of September. We had made \$55 and

\$174 in the two previous months and now we are at a loss of \$451. This is \$277 more than I had expected and it is really just about impossible to call this when our wip changes with large numbers. . . . Not very pretty, but it is what it is. Don't like, but it is.” (FACC, ¶178).

- Payne replies: “I will call you in about ten minutes but I need to go throw up first!!!!!!” (FACC, ¶179).
- There are questions of law or fact common to the Class. The common questions include, but are not limited to, whether Defendants breached their fiduciary duties (including loyalty, due care, and good faith) to the minority stockholders who would constitute the Class including:
 - “By approving the Merger at all” (FACC, ¶ 595(P)) (emphasis added).
 - “By approving the Merger on terms where SCI gave consideration in excess of \$164 million for a company worth vastly less than that, and then allowing it to close;” (FACC, ¶ 595(R)).
 - “To the extent any one of them was not aware of the financial situation of FITG, by failing to learn of it take it into account, or see that it was taken into account, with regard to the Merger and cancelling the Merger” (FACC, ¶ 595(V)).
 - “By allowing the merger to close notwithstanding the financial condition of FITG” (FACC, ¶ 595(X)).
 - “By allowing debt previously held by FITG (owed to WLR) to be transferred to the Combined Company and/or by allowing that debt to be converted into preferred stock” (FACC, ¶ 595(Y)).

I. Controlling Shareholder Liability

The controlling shareholder of a company owes a fiduciary duty to the minority shareholders. *Rosette v. Gentile*, 906 A.2d 91, 103 (Del. 2006) (noting that controlling shareholder owed fiduciary duty to minority shareholders “not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority”); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 26 n.74 (Del. Ch. 2010). In his complaint, Menezes alleged that the controlling shareholder was liable to him for allowing the merger to close. (R.p. 31-32; ¶¶ 99, 99(a)). In his amended complaint, he alleged that the controlling shareholder was

liable to him for “approving the merger.” (FACC, ¶ 595(P)). It is a crucial point that the controlling shareholder’s action in this case – voting to approve the merger – took place on October 20, 2006, which was after the Release. The merger could not have closed without the approving vote of the controlling shareholder on that date. Menezes has challenged that vote. Accordingly, the Court’s statement that Menezes did “not challenge later, separate acts, such as the propriety of the shareholder vote approving the merger,” Opinion, at 24, is not correct.

The August 29, 2006 merger announcement suggested that the merger was “assured” because the controlling shareholders intended to vote for the merger on October 20, 2006.² Even assuming that were true,³ that announcement by SCI’s Board did not relieve the controlling shareholder of its fiduciary duties to the minority shareholders. As detailed in the pleadings above, the controlling shareholder possessed the knowledge that FITG was failing. For example,

² The initial complaint did allege that because WLR and Wilbur Ross controlled the stock of both ITG and SCI, “they were in a position [to] cause the Merger to occur regardless of the interests of the minority stockholders,” and therefore “[t]he approval process was a formality.” The complaint, however, was amended with the approval of the circuit court. The FACC states that “WLR and Ross were in a position to cause the Merger to occur (or not to occur) regardless of the actions of any other stockholder.” (FACC, ¶ 136) (emphasis added). The point is that the controlling shareholder did not in fact vote until October 20, 2006, and had the power to vote the Merger up or down at that point. The controller’s fiduciary duties were exercised at that point – which was after the Release was signed.

³ The fact is that the merger was not assured as of the date of the merger announcement, or the date of the Release because the merger could not have closed without the consent of SCI’s secured lender, and third party, Wachovia Bank. Wachovia did not consent until October 20, 2006. (FACC, ¶¶ 525-28); see also R. pp. 1268-79 (Wachovia consent documents dated as of October 20, 2006). This issue was explicitly pleaded in the amended complaint which post-dated the appeal (FACC, ¶¶ 525-28):

526. There were numerous contingencies to the closing of the Merger set forth in the Merger Agreement including consent by lenders. (9/22/06 Proxy at 82-83 & A34-36.)

527. As of October 3, 2006, Wachovia was reluctant to consent to the Merger (see Duerk Ex. 34), but by October 20, 2006, it did consent. (Duerk Ex. 36 at FURSA-0824577; ITG Form 8-K, dated October 26, 2006.)

528. With the Wachovia consent in place, the Merger closed on October 20, 2006, and the companies were joined.

after Menezes signed the release, “on October 1, 2006, nearly three weeks before the Merger closed, Ross emailed Gorga regarding FITG’s “discouraging weekly report” which show[ed] him that the remainder of 2006 would be “terrible” and commenting that “it seems less and less intelligent to commit vast sums based on lon[g] term forecasts from businesses that continually miss their short term budgets.” (FACC, ¶ 175). Equipped with this post-Release information, the controlling shareholder had a fiduciary duty to vote against the merger. Menezes has alleged that the controlling shareholder breached its fiduciary duties to the minority shareholders by allowing the merger to close and by approving the merger. (Menezes Affidavit, ¶¶ 3&7). Menezes has thus directly challenged the shareholder vote.

Menezes also complains of the equity dilution inflicted upon the minority shareholders when the controlling shareholder entered into a new credit facility and agreed to exchange FITG debt owed to WLR for preferred shares in the combined company—the controlling shareholder essentially raided SCI for its clean balance sheet. These unfair actions that diluted the minority shareholders’ equity did not occur until March 2 and March 8, 2007. (R.p. 26, ¶¶ 77, 80). Accordingly, Menezes has challenged later and separate acts of the controlling shareholder. None of these post-Release claims could have been released by Menezes. *See Gardner v. City of Columbia Police Dep’t*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) (noting that a release applies to “all claims and demands due at the time of execution”).

II. Footnote 15

A. Acquiescence

As noted above, Menezes has shown in both his original complaint and his amended complaint that he challenged several post-Release acts of the controlling shareholder. In Footnote 15 of the Opinion, however, this Court states that Menezes has not preserved the

argument that post-Release acts could serve as a basis for his claims. The Court states that “any objection to the trial court’s consolidation of the Petitioner’s [ten separate] allegations is not preserved for review.” Opinion, at 25 n.15. The Court goes on to state that, “it is not even clear that Petitioner contests the consolidation.” *Id.* Both of those statements are in error, and reflect a misunderstanding of the record on appeal.

i. Issue Preservation

At the circuit court, in Menezes “Second Memorandum In Opposition to Defendants’ Motion to Dismiss,” he made the same arguments that he has advanced throughout this petition—that is, that conduct should be analyzed separately and post-Release conduct could not be released. (R.p. 360-63.) The circuit court nevertheless consolidated the separate allegations in its analysis, ruled in favor of Menezes, and dismissed the counterclaim and affirmative defenses. As the prevailing party below, Menezes was not required to seek an additional ruling for preservation purposes. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (noting “[i]t would be inefficient and pointless to require [the prevailing party] to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.”). In addition, the issue was raised by Menezes in briefing before the court of appeals. (R.p. 1220-22.) These arguments were therefore preserved and properly before this Court. *Id.*

ii. Menezes Does Contest the Consolidation

This Court states that, “it is not even clear that Petitioner [i.e., Menezes] contests the consolidation,” Opinion, at 25 n.15, of the separately pled allegations supporting liability in this case. To support that statement, the Court cites the following quote from the court of appeals’ decision: “Appellants neither argued that the claims should be considered separately, nor asked the court to alter or amend its ruling.” Opinion, at 25 n.15. (quoting *Menezes*, 392 S.C. at 598,

709 S.E.2d at 121). The *Appellants* in the court of appeals, however, were the WLR Defendants; Menezes was the *Respondent*. Menezes prevailed at the circuit court; he has never acquiesced in the consolidated treatment of the originally pled allegations; he has relied upon settled issue preservation rules that provide him with the ability to raise any issue found in the record on appeal. *Ion*, 338 S.C. at 420, 526 S.E.2d at 723. The same argument was advanced at the circuit court, and it is in the record on appeal at pages 360-363. And the same argument was made in briefing to the court of appeals. (R.p. 1220-22.) Accordingly, it is properly before this Court.

B. The Principle of Consanguinity Does not Apply

This Court determined that the post-Release actions and inaction of the controlling shareholder were released because the “ten allegations [in the complaint] are all consanguine with the SCI Board’s adoption of the merger terms.” Opinion, at 25 n.15. Menezes has demonstrated above that the SCI Board vote to approve the merge with FITG is not the only basis for legal liability in this case; in doing so, Menezes has demonstrated that the controlling shareholder of SCI should be held liable for its October 20, 2006 vote approving the merger, and for its later actions that diluted the equity interests of the minority shareholders.

As discussed above, the SCI Board and the controlling shareholder are not one and the same. The controlling shareholder includes six other persons/entities. The SCI Board voted to approve the merger; the controlling shareholder voted to close the merger. Nevertheless, this Court’s consanguinity reasoning provides that the SCI Board vote operated to shield the controlling shareholder (including six other Defendants) from liability for its future vote.

When the result of that ruling is juxtaposed to the above described allegations in the complaint and amended complaint, it is evident that the Court’s legal justification cannot stand. If it does, then the Court is interpreting a Release to extinguish claims against a person/entity for

actionable conduct that has not occurred at the time the Release is executed. It is well settled that a release does not apply to future conduct, not to mention the future conduct of different actors (SCI Board versus controlling shareholder). CORPUS JURIS SECUNDUM, SCOPE AND EXTENT OF RELEASE § 76 (noting that “a release covering all claims that might later arise between the parties to the release is plainly against public policy, a release will not be extended to cover claims that arise in the future”).

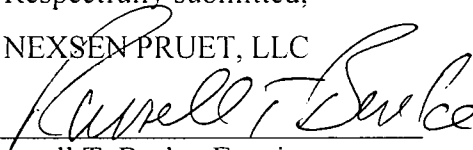
III. Conclusion

This case was decided below at the pleading stage. Consequently, upon review of that decision, this Court is required to determine whether in the light most favorable to the complainant and with every doubt resolved on his behalf, he states a valid claim for relief. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Based upon this standard, the Court erred in holding that the post-Release conduct of the controlling shareholder cannot serve as a basis for liability. Menezes’ petitions this Court to hold a rehearing to discuss the liability issues associated with the controlling shareholder’s post-Release conduct; and/or issue an amended opinion clarifying that Menezes has not released the controlling shareholder from its post-Release conduct, with instructions to the circuit court to determine in the first instance which claims were released, and which were not.

Respectfully submitted,

NEXSEN PRUET, LLC

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June 6, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
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Opinion No. 4810, (S.C. Ct. App. filed March 23, 2011)

S.C. Supreme Court

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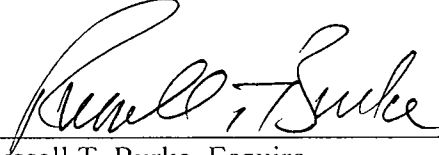
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Associates III LLC,.....Respondents.

PROOF OF SERVICE

I certify that on this 6th day of June, 2013, I have served the **Petition for Rehearing** upon all counsel of record by depositing a copy of same in the United States mail, postage prepaid, and addressed as follows:

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Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

In re International Textile Group) C.A. No. 2009-CP-23-3346
Merger Litigation,)
) **AFFIDAVIT OF BRIAN P. MENEZES**
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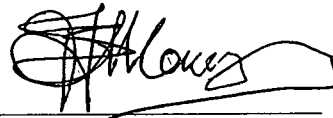
PERSONALLY APPEARED BEFORE ME, the affiant, Brian P. Menezes, who, being
sworn, deposes and states the following:

1. I am a resident of Charleston County, South Carolina.
2. On April 9, 2008, I initiated the underlying class-action lawsuit, by filing a summons and complaint in the Greenville County Court of Common Pleas.
3. In the April 9, 2008 Complaint, I specifically alleged that the “controlling shareholder” of SCI breached its fiduciary duties to the minority shareholders of SCI by “allowing [the merger] to close notwithstanding the financial condition of FITG.” (R.p. 31; Complaint ¶¶99(a)).
4. After the Honorable Edward W. Miller issued his February 17, 2009, Order dismissing the WLR defendants counterclaim against me, the litigation continued into the discovery phase.
5. On April 17, 2009, I filed a derivative lawsuit on behalf of the new International Textile Group, Inc. (“NITG”), formerly known as Safety Components International, Inc. in the Greenville County Court of Common Pleas.
6. On October 10, 2011, I, and other minority shareholders, filed the First Amended Consolidated Complaint (“FACC”) in the Greenville County Court of Common Pleas.

The FACC consolidated my April 9, 2008 class action complaint, my April 17, 2009 derivative complaint, and another class action/derivative complaint filed by other affected shareholders; the FACC is styled both as a class action and a derivative action.

7. In the October 10, 2011 FACC, I specifically alleged that the “controlling shareholder” of SCI breached its fiduciary duties to both the minority shareholders and SCI “by approving the merger at all.” (FACC, ¶¶ 595(P), 638, 640 (emphasis added) (attached hereto, and incorporated, as **Exhibit A**)).
8. In the October 10, 2011 FACC, I also specifically alleged and detailed information that the controlling shareholder received during the month of October 2006 that should have caused it to vote against the merger. (FACC, ¶¶ 175-78).
9. In the October 10, 2011 FACC, I also specifically alleged that the merger could not have occurred without the required consent of SCI’s secured lender, and third party, Wachovia Bank; Wachovia Bank did not consent to the merger until October 20, 2006. (FACC, ¶¶ 525-29).

FURTHER AFFIANT SAYETH NAUGHT,



Brian P. Menezes

SWORN and subscribed to before me

This 4th day of June, 2013



Notary Public for Ontario, Canada

L. PAUL SHENTON
BARRISTER & SOLICITOR

My commission expires: _____



STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)
 In re International Textile Group Merger) C.A. No. 2009-CP-23-3346
 Litigation)

FIRST AMENDED CONSOLIDATED COMPLAINT

Contents

INTRODUCTION	1
JURISDICTION AND VENUE	4
PARTIES	4
PLAINTIFFS	4
Brian P. Menezes – SCI Minority Shareholder	4
FURSA Alternative Strategies LLC & FURSA Master Global Equity	4
Driven Fund, LP – SCI Minority Shareholders	4
Ramius Securities, LLC and Ramius Credit Opportunities Master Fund	5
Ltd. – SCI Minority Shareholders	5
Kirk Wortman & Riverside Capital Partners, LLC – SCI Minority	5
Shareholder	5
Joseph and Marilyn Asiaf – SCI Minority Shareholders	5
Juanita Marett – SCI Minority Shareholder	5
NOMINAL DEFENDANT – International Textile Group, Inc.	5
DEFENDANTS	6
Wilbur L. Ross – WLR Owner/CEO, Chair SCI, FITG, and NITG	6
W.L. Ross & Company, LLC – WLR Management Company	8
WLR Recovery Fund II, L.P – Controlling Shareholder	9
WLR Recovery Associates II LLC – GP of Fund II	9
WLR Recovery Fund III, L.P. – Controlling Shareholder	10
WLR Recovery Associates III LLC – GP of Fund III	10
Michael J. Gibbons – WLR Chief Financial Officer, SCI & NITG	10
Director	11
David H. Storper – WLR Senior Managing Director, SCI & NITG	11
Director	12
David L. Wax – WLR Managing Director, FITG & NITG Director	12
Joseph L. Gorga – SCI, FITG & NITG Director, CEO FITG & NITG	12

Daniel D. Tessori – SCI & NITG Director	14
Stephen B. Duerk – SCI President	14
Gary L. Smith – FITG & NITG Director and CFO	15
RSM EquiCo Capital Markets LLC – Financial Adviser to SCI	15
FACTUAL ALLEGATIONS	16
THE MERGER – Overview and Consideration	16
The Real Reasons for the Merger	18
FITG Was Failing and Needed SCI’s Liquidity	18
The FITG and WLR Defendants Were Acutely Aware That FITG Was Failing	19
The WLR and FITG Defendants Were Aware Of and Disregarded the Risk to SCI	20
The WLR and FITG Defendants’ Real Agenda	22
THE MERGER – Background Facts	23
The First Standstill Waiver by Tessori	23
The Second Standstill Waiver – The Co-Opting of Tessori	24
The Problematic Basis for the Second Standstill Waiver	25
FITG Conducts Diligence on SCI and Recommends Buying SCI	25
SCI Not Authorized To Conduct Diligence on FITG	26
Ross Directs That SCI Acquire FITG (Instead of FITG Acquiring SCI) To Avoid Spending Cash to Buy Out SCI Minority Shareholders	26
The WLR Proposal for Merging FITG into SCI	27
SCI Board Creates a Special Committee to Consider the Merger but It Is Fatally Flawed	28
The Pressure on Tessori – The Selection of RSM	34
The Merger Agreement – Unfair to SCI	38
FITG and WLR Improperly Communicated With RSM	43
FITG Requests a Higher Share of the Combined Company	43
RSM Undervalues SCI	48
RSM Overvalues FITG	48
The SCI Special Committee’s Approval of the Merger	54
SCI Board’s Approval of the Merger	55
The Merger Closed On October 20, 2006	60
The Value of SCI (Now NITG) Has Collapsed Because Of the Merger	60
Further Negative Consequences of the Merger	61

New Credit Facility	61
Debt for Equity Swap	62
ALLEGATIONS AS TO DEFENDANTS' KNOWLEDGE	63
CLASS ALLEGATIONS	66
DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS	69
CAUSES OF ACTION	72
CAUSES OF ACTION 1 AND 1A – BREACH OF FIDUCIARY DUTY – Controlling Shareholder – Against WLR, Ross, Gibbons, Storper & Wax	72
CAUSES OF ACTION 2 AND 2A – BREACH OF FIDUCIARY DUTY – Directors, Officers, & Affiliates – Against Ross, Gibbons, Storper, Gorga, Tessoni, Duerk, Wax and WLR.....	73
CAUSES OF ACTION 3 AND 3A – AIDING AND ABETTING BREACH OF FIDUCIARY DUTY – Against Wax, Smith & RSM; Ross, Gorga, Storper, Gibbons & WLR.....	74
CAUSES OF ACTION 4 AND 4A – WASTE – Against WLR, Ross, Storper, Gibbons, Gorga, Tessoni, and Duerk.....	76
CAUSES OF ACTION 5 AND 5A – UNJUST ENRICHMENT – Against WLR, Ross, Storper, Gibbons, Wax, Gorga and Smith	77
CAUSES OF ACTION 6 AND 6A – Civil Conspiracy – Against All Defendants	78
CAUSES OF ACTION 7 AND 7A – GROSS NEGLIGENCE – Against RSM.....	78
CAUSES OF ACTION 8 AND 8A – BREACH OF FIDUCIARY DUTY – Against RSM	82
PRAYER FOR RELIEF	84

Plaintiffs allege, upon information and belief, as follows:

INTRODUCTION

1. This is a class action brought on behalf of the minority stockholders of a Greenville, South Carolina, public company known as Safety Components International, Inc. ("SCI"), as of October 20, 2006, and a derivative action on behalf of the company itself.

2. On that date, a North Carolina private company known as International Textile Group, Inc. ("former ITG," "FITG," or "old ITG"), was merged into SCI (the "Merger"). The shareholders of FITG received consideration from SCI in the Merger worth more than \$164 million, based on the share price of SCI at the time the Merger was approved by the Boards of SCI and FITG.

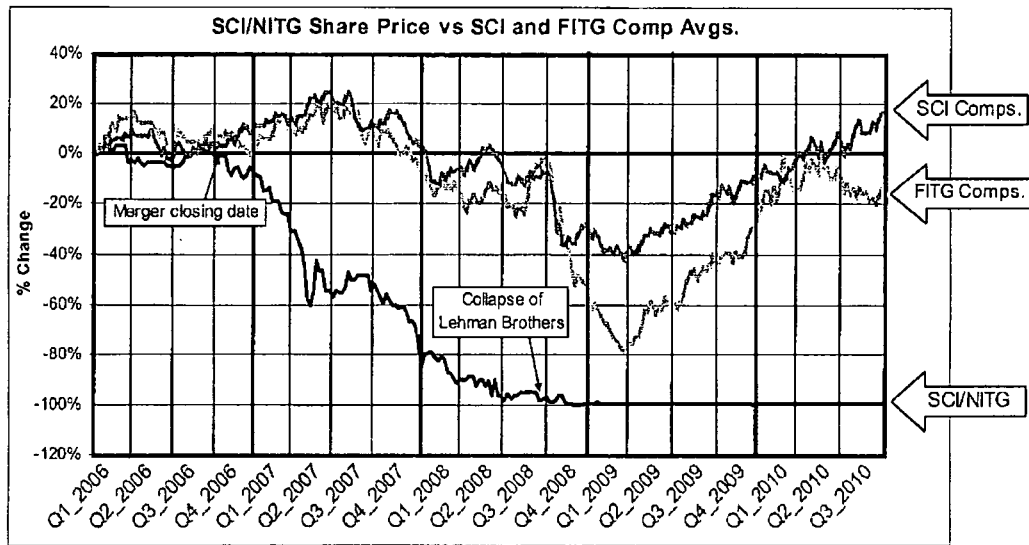
3. FITG, after merging into SCI, ceased to exist. SCI continued to exist but was renamed "International Textile Group, Inc." SCI after the Merger may be referred to here as "SCI" or as "NITG" (for New ITG) or the "Combined Company."

4. At the time the Merger was publically announced, SCI's stock was trading at \$14.65 per share and its market value was approximately \$80 million. (Amendment No. 1 to Form S-4 for SCI filed on September 22, 2006 ("Prospectus") at 11, 17 (based upon 5.431 million SCI shares outstanding, on a fully diluted basis, as of June 30, 2006).)

5. Had FITG been worth the more than \$164 million in consideration SCI was forced to give, SCI's stock value would have remained essentially the same and the market cap of the Combined Company would have been at least \$244 million (\$80 million plus \$164 million).

6. Instead, as the following chart shows, in the five months after the Merger, the share price declined over 50%, while the comparable companies showed positive growth on average.¹

¹ The "comparable companies" are those identified and used as such by defendant RSM in its fairness analysis for the SCI Special Committee. (See Tesson Dep. Ex. 7 at 26, 44.) SCI comparables include Autoliv, Inc. (ALV); TRW Automotive Holdings Corp. (TRW); Commercial Vehicle Group Inc. (CVGI); Magna International, Inc. (MGA); Rieter Holdings (RIEN.SW); Commercial Vehicle Group (CVGI); Faurecia SA (FAU.F); and MGI Coutier (MGIC.PA). FITG comparables include Mohawk Industries, Inc.(MHK); Xerium Technologies, Inc.(XRM); Polymer Group, Inc.(POLGA.OB); The Dixie Group, Inc.(DXYN); The Hallwood Group, Inc.(HWG); Unifi, Inc.(UFI); and Culp, Inc.(CFI). Quotations for Quaker Fabric Corp. unavailable. All stock quotes retrieved from <http://www.finance.yahoo.com>.



7. By April 2, 2008 (prior to the current economic downturn), the stock was at \$1.65, a reduction in value of nearly 90%.

8. As of the date of this amended complaint, it trades for only a few cents a share, and the company's market value is negligible.

9. Further, the company has a stockholder equity of negative \$95 million. (Form 10-Q for NITG filed on November 12, 2010 at 18.)

10. The central claim in this case is that FITG had little or no value and may even have had a negative value at the time of the Merger, that Defendants breached their fiduciary duties to SCI (or aided and abetted others in breaching their fiduciary duties to SCI) when they caused the merger of FITG into SCI, and that these actions by Defendants destroyed the value of SCI and of Plaintiffs' stock in SCI and saddled the combined company with significant debt and other obligations.

11. The contention is that Defendants undertook these actions not for the benefit of SCI but in an effort to save FITG, which certain of Defendants also owned and controlled, and for other self-serving reasons.

12. Because those Defendants also owned and/or controlled FITG – they were on both sides of the transaction – their actions in this case are judged not by the “business judgment” rule but by the “entire fairness” standard. *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1115-18 (Del. 1994).

13. This standard requires that the Merger be entirely fair to SCI in terms of both fair dealing and fair price, and further that the defendants bear the burden of proof on these issues. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983). The standard entails an “exacting scrutiny to determine whether the transaction is entirely fair to the stockholders.” *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 n.9 (Del. 1994).

14. The fairness determination in an interested director transaction turns not on “whether the interested directors acted in good faith but rather whether ‘in the absence of arms-length bargaining’ the transaction, viewed objectively, in fact was fair and reasonable.” *In re Franklin Nat. Bank Sec. Litig.*, 2 B.R. 687, 707 (E.D.N.Y. 1979), *aff’d mem. sub nom Corbin v. Franklin Nat’l Bank*, 633 F.2d 203 (2d Cir. 1980).

15. “Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather the transaction itself must be objectively fair, independent of the board’s beliefs.” *Gesoff v. IIC Industries Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006), *subsequent proceedings*, 2006 WL 2521441 (Del. Ch. Aug. 22, 2006). *See generally* S.A. Radin, *The Business Judgment Rule – Fiduciary Duties of Corporate Directors*, at 65-66(6th Ed. 2009).

16. “To demonstrate entire fairness, the board must present evidence of the cumulative manner by which it discharged all of its fiduciary duties,” and “[t]he entire fairness test is not simply a bifurcated analysis of these two components, fair dealing and fair price.” *Emerald Partners v. Berlin*, 787 A.2d 85, 97 (Del. 2001). Rather, “these two aspects” – fair dealing and fair price – “as well as any other relevant considerations” are considered. *Id.*

17. In short, “where corporate fiduciaries, because of a conflict, are disabled from safeguarding the interests of the stockholders to whom they owe a duty, the Court will furnish compensatory procedural safeguards by imposing upon the fiduciaries an exacting burden of establishing the utmost propriety and fairness of their actions.” *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *10 (Del. Ch. Mar. 6, 1991). *See generally* Radin, *supra*, at 70-71.

18. In the “entire fairness” consideration, “the overriding consideration is whether the substantive terms of the transaction were fair.” *Delaware Open MRI Radiology Associates, P.A. v. Kessler*, 898 A.2d 290, 311 (Del. Ch. 2006). *See generally* Radin, *supra*, at 73.

19. Defendants’ actions do not meet the entire fairness standard, and do not even meet the conventional business judgment standard.

20. The damages on the shareholder claims are estimated to be in excess of twenty million dollars. The damages on the derivative claims (the damages to SCI (NITG) itself) are estimated to run into the hundreds of millions of dollars.

21. Plaintiffs are shareholders of SCI (now NITG).

22. Defendants are the financier Wilbur Ross (“Ross”) and his company W.L. Ross & Co. LLC (“WLR”), which through funds it controlled was the majority owner and controlling shareholder of both SCI and FITG, and now is the majority owner and controlling shareholder of NITG.

23. Also defendants are David Wax (“Wax”), Michael Storper (“Storper”), and David Gibbons (“Gibbons”) who are employees and officers/directors of WLR and were on the board of SCI or deeply involved in the actions here, and the WLR Funds that actually owned stock in and were the controlling shareholders of SCI and FITG, along with their general partners.

24. The other defendants are Daniel Tessori ("Tessori"), the "independent" director of SCI, Joseph Gorga ("Gorga"), the CEO of FITG who was also a member of the boards of SCI and FITG, Gary Smith ("Smith"), the CFO of FITG who was also a member of the board of FITG, and RSM EquiCo Capital Markets LLC (now known as McGladrey Capital Markets LLC, but referred to herein as "RSM"), the investment bank hired to protect the interest of the SCI minority shareholders.

25. SCI (now NITG) is the Nominal Defendant because of the derivative claims.

26. If Plaintiffs are successful in the derivative action, a substantial benefit and common fund will accrue to the benefit of the Nominal Defendant and its stockholders.

JURISDICTION AND VENUE

27. This is a civil action seeking damages for various causes of action including breach of fiduciary duty, aiding and abetting, waste, unjust enrichment, civil conspiracy, and gross negligence.

28. The Court has personal jurisdiction over each Defendant as to the causes of action at issue pursuant to S.C. Code §§ 36-2-802 and/or -803 (2003), and venue is appropriate in Greenville county pursuant to S.C. Code §15-7-30 (2003).

PARTIES

PLAINTIFFS

Brian P. Menezes – SCI Minority Shareholder

29. Plaintiff Brian P. Menezes is an adult individual citizen and resident of South Carolina. At the time these causes of action arose, he resided in Greenville County, South Carolina. Since prior to the events at issue and the transaction complained of, he has owned 102,000 shares of SCI (now NITG). He continues to own those shares along with 11,334 additional shares issued as his proportionate share of additional shares issued to all SCI shareholders coincidental with the Merger, for a total of 113,334 shares.

FURSA Alternative Strategies LLC & FURSA Master Global Event Driven Fund, LP – SCI Minority Shareholders

30. Plaintiffs FURSA Alternative Strategies LLC (f/k/a Mellon HBV Alternative Strategies LLC) and FURSA Master Global Event Driven Fund, LP (f/k/a Mellon HBV Master Multi Strategy Fund LP) (both together referred to hereinafter as "FURSA"), own (beneficially and directly) approximately 471,300 shares in SCI (now NITG) and have owned shares in SCI (now NITG) since well before the events at issue and the announcement of the transaction complained of.

**Ramius Securities, LLC and Ramius Credit
Opportunities Master Fund Ltd. – SCI Minority Shareholders**

31. Plaintiffs Ramius Securities, LLC and Ramius Credit Opportunities Master Fund Ltd. (f/k/a RCG Carpathia Master Fund, Ltd.) (both together referred to hereinafter a “Ramius”) owned (beneficially and directly) approximately 350,000 shares in SCI (now NITG) from well before the events at issue and the announcement of the transaction complained of and Credit Opportunities continues to own approximately 33,000 shares.

Kirk Wortman & Riverside Capital Partners, LLC – SCI Minority Shareholder

32. Plaintiff Kirk Wortman, through Riverside Capital Partners, LLC, owned approximately 10,000 shares in SCI (now NITG) from well before the events at issue and the announcement of the transaction complained of and continues to own approximately 400 shares.

Joseph and Marilyn Asiaf – SCI Minority Shareholders

33. Plaintiffs Joseph and Marilyn Asiaf owned approximately 2,000 shares in SCI (now NITG) from well before the events at issue and the announcement of the transaction complained of. They have since sold those shares and are not plaintiffs on the derivative claims.

Juanita Marett – SCI Minority Shareholder

34. Plaintiff Juanita Marett owned approximately 57 shares in SCI (now NITG) from well before the events at issue and the announcement of the transaction complained of and continues to own those shares. She is a resident of Greenville County, South Carolina.

NOMINAL DEFENDANT – International Textile Group, Inc.

35. Nominal Defendant NITG is a publicly-traded Delaware company. Prior to the Merger, it was known as Safety Components International, Inc. (“SCI”), and had its headquarters and principal place of business in Greenville, South Carolina. It is also referred to herein the “Combined Company.”

36. After the Merger, the Combined Company’s headquarters was moved to Greensboro, North Carolina. The operations of what had been SCI’s Greenville-based business remain in Greenville, South Carolina, however.

37. SCI’s Board of Directors during the period of the Merger consisted of defendant Wilbur Ross as Chair, defendant Michael J. Gibbons, defendant David H. Storper, defendant Joseph L. Gorga, and defendant Daniel L. Tesson. (Prospectus at 34.)

38. SCI was in the business of designing and developing airbag fabric and airbag cushions. As of 2005, it had a 66% share of the North American outsourced airbag cushion market, and an 11% share of the total North American air-bag cushion market, along with a 38% share of the European outsourced airbag cushion market, and a 16% share of the total European airbag cushion market, according to CSM Worldwide. (Prospectus at 97.)

39. The former International Textile Group, Inc. ("FITG"), was merged into SCI (which was then renamed International Textile Group, Inc. and referred to herein as "NITG"). FITG was a privately-held Delaware corporation with its headquarters in Greensboro, North Carolina.

40. FITG was formed by WLR (defined below) in 2004 to consolidate the assets of Burlington Industries, Inc., and Cone Mills Corporation which WLR had purchased out of bankruptcy. (Prospectus at 108.)

41. FITG had four principal lines of business: bottom-weight woven apparel fabrics (including denim, synthetic and worsted fabrics), interior furnishings (including mattress fabrics and upholstery fabrics), government uniform fabrics (including fabrics for military dress and battle uniforms), and specialty fabrics and services (including commission printing and finishing). Id.

DEFENDANTS

Wilbur L. Ross – WLR Owner/CEO, Chair SCI, FITG, and NITG

42. Defendant Wilbur L. Ross, Jr. ("Ross") is a citizen of the state of Florida. He was and is an employee and the Chairman and CEO of defendant WL Ross & Co. LLC ("WLR"). Prior to the sale to Amvescap PLC (below), he was the 99% owner of WLR, which he created in 2000, raising \$450 million then to invest into distressed companies. He continues to have a financial stake in WLR, along with a financial stake in the WLR Funds referenced below.

43. Ross was the Chairman of the Boards of SCI and FITG prior to the Merger, and of NITG since the Merger.

44. Ross, also serves as Chairman of the Board of Directors of Nano-Tex, LLC, and on the board of numerous companies including International Coal Group, Inc., Clarent Hospital Corp., and Phoenix International Holding Co. of the United States; Mittal Steel Company, N.V. of the Netherlands; Insuratex, Ltd. of Bermuda; Nikko Electric Industry Co. Ltd. and Ohizumi Manufacturing Company of Japan; Blue Ocean Re Holdings Ltd. and Montpelier Re Holdings Ltd. in Bermuda; International Auto Components Group SL in Europe and Brazil; and Wagon PLC in Europe.

45. Ross is commonly described in the media as a "billionaire" and also as the "King of Bankruptcy." He has regularly been on the Forbes list of the 400 richest Americans.

46. In September 2010, Ross was number 205 on the Forbes list with an estimated net worth of \$1.9 billion, having increased from \$1.23 billion in 2006. (Ross Dep. Ex. 702.)

47. As detailed further below, through WLR, Ross had substantial majority ownership of SCI (75.6%) and FITG (85.4%) prior to the Merger and of NITG (in excess of 87.4%) since the Merger.

48. Through WLR, Ross directly controlled four of the five seats on the SCI Board, five of the six seats on the FITG Board, and six of the eight seats on the NITG Board.

49. In mid-2006, Ross agreed to sell WLR to Amvescap PLC (now known as Invesco Ltd.). Upon information and belief, the total consideration for the sale of WLR to Amvescap PLC was to be \$375 million, with an initial payment of \$100 million and five annual “earn-out” provisions of up to \$55 million based on the expected launching of additional funds, for a total of an additional \$275 million.

50. The “earn-out provisions” were not based on the performance or stock value of FITG or SCI (or NITG).

51. The sale to Amvescap closed on October 3, 2006. WLR is now wholly owned by Amvescap.

52. The purchase price was based in part on WLR having assets under management of approximately \$2.6 billion.

53. Upon information and belief, FITG, based on a valuation of approximately \$164 million, the imputed valuation in connection with the acquisition by SCI, constituted a meaningful part of those assets, approximately 6.5%.

54. Upon information and belief, had FITG’s true condition been revealed it would have negatively impacted the Amvescap transaction and/or the amount Ross stood to receive and did receive from Amvescap.

55. Ross remains in charge of WLR as Chairman and CEO and continues to have a major financial interest in the company and its investments.

56. In 2008, Ross and WLR closed on a new fund, WLR Recovery Fund IV (“Fund IV”).

57. Ross stated regarding the new fund: “We launched this fund, our largest to date, some months ago in anticipation of the turmoil that is now providing us with a wide range of distressed investment opportunities.” (<http://www.finalalternatives.com/node/3475>)

58. Fund IV has raised close to \$4 billion.

59. WLR’s yearly income (and through it Invesco’s yearly income), solely for the management company of Fund IV, is approximately 1.5% of the amount of funds raised, or approximately \$60,000,000. WLR (and through it Invesco) also receives management fees, and other income, for its other Funds.

60. More recently, Ross has begun marketing a new fund, WLR Recovery Fund V (“Fund V”) which is to raise four billion. (Storper Dep. 24.) Fund V was also launched to make investments in financially distressed companies.

61. WLR’s yearly income (and through it, Invesco’s income) as the management company of Fund V is expected to be approximately 1.5% of \$4 billion, or \$60,000,000.

62. As a result of successfully raising additional funds, Ross has received four annual earn-out payments of \$55 million from Amvescap and is scheduled to receive one further such payment, as referenced above.

63. In 2006 FITG's business plan required significant capital expansion, and in order for Ross to maintain his reputation of success in turning around distressed companies, he needed to combine FITG with additional unlevered companies to make it attractive for a public offering in 2007.

64. Had FITG not merged into SCI, it would have negatively affected Ross's reputation and his ability to raise subsequent funds.

65. Further had FITG not merged into SCI, Ross would have not have received the annual earn-outs from Amvescap, or the earn-outs would have been reduced, and Ross would not be scheduled to receive further earn-out(s) from Amvescap, or they would be reduced.

66. Ross's actions at issue in this case were taken:

A. in his personal capacity and on behalf of himself personally;

B. in his capacity as owner, CEO, employee, manager, limited partner, and/or affiliate of WLR and each of the WLR entities referenced below, and on behalf of WLR and each such entity, each of which, with WLR, is responsible for his actions under the principle of *respondeat superior*;

C. in his capacity as director and chair of the board of SCI, and on behalf of SCI, which is responsible for his actions under the principle of *respondeat superior*;

D. in his capacity as director and chair of the board of FITG, and on behalf of FITG, which is responsible for his actions under the principle of *respondeat superior*;

E. and, with respect to those actions taken after the closing of the Merger, in his capacity as director and chair of NITG, and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

W.L. Ross & Company, LLC – WLR Management Company

67. As noted above, defendant WLR² is the investment firm ("private equity firm") founded by Wilbur L. Ross in April 2000. It specializes in leveraged restructurings, buyouts, and industry consolidations ("LBOs") of financially distressed companies. It is a citizen of the state of New York.

² References to "WLR," as used above and below herein, except where the context indicates otherwise, include defendants Fund II, Associates II, Fund III, and Associates III, along with the WLR individual defendants, Ross, Storper, Gibbons, and Wax. They are all citizens of states other than South Carolina.

68. At the time of the Merger, WLR was the controlling shareholder of SCI, owning directly or beneficially 4,162,394 shares of SCI stock (out of 5,507,147 total SCI shares), constituting 75.58% ownership of the company. (Prospectus at 162.)

69. WLR affiliates also held four of the five seats on the SCI Board (Ross as Chair, WLR employees Gibbons and Storper, and WLR affiliate Gorga).

70. Also at the time Merger, WLR was the controlling shareholder of FITG, owning directly or beneficially 14,310,497 shares of FITG, constituting 85.4% ownership. (Prospectus at 163.)

71. WLR affiliates held five of the six seats on the FITG Board (Ross as Chair, WLR employees Wax and Wilson, and WLR affiliates Gorga and Smith).

72. WLR was and remains the controlling shareholder of NITG, owning directly or beneficially 22,902,280 shares of NITG stock, constituting 87.4% ownership of the company.

73. WLR affiliates hold six of the eight seats on the NITG Board through employees or affiliates (Ross as Chair, WLR employees Gibbons, Storper, Wax, and Wilson, and WLR affiliate Gorga).

WLR Recovery Fund II, L.P. – Controlling Shareholder

74. Defendant WLR Recovery Fund II, L.P. ("Fund II"), was the actual owner of 241,419 of the shares of SCI that WLR controlled prior to the Merger.

75. The "valuation" of these shares (based on historical cost), according to WLR's report for the quarter ended September 30, 2006, was approximately \$3 million at that time.

76. Fund II was also the owner of 14,310,497 shares and approximately \$56 million in subordinated notes of FITG as of September 30, 2006. The "valuation" of these shares (based on the last equity transaction (cost was only \$53 million)), according to WLR's report for the quarter ended September 30, 2006, was approximately \$112 million. The notes were valued at face value. The total value of the Fund II's investment in FITG was approximately \$168 million.

WLR Recovery Associates II LLC – GP of Fund II

77. Defendant WLR Recovery Associates II LLC ("Associates II") is the general partner of Fund II. Its investment manager is WLR. Ross was/is the general manager of Associates II. Ross and Associates II had and have share voting and dispositive power over the SCI (NITG) shares owned by Fund II. WLR and Ross are the beneficial owners of the shares held by Fund II.

78. Associates II's partnership share of Fund II, as of September 30, 2006, was 11.31%.

79. Associates II itself was owned Ross and others at WLR. Ross's ownership share was 55%; Storper's was 11.5%; Wax's was 7%; Gibbon's was 2%. Other employees of WLR had other percentages.

WLR Recovery Fund III, L.P. – Controlling Shareholder

80. Defendant WLR Recovery Fund III, L.P. ("Fund III"), was the actual owner of the 3,920,975 of the shares of SCI that WLR controlled prior to the Merger.

81. The "valuation" of these shares (based on historical cost), according to WLR's report for the quarter ended September 30, 2006, was approximately \$48.7 million at that time.

82. Fund III did not have any financial interest in FITG.

WLR Recovery Associates III LLC – GP of Fund III

83. Defendant WLR Recovery Associates III LLC ("Associates III") is the general partner of Fund III. Its investment manager is WLR. Ross was/is the general manager of Associates III. Ross and Associates III had and have share voting and dispositive power over the SCI (NITG) shares owned by Fund III. WLR and Ross are the beneficial owners of the shares held by Fund III.

Associates III's partnership share of Fund III, as of September 30, 2006, was 6.75%.

84. Associates III itself was owned Ross and others at WLR. Ross's ownership share was 55%; Storper's was 11.5%; Wax's was 7%; Gibbon's was 2%. Other employees of WLR had other percentages.

Michael J. Gibbons – WLR Chief Financial Officer, SCI & NITG Director

85. Defendant Michael J. Gibbons ("Gibbons") has been the Chief Financial Officer and a managing director of WLR since 2002. As such, he has been an employee and officer of WLR at all relevant times, and WLR is responsible for his actions under the principle of respondeat superior. He is a citizen of New York.

86. Further, Gibbons has at all relevant times had, directly or indirectly, a financial stake in WLR and/or its affiliate companies.

87. Gibbons was a member of the Board of SCI prior to the Merger, and since the Merger has been a member of the Board of NITG.

88. From 1996 to July 2002, Gibbons was a Senior Manager of the Hedge Fund/Investment Partnership specialty practice group of Marcum & Kliegman LLP, a public accounting and financial consulting firm. Mr. Gibbons is licensed as a certified public accountant in the State of New York and graduated from Pace University with a B.A. in Business Administration.

89. Gibbons' actions at issue in this case were taken:

- A. in his personal capacity and on behalf of himself personally;
- B. in his capacity as owner, employee, manager, limited partner, and/or affiliate of WLR and each WLR entity referenced herein, and on behalf of WLR and each such entity, each of which, with WLR, is responsible for his actions under the principles of *respondeat superior*;
- C. in his capacity as director of SCI and on behalf of SCI, which is responsible for his actions under the principles of *respondeat superior*; and with respect to those actions taken after the closing of the Merger; and
- D. in his capacity as director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

David H. Storper – WLR Senior Managing Director, SCI & NITG Director

90. Defendant David H. Storper (“Storper”) has been a Senior Managing Director of WLR since its founding in April 2000. As such, he has been an employee and officer of WLR at all relevant times and WLR is responsible for his actions under the principle of *respondeat superior*. He is a citizen of New York.

91. Further, Storper has at all relevant times had, directly or indirectly, a financial stake in WLR and/or its affiliated companies.

92. He was a member of the Board of SCI prior to the Merger, and since the Merger has been a member of the Board of NITG.

93. Prior to joining WLR, he worked for Rothschild Inc., starting in 1996 as a Vice President and eventually becoming a Managing Director in the Restructuring Group. He holds a B.S. in Applied Mathematics from Columbia University’s School of Engineering and Applied Science and an M.B.A. in accounting finance from Columbia University.

94. Storper’s actions at issue in this case were taken:

- A. in his personal capacity and on behalf of himself personally;
- B. in his capacity as owner, employee, manager, limited partner, and/or affiliate of WLR and each WLR entity referenced herein, and on behalf of WLR and each such entity, each of which, with WLR, is responsible for his actions under the principles of *respondeat superior*;
- C. in his capacity as director of SCI and on behalf of SCI, which is responsible for his actions under the principles of *respondeat superior*; and with respect to those actions taken after the closing of the Merger; and
- D. in his capacity as director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

David L. Wax – WLR Managing Director, FITG & NITG Director

95. Defendant David L. Wax (“Wax”) has been a Managing Director of WLR since its founding in April 2000. As such, he has been an employee and officer of WLR at all relevant times and WLR is responsible for his actions under the principle of *respondeat superior*. He is a citizen of Connecticut.

96. Further, he has at all relevant times had, directly or indirectly, a financial stake in WLR and/or its affiliated companies.

97. Further, Wax was the person at WLR primarily responsible for its portfolio companies FITG and SCI from February 2006 through the Merger and afterward. (Wax Dep. 208-09 & 318.) Likewise, he was the person charged by WLR and Ross with “combining SCI and [F]ITG.” (Wax Dep. Ex. 415; Wax Dep. 244-47.)

98. He was a member of the Board of FITG prior to the Merger, and since the Merger, has been a member of the Board of NITG.

99. Before joining WLR in 2000, he was a Managing Director at Rothschild, Inc., an investment banking firm, where he was active in restructuring and workouts for over 10 years. Before joining Rothschild, he had been with Bankers Trust for 15 years.

100. Wax’s actions at issue in this case were taken:

- A. in his personal capacity and on behalf of himself personally;
- B. in his capacity as owner, employee, manager, limited partner, and/or affiliate of WLR and each WLR entity referenced herein, and on behalf of WLR and each such entity, each of which, with WLR, is responsible for his actions under the principles of *respondeat superior*;
- C. in his capacity as director of FITG and on behalf of FITG, which is responsible for his actions under the principles of *respondeat superior*; and with respect to those actions taken after the closing of the Merger; and
- D. in his capacity as director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

Joseph L. Gorga – SCI, FITG & NITG Director, CEO FITG & NITG

101. Defendant Joseph L. Gorga (“Gorga”), was President and CEO of FITG from its inception in August 2004 through the Merger and the President and CEO of NITG since the Merger, and, like Ross, was a member of the Boards of FITG and SCI prior to the Merger and of the Board of NITG since.

102. Prior to August 2004, Gorga was President and Chief Executive Officer of Burlington Industries LLC, a manufacturer of textile products for apparel and interior furnishing products. He served as Executive Vice President of Burlington Industries Inc. from December

2002 until November 2003. He is vice chairman of the board of directors of Nano-Tex, LLC and a member of the board of directors of OCM India Limited.

103. He is and at all relevant times has been an agent and affiliate of WLR, as well as of FITG (and now NITG), all of which are responsible for his actions under the principles of *respondeat superior*.

104. Prior to the Merger, Gorga beneficially owned 213,750 shares of FITG stock, or 1.3% of the company. (Prospectus at 163.)

105. Upon information and belief, he did not own any stock of SCI.

106. His compensation from FITG in 2005 included \$600,000 in base salary, \$297,301 in bonus, and \$511,559 for taxes incurred upon the vesting of restricted stock in 2005. In 2005, he was issued 210,000 shares of restricted stock valued at \$1,423,800 and options for 150,000 shares of common stock valued at \$1,017,000.

107. In 2006, Gorga's total compensation from FITG/NITG was \$963,185, which included \$600,000 in base salary, \$163,233 in other compensation, and \$177,918 in stock and \$21,034 in options. (Gorga Ex. 290 at 12.)

108. In 2007, Gorga's total compensation from NITG was \$1,066,296, which included \$600,000 in base salary, \$106,349 in other compensation, \$150,000 in non-equity incentive plan compensation, and \$103,298 in stock and \$106,249 in option. (*Id.*)

109. In 2008, Gorga's total compensation from NITG was \$808,412, which included a base salary increased to \$660,000, \$36,420 in other compensation, and \$5,343 in stock and \$106,649 in options. (Gorga Ex. 291 at 12.)

110. In 2009, Gorga's total compensation from NITG was \$602,055. His base salary was reduced to \$577,500. Other compensation was \$24,555. (Gorga Ex. 292 at 43.)

111. For 2010, Gorga's base salary was raised back to \$660,000. (*Id.*) The other components of his compensation are not known at this time.

112. In addition, all or a substantial portion of the restricted stock and stock options issued to Gorga prior to the Merger vested upon consummation of the Merger.

113. Gorga's actions at issue in this case were taken:

A. in his personal capacity and on behalf of himself personally;

B. in his capacity as an agent or affiliate of WLR and on behalf of WLR, which is responsible for his actions under the principle of *respondeat superior*;

C. in his capacity as director of SCI and on behalf of SCI, which is responsible for his actions under the principle of *respondeat superior*;

D. in his capacity as an officer and director of FITG and on behalf of FITG, which is responsible for his actions under the principle of *respondeat superior*; and, with respect to those actions taken after the closing of the Merger; and

E. in his capacity as an officer and director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

Daniel D. Tessoni – SCI & NITG Director

114. Defendant Dr. Daniel D. Tessoni (“Tessoni”) was the “independent” member of the Board of SCI.

115. Tessoni holds a Ph.D. in accounting and finance from Syracuse University, is an assistant professor of accounting at the College of Business at the Rochester Institute of Technology in Rochester, New York, and has been a member of the accounting faculty since 1974. He is licensed as a certified public accountant in the State of New York. He is also the owner of Value Based Management Associates, through which he provides financial training and consulting services to a wide variety of publicly and privately held companies.

116. Tessoni’s actions at issue in this case were taken

A. in his personal capacity and on behalf of himself personally;

B. in his capacity as director of SCI and on behalf of SCI, which is responsible for his actions under the principle of *respondeat superior*; and, with respect to those actions taken after the closing of the Merger; and

C. in his capacity as director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

Stephen B. Duerk – SCI President

117. Defendant Stephen B. Duerk is an individual resident of Greenville County, South Carolina. He was President of SCI prior to the Merger and after the Merger was President of the Automotive Safety Group (what had been SCI) of the Combined Company. He was involved in the events at issue in this action and, in fact, executed the Merger agreement and closing documents on behalf of SCI. He retired on December 31, 2007.

118. Duerk’s actions at issue in this case were taken

A. in his personal capacity and on behalf of himself personally;

B. in his capacity as an officer of SCI and on behalf of SCI, which is responsible for his actions under the principle of *respondeat superior*; and, with respect to those actions taken after the closing of the Merger; and

C. in his capacity as an officer of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

Gary L. Smith – FITG & NITG Director and CFO

119. Defendant Gary L. Smith (“Smith”) was the Executive Vice President and Chief Financial Officer of FITG as well as a member of its Board of Directors from its inception in 2004 through the Merger. After the Merger, he held those same positions with, and was a director of, NITG. He is a citizen of North Carolina.

120. On information and belief, Smith was at all relevant times an agent and affiliate of WLR and of FITG (then NITG), and WLR and FITG (then NITG) are responsible for his actions under the principle of *respondeat superior*.

121. Before FITG, Smith served as Executive Vice President and Chief Financial Officer of Cone Mills Corporation, a manufacturer of textile products, primarily denim, for apparel and interior furnishing products, from 1999 to 2004.

122. Prior to the Merger, Smith beneficially owned 74,375 shares of FITG stock. (Prospectus at 163.)

123. Upon information and belief, he did not own any stock of SCI prior to the Merger.

124. His compensation from FITG in 2005 included \$366,667 in base salary, \$158,560 in bonus, and \$182,700 for taxes incurred upon the vesting of restricted stock in 2005. In 2005, he was issued 75,000 shares of restricted stock valued at \$508,500 and options for 50,000 shares of common stock valued at \$339,000.

125. Upon information and belief, all or a substantial portion of the restricted stock and stock options issued to Smith prior to the Merger vested upon consummation of the Merger.

126. He resigned from all positions and the Board of NITG effective May 31, 2008.

127. Smith’s actions at issue in this case were taken

A. in his personal capacity and on behalf of himself personally;

B. in his capacity as an agent or affiliate of WLR and on behalf of WLR, which is responsible for his actions under the principle of *respondeat superior*;

C. in his capacity as an officer and director of FITG and on behalf of FITG, which is responsible for his actions under the principle of *respondeat superior*; and, with respect to those actions taken after the closing of the Merger; and

D. in his capacity as an officer and director of NITG and on behalf of NITG, which is responsible for his actions under the principle of *respondeat superior*.

RSM EquiCo Capital Markets LLC – Financial Adviser to SCI

128. Defendant RSM EquiCo Capital Markets LLC (now known as McGladrey Capital Markets LLC, but referred to herein as “RSM”) is an investment banking firm based in

California with offices in New York, Chicago, Boston, Dallas and London, which claims to specialize in mergers and acquisitions. Upon information and belief, it is a citizen of California.

129. RSM, as described further below, was retained by the SCI Special Committee relating to the Merger (as alleged below) during the week of July 24, 2006, to ascertain on behalf of SCI the fairness of the consideration to be provided by SCI for FITG with respect to the shareholders other than WLR Recovery Fund II, L.P., and WLR Recovery Fund III, L.P.

130. Further, as detailed below, RSM provided services beyond the scope of its Engagement Agreement, in particular, advising the SCI Special Committee (Tessoni) on the appropriateness of the Merger in general and assisting in negotiations of the Merger terms with the FITG Special Committee.

FACTUAL ALLEGATIONS

THE MERGER – Overview and Consideration

131. As noted, the Merger closed on October 20, 2006. The agreement to merge (Duerk Ex. 1) was approved by the Boards of SCI and FITG and executed on August 29, 2006.

132. The publicly stated reason for the Merger was that it would “allow the Combined Company to better serve its markets and customer base, more efficiently execute its business strategies, and result in greater long-term growth opportunities than either pre-merger company could achieve operating alone.” (Prospectus at 6.)

133. It was said that the Merger would enable the Combined Company to “benefit from cost and operational synergies,” “leverage scale and management expertise in international sales and operations,” “improve its access to capital,” “better leverage research and new product development capabilities,” and “diversify financial and economic risks.” (*Id.*)

134. Many of these supposed benefits did not come to pass. (Duerk Dep. 237-42.)

135. As already noted, WLR and Ross owned directly or beneficially 75.6% of the stock of SCI and 85.4% of the stock of FITG and controlled four of five directors on the SCI Board and five of six directors on the FITG Board.

136. WLR and Ross were in a position to cause the Merger to occur (or not to occur) regardless of the actions of any other stockholder.

137. When the Merger took place, each shareholder of FITG surrendered his FITG stock and received shares of SCI on the ratio of 1.4739 to 1 (the “Exchange Ratio”). (Prospectus at 51.) In other words, for each 1.4739 shares of FITG stock surrendered, the FITG shareholder received 1 share of SCI stock. In addition, each restrictive share and option to purchase shares of FITG stock was converted into the same for shares of SCI on the same ratio.

138. The Exchange Ratio represented the consideration that SCI paid for FITG.

139. The Exchange Ratio was set so that pre-merger SCI shareholders would end up owning 35% of the Combined Company and pre-merger ITG shareholders would end up owning 65% of the Combined Company.

140. Pursuant to the Exchange Ratio, SCI issued a total of 11,975,943 additional shares of SCI stock (and options for the purchase of 641,495 more shares). (Prospectus at 9.) Of those, 611,905 shares were a dividend issued to SCI shareholders that did not relate to the Exchange Ratio. Hence, the total number of shares issued to FITG shareholders pursuant to the Exchange Ratio in connection with the Merger was 11,364,038.

141. The price of SCI stock was \$14.65 per share on August 29, 2006, the day the Merger terms were agreed to by the Boards of Directors of SCI and FITG.

142. Based on the \$14.65 price per share, the SCI Board (Ross, Gorga, Gibbons, Storper, and Tesson) agreed to provide consideration for FITG with a value of approximately \$166 million (or 11,364,038 shares times \$14.65/share) as of the date of their decision.

143. After the Merger was announced, the price of SCI stock dropped until on October 20, 2006 (the day of the Merger), it was \$13.25 per share.

144. Based on the \$13.25 price per share, SCI gave consideration in the Merger for FITG valued at approximately \$150 million as of the date of the Merger.

145. WLR, as already noted, owned directly or beneficially 85.4% of FITG which amounted to 14,310,497 shares of FITG.

146. Technically, the shares were owned by International Textile Holdings, Inc. ("ITH"), which was 100% owned and controlled by WLR.

147. Based on the Exchange Ratio, WLR (beneficially through ITH) received 9,709,272 shares of SCI stock in return for its FITG stock.

148. Based on the \$13.25 price per share, WLR (beneficially through ITH) received consideration for its FITG shares valued at approximately \$129 million at the time of the Merger.

149. Defendant Gorga owned 213,750 shares of FITG stock.

150. Based on the Exchange Ratio, he received 145,023 shares of SCI stock for the FITG stock that he owned (including beneficial stock).

151. Based on the \$13.25 per share price, Gorga received consideration for his FITG shares valued at approximately \$1.92 million as of the date of the Merger.

152. Defendant Smith owned 74,375 shares of FITG stock.

153. Based on the Exchange Ratio, he received 50,461 shares of SCI stock for the FITG stock that he owned (including beneficial stock).

154. Based on the \$13.25 price per share, he received consideration for his FITG stock valued at approximately \$668,600 as of the date of the Merger.

155. FITG was not worth the \$166 million that the SCI Board (Ross, Gorga, Gibbons, Storper, and Tessori) agreed to on August 29, 2006.

156. FITG, as discussed further below, was worth much less than half that amount and probably had a negative value.

157. But for the Merger into SCI (or a very substantial infusion of additional capital), FITG would likely have gone bankrupt.

158. Had FITG gone bankrupt, or been in danger of going bankrupt, it could well have impeded or interfered with Ross's deal to sell WLR to Amvescap, or affected the price paid by Amvescap, or adversely affected his and its reputation and ability to raise further funds, in particular Fund IV and V.

159. Obviously, it would also have interfered with WLR's strategy of taking FITG public to monetize its investment. (See Paragraphs 195-197 below.)

The Real Reasons for the Merger

FITG Was Failing and Needed SCI's Liquidity

160. In 2005, FITG's sales were \$697.3 million, net income \$0.7 million, EBITDA \$12 million, and pro forma EBITDAR \$29 million. (Smith Ex. 17 at 3.) In 2006, worldwide demand for denim decreased, and ITG's profit margins decreased due to lower sales and pricing pressure. (Bank of America Business Capital Quarterly Portfolio Report, 4/30/06.)

161. In 2004, ITG had projected \$39 million in EBITDA in 2006. (Bank of America Risk Rating Detail Report, 9/27/06, p. 5.) In 2005, ITG's pro forma EBITDA dropped to 16.4 million. (Bank of America, International Textile Group Financing Opportunity – Updated 12/14/05, p. 30.) As of August 17, 2006, FITG's projected sales for CY2006 were \$610.2 million, projected net income was negative 19.3 million, projected EBITDA was negative \$14.8 million, and projected pro form EBITDAR of \$1 million. (*Id.*) FITG was also projecting cash flow from operations of negative \$42.9 million in the last quarter of 2006. (Smith Ex. 17 at 6)

162. As of August 30, 2006, FITG was forecasting for the September 30, 2006 fiscal year end a \$47 million decrease in total sales versus plan and a \$13 million deficit in operating income versus plan, with over \$8 million of that difference coming in July-August-September period. (Smith Ex. 46 at 2.)

163. To cover FITG's negative cash flow, WLR continually had to pump funds in, and WLR issued FITG over \$66 million in shareholder loans in a seven month period: \$15,710,000 on May 31, 2006; \$20,500,000 on June 28, 2006; \$20,000,000 on September 18, 2006; and an additional \$10,000,000 on December 20, 2006. (Wax Ex. 424 at 3; Wax Dep. 312.)

164. These loans were used in part to fund FITG's risky international greenfield efforts (the construction of four new textile manufacturing facilities in China, Vietnam and Nicaragua) which were a critical part of FITG's turn-around plan.

165. Importantly, they were also used to fund basic operating losses. (Smith Dep. 269-70.)

166. SCI, on the other hand, was generating cash. As of September 30, 2006, it had over \$3,000,000 in cash on hand. (NITG [SCI] Sept. 2006 10-Q at 3.) Further, it had a \$35 million line of credit with only \$8,000 drawn out. (*Id.* at 9)

167. Defendants' plan, according to an email from Wax to Gorga and Smith on April 21, 2006, was to gain access to SCI's "liquidity . . . to reduce the amount we [WLR] have to fund to ITG." (Wax. Ex. 416; Wax Dep. 258.) Further, as discussed in more detail below, WLR planned to use SCI's sales to "provide sufficient scale" for the merged entity for a planned public offering in late 2006 or early 2007. (Storper Ex. 527 at 5 & 10; Gorga Ex. 208 at 4 & 9.)

**The FITG and WLR Defendants
Were Acutely Aware That FITG Was Failing**

168. Obviously from their involvement in FITG and the revisions to its budgets, as well as the loans to FITG, the WLR and FITG defendants were well aware of FITG's performance issues. Further, WLR was focused on FITG's performance in August, 2006, because funding issues between WLR Fund II and WLR Fund III required WLR to perform a complicated valuation analysis of ITG by the end of August. (BofA000631-632.) The internal contemporaneous WLR emails make clear WLR's knowledge of FITG's financial condition.

169. On May 9, 2006, Pamela Wilson, a Board Member of FITG, emailed Ross and Wax (a Managing Director of WLR), noting that the Cone Denim division of FITG was nearly \$2 million below plan in the March quarter, with June projected to be \$5 million below plan, with fiscal year projections now \$5 million below plan." (Storper Ex. 525.)

170. On August 14, 2006, Ross emailed Wax: "We have a problem. Pre the [proposed] IPO at 12 31 06 ITG will have \$635 million of debt and only \$272 million of equity [with SCI included]. **How can this possibly make sense? WLR.**" (Wax Ex. 461 at 2, emphasis added.)

171. On August 27, 2006, Ross sent Wax comments on the S4 to be filed with the SEC for the Merger. Ross noted that FITG was "not just a declining and money losing business" but could be viewed as "slowly slipping into an abyss." He wanted the company presented much more favorably to the public since he was "hopeful for a public offering in 07." (Wax Ex. 471 at 3.)

172. Later the same day, Ross noted in another email to Wax the "consistent underperformance relative to budget" and the "execution risk in addition to the market risk we always knew we had," and questioned "how we get a big bang for the buck [even] if everything works." (*Id.* at 1.)

173. On September 6, 2006, Pamela Wilson of WLR, answering an email from Wax, complained that FITG management needed a better handle on the “execution risk of downsizing” (i.e., closing FITG’s domestic operations while building new facilities overseas), and was “clueless” as to why they’ve lost business. (Smith Ex. 58 at 1 & 3.)

174. On September 22, Ross noted in an email to Gorga that FITG had “consistently reduced their budgets and just as consistently failed to meet the reduced budgets,” that FITG had a “huge execution risk” with start-ups in several countries, and that there is an additional “execution risk” of acquiring and integrating SCI into FITG. (Gorga Ex. 232.)

175. On October 1, 2006, nearly three weeks before the Merger closed, Ross emailed Gorga regarding FITG’s “discouraging weekly report” which shows him that the remainder of 2006 would be “terrible” and commenting that “it seems less and less intelligent to commit vast sums based on lon[g] term forecasts from businesses that continually miss their short term budgets.” (Gorga Ex. 271.)

176. Gorga replied to Ross, noting the “difficult market” FITG is experiencing in “many of our businesses.” (*Id.*, emphasis added.)

177. Finally, an FITG internal email string made the same point as Ross above, but more graphically.

178. Lynn Guest wrote James Payne on October 12, 2006: “... September was a Disaster. We lost \$680,000 in the month of September. We had made \$55 and \$174 in the two previous months and now we are at a loss of \$451. This is \$277 more than I had expected and it is really just about impossible to call this when our wip changes with large numbers. ... Not very pretty, but it is what it is. Don’t like, but it is.” (Smith Ex. 157, emphasis added.)

179. Payne replies: “I will call you in about ten minutes but I need to go throw up first!!!!!!” (*Id.*)

180. None of these issues or concerns was shared with SCI or the SCI Special Committee.

**The WLR and FITG Defendants Were Aware
Of and Disregarded the Risk to SCI**

181. FITG was obviously a high risk proposition.

182. As Ross himself put it in an email dated September 14, 2006: “ITG’s plate is extremely full and has tremendous execution risk.” (Ross Ex. 783.)

183. Wax agreed in a reply email: “Wilbur, I agree completely with your observations on ITG.” (Ross Ex. 784.)

184. Ross explained in deposition: “I think anybody who looked at ITG, and looked at the financial forecasts, would know that. They were phasing down several operations in the United States, starting up things in several different countries and planning to make series of

acquisitions. Anybody who can read and write would know there was tremendous execution risk." (Ross Dep. 598, emphasis added.)

185. Ross himself raised the question of whether it made sense, given the risk, to merge SCI in with FITG.

186. On August 29, 2006, after receiving and reviewing the business plan for the combined company (Wax Ex. 473) and more than five hours prior to the SCI Board meeting to approve the Merger, Ross asked pointedly of Wax how they could "**rationaly ... risk SCI and BST by putting them in there [with FITG]**":

Thanks. This [Wax Ex. 473] is not all of what I requested in the email. **I would like to know the run rate of ITG proforma for the annouced plant closures and to the degree that that rate is materially below the 07 forecast for ITG, how we get from the run rate to the forecast for 07. As you can see they are forecasting a huge turnaround in EBITDA and if something like it is not achieved noone [sic] will believe the 08 numbers, let alone put a multiple on them.** If these data came from the 8(12 bank meeting presumably some suchb [sic] logic trail exists. I also have some more detailed questions such as how BST is expected to have so much cash in view of the starting point in our purchase agreement and the fact that we will only own it for a short while before year end. **But my major question remains whether the business plan hangs together well enough for us to rationally undertake the itg direct commitment and risk SCI and BST by putting them in there.** What due diligence have you done? WLR

(Wax Ex. 472 at 1, emphasis added.)

187. In deposition, Wax described the questions from Ross as "rhetorical" and was unable to name any due diligence that was done on the question of whether it was rational to risk SCI by putting it in with ITG. (Wax Dep 615-19.)

188. Ross did not mention his concerns about the Merger to Storper or Gibbons, even though both Storper and Gibbons were on the SCI Board. (Gibbons Dep. 202-203.) Neither Storper nor Gibbons did anything personally to analyze the execution risks of FITG before voting as an SCI Board member to approve the Merger with FITG. (Storper Dep. 100-101; Gibbons Dep. 82) Gibbons admitted that he did not read the written materials concerning the Merger which were provided to him on the same day as the SCI Board meeting to approve the Merger, August 29, 2006. (Gibbons Dep. 218-219.)

189. For his part, Ross insisted that his concerns had been satisfied prior to the SCI Board meeting, but his only evidence for that was that he voted for the Merger:

Q. Other than voting for the transaction, do you have any evidence to show that a conversation or something from Mr. Wax occurred to satisfy you that the business plan hung together well enough to rationally undertake the ITG direct commitment and risk SCI and BST by putting them in there?

A. Well, my behavior is the answer to that. There is no reason in the world I would have gone along with these deals if I didn't feel it hung together."

(Ross Dep. 575-76.)

190. Disregarding these concerns and the risk to SCI, Ross and the other SCI board members voted to approve the Merger later on August 29, 2006.

The WLR and FITG Defendants' Real Agenda

191. The domestic textile market was rapidly declining from 2001 through 2005. WLR and FITG Defendants developed a complex plan for FITG to meet this changing market by transferring production from its domestic plants to new plants it would construct in China, Vietnam and Nicaragua (the "greenfield" investments), and this would save its business.

192. Apart from the need to fund on-going operations losses, the plan required enormous capital and involved tremendous execution risk.

193. The Merger, and obtaining SCI's liquidity, was a significant part of WLR and FITG's strategy for addressing ITG's capital needs, for increasing its borrowing capacity, and for obtaining a positive cash flow while the plan was being carried out.

194. Without the Merger, or some equivalent strategy, FITG had little chance of carrying out its plan.

195. In addition, the Merger was a key part of WLR's strategy for having a public offering ("IPO") for ITG.

196. An IPO was WLR's way to "exit" the company and obtain its pay off. It was how it monetized its investment. (Wax Dep. 37-38.)

197. Without the Merger, FITG (apart from being unable to carry through its plan) would not achieve the necessary scale for a public offering. (Storper Ex. 527 at 5 & 10; Gorga Ex. 208 at 4 & 9.) After a meeting with Ross and Smith on June 21, 2006, it was clear to Bank of America that the Merger was not for the benefit of SCI, but rather was designed so that ITG could be monetized for its investors: "Ross would like to merge ITG and SCI together by 10/6. SCI makes fabrics for airbags, with little or no overlap with ITG. The primary reasons for the merger appear to be diversification, and create a larger platform for a secondary equity offering in 2007." (BofA000180.) WLR would have had to develop a different strategy for saving FITG and monetizing its investment.

198. Moreover, given FITG's declining financial performance, without the Merger to mask and delay it, FITG was at risk of having its true condition revealed, and was also at risk of insolvency and bankruptcy.

199. Having a major and high profile investment go negative or bankrupt would have been damaging to Ross and WLR's reputation and negatively impacted their ability to raise further funds, and thus their income.

200. In addition, without the Merger to address the foregoing issues, the Amvescap transaction would likely not have occurred and Ross would not have received his gigantic payday (\$375 million) for WLR. Alternatively, if the Amvescap transaction did occur, the value would likely have been substantially less than \$375 million.

201. All of the foregoing created significant reasons for the WLR defendants to Merge SCI and FITG regardless of the risk to SCI and the interests of the SCI minority shareholders (who had no interest in FITG).

202. The FITG defendants had those and other even more obvious reasons. If FITG failed, they would lose their jobs and income, along with any chance of obtaining anything for their stock in the company.

THE MERGER – Background Facts

The First Standstill Waiver by Tessori

203. WLR had owned (“owned,” as used herein, includes direct and beneficial ownership) its controlling interest in FITG since 2004 when it created FITG.

204. WLR had owned its controlling interest in SCI since late 2005 when it bought out the prior controlling shareholder, Zapata Corp, which had decided to move into the sports industry. (Menezes Dep. 139.)

205. There were other potential purchasers of the Zapata shares. Indeed, D.E. Shaw thought that it had a deal with Zapata to purchase the shares, but WLR came in at the last minute and made the deal.

206. Before acquiring its interest in SCI, WLR had executed a “confidentiality agreement” with SCI that included a “standstill” provision. (Tessori. Ex. 26.) The agreement prevented WLR from purchasing stock in SCI without the consent of the corporation. (Tessori Ex. 49.)

207. The SCI Board appointed a “special committee” composed solely of defendant Tessori to consider WLR’s request that the standstill agreement be waived so that he could purchase the SCI shares owned by Zapata Corp.

208. In seeking the waiver of the standstill agreement, Ross stated to Tessori that he “intended to maintain the Corporation’s publicly traded status,” that he “intended to create value for the Corporation’s minority shareholders,” that he believed “vertical integration [was] essential for companies engaged in the Corporation’s business and that he intend[ed] to provide the Corporation with the benefits of vertical integration,” and that he was a “‘builder’ of companies rather than a ‘raider’ of them.” (Tessori Ex. 49.)

209. Tessori agreed to the waiver and WLR purchased the 4,162,394 SCI shares owned by Zapata for \$12.30/share (\$51.2 million in aggregate). (*Id.*; Wax Ex. 404.) This was a 15% or \$2.20 discount relative to the September 26, 2005, prevailing stock price of \$14.50 a share, for a total discount to WLR \$12.1 million from the market price.

210. The market value for SCI at the time, based on the \$14.50 per share market price, was approximately \$80 million. The value, using the discount WLR negotiated, was approximately \$68 million.

The Second Standstill Waiver – The Co-Opting of Tessori

211. Before or soon after completing that purchase, WLR began to consider acquiring, or having one of its portfolio companies acquire, the remainder of SCI, or some similar transaction.

212. Accordingly, later in 2005 or early in 2006, WLR requested another waiver of the “standstill” provision so that it could proceed with acquiring the remaining shares of SCI, or another transaction requiring a waiver of the standstill agreement.

213. WLR pressed this request repeatedly, calling and emailing Tessori and his counsel numerous times.

214. At the same time, WLR attempted to begin discussions with SCI management and plaintiff Menezes, interim CEO at the time, regarding a potential transaction with FITG and related due diligence.

215. Menezes was advised by corporate counsel that, out of fairness to the minority shareholders, any such process should be led by Tessori, and he in turn advised Gibbons and Gorga of that fact. (Tessori Ex. 31.)

216. At this time, Wax advised Gibbons and Gorga, they “needed to reach out and co-opt Tessori as we discussed.” (Wax Ex. 410, emphasis added.)

217. In early March or late February 2006, Tessori advised his attorney that “things were ‘getting ugly.’” (Tessori Ex. 35.)

218. WLR’s counsel, Dave Phillips of Jones Day explained the “urgency” of the request to Tessori’s counsel based on the fact that “Ross want[ed] to commence due diligence on Safety’s operations as soon as possible – including speaking with employees, customers, and supplie[r]s – which actions are expressly forbidden by Section 2 of the Confidentiality Agreement.” (Tessori Ex. 35.)

219. On or about March 10, Tessori was, in the words of his attorney, “double teamed by the Ross guys.” (Tessori Ex. 38.)

220. By March 16, 2006, Tessori had agreed to the requested waiver. (Tessori Ex. 41.) The subject line in his attorney’s email read simply “Phew!”

221. Tessori neither asked for nor received for SCI any consideration for the waiver of the standstill provision.

The Problematic Basis for the Second Standstill Waiver

222. The second standstill waiver included the condition that Ross would cause the SCI Board to appoint a new Special Committee, also composed only of Tessoni, with “exclusive authority on behalf of the Company to review, evaluate, investigate, negotiate, and approve the terms of any Potential Transaction with Ross.” (Emphasis added.)

223. This was highly problematic as a “single member” special committee as explained below. (See Paragraphs 273-276.)

224. “Potential Transaction[s]” were limited to those where Ross, or an affiliate of it, acquired the remaining shares of SCI for cash and/or securities of an affiliate of Ross, or where SCI was merged with or into a Ross affiliate or a Ross affiliate was merged with or into SCI. (*Id.*)

225. This too was highly problematic as explained in Paragraphs 298-302 below.

226. Contrary to Ross’s statement to Tessoni when he obtained the original waiver, there was no commitment “to maintain [SCI’s] publicly traded status,” no commitment that Ross would “provide [SCI] with the benefits of vertical integration,” and no reference to him as a “‘builder’ of companies rather than a ‘raider’ of them.”

FITG Conducts Diligence on SCI and Recommends Buying SCI

227. Promptly after the waiver of the standstill agreement, FITG re-commenced due diligence on SCI, the first step of which was to execute a March 15, 2006, confidentiality agreement in favor of SCI allowing FITG access to confidential SCI information. (Smith Ex. 168.)

228. Some diligence on SCI had already taken place by FITG prior to it being halted by Menezes at the instruction of corporate counsel, as noted above, and diligence by FITG on SCI continued into July and August.

229. On March 24, 2006, a team from FITG, including defendant Smith, visited SCI with an extensive list of questions and requests for information. (Smith Ex. 170.) FITG obtained extensive other diligence information from SCI.

230. By April 5, 2006, FITG management had completed a preliminary analysis of the information on SCI and formulated a recommendation to the FITG Board that FITG acquire SCI. (Wax Ex. 414 – “Management Recommendation / ITG management recommends that WLR merge ITG and Safety Components”). Defendant Smith and his staff drafted the recommendation. (Smith Dep. 378.)

231. Based on the recommendation, the FITG board “d[e]finitively decided” on April 6, 2006, to combine SCI and ITG. (Wax Ex. 415.)

232. Defendant Wax was charged by WLR and Ross with “combining SCI and [F]ITG.” (Wax Dep. Ex. 415; Wax Dep. 244-47.)

SCI Not Authorized To Conduct Diligence on FITG

233. In contrast to FITG, SCI was not authorized to conduct due diligence on FITG. Indeed, SCI never signed a confidentiality agreement that would have given it access to confidential FITG information.

234. Defendant Duerk, the President of SCI as June 9, 2006, and the person who signed the Merger agreement on behalf of SCI, has testified that he did not perform any due diligence on FITG, that no one else within SCI performed due diligence on FITG, and that whatever diligence was done, if any, was by the SCI Special Committee (Duerk Dep. 231-33.)

235. As to the Special Committee, Tessoni testified that he did not do any due diligence himself; he relied on his advisers. (Tessoni Dep. 124-25.)

236. However, his financial adviser RSM assumed that SCI had done its own diligence in connection with the Merger. (RSM-Choy Dep. 356). Therefore, RSM did not “vet the numbers” of FITG. (*Id.* at 558-59.)

237. RSM did not even consider it part of its “mandate” to make sure that the numbers from FITG that it was using were “reasonable and justified.” (*Id.* at 98-99 (“Q. So your mandate did not include you having to make sure your reliance was reasonable and justified? A. That’s my recollection.”))

238. Since SCI management did not conduct diligence on FITG, SCI management did not assess FITG and its business prospects going forward.

239. Further, at least some members of SCI management had reservations and were skeptical as to the value of integrating an auto parts company such as SCI with a textile company like ITG. (Gorga Ex. 200 at 2.)

240. Likewise, SCI management did not make any recommendation to the SCI board regarding a combination with FITG. There was for SCI no equivalent to the April 5, 2006, merger analysis/recommendation by FITG management. (Wax. Ex. 414.)

Ross Directs That SCI Acquire FITG (Instead of FITG Acquiring SCI) To Avoid Spending Cash to Buy Out SCI Minority Shareholders

241. The initial suggestion from FITG management was for FITG to buy-out the minority shareholders of SCI. (Wax Ex. 414 – “The merger would be accomplished by the issuance of ITG shares and cash for Safety Component shares.”)

242. However, as Wax testified, it would have required “\$25 million plus” to buy out the SCI minority shareholders. (Wax Dep. 256.)

243. This means that Wax, a sophisticated buy-out professional with months of insider information about SCI, was placing a buy-out value on SCI’s minority stock of \$17.85 a share or more. This equates to a value for SCI of over \$98 million. (5,507,147 at \$17.85 per share.)

244. Ross, however, rejected this idea and directed that FITG acquire SCI instead so that nothing would need to be spent to buy-out the SCI minority shareholders.

245. As Wax wrote in an email dated April 21, 2006: "it is important to [Ross] that we retain the liquidity that SCI brings to the table for acquisitions and to reduce the amount we [WLR] have to fund to ITG. Accordingly, he proposed the idea that we leave all the minority sci [sic] shareholders in place and have sci [sic] acquire itg [sic] for sci [sic] stock." (Wax. Ex. 416; Wax Dep. 258.)

246. This concept was also embodied in April 26, 2006, slides for FITG's fairness adviser, SunTrust Robinson which expressly noted "WLR's desire to minimize the use of cash to remove minority shareholders." (Gorga Ex. 205 at 3, emphasis added.)

The WLR Proposal for Merging FITG into SCI

247. Accordingly, on May 30, 2006, WLR submitted a proposal to FITG and SCI that FITG be combined into SCI. (Wax Ex. 440.) The merger of FITG into SCI would be a "reverse merger." (Gorga Ex. 205 at 3.)

248. The stock of FITG would be exchanged for stock of SCI. The exchange ratio would be based on the ratio of the book value of SCI, discounted by ten percent, to the book value of FITG as of June 30, 2006.

249. The ten percent discount in the book value of SCI was to account for the fact that FITG had assets thought to be undervalued on the FITG books since its assets had been purchased out of bankruptcy. (Wax Ex. 440; Wax Dep. 463.)

250. The proposal had the book value of FITG as of June 30, 2006, as \$7.84 per share, and the book value of SCI at that time as \$14.80 per share.

251. Based on these numbers and the 10% discount for SCI, the proposal had FITG shareholders ending up owning 61.8% of the Combined Company and SCI shareholders 38.2%. (Prospectus, p.72.)

252. The proposal incorrectly stated that the FITG shareholders would own 65% of the Combined Company; it is conspicuous that that is what ended up being given to FITG in the Merger.

253. Since SCI's minority shareholders were then going to continue to be part of the company, and since the company was then going to include FITG, the condition and future prospects of FITG became of critical importance to SCI's shareholders and should have been critically assessed by the SCI board.

254. To be more specific, appropriate due diligence by SCI was essential because, since the Merger was going to be effectuated by the issuance of SCI stock to FITG shareholders, and since the former FITG shareholders would end up with more than twice as much stock in the Combined Company as the former SCI shareholders would have, SCI was effectively ceding control of SCI to the shareholders of FITG.

255. Further, because SCI was the surviving entity in the merger, SCI shareholders were merely going to keep the shares they owned and were not going to receive cash or any other consideration. (They did receive a 1/9th share dividend just before the Merger, but that was merely a stock split and did not increase their percentage ownership in SCI. Those additional shares were created to be held in reserve for the indemnification obligation referenced below and did not represent any consideration for the Merger.)

256. Indeed, because the Merger was structured in this manner, SCI's shareholders did not even have "appraisal rights," or the right to demand that their shares be purchased at a price set by a court.

257. What the SCI shareholders received from the Merger was a severely diluted interest in the Combined Company. Accordingly, the success of the Combined Company was essential. However, that success was premised almost exclusively on the success of FITG's greenfield initiatives, with SCI only providing much needed liquidity and a convenient platform for a future public offering because of its publicly-traded status.

258. Hence, because of this deal structure, SCI shareholders were essentially forced to bet the farm on the success of FITG's business plan – a tremendously risky proposition (as Wilbur Ross himself admitted in deposition – Paragraph 184 above).

259. Given this scenario, knowledge of FITG's internal forecasts, projections, budgets and business plans was absolutely critical in evaluating the merits of the Merger and the valuation of FITG in the share exchange ratio.

260. The Defendants, however, did not address or assess these issues and did not even arrange for SCI to conduct due diligence on, and a detailed analysis of, FITG, as FITG had done on SCI.

261. This harm from this was exacerbated by the fact that, due to the "clever structure of the deal" (Harley Ex. 11) (as a "reverse merger" – Hawthorne Dep. 193), the minority shareholder had no vote on the Merger.

262. Even the SCI minority shareholder protection privileges in Article VI of its charter (Tessoni Ex. 15), which ordinarily would have required a supermajority of the minority shareholders to approve even a reverse merger, would be inapplicable once the "co-opted" Tessoni approved the deal.

263. In other words, the SCI minority shareholders had no right to vote to disapprove of the Merger and were completely powerless and unable to protect their interests in any way. They had no remedy.

SCI Board Creates a Special Committee to Consider the Merger but It Is Fatally Flawed

264. In response to the WLR proposal, on April 13, 2006, the SCI Board appointed Tessoni to the single-member special committee (the "SCI Special Committee") envisioned by Tessoni's prior approval of the waiver of the standstill agreement. (Tessoni Ex. 44.)

265. The obvious reason for appointing the committee was to shift, in any dispute regarding the Merger, the burden of proof so that the challengers would have the burden to show that the Merger was not “entirely fair,” rather than Defendants having the burden to show affirmatively that the Merger was “entirely fair.”

266. However, for the burden to shift, Defendants must demonstrate that “the special committee was truly independent, fully informed, and had the freedom to negotiate at arm’s length.” *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1121 (Del. Supr. 1994).

“Single Member” Special Committee Is Inherently Suspect Under Delaware Law

267. The first issue with Special Committee was that it was, by express agreement with Tessoni himself, to be limited to Tessoni alone.

268. In other words, WLR and Tessoni had engineered a critical Special Committee which would have Tessoni as its only member.

269. Apart from the inappropriateness of Tessoni and WLR engineering that, and apart from the fact that Tessoni had already been “co-opted” once by WLR, a single-member special committee is inherently suspect.

270. Indeed, by contrast, FITG’s bylaws expressly forbade committees of less than two members. That provision had to be waived when the FITG Board appointed a single member Special Committee to evaluate the Merger from its point of view. (FURSA-0040335.)

271. Even then, the single member on the FITG Special Committee expressly considered whether additional independent board members should be recruited so they could be on the special committee and assist in the evaluation of the Merger transaction. (FURSA-0035178.)

272. However, none of the Defendants gave any consideration to the question of whether additional independent persons should be brought on to the SCI Board for service on the SCI Special Committee in evaluating the Merger.

273. While there is no legal requirement that a special committee have more than one member, according to the Delaware Court of Chancery, “a single-member special committee” is “a worrisome portent of unfair dealing.” *Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1149 (Del. Ch. 2006).

274. The Delaware Supreme Court has also stated that a single-member Special Committee is “oxymoronic and unwise.” *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022, 1034 (Del. Ch. 2004); *aff’d* 872 A.2d 559 (Del. S.Ct. 2005).

275. The Delaware Chancery Court has said that a single member special committee must meet “unyielding standards of diligence and independence.” *Sutherland v. Sutherland*, 2007 WL 1954444 n.10 (Del. Ch. 2007).

276. Further, “[i]f a single member committee is to be used, the member should, like Caesar’s wife, be above reproach.” *Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del.1997) (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch.1985).

***Tessoni Had Inadequate Experience and Expertise
to Handle Such a Role by Himself***

277. Given the challenge of having a legitimate single-member special committee, one would expect that the “single member” on the committee would have exceptional expertise and qualifications.

278. Tessoni had nothing of the sort. While he is a professor of accounting, he does not handle finance or mergers and acquisitions or teach courses in those areas (Tessoni Dep. 17 & 20).

279. He has never been hired to consult regarding a merger or acquisition and does not consider himself an expert in mergers and acquisitions. (Tessoni Dep. 27 & 29.)

280. And he had never served on a single member special committee prior to being on the Board of SCI. (Tessoni Dep. 806.)

281. Indeed, in deposition he could only identify one prior merger/acquisition that he had been involved in. That was in 1998 when he was on the board of ACC Corporation, which was acquired. (Tessoni Dep. 272-73.) He did not serve on a special committee in that case, but was merely a member of the board.

282. In addition, that transaction was much simpler. It did not, for example, involve a shareholder who controlled both companies or one private and one public company. (Tessoni Dep. 275.)

283. Tessoni had also never been involved in a merger where advisers were hired to “get in and verify and double-check the numbers that the other party was claiming.” (Tessoni Dep. 567-68.)

284. However, according to defendant Wax, that is precisely what was done by WLR itself in connection with its arm’s-length acquisition of BST during the same time period as the SCI-FITG Merger. (See Paragraph 350 below.) It is what should have been done here.

285. In addition, Tessoni had never even heard of the concept of an “earn-out” in a merger (Tessoni Dep. 748-49), a very basic concept in business mergers and acquisitions.

286. Indeed, he found the SCI-FITG merger so unusual that afterwards he wrote a case-study based on it, with “ABI” the pseudonym for SCI, “WFC” the pseudonym for FITG, “Maxim Funds” the pseudonym for WLR, “Dr. Prosser” the pseudonym for himself. (Tessoni Ex. 80; Tessoni Dep. 1100.)

287. The case-study includes a number of very interesting observations under the heading “Unique Features of the Proposed Merger”:

A. “For starters, Maxim Funds was the majority stockholder in both firms. In a certain sense, the merger was a done deal once Maxim Funds made the decision.”

B. In practice, however, given the ownership structure, the minority shareholders had no choice but to acquiesce to the merger.”

C. “So, in theory, this merger was not conducted in the presence of robust monitoring by markets.”

D. Another unique feature was that WFC was privately held while ABI was publicly held. This created certain problems in evaluating the potential merger. All of the information concerning ABI was contained in publicly filed documents that were available to all interested parties.”

E. “In sharp contrast, as a privately held company, WFC was not required to file public documents concerning its financial performance and other matters. As a result information provided by WFC was not subject to the same oversight as publicly filed documents.”

F. “Making matters even more complex was the fact that the Maxim Funds controlled both ABI’s and WFC’s Board of Directors. As a matter of fact each company’s Board had only one independent director among its members: Mr. Stevenson for WFC, and Dr. Prosser for ABI.”

G. “They knew that they would be at risk if the terms of the merger favored the minority shareholders of either one of the companies at the expense of the other. They each realized that they would need to engage legal and financial experts to assist them in performing their required due diligence.”

(Tessoni Ex. 80, emphasis added.)

288. Notwithstanding his after-the-fact recognition of the challenging issues in the SCI-FITG merger, Tessoni did not retain any expert advisers other than RSM and Nixon Peabody.

289. Most critically, he did not retain any strategic or marketing experts, or any textile or automotive experts. (Tessoni Dep. 785-86.)

***Tessoni Was Not Independent
or Disinterested As To the Merger***

290. Also in the spirit of a single-member special committee needing to be “like Caesar’s wife, above reproach,” one would expect that the single member would be absolutely insulated from influence by the interested parties.

291. Tessoni, however, had a major financial interest in keeping in the good graces of WLR, which is probably why WLR had been able to “co-opt” him when it came to the second waiver of the standstill agreement.

292. Tessonni earned \$114,416 from his service on the SCI Board in 2006. (Tessonni Ex. 1 at 11.) In 2007, he earned \$91,250 from his service on the SCI Board. (*Id.* at 16.) In 2008, he earned \$80,750 from his service on the SCI Board. (*Id.* at 21; Gorga Ex. 291 at 22.) And in 2009, he earned \$67,000 from his service on the SCI Board. (Gorga Ex. 292 at 59.)

293. As he has testified, his income from SCI was approximately fifty percent of his 2006 income and approximately 40% thereafter. (Tessonni Dep. 52.)

294. And, as he admitted in deposition, he served completely at the discretion of WLR. (Tessonni Dep. 55 – “With Wilbur Ross or the Ross funds controlling 75 percent of the stock of Safety, your election was obviously subject to their decision to re-elect you, correct? A. Correct. Q. So it was subject to their -- it was their decision whether you would be a board member or not, correct? A. Correct.”)

295. Tessonni’s term on the SCI Board was scheduled to end at the next shareholder meeting.

296. Upon information and belief, if he had not gone along with WLR and approved the Merger, he would not have been re-elected to the board. This would have ended his income from his SCI board service.

297. Accordingly, he was neither independent nor disinterested with respect to the approval or disapproval of the Merger. *See In Re Emerging Communications, Inc.*, 2004 WL 1305745, *34-35 (Del. Ch.) (“expectation [of continuing board service], coupled with the fact that his director and committee fees represented a sizeable portion of his income, was sufficient to vitiate Vondras’ independence for purposes of considering objectively whether the Privatization was fair to the minority stockholders”).

The SCI Special Committee Was Not Allowed To Consider Other Transactions

298. Yet another issue with the single-member special committee was that its authority was strictly limited to “review, evaluate, investigate, negotiate, and approve the terms of any Potential Transaction,” and “Potential Transaction” was limited to transactions with Ross affiliates. (Tessonni Ex. 44, emphasis added.)

299. Thus, Tessonni had no authority to consider or solicit other offers from or transactions with other companies in arms-length transactions.

300. Tessonni testified that he could only “deal[] with the transaction that was in front of me” (*Id.*)

301. This was fatal since it prevented Tessonni from conducting the negotiations like a non-captive company would do, as would actually happen in a real arm’s-length deal.

302. This obviously was to the harm of SCI. As Tessonni himself admitted in deposition, an “alternative to the Ross transaction” might have been in the interest of the company and the minority shareholders by producing a “much more robust price or something along those lines for a variety of reasons” (Tessonni Dep. 840, emphasis added.)

The Special Committee Was Not Fully Informed

303. In addition, as noted in more detail below (Paragraphs 464-478), RSM's valuation of FITG was based on a strategic plan from FITG dated August 17, 2006, which, in the words of Wilbur Ross, included deals that "have been neither agreed nor contractualized." (Wax Ex. 477 at 2.)

304. After sending the August 17 forecast to RSM and at the direction of defendant Wax on August 24, 2006, FITG created a new strategic plan that included only projects where the "financing is currently in place or [FITG can say] it is a 'done deal' with a term sheet." (Wax Ex. 428.) Among other things, a potential acquisition of certain assets from Delta Woodside was removed from the strategic plan spreadsheets.

305. The revised model showed a dramatic reduction in projected sales, net income, and Pro Forma EBITDAR for FITG's business versus the August 17 model which the financial advisers for SCI and FITG's Special Committees had utilized in their analysis. Indeed, the key number for the RSM discounted cash flow ("DCF") valuation, projected 2010 EBITDAR, dropped from \$105 million to \$77 million, a drop of more than 25% (numbers in thousands):

Revenues	2006	2007	2008	2009	2010
8/17 Plan (sent to RSM)	\$610,178	\$778,150	\$939,161	\$1,047,582	\$1,112,999
8/28 Plan	\$610,178	\$699,423	\$848,583	\$907,149	\$963,323
Change	\$0	(\$78,727)	(\$90,578)	(\$140,433)	(\$149,676)
Percent Change	\$0	-10.12%	-9.64%	-13.41%	-13.45%

Net Income (Loss)	2006	2007	2008	2009	2010
8/17 Plan (sent to RSM)	(\$19,341)	(\$9,430)	\$13,956	\$30,415	\$38,106
8/28 Plan	(\$19,586)	(\$11,267)	\$7,808	\$14,063	\$17,796
Change	(\$245)	(\$1,837)	(\$6,148)	(\$16,352)	(\$20,310)
Percent Change	-1.27%	-19.48%	-44.05%	-53.76%	-53.30%

Pro Forma EBITDAR	2006	2007	2008	2009	2010
8/17 Plan (sent to RSM)	\$973	\$30,845	\$75,995	\$98,171	\$105,163
8/28 Plan	\$673	\$27,293	\$64,535	\$73,304	\$77,803
Change	(\$300)	(\$3,552)	(\$11,460)	(\$24,867)	(\$27,360)
Percent Change	-30.83%	-11.52%	-15.08%	-25.33%	-26.02%

(Spradling Ex. 338.)

306. Using the August 28 model numbers in RSM's DCF valuation, even without correcting the many other issues in the RSM Discounted Cash Flow valuation model (discussed below, Paragraphs 433-486), reduces the valuation of FITG by more than \$150 million to just over \$58 million.

307. RSM and the SCI Special Committee should have been, but were not, informed that the projections for FITG that they were given included deals that had "neither been agreed nor contractualized," and should have obtained a model that did not include such deals.

The Special Committee's Financial Adviser Was Inadequate

308. Finally, as shown below, RSM was inadequate as an adviser to the Special Committee since it had never done a fairness opinion before, had limited experience in the automobile and textile markets, and, through a sister company, had done work for and had deep relationships with FITG.

309. The extensive issues with the Special Committee as alleged above, without reference to the quality of its work or its advisers' work, make it insufficient to shift the burden of proof from Defendants to prove that the Merger was "entirely fair."

The Pressure on Tessoni – The Selection of RSM

310. After appointment as the single-member Special Committee, Tessoni continued the engagement of the law firm, Nixon Peabody LLP ("Nixon Peabody"), as his legal adviser.

311. The first choice for his financial adviser, Wachovia Securities, declined when they were asked not merely to render an "opinion" but also to serve as an adviser. That was considered a conflict of interest. A second candidate, Raymond James, was not retained for reasons unknown.

312. Tessoni was under tremendous pressure from WLR to retain a financial adviser so the Merger could proceed rapidly.

313. Indeed, he reported to his counsel, as noted in a July 24, 2006 email, that he was "get[ting] daily calls from his Ross colleagues regarding the status of the engagement of a financial adviser." (Tessoni Ex. 84.)

314. James Locke of Nixon Peabody reported that Tessoni "has been pounded upon relentlessly by a Mr. Wax (a WL Ross executive)." (Tessoni Ex. 85.)

315. Wax explained that the urgency was driven by WLR's desire to have an IPO for the Combined Company in 2007. (Wax Dep. 534.)

316. As a result of Wax's pressure, defendant RSM was engaged by the SCI Special Committee on July 28, 2006.

RSM's Lack of Experience and Potential Conflict of Interest

317. RSM had never done a fairness opinion before (RSM Ex. 74 at MCM016185), a fact which was not disclosed to or discovered by Tessoni.

318. Further, RSM had no significant expertise in the textile industry.

319. In fact, RSM had intentionally offered a low bid to secure the SCI fairness opinion work to build that practice and, hopefully, obtain further work from the merged company and from WLR.

320. An RSM email on August 29, 2006, states: "Mats [the attorney who referred the work to them] should be happy, we made him look good, and quid pro quo, we cut our teeth, made 275k and got a Wilbur Ross tombstone." (RSM Ex. 85, emphasis added.)

321. An RSM email on September 7, 2006, states: "they paid us \$275K for three weeks work to tell them the deal was fair. Next one we can charge 350K. . . We 'bought' this one." (RSM Ex. 78, emphasis added.)

322. Within months of the close of the Merger, RSM was in fact invited to and did bid on further fairness opinion work for the Combined Company, including an opinion regarding the pricing/conversion of certain stock and an opinion regarding the Combined Company's acquisition of BST, another company in the WLR portfolio.

323. The work went to SunTrust Robinson Humphrey ("SunTrust"), which had been the fairness advisor for the FITG Special Committee in connection with the Merger.

324. Upon information and belief, if RSM had not found the Merger to be fair, from a financial point of view, it would have not been invited to bid for the later fairness opinion work. Further, if the Merger had not gone through, there would not have been the other fairness opinion work.

325. Moreover, in addition to being invited to bid on further fairness opinion work for NITG and WLR, within three months of the close of the Merger, RSM's affiliate company McGladrey & Pullen ("MP"), was retained by WLR to provide advice in connection with WLR's acquisition of BST US Holdings, Inc. and the transfer of it to NITG. It was paid over \$870,000 for these services in 2007. (RSM Ex. 76.)

326. Upon information and belief, the use of RSM's sister company for this extensive work was a reward for RSM's approval of the SCI-FITG merger or evidence of the close relationship between the RSM companies and FITG and WLR or both.

327. In any event, RSM had discovered in its conflict check for this fairness work for SCI that FITG was a client of its sister company, RSM McGladrey, Inc. ("RSM"). (RSM Ex. 79.) RSM and RSM were both owned by H&R Block. (RSM Ex. 17 at MCM010410.) RSM included a review of clients of RSM (and McGladrey & Pullen – see below) in its conflict check process.

328. The services the RSMM provided to FITG included auditing of the FITG pension plan and general advice concerning Sarbanes-Oxley compliance. (Smith Dep. 565-66.)

329. The auditing services were provided through McGladrey & Pullen, LLP ("MP").

330. RSMM employees and directors were also partners of MP. And the work of MP was considered work of RSMM for purposes of conflict checks. (E.g., RSM Ex. 79 – Keith T. Wallace is listed as "Managing Director – RSM McGladrey, Inc." and "Partner – McGladrey & Pullen, LLP.")

331. Further, RSM presented MP to the world as affiliated with it. (See RSM Ex. 17 at MCM010410.)

332. The relationship between MP and FITG was long-standing and close.

333. Defendant Gary Smith, the CFO of FITG, had been dealing with MP throughout his career. (Smith Dep. 564-65.)

334. As shown above, in 2007, NITG/WLR retained MP for over \$870,000 worth of work flowing from the acquisition of BST.

335. Finally, RSMM was reporting to the FITG Board itself on August 17, 2006, in a board meeting that dealt in part with the Merger. The PowerPoint presentation for that meeting included the following bullet:

- McGladrey Phase I Deliverable Reviewed
 - Updated location and process strategy
 - Will update numbers after year-end to include most recent financial results and completed transactions.

(Wax Ex. 465, FURSA-0035459.)

336. Notwithstanding these facts, RSM advised the SCI Special Committee that it had no conflict of interest.

337. In a letter to Nixon Peabody dated July 24, 2006, RSM wrote: "The key determinant in concluding whether a conflict arises is whether or not the ITG pension plan holds a direct investment in the shares of ITG or SCI. In the case, the pension plan does not directly hold shares of either firm. As a result, there is no conflict." (Tessoni Ex. 16 at 2.)

338. The attorney at Nixon Peabody who researched the issue wrote on July 19, 2006, that RSM was not "specifically 'conflicted out'" from providing a fairness opinion under SEC rules, but felt that they should "disclose in the proxy statement . . . the relationship" between RSM and FITG. (Tessoni Ex. 84 at 2, emphasis added.)

339. Under RSM's own analysis, RSM would have had a conflict if FITG's pension plan had held FITG stock, even though the audit work was done by RSM's sister company, and not RSM itself.

340. In any event, Tessoni did not inquire into the relationship between RSM and its related entities and FITG.

341. Hence, notwithstanding RSM's affiliate company doing work for FITG and having a long-standing relationship with FITG and key personnel, and notwithstanding RSM having never done a fairness opinion, and notwithstanding RSM having little or no expertise in the automobile or textile industry, Tessoni retained RSM as the financial adviser to the SCI Special Committee.

***The RSM Engagement Agreement – Limitations Rendered
It of “Questionable Reliability”***

342. The Engagement Agreement entered into between RSM and SCI provided that RSM could “rel[y] upon and assume[] the accuracy and completeness” of information provided by SCI, and disclaimed “any obligation to verify” any of the information provided to it. (RSM Ex. 13 at FURSA-0690916-17.)

343. According to the Supreme Court of Delaware, such limitations to a fairness opinion, including specifically reliance on information submitted by the parties to a transaction and failure to verify such information, render a fairness opinion of “questionable reliability.” See *In Re Tri-Star Pictures, Inc., Litigation*, 634 A.2d 319 (Del. Sup. 1993), citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 706-07 (Del. Sup. Ct. 1983).

344. This is doubly true here, where the party supplying the information (FITG) was expressly excused from any responsibility to ensure that the information it was supplying was complete or accurate. The July 31, 2006, agreement RSM signed in order to gain access to FITG's confidential information stated:

EquiCo [RSM] understands that neither [F]ITG nor any of its directors, officers, agents or representatives makes any representation or warranty as to the accuracy or completeness of any Confidential Information, and EquiCo agrees that such persons shall have no liability to EquiCo resulting from any use of Confidential Information.

(RSM Ex. 60 at 2, emphasis added.)

***RSM Questioned But Did Not “Vet” FITG Numbers,
Violating Normal Practice***

345. RSM's representatives conducted one meeting with ITG management. (Smith Ex. 113.) RSM kept no notes from this short meeting. RSM did think FITG's projections were “optimistic,” and it “flagged” them for Tessoni as a “risk” (RSM-Choy Dep. 243).

346. And its presentation noted: “Very aggressive projections in terms of revenue growth and margin improvement” and “Projections contingent upon raising a substantial amount of outside equity and debt which could prove challenging given the current performance of the company.” (Tessoni Ex. 7 at 48.)

347. However, RSM did not consider it part of its “mandate” to “vet numbers that we received” or to “vet any numbers.” (RSM-Choy Dep. 510 & 512.)

348. Indeed, as already noted, RSM testified that it was not even required to make sure that the numbers it was using were “reasonable and justified.” (*Id.* at 98-99.)

349. However, according to defendant Wax, it is “normal” for a “buyer’s financial advisor to vet or otherwise review the targets, projections, and if they weren’t comfortable with the projections or if they disagreed with certain aspects of the projections, to recast those projections to be consistent with what they thought were proper assumptions or not proper as though the assumptions were improper. I think the right terminology would be to recast the assumptions so that the assumptions were assumptions they were more comfortable with.” (Wax Dep. 235-36.)

350. In fact, in WLR’s arms-length acquisition of another automobile airbag company in 2006, BST, WLR specifically engaged a financial adviser with expertise in the automobile industry so that the adviser could determine whether BST’s projections were reasonable or not. The adviser (BBK) was not comfortable with BST’s projections and did its own projections for BST. (Wax Dep. 228 & 235-37.)

351. Despite finding the FITG projections “optimistic” and “flagg[ing]” them based on such knowledge as it did have, RSM did not consult with any industry expert to evaluate whether FITG’s projections were actually realistic and did not recommend that such expertise be obtained. (See RSM-Choy Dep. 244-46 – RSM’s corporate designee “could not recall” any expert being consulted.)

352. In fact, no one with expertise in the textile industry and the ability to evaluate FITG’s strategic plan and projections was brought in to evaluate the proposed Merger on SCI’s behalf.

353. FITG’s projections supplied to RSM assumed a “compounded annual growth rate” (“CAGR”) in revenue from 2006 through 2010 of 16.2%. They assumed a CAGR in “Adjusted EBITDA” of 222.4%. (RSM Ex. 58 at 49.)

354. These kind of growth rates are often described as “hockey stick” rates. They were not merely “optimistic,” as RSM observed, but in fact were unrealistic.

355. Even Wilbur Ross himself recognized that FITG was forecasting a “huge turnaround” in EBITDA and questioned whether it made sense to “risk SCI” by merging it with FITG. (Wax Ex. 472 at 1.)

The Merger Agreement – Unfair to SCI

WLR Refuses To Provide Warranties

356. Parallel to RSM’s work, the SCI Special Committee legal counsel, Nixon Peabody, was considering the merger agreement itself. It found that the first draft lacked meaningful protections for SCI against breaches of warranties and representations.

357. On July 24, 2006, Nixon Peabody submitted a counter-draft that included a provision where “the controlling shareholders of ITG (the WL Ross entities) would indemnify SCI with respect to damages arising from certain breaches of representations, warranties and covenants of ITG for a certain period of time following the closing” (Tessoni Ex. 61 at 3.)

358. As Nixon Peabody later wrote on August 9, 2006:

We and our client believe that such post-closing indemnity protection is fair and is consistent with the ‘market’ for a transaction like this which involves a private company such as ITG. In addition, even in the context of a disposition of a publicly-traded company, we believe that it is not unusual for a controlling stockholder to provide post-closing indemnification obligations. Your client is in the best position to assess the risks associated with the assets, liabilities, and operations of ITG.

(*Id.*, emphasis added.)

359. On July 28, 2006, Jones Day, counsel for the WLR entities, rejected this proposal. (*Id.*)

360. On August 1, 2006, Jones Day indicated the WLR “might be willing to consider some form of mutual cross-indemnification from the ITG stockholders and the SCI stockholders.” (*Id.*)

361. Nixon Peabody rejected this proposal because it

does not provide for a meaningful and fair indemnity for the parties because (1) it requires the minority stockholders of SCI to provide indemnification, a very difficult and inappropriate request for minority stockholders of a public company, and (2) we believe it would be difficult, if not impossible, to identify and legally appoint truly independent stockholder representatives of the SCI stockholders and the ITG stockholders who would be willing to monitor and fairly administer such claims related to this mutual cross-indemnity following the closing.

(*Id.*)

362. On August 9, 2006, Nixon Peabody wrote: “We continue to believe it is appropriate for the WL Ross entities, as the controlling stockholders of both ITG and SCI and the proponents of the merger transaction, to be responsible for any material undisclosed liabilities of ITG and breaches of other representations, warranties and covenants of ITG for a reasonable time after the effective time of the merger.” (*Id.* at 3-4.)

363. Nixon Peabody further stated that it had “recommended that the [SCI] Special Committee not approve a transaction with ITG which does not provide reasonable post-closing indemnity protections.” (*Id.* at 4.)

364. According to the August 9, 2006, letter, the Special Committee concurred with Nixon Peabody's recommendation and "believes that it is in the best interest of the stockholders of SCI to suspend our legal work related to these negotiations at this time." (*Id.*)

365. The letter concluded with the following sentence: "Should your client change its position and be willing to negotiate a Merger Agreement which contains a fair and meaningful post-closing indemnity for SCI, please contact us so that negotiations may re-commence." (*Id.*)

366. This letter had the effect of temporarily suspending negotiations on the Merger agreement.

367. It was clear, however, that a deal would be reached one way or another. Indeed, in an email one day later, August 10, 2006, defendant Smith called RSM to request that it continue its work on the fairness opinion for SCI. (RSM-Choy Ex. 25.)

368. The call illustrated the inappropriate relationship between RSM and ITG since RSM was not ITG's client on this matter. (Choy Dep. 247-248.) Smith's willingness to overstep his bounds in this manner confirms his long-standing a close relationship with its sister company. (See Paragraphs 333 & 327-332 above.)

369. In any case, Smith told RSM that "the Nixon Peabody request on indemnification will not be met, but they are working on alternatives to try to get around the issue." (RSM-Choy Ex. 25.))

370. RSM told Smith that it could appreciate the "certainty of close" for the transaction." (*Id.*)

371. Late on August 15, Ross spoke privately with Tessori, out of the presence of any advisers, and made a proposal for a mutual cross-indemnification from the ITG stockholders and the SCI stockholders. Jones Day sent a copy of the proposal to Nixon Peabody the following day. (Tessori Ex. 64.)

372. The proposal did not solve the problems with cross-indemnification that had been identified by Nixon Peabody in its August 9, 2006, letter referenced above. Further, even claims of fraud would be exclusively subject to the indemnity just like all other claims.

373. Nevertheless, at the direction of Tessori, on August 16 Nixon Peabody sent back to Jones Day a revision of the indemnification proposal. (Tessori Ex. 65.) Among other changes, the revision "carve[d]-out claims based on fraud." It also stated that "it would be a term of the merger agreement that the post-merger independent director or directors of SCI are appointed as the shareholder representative(s)" to deal with post-closing claims by SCI against ITG.

374. On August 17, 2006, Jones Day conveyed an updated draft of the Merger agreement with the indemnification provisions within it. (Tessori Ex. 14.) The indemnification provisions were accepted by the SCI Special Committee. (Tessori Ex. 5 at 6.)

375. The August 17 draft of the merger agreement explicitly identified Stephen Bosworth (who was the FITG Special Committee member) as the "ITG Stockholder

Representative” for purposes of the mutual indemnification provision. (Tessoni Ex. 13 at 43, §8.1(e).)

376. It did not, however, identify anyone specific as the “SCI Stockholder Representative.” Instead, it merely indicated that the SCI Stockholder Representative would be one of the independent members of the board of directors:

Effective as of the Effective Time, SCI shall appoint and authorize the SCI Stockholder Representative as the shareholder representative of SCI with exclusive authority to investigate, prosecute, defend, negotiate and settle Indemnity Claims on behalf of SCI. “SCI Stockholder Representative” shall mean, at any time there is only one member of the Board of Directors of SCI who is not an Affiliate of WL Ross & Co. LLC or an employee of SCI or any Subsidiary thereof (an “*SCI Independent Director*”), such SCI Independent Director, and, if there is at such time more than one SCI Independent Director, the SCI Stockholder Representative shall be the SCI Independent Director so appointed to act by a majority of the SCI Independent Directors.”

(*Id.*)

377. In other words, the person who would serve as the SCI Stockholder Representative was left open till the “Effective Time” of the Merger, which was when the Certificate of Merger was filed after the Closing date. (*Id.* §1.3.) At that time, he would be selected by and from the independent members of the board. Ultimately, Tessoni became the Stockholder Representative for SCI.

378. The Merger agreement was unfair to and inappropriate for SCI for additional reasons as well. Among other respects:

The Indemnity Did Not Exclude Fraud

379. Ultimately, the carve-out for “fraud” requested by Nixon Peabody on August 16 was removed from the final Merger agreement. Fraud claims were exclusively covered by the indemnity and subject to a cap of ten percent of the stock issued to FITG. The only distinction was that they were not subject to the one million dollar “threshold” for claims. (Duerk Ex. 1 at 60 [Merger Agreement §§8.1 (h) & (i)].) SCI had no right to pursue any other remedy for fraud.

The Indemnity Was Less Valuable the Greater the Breach

380. The value of the indemnity, by being paid in stock of NITG, decreased in value with the degree of the breach. Hence, it had the perverse effect that the greater the breach, the less the remedy.

The Indemnity Disproportionately Disadvantaged SCI

381. The limitations of remedies to the indemnity was far more disadvantageous to SCI than FITG.

382. SCI was a public company. Information about it was publicly available. FITG was a private company, with very limited information publicly available.

383. FITG had also conducted extensive diligence on SCI for many months. It had superior knowledge as to what it was getting. Further, it could reasonably judge the risk associated with waiving its rights regarding claims for breaches of representations, warranties, fraud, etc.

384. SCI had done no diligence on FITG. SCI had no idea what it was getting. And it could not judge the risk associated with waiving its rights regarding claims for breaches of representations, warranties, fraud, etc.

***No Truly Independent Board Representative
Protected the SCI Minority Shareholders***

385. There was no “truly independent” representative to protect the interest of the SCI stockholders.

386. Tessoni was not truly independent from WLR and did nothing in his role as SCI Shareholder representative after the Merger to protect the interest of the SCI minority shareholders.

387. Indeed, Tessoni felt that he had no duty over and above his general duty as a director of the corporation. (Tessoni Dep. at 76-77.) He could not remember doing anything in that role. (*Id.* at 69-70.) He never made or considered making any claim for indemnification. (*Id.* 923)

No Earn-Out on the Consideration to FITG

388. An “earn-out” on the consideration to be paid for FITG shares was appropriate since all of the value of FITG was, as RSM recognized, in the future: the “[v]aluation drivers for ITG are back-end loaded 100%.” (See Paragraph 402 below.)

No Real Protection for SCI for False FITG Information

389. The agreement provided no consequence if FITG had produced false or misleading information in connection with the Merger which SCI had relied on. The only possible consequence was with respect to information that appeared in the S-4. Even then, the consequences were limited to the indemnification provision with its glaring flaws.

No Fiduciary Duty Out

390. The agreement also did not include a “fiduciary duty out” or a provision that would have allowed either side to cancel the agreement if going through with it would have caused a breach of fiduciary duty. (WLR, however, did have the ability to terminate the Merger because it controlled both sides of the transaction.)

No Go-Shop Provision

391. In addition, the agreement did not include a “go shop” provision which could have mitigated the failure to conduct an auction or market test for SCI. It would have enabled the SCI directors to reach agreement with FITG, but then have a period of time to consider and even solicit other bids in order to fulfill the board’s fiduciary duties to SCI and its shareholders.

FITG and WLR Improperly Communicated With RSM

392. The August 10, 2006, call from defendant Smith to RSM to request that RSM continue its work on the fairness opinion despite the indemnification issue (RSM-Choy Ex. 25) is an example of an inappropriate contact with the fairness adviser working for SCI and, as noted above (Paragraphs 367-370), an example of the inappropriate relationship between Smith/FITG and RSM.

393. Another example of interference is a call on August 18, 2006, from David Wax.

394. By email at 9:02 that morning, Ross told Wax that “[a]s of yesterday, we were told that the FAs [fairness advisers] on each side were not signed off,” and asked him to “[p]lease follow through with them.” (Ross Ex. 740.)

395. Wax spoke with RSM (and also SunTrust) that afternoon. (Wax Ex. 468.) In his deposition, he claimed not to remember the substance of the conversation. (Wax Dep. 589.)

FITG Requests a Higher Share of the Combined Company

396. As previously noted, WLR’s original proposal called for SCI shareholders to end up with 38.2% of the Combined Company and ITG shareholders to end up with 61.8% of the Combined Company. This was based on the book values of the two companies as of June 30, 2006, with SCI’s book value discounted by 10%.

397. Unfortunately for SCI, the WLR proposal had a misprint and stated the ratios as 65/35.

398. By August 22, 2006, this issue had reared its head and the FITG Special Committee asked for a greater share of the Combined Company.

399. By this point, RSM had essentially completed its work and prepared a proposed fairness opinion endorsing the original exchange ratio proposed by WLR on May 30, 2006 (adjusted for the indemnity provision). (RSM Ex. 33b.)

400. However, the FITG Special Committee insisted that FITG had off-book assets of approximately \$100 million so that the original book value to book value (with SCI’s BV discounted by 10%) formula was not fair to it. (Tessoni. Ex. 5 at 7.)

401. An “all-hands” meeting was scheduled for August 22, 2006, at 6:00pm between the SCI Special Committee, RSM and Nixon Peabody. (*Id.*)

***RSM Document Shows FITG Not Worth
What Had Already Been Proposed***

402. In preparation for the all-hands meeting, RSM prepared a “script” (the “Script”) to be used in discussions with the ITG Special Committee and its advisers which read as follows:

Script Outline of Response to ITG (Our Side Only)

- Holistic concept
 - The entire transaction (i.e., PSA) was forged with the agreed upon exchange ratio in mind
- Slippery slope
 - There has been significant thinking in place around the book value and a fair premium concept.
 - Opening up the overall valuation is a Pandora's Box.
- Undervalued assets
 - Already addressed by the 0.9 multiplier
 - SCI has undervalued assets as well = slippery slope
 - Exercise in futility – Won't necessarily agree to each other's specific detailed “exploded” version of value = treadmill to nowhere
 - Huge time sink with no clear finish line
- Other important considerations
 - The book value calculation was chosen to be fair
 - Non-exploitive to ITG
 - Accelerated the deal's formation
 - However, book value is still a distortion of true equity value, but we can live with it
 - ITG's current levels of earnings (EBITDA, EBIT and Net Income) do not support the implied equity valuation given to ITG
 - We have been generous not to exploit this. Fair.
 - Near term, SCI would be contributing all of the positive free cash flows in the post-merger entity
 - Post-merger, free cash flow will be lower when combined due to ITG “drag”
 - Execution risk of planned debt and equity capital raise not factored into book value calculation
 - The projected time and magnitude of the capital raise appears optimistic
 - Execution risk of pro forma projections are not factored into book value calculation
 - Valuation drivers for ITG are back-end loaded 100%
- What's fair?
 - We have listened to the points and respectfully feel the deal's agreed upon exchange rate is fair to both parties

(Tessoni Ex. 22 at 2.)

403. Some of the key points from this Script are that RSM, the supposed independent financial adviser for SCI, thought:

- A. The transaction was a “done deal” when WLR proposed the original ratio:
“The entire transaction (i.e., PSA) was forged with the agreed upon exchange ratio in

mind.” This was consistent with it already having drafted as of August 18, 2006, a fairness opinion approving the original split.

B. FITG’s undervalued assets were already addressed by WLR by discounting SCI’s book value by 10%. Wax and Smith have both testified that the 10% discount to SCI’s book value was to address the fact that FITG had undervalued assets. (Wax Dep. 464; Smith Dep. 451-53).

C. SCI had undervalued assets also that had not been accounted for.

D. It would take too long to properly value each side’s assets.

E. That “book value” itself was a “distortion of true equity value,” but that the SCI Special Committee was prepared to “live with it.”

F. That “ITG’s current levels of earnings (EBITDA, EBIT and Net Income) do not support the implied equity valuation given to ITG.”

G. That the SCI Special Committee was being “generous not to exploit this.”

H. That “[n]ear term, SCI would be contributing all of the positive free cash flows in the post-merger entity.”

I. That “[p]ost-merger free cash flow will be lower when combined due to ITG ‘drag.’”

J. That the “[e]xecution risk of planned debt and equity capital raise not factored into book value calculation.”

K. That the “projected time and magnitude of the capital raise appears optimistic.”

L. That “[e]xecution risk of pro forma projections are not factored into book value calculation.”

M. That the “[v]aluation drivers for ITG are back-end loaded 100%.”

404. Incredibly, having essentially pointed out that FITG was not worth the exchange ratio that had already been proposed, RSM concluded the Script with: “What’s fair? / We have listened to the points and respectfully feel the deal’s agreed upon exchange rate is fair to both parties.”

405. In the all-hands meeting, under Nixon Peabody’s guidance, only minor changes were made to the Script:

A. In the first part the reference to “PSA” was changed to “proposed merger agreement” and “agreed upon exchange ratio” was changed to “proposed exchanged ratio”;

B. A line was included stating: "SCI has undervalued land, off balance sheet fixed assets and IP that has not been considered in detail";

C. The line stating that the use of "book value" to set the exchange ratio had "[a]ccelerated the deal's formation" was deleted;

D. The line "ITG's current levels of earnings (EBITDA, EBIT and Net Income) do not support the implied equity valuation given to ITG" was preceded by "Under the proposed exchange ratio";

E. The line "We have been generous not to exploit this. Fair." was stricken; and

F. In the last line "agreed upon exchange rate" was changed to "proposed exchange ratio."

(Tessoni Ex. 23 at 2.)

Tessoni Caved and Agreed To Higher Split for FITG

406. Early the following morning, August 23, 2006, an "all hands" meeting was held between the SCI Special Committee and its advisers and the ITG Special Committee and its advisers.

407. In this meeting, RSM went through the Script and explained to the FITG Special Committee and its advisers the "[SCI Special] Committee's rationale as to why the original proposed exchange ratio was fair to the parties." (Tessoni Ex. 5 at 9.)

408. Following that meeting, at 11:00 am, the SCI Special Committee met with its own advisers. In the follow-up meeting, it was decided that "RSM, on behalf of the Committee, would ask for a specific proposal from the ITG Special Committee" (*Id.*)

409. At 4:15 that same day, the SCI Special Committee met again with its advisers to discuss the proposal received from the ITG Special Committee. The ITG Special Committee had proposed an exchange ratio that would increase the ITG shareholders' ownership of the Combined Company from 61.8% to 67% and decrease the SCI shareholders' ownership from 38.2% to 33%.

410. This proposal had been made even though, as pointed out in the Script, "ITG's current levels of earnings (EBITDA, EBIT and Net Income) [did] not support the implied equity valuation given to ITG" even under the original exchange ratio. (RSM-Choy Dep. 421.)

411. At this meeting of the SCI Special Committee and its advisers, "it was agreed that Dr. Tessoni would contact the ITG Special Committee and set forth a counter-proposal whereby the post-merger ownership of the combined entity would be split 65% [ITG] (to pre-merger ITG stockholders) / 35% SCI (to pre-merger SCI stockholders)."

412. RSM was part of this agreement.

413. Shortly after the meeting, Tessori made that proposal.

414. That same afternoon, August 23, 2006, the proposal was accepted by the ITG Special Committee. (RSM Ex. 45.)

***By Agreeing to FITG's Request, Tessori Assured Himself a
Seat on the Board of the Combined Company, Thereby Protecting His Board Income***

415. On Friday, August 25, after the 65/35 split had been accepted, a new version of the Merger agreement was circulated which named Tessori as the SCI Shareholder Representative:

SCI Stockholder Representative.

(i) Effective upon the Closing Date, Dr. Daniel Tessori is hereby appointed, authorized and empowered to act as the SCI Stockholder Representative for the benefit of the holders of SCI Common Stock as the exclusive agent and attorney-in-fact to act on behalf of each of the holders of SCI Common Stock in connection with and to facilitate the consummation of the transactions contemplated hereby. For purposes hereof, "SCI Stockholder Representative" shall mean, at any time there is only one member of the Board of Directors of SCI who is not an Affiliate of WL Ross & Co. LLC, an employee of SCI or any Subsidiary thereof, or the ITG Stockholder Representative (an "SCI Independent Director"), such SCI Independent Director, and, if there is at such time more than one SCI Independent Director, the SCI Stockholder Representative shall be the SCI Independent Director so appointed to act by a majority of the SCI Independent Directors.

(Tessori Ex. 14 §8.1(e)(i).) This provision remained in the final merger agreement. (Duerk Ex. 1 at 56.)

416. Tessori, by means of agreeing to the mutual indemnification provision, which was not in SCI's interest, and by agreeing to the 65/35 split, which also was not in SCI's interest, had assured himself of a continuing presence on the SCI (then NITG) board after the Merger closed.

417. As already noted, this was highly significant for Tessori since his service on the SCI board was a major part of his income, approximately 50% in 2006 and 40% thereafter, and it was scheduled to come to an end at the next shareholder meeting. (See Paragraphs 292-296.)

418. Tessori was in fact re-elected to the SCI Board (then NITG) at the shareholder meeting on October 20, 2006, to serve until the 2007 annual meeting of stockholders. (Tessori Ex. 2 at 3-4; Tessori Dep. 54-55.)

419. Tessori was re-elected to the SCI (then NITG) board at the shareholder meeting on October 20, 2006, as a reward for approving the Merger.

420. Indeed, Tessori has continued to be re-elected to the SCI (then NITG) board because he approved the Merger and has not raised issues as the SCI Stockholder Representative.

RSM Undervalues SCI

421. On Sunday night, August 27, 2006, just before midnight, RSM supplied its fairness analysis to Tessori, a 65-page PowerPoint presentation. (Tessori Ex. 7.)

422. The following day, Monday, August 28, 2006, at 7:30 pm (EST), the SCI Special Committee met to consider RSM's presentation and vote on the merger. (Tessori Ex. 5, at 11.)

423. As reflected in the minutes, RSM presented its findings regarding the relative values of SCI and FITG and its opinion as to the fairness of the Merger.

RSM Fails To Apply Control Premium to SCI

424. As recorded in the minutes, RSM had concluded that SCI had an enterprise value of \$80 to \$95 million.

425. Even though it was supposedly working for SCI, it had calculated SCI's implied value per share at \$14.50 which was at the lower end of the valuation range, and less than the trading price of \$14.65 per share.

426. RSM explained that this was due, in part, to the fact that SCI "is an automotive supplier which is facing increasing competition, declining revenues, and profit margin contraction." (*Id* at 14.)

427. RSM applied no such discount to FITG even though it faced much greater issues and risk.

428. In any case, the \$14.50 per share equated to an equity value for SCI of approximately \$80 million.

429. RSM, without explanation, did not apply a "control premium" to the value of SCI, a standard procedure in these circumstances, resulting in SCI being undervalued. *Rapid-America Corp. v. Harris*, 603 A.2d 796 (Del. 1992); *Doft & Co. v. Travelocity.com, Inc.*, 2004 Del.Ch. LEXIS 75 (Del. Ch. 2004).

RSM Overvalues FITG

430. As to FITG, RSM calculated an enterprise value (equity plus debt) of \$250 to \$300 million, and an imputed share price of \$9.84. That equated to a market value of \$164.777 million. (Tessori Ex. 7 at 7.)

431. RSM reached this decision without distinguishing in any degree or even recognizing the work of Trenwith Valuation, LLC, in July 2005 which put the value of FITG's stock, at a time when its business was doing much better, at only \$6.78 share. (*See* RSM-Choy Ex. 16.)

432. RSM had been made explicitly aware of the Trenwith valuation. Even so, it ignored Trenwith's work and accepted an increase in FITG's value of over 45% at a time when FITG's business was declining. It did not even bother to raise the issue with Tessori.

433. Apart from this and the issues discussed above (this being RSM's first fairness opinion, RSM's conflict of interest, RSM buying the fairness opinion work, etc.), these conclusions by RSM were rife with errors including the following:

RSM Improperly Used Different Metrics for FITG than for SCI

434. In the "comparable companies" and "comparable transactions" analyses, RSM used for SCI projected 2006 EBITDA. (Tessori Ex. 7 at 25 & 28.)

435. However, in those analyses for FITG, RSM did not use FITG's projected 2006 EBITDA, but rather used FITG's book value as of June 30, 2006. (*Id.* at 43 & 46.)

436. Had RSM used the same metrics for FITG (projected 2006 EBITDA) as it did for SCI, FITG would have had a much lower value, indeed a negative value.

437. The failure to use the same metrics created an "apples-to-oranges" analysis of questionable validity.

RSM Improperly Disregarded Negative Metrics for FITG

438. RSM disregarded all analyses and metrics for FITG which led to negative values for FITG (such as "comparable companies" and "comparable transactions" using projected 2006 EBITDA, as noted above).

439. This was inappropriate given that FITG was being *merged* into SCI. In these circumstances the negative EBITA of FITG, for example, would be merged into the positive EBITDA, thus reducing the overall company EBITDA and the value of the merged company.

440. By disregarding negative values and metrics, RSM substantially skewed the value of FITG upward, increasing it by many millions of dollars.

RSM Improperly Disregarded Execution Risks of FITG

441. RSM explicitly recognized the fact that FITG's business plan was dependent on raising additional debt and equity.

442. This was noted in the RSM Script above (the "projected time and magnitude of the capital raise appears optimistic").

443. It was also noted in RSM's presentation to the Special Committee: "Projections [in FITG's strategic plan] contingent upon raising a substantial amount of outside equity and debt which could prove challenging given the current performance of the company." (Tessori Ex. 7 at 48.)

444. However, RSM applied no discount for the risk that the necessary debt/equity raises could be unsuccessful or delayed.

445. This had an enormous and highly material impact on the valuation of FITG, increasing it by many millions of dollars.

446. Likewise, RSM explicitly recognized the fact that FITG's business plan was dependent on "an aggressive plan to rationalize domestic assets, transfer technology, and shift production to low cost areas and it is often difficult to predict with accuracy the appropriate timeline for such an endeavor." (*Id.*)

447. As RSM had stated in the Script, "ITG's current levels of earnings (EBITDA, EBIT and Net Income) do not support the implied equity valuation given to ITG."

448. As noted above, Wilbur Ross himself felt that "[a]nyone who can read and write would know there was tremendous execution risk" in FITG's plan. (Ross Dep. 598.)

449. Again, however, RSM disregarded this difficult fact in determining its valuation for FITG. There was no discount applied to address this risk.

450. Indeed, RSM's DCF analysis (referenced below) failed to even consider the effect on the valuation of FITG if it did not achieve its projected sales and profits or if they were delayed. Its "sensitivity analysis" only considered if FITG did *better* than it had projected, not if it did worse. (RSM-Choy Dep. 306-07.)

451. This had an enormous and highly material impact on the valuation of FITG, increasing it by many millions of dollars.

RSM Improperly Disregarded Planned Dilution of FITG

452. RSM's valuation of FITG disregarded the dilution in share value that would occur from the debt and equity raises planned by FITG for 2006 and 2007.

453. These debt/equity raises were set forth explicitly in the August 17, 2006, strategic plan that RSM was basing its valuation upon and the plan was predicated upon them.

454. Disregarding this dilution had an enormous and highly material impact on the valuation of FITG, increasing it by many millions of dollars.

RSM Improperly Disregarded FITG's Under-Funded Pension Liability

455. RSM expressly found that ITG's pension plan, "if ITG terminated at this time, would result in a liability of approximately \$24.7 million to ITG." (Tessoni Ex. 5 at 14.)

456. However, RSM failed to take the under-funding into account in its DCF analysis, contrary to standard practice in the industry.

457. This failure caused the valuation of FITG to be substantially and materially overstated.

RSM Improperly Failed to Assess FITG's Claimed Off-Balance Sheet Assets

458. RSM made no analysis at all of FITG's claim of over \$100 million in off-book assets.

459. RSM simply accepted this claim at face value. (8/28/06 Min. at 5 (Tessoni Ex. 5).) As reflected in the minutes:

In fact, ITG's financial advisers had argued that some \$100 million in additional off-balance sheet assets of ITG should have been factored into the exchange ratio. RSM explained that, by way of example, if all of such off-balance sheet assets were fully credited to ITG, pre-merger ITG shareholders would have received ownership of approximately 72.6% of the company. RSM indicated that the agreed ownership split of 65% to pre-ITG stockholders and 35% to pre-merger SCI stockholders does reflect a slight premium in favor of ITG (as a result, in part, of the greater amount of ITG's assets), but that this premium was well less than the requested premium which ITG's advisers had suggested."

460. Apart from RSM's failure to assess these assets, these off-book assets were not worth \$100 million and in no way justified the Merger.

461. Indeed, their value, if any, was only meaningful in the context of a *liquidation* of FITG, and FITG was not being merged with SCI in order to be liquidated.

462. As Wax has testified: "the companies that we buy, you know, we're not buying bricks and mortar for the sake of buying bricks and mortar. We're buying businesses and we're looking -- we're arriving at a valuation based on a number of factors, but it's based on the income generation ability of the enterprise. . . . Something can have a lot of fixed assets and have no earnings, and it's not going to have a lot of value to us because we're not real estate investors." (Wax Dep. 235-35.)

463. That same analysis should have been applied by RSM in determining the equity value of FITG.

***RSM Improperly Used FITG Projections That Included
Unapproved or Uncertain Projects***

464. As already noted (Paragraph 303-309), RSM's valuation of FITG was based on a strategic plan from FITG dated August 17, 2006.

465. The plan, in the words of Wilbur Ross, included deals that "have been neither agreed nor contractualized." (Wax Ex. 477 at 2.)

466. The most prominent such deal was the possibility of acquiring the assets of Delta Woodside, a textile company headquartered in Greenville, SC.

467. The materials for the August 17, 2006, FITG Board meeting made clear that FITG did not at that time know whether “the acquisition of Delta Woodside was a realistic possibility.” (Wax Ex. 463 at 11.) Those materials were supplied to Wax on August 15, 2006, and the entire FITG Board (including Ross, Wax, Gorga and Smith – and WLR principal Pamela Wilson) prior to the August 17, 2006 Board meeting. (Wax Ex. 465.)

468. Indeed, in other spreadsheets emailed internally at WLR during this time period it was expressly noted that the calculations were “[b]ased upon offer letter to Delta, no agreement has been reached. Discussions are continuing. Cash spending based upon expected closing date if a transaction can be agreed upon.” (Gibbons Ex. 569, page 3, “Summary of Funding of Major Projects,” n.1.)

469. At the direction of defendant Wax on August 24, 2006, FITG created a new strategic plan that included only projects where the “financing is currently in place or [FITG can say] it is a ‘done deal’ with a term sheet.” (Wax Ex. 428.)

470. The revised model showed a dramatic reduction in projected sales, net income and Pro Forma EBITDAR for FITG’s business versus the August 17 model, as shown in the table in Paragraph 305 above. Indeed, the key number for the RSM discounted cash flow analysis, projected 2010 EBITDAR, dropped from \$105 million to \$77 million, a drop of more than 25%.

471. Using the August 28 model numbers in RSM’s DCF valuation produces a value for FITG that is dramatically less than the August 17 Model.

472. Without correcting other issues, the value for FITG based on the 13.1% discount rate and a multiple of 6.5x, was \$213.5 million based on the August 17 plan (Tessoni Ex. 5 at 49).

473. That value drops to \$58.6 million based on the August 28 plan (using RSM’s erroneous discount rate of 13.1%). (Tessoni Ex. 92.)

474. That is a drop of more than \$150 million.

475. RSM and the Special Committee should have determined that the August 17 model included deals that had neither been “agreed nor contractualized,” should have obtained a model that did not include such deals, and should have considered that model and the downside case in its analysis.

476. Amazingly, as noted above (§450), RSM did not consider the possibility that FITG would not meet the numbers in the August 17 model, and so obviously did not consider the possibility that the acquisition of Delta Woodside (assuming it knew of it) would not occur.

477. As Wax agreed, in making an acquisition for WLR, he would want to know if the target’s “business plan included an acquisition or a possible acquisition that management thought could well happen and they had included numbers based on that acquisition in their business plan.” (Wax Dep. 354.) And if he knew it was in the business plan he would have the ability “to

follow up and ask questions and explore that, and make [his] own decision about whether it was a realistic possibility.”

478. Defendants Ross, Wax, Gorga and Smith should have ensured that the projections provided to RSM did not include deals that had “neither been agreed nor contractualized” and should have provided the August 28 model to RSM and Tessoni.

RSM Improperly Failed To Recommend or Conduct a Market Test

479. RSM did not conduct a “market test” of any sort to determine whether, in an arm’s length transaction, FITG would actually be worth the \$166 million that was being proposed in the Merger. (Paragraph 142 above.)

480. This was not part of RSM’s “mandate.” Indeed, its final written opinion specifically stated that it had “not been requested to, and did not, solicit third party indications of interest in acquiring all or any part of the Company.” (RSM Ex. 70.)

481. Given the facts of this case and limitations of its experience, work and opinion, it was inappropriate for RSM not to conduct a market test, or at least recommend one to Tessoni.

482. Likewise it was inappropriate for the SCI Special Committee not to require RSM, or another expert, to conduct a market test in these circumstances.

483. Without such a market test, or some equivalent process, the SCI Board could not possibly comply with its duty under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).)

RSM Improperly Determined FITG’s Value from Discounted Cash Flow Analysis

484. RSM advised the SCI Special Committee (Tessoni) on August 28, 2006, that FITG had a value based on a discounted cash flow analysis of \$154.8 to \$245.7 million.

A. RSM determined that the equity value of FITG based on a discounted cash flow (DCF) with a WACC (the “weighted average cost of capital” discount rate) of 13.1% and using multiples of 6x, 6.5x, and 7x, was \$181.3m, \$213.5m, and \$245.7m, respectively. (Tessoni Ex. 7 at 49.)

B. RSM determined that with a WACC of 14.1% and the same multiples, FITG had an equity value of \$167.8m, \$198.8m, \$229.9m, respectively.

C. RSM determined that with a WACC of 15.1% and the same multiples, it had an equity value of \$154.8m, \$184.8m, and \$214.8m, respectively.

485. RSM’s DCF analysis was grossly incorrect in numerous respects including:

A. Apart from other technical mistakes in the DCF model, RSM’s improperly selected numbers from different points in time, creating an invalid DCF model. It used

“free cash flow” starting as of January 1, 2007, but used “net debt” as June 30, 2006. A proper DCF as of January 1, 2007, would have used the “net debt” from that same date, which, according to the August 17, 2006, model, was over \$150 million higher than the “net debt” as June 30, 2006. A proper DCF as of June 30, 2006, would have used the “free cash flow” from that date which, according to the August 17, 2006, model, was more than \$150 million lower than the “free cash flow” starting as January 1, 2007. The net effect of RSM’s decision to mix numbers was to overstate the value of FITG by more than \$150 million.

B. Further, RSM disregarded the execution risk that RSM itself had pointed out in connection with the capital raise and the greenfield projections. The discount rates used in the analysis (the WACC’s) were not increased to take into account FITG’s “tremendous execution risk,” which even Ross himself recognized. (Ross Dep. 598, “Anybody who can read and write would know there was tremendous execution risk.”)

C. In contrast, SunTrust, which did a DCF of FITG on behalf of the FITG Special Committee, used a WACC (which is an assessment of the riskiness of the company) of 23%. David Wax has testified that he might well have agreed with SunTrust’s WACC, stating: “And, you know, effectively I might have gotten to the same place [as SunTrust’s WACC] because there’s no question that there should be an increased risk premium for ITG at that level, at that stage in its development.” (Wax. Dep. 514.)

D. Changing the RSM DCF model by using the correct “net debt” and “PV of the Free Cash Flows” produces equity values for FITG that are hundreds of millions of dollars lower than those in RSM’s analysis. If a more appropriate WACC is used, the number falls even farther. Indeed, SunTrust’s analogous DCF analysis, which itself was overstated, produced an equity value for FITG of only \$11.4 million (with a WACC of 23% and multiple of 6x.) (Gorga Ex. 263 at 23.)

E. Also, as already noted, RSM used projections from FITG that included deals that had neither been “contractualized” nor determined to be a “realistic possibility.” (See Paragraph 464-478 above.) Had those deals not been included, the DCF values would have dropped by more than \$150 million even without reference to the other issues referenced above.

The SCI Special Committee’s Approval of the Merger

486. Notwithstanding these issues and all of the issues that RSM itself pointed out in the Script (Paragraph 402 above), RSM issued an oral opinion that the 65/35 split was “fair to the stockholders of SCI from a financial point of view.”

487. The fifth “Whereas” reiterated that RSM’s opinion had been that the Exchange Ratio was “fair to the stockholders of the corporation.” (8/28/06 Min. at 6 (Tessoni Ex. 5).)

488. This was the incorrect standard. RSM was supposed to evaluate the merger in terms of whether it was fair to the minority stockholders of SCI.

489. In any event, RSM advised Tessoni on August 28, 2006, that the Merger was fair without any limitations on its opinion. The minutes to the meeting include no limitation was stated. The minutes had been submitted to RSM for approval.

490. RSM did not express any limitations on its opinions until submitting its written opinion to Nixon Peabody at 6:04 P.M. the following day, well after the SCI meeting approving of the Merger. (RSM Ex. 70.)

491. Nevertheless, notwithstanding all of the issues with the Special Committee and its advisers, as alleged above, Tessoni, with the approval of RSM and Nixon Peabody, voted to approve the Merger of SCI with ITG based on the 65/35 split.

492. As part of this vote, and with no justification at all (and no consideration), Tessoni also approved eliminating Article VI from SCI's charter. Hence, Tessoni, the supposed champion of the minority shareholders, approved eliminating the special protection in place for them.

493. Ironically, Ross himself did not even insist on that. (FURSA-0758291 – Ross wrote: “Why does SCI need the flexibility to drop the charter amendment as described on page 29 [of the S-4]. I think it invites dissidents to make trouble.”)

SCI Board's Approval of the Merger

494. The following day, August 29, 2006, the full SCI Board convened at 3:00 PM and, in a thirty minute meeting, approved the Merger. All board members voted in favor of the Merger. (FURSA-0611551-56.)

The Board Approved the Merger Without Analyzing The RSM Presentation

495. Several hours prior to the board meeting, the WLR defendants requested a copy of the RSM fairness presentation. Counsel for WLR, Mark Hanson of Jones Day, wrote on their behalf:

The WLR directors on each of the SCI and ITG Boards would like to receive copies of the Financial Advisers' reports delivered to the respective Special Committees in the Special Committee meetings. Obviously both Boards understand the the [sic] FA reports are officially delivered only to the Special Committees, but the Boards believe it is necessary for them to see the analyses to put in context the fairness opinions and the reports and recommendation that will be delivered by the special committee members at the full board meetings.

If Nixon Peabody and Kilpatrick would please forward those reports to me as soon as possible, I will then forward them on to the other directors in advance of the start of the meetings this afternoon. I really need to have those in the next hour or so to give the directors time to review them.

(Wax Ex. 451, emphasis added.)

496. They promptly received a copy of the SunTrust report to the FITG Special Committee (Wax Ex. 450).

497. They did not receive the RSM report.

498. Even so, the directors proceeded to approve the Merger.

499. See also Paragraphs 181-190 above.

***The Board Approved the Merger Even Though the
Consideration to FITG Was Far In Excess Of Other Valuations of FITG***

500. Approval of the Merger was in effect a vote that SCI would provide FITG shareholders with consideration for their approximately 16,749,500 shares of FITG worth \$166 million based on the \$14.65 per share market price (Paragraph 142 above), or \$164.777 million, or \$9.84 per share, based on RSM's analysis for the SCI Special Committee. (Tessoni Ex. 7 at 7.) The SCI Board, however, was aware that FITG had recently been valued at far less than the derived valuation of FITG in the Merger ratio.

501. In 2005, FITG hired Trenwith Valuation, LLC to determine the exercise price for its 2005 stock options grants. In July, 2005 Trenwith valued FITG at \$6.78 a share (\$114 million in total). The Trenwith valuation was known to the SCI Special Committee and to the SCI Board. (See RSM-Choy Ex. 16.) The SCI Board thus accepted a 45% increase in the value of FITG over the Trenwith valuation, even though FITG's finances had declined significantly since that valuation. (See Paragraph 160-161.)

502. Further, in FITG's last equity transaction, in June 2005, the company issued shares to the PBGC valued at \$7.81 to settle various lawsuits that the PBGC had filed against WLR and FITG regarding underfunding of a predecessor company's pension plan. (See NixonPeabody 0000236; FURSA-0653141; 9/22/06 Prospectus at F56-57, F-71.) The SCI Board thus accepted a 26% increase in the value of FITG over the last equity transaction, even though FITG's finances had declined significantly.

503. In April 6, 2006, FITG Board meeting (Ross and Gorga were on both boards, and Wax was on the FITG Board), the FITG valuation was still considered to be \$114 million, or \$6.78 share, more than three dollars (or 31%) below the merger price. (FURSA-0696593.)

504. Just five days before the SCI Board approved the Merger, on August 23, 2006, WLR's own internal valuation for FITG was only \$7.81 a share, which was more than two dollars (or 21%) lower than the Merger price. Pamela Wax, WLR's CFO, wrote to Wilbur Ross on that date regarding a memorandum for the Advisory Committee of WLR Fund II:

The book value per share as of 7/2/06 is \$7.39 vs **our valuation of \$7.81**. The quarter ending July 2, 2006 was particularly weak with a net income loss of \$5.97 million, due to a loss from operations of \$1.69 mm and to the deferred tax charges of \$4.4 mm principally related to the valuation allowance. **I would prefer to say**

“we valued that [sic] shares based on the last equity transaction, which was the sale of shares to the PBGC.” and not to reference the book value, which could be volatile.

(FURSA-0653141, emphasis added.)

505. Finally, on August 27, 2006, Wilbur Ross himself pegged FITG’s “net worth” at only \$128 million. (FURSA-0235211.) That was approximately \$7.64/share, more than two dollars a share (and 22%) less than the merger consideration that he himself agreed to only two days later.

***The Board Approved the Merger Even Though
the SunTrust Valuation (Which Had Been Provided To Ross
And Gorga) Showed that FITG was Not Worth Anything Close to the Merger Consideration***

506. Moreover, the SCI Board approved the Merger even though, according to FITG’s own financial adviser, SunTrust, FITG was worth nothing close to \$166 million (the price based on the trading price of \$14.65 per share - Paragraph 142 above) or \$164.8 million (the price based on the RSM analysis. (Tessoni Ex. 7 at 7.)

507. While their subjective state of mind may not be important to the “entire fairness” standard, the members of the SCI Board other than Tessoni were on notice of the SunTrust report prior to the 3:00 P.M. board meeting.

508. The SunTrust report was delivered to Ross by email from Russ Robinson at 12:58 P.M. on August 29, 2006, more than two hours before the SCI Board meeting. (Ross Ex. 729.)

509. It was delivered to Ross a second time, and also to Gorga, Wax and Smith, by email from Mark Hanson at 1:56 P.M. on August 29, 2006, more than an hour before the SCI Board meeting.

510. Prior to the SCI meeting, Ross “looked through” the report (Ross Dep. 235), Gorga “read” it (Gorga Dep. 536), and Wax (the WLR “point person” (Ross Dep. 235)), “probably would have glanced through it for purposes of ensuring that it looked to be a complete report” (Wax Dep. 527).

511. The SunTrust report shows seven valuation metrics for FITG. (Gorga Ex. 263 at 29.)

Summary Valuation

(\$ in 000, except per share values)

Methodology	Implied Equity Value					
	Mean		High		Low	
	Total	Per Share (1)	Total	Per Share (1)	Total	Per Share (1)
Selected Reference Company Analysis:						
Mean Multiples	\$ 95,969	\$ 5.73	\$ 415,469	\$ 24.80	\$ -	\$ -
Median Multiples	79,482	4.75	284,023	16.88	-	-
Selected Reference Transaction Analysis:						
Mean Multiples	45,602	2.72	150,003	8.98	-	-
Median Multiples	-	-	-	-	-	-
Discounted Cash Flow Analysis:						
Management Case	-	-	-	-	-	-
EBITDA Terminal Value Approach	11,381	0.68	117,023	6.89	-	-
Perpetual Growth Value Approach	-	-	-	-	-	-
Net Asset Valuation Analysis	188,698	10.07	212,825	12.71	124,570	7.44

512. A simple average of those metrics gives an average valuation of FITG at only \$57 million, or \$3.42 per share. (*Id.*; Ross Ex. 735.)

513. This straight-line average overstates the value of FITG since it gives equal weight to the “net asset” valuation of FITG (or the “forced liquidation value”). That is not appropriate, as the Trenwith report indicated, where FITG is being purchased as “going concern,” and not to be liquidated.

514. Indeed, the SunTrust analysis itself gave book value (“asset value” is the same as “book value” (Wax Dep. 234)) a weighting of only 10% in the “Selected Reference Company Mean Analysis.” (Gorga Ex. 263 at 20.)

515. WLR itself, according to Wax, does not put much emphasis on asset value. Wax testified that “asset valuation is just another way of looking at book value,” and WLR looks for valuation “based on the income generation ability of the enterprise. . . . Something can have a lot of fixed assets and have no earnings, and it’s not going to have a lot of value to us because we’re not real estate investors.” (Wax Dep. 234-35.)

516. Further, SunTrust’s internal documents show that even these values are too high. The Spreadsheet behind the section of the SunTrust report copied above shows that SunTrust actually included two additional valuation metrics (“downside” cases for the discounted case flow analysis). SunTrust included those in its average to find the value of FITG was only \$29 million. If the “net assets valuation analysis” is included in the average, the value rises but only to \$44.6 million:

	A	B	C	D	E	F	G	H	I	J	K	L	M	N
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2														
3														
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(From STRH_For_ITG_0000821.xls, rows and columns unhidden, circles added for emphasis.)

517. In any event, even without considering various errors in the SunTrust analysis that caused it to overvalue FITG, all of these averages show that it was not worth even close to \$166 million or \$164.8 million.

518. Moreover, if valuation is looked at merely as a relative issue, based on the 65/35 split FITG should have been worth 1.86 times as much as SCI in order for the Merger to be fair.

519. The SunTrust metrics for SCI give an average value for it of \$65 million. (Gorga Ex. 263 at 49; Ross Ex. 735.)

520. Hence, even according to analysis of FITG's own fairness adviser, FITG was not worth even as much as SCI, and certainly not worth nearly twice as much as SCI.

521. FITG was not worth the what that the SCI Board (Ross, Gorga, Gibbons, Storper & Tessoni) agreed to on August 29, 2006 – \$166 million according to the per share trading price (Paragraph 142 above) or \$164.8 million based on RSM's analysis for the SCI Special Committee. (Tessoni Ex. 7 at 7.)

522. In fact, FITG was worth less than half that amount and probably had a negative value.

523. Upon information and belief, but for the Merger into SCI (or a very substantial infusion of additional capital), FITG would likely have gone bankrupt.

524. Upon information and belief, had FITG gone bankrupt, or been in danger of going bankrupt, it could well have impeded or interfered with Ross's deal to sell WLR to Amvescap or affected the price or adversely affected his and its reputation and ability to raise further funds, in particular Fund IV and V.

The Merger Closed On October 20, 2006

525. Shortly after Board approval on August 29, 2006, Stephen Duerk signed the Merger Agreement and related documents on behalf of SCI. (E.g., Duerk Exs. 1, 3-5), doing so without any due diligence regarding the transaction. (Duerk Dep. 232-33.)

526. There were numerous contingencies to the closing of the Merger set forth in the Merger Agreement including consent by lenders. (9/22/06 Proxy at 82-83 & A34-36.)

527. As of October 3, 2006, Wachovia was reluctant to consent to the Merger (*see* Duerk Ex. 34), but by October 20, 2006, it did consent. (Duerk Ex. 36 at FURSA-0824577; ITG Form 8-K, dated October 26, 2006.)

528. With the Wachovia consent in place, the Merger closed on October 20, 2006, and the companies were joined.

529. As noted above, after the Merger FITG ceased to exist, SCI was renamed "International Textile Group, Inc.," and the headquarters of the Combined Company was moved to Greensboro, N.C.

The Value of SCI (Now NITG) Has Collapsed Because Of the Merger

530. The unfairness of the Merger is evident from the foregoing and also from what happened to the stock price of SCI (now NITG) after the Merger.

531. On the day the Merger was publicly announced, August 30, 2006, NITG (then SCI) stock was trading at \$14.65 a share.

532. The market value of SCI based on this share price was \$80,679,703.55 (which is 5,507,147 shares at \$14.65/share).

533. The firm had been valued by RSM in connection with the merger at \$14.50/share.

534. The value of SCI based on the RSM price was \$79,853,631.50 (which is 5,507,147 shares at \$14.50/share).

535. Had FITG been worth the approximately \$164 million in consideration SCI was forced to agree to give, SCI's stock value should have remained essentially the same and the market cap of the Combined Company would have been at least approximately \$245 million (\$81 million plus \$164 million).

536. However, the stock value and market cap of SCI (then the Combined Company) began a long and steep decline after the Merger closed as a result of the Merger.

537. By April 2, 2008 (before the current economic downturn), the stock value had declined to approximately \$29 million (approximately 17.5 million shares times \$1.65/share).

538. As of today, the market cap and stock value is negligible and the company has a stockholder equity of negative \$95 million. (Form 10-Q for NITG filed on November 12, 2010 at 18.) (See Paragraphs 5-9 above.)

Further Negative Consequences of the Merger

539. Apart from being unfair to SCI, the Merger was also the cause of several other specific negative changes regarding the business of SCI (now NITG), all of which were approved by the Board of NITG.

New Credit Facility

540. As a result of the Merger and/or the decline of FITG during the period surrounding the Merger, NITG negotiated a new credit facility to replace the former credit facilities of SCI and FITG. The negotiations were consummated on December 29, 2006. The new facility was announced on January 11, 2007.

541. The terms, conditions and relative credit availability of the new facility were much less favorable than SCI's prior credit arrangements.

542. Further, the lenders appear to have required a minimum of \$100 million in commitments of new equity capital from the majority shareholder WLR.

543. On March 2, 2007, WLR and Ross and NITG entered into an agreement that WLR's new capital contribution would be in the form of the purchase of preferred stock. This preferred stock included a cumulative dividend (effectively an interest rate) of 7.5% per year and was convertible into common stock of NITG.

544. The conversion price was set at the book value as of December 31, 2006. WLR also receives an automatic premium of 33% in additional common stock if the conversion takes place in connection with a future Public Offering of company stock, as it logically would (in order for WLR to take advantage of the premium).

545. In addition to having terms that were inappropriate and unfair to SCI's minority stockholders and highly advantageous to WLR, this additional preferred stock further diluted the SCI minority stockholders including Plaintiffs and damaged their economic interests and voting rights.

546. This New Credit Facility would not have been necessary but for the closing of the Merger. The New Credit Facility further damaged SCI (now NITG).

547. Upon information and belief, the Defendants (certainly Gorga, Ross, Wax, and Storper), knew or should have known prior to the Merger that SCI would, with the Merger, lose its existing credit facility and that a new, less-favorable credit facility would have to be obtained.

548. Upon information and belief, inquiries were made and/or negotiations begun regarding the new credit facility even prior to the Merger closing.

Debt for Equity Swap

549. By the time of the Merger, WLR had injected loans of over \$60 million into FITG. (Wax Ex. 424.)

550. These cash injections ("loans") from WLR to FITG took the form of unsecured subordinated notes drawing interest at the low rate of 4.78% per year.

551. Considering FITG's financial condition, this unsecured, subordinated debt was basically worthless.

552. With the Merger, WLR caused the debt to be transferred to NITG, and upon information and belief, further undermined and damaged SCI.

553. In any event, on March 8, 2007, WLR and Ross and NITG entered into an agreement that WLR could exchange the \$68 million in unsecured subordinated notes (the enormous debt owed to it by FITG) for preferred stock in NITG.

554. This preferred stock had the same terms as that received by WLR in connection with the new credit facility: a cumulative dividend of 7.5% per year, convertible into common stock based on book value as of December 31, 2006, and an automatic 33% premium in additional common stock if the conversion takes place in connection with a Public Offering.

555. Like the preferred stock issued in connection with the new credit facility, this additional preferred stock had terms that were inappropriate and unfair to NITG and further diluted the minority shareholders of SCI.

556. Upon information and belief, but for the Merger, this new credit facility and the debt for equity swap, and the reduction in value they caused for NITG would not have taken place.

557. By these and other actions (e.g., purchase of BST from WLR affiliates and the issuance of preferred stock to WLR in connection with that purchase and in connection with \$50 million in working capital provided by WLR to NITG, capital which would not have been needed by SCI but for the Merger), Defendants have dramatically and wrongfully undermined the value of NITG and of Plaintiff's interest in NITG.

ALLEGATIONS AS TO DEFENDANTS' KNOWLEDGE

558. Each of the Defendants, by virtue of their positions (and the positions of their employees and affiliates) (e.g., within the boards and managements of FITG and SCI and their involvement in assessing FITG and SCI's businesses), knew or should have known prior to the Merger on October 20, 2006, of the financial condition of FITG referenced hereinabove, including, for example:

559. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG expected losses in the second half of 2006 prior to and after the Merger, and of the approximate magnitude of those losses.

560. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, of FITG's actual weekly losses in the second half of 2006 prior to the Merger.

561. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG would need to borrow millions of dollars in September and/or October to fund losses and operations.

562. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, and Duerk knew, or should have known, that FITG had in fact borrowed \$20 million for losses and operations in September 2006.

563. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, and Duerk, and knew, or should have known, that FITG borrowed millions more in the months prior to and immediately after the Merger.

564. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG's operations would need millions of dollars in further infusions of cash after the Merger even before the end of 2006.

565. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that closing FITG's Mattress Division and taking the associated significant charge to earnings was under consideration.

566. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG's Mattress Division was going to be closed after the Merger.

567. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG's Net Income and Equity would decline dramatically in the second half of 2006 and in 2007.

568. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that the equity associated with FITG's business would decline substantially from June 30 to December 31, 2006.

569. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that after the Merger SCI would lose its old credit facility and a new, less favorable credit facility would be needed.

570. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that after the Merger the growing debt from FITG (owed to WLR) would be transferred to SCI.

571. Upon information and belief, WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, and Smith knew, or should have known, of the debt-for-equity swap that would take place after the Merger (referenced above).

572. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that RSM's, the SCI Special Committee's, the SCI Board's, and their own approval of the Merger and the Exchange Ratio were based substantially on financial projections from FITG that neither RSM nor SCI had independently verified the reasonableness of.

573. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that Gorga, Smith and Wax, and persons working under their direction, were involved in or supervised the preparation of the financial projections for FITG that were provided to RSM.

574. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that no one within the management of SCI was involved in the Merger transaction, doing due diligence on FITG, and looking out for the interests of SCI.

575. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that the FITG was not worth what SCI was paying for it.

576. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, and RSM knew, or should have known, that in rendering its Fairness Opinion, RSM had not deducted the unfunded pension liability from FITG's equity value, had not deducted debt of approximately \$180 million for the last six months of 2006 in its valuations, had not considered any negative valuations in its metrics, had not considered the projected negative cash flow of over \$60 million in the last two months of 2006 in its DCF calculation, had not utilized a reasonable discount rate in its DCF calculation, had not properly accounted for significant differences between FITG and the "comparable" companies that it used in its comparable company and comparable transaction methodologies, had not considered the dilutive effect of FITG's planned IPO, had not used a control premium for SCI in its comparable public company valuation methodology, and was not valid in other respects as well.

577. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, by the date of the Prospectus if not before, that the consideration proposed to be provided by SCI for FITG in the Merger was not appropriate or fair to SCI (now NITG).

578. RSM knew, or should have known, at the time it rendered its informal and then formal Fairness Opinion that the consideration proposed to be provided by SCI for FITG in the Merger was not appropriate or fair to SCI (now NITG).

579. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, by the date of the Merger if not before, that the consideration proposed to be provided by SCI for FITG in the Merger was not appropriate or fair to SCI (now NITG).

580. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that the Fairness Opinion of RSM (and also of SunTrust) used forecasts for ITG that included deals that "have been neither agreed nor contractualized."

581. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that defendants RSM and Tessoni's approval of the Merger and the Exchange Ratio were based substantially on financial projections from FITG that included deals that "have been neither agreed nor contractualized." (Wax Ex. 477 at 2.)

582. WLR, Ross, Gibbons, Storper, Wax, Gorga, and Smith knew, or should have known, that SunTrust's valuation of FITG showed that FITG was not worth what SCI was giving for it and that the Merger was not fair to SCI for the reasons set forth above.

583. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that SCI was not conducting due diligence on FITG or otherwise analyzing whether the Merger was appropriate for it.

584. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that FITG's numbers were not being "vetted" or properly analyzed on SCI's behalf.

585. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that SCI (and the SCI Special Committee) had not engaged appropriate expertise to evaluate the Merger.

586. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that RSM was not a proper fairness adviser for SCI in that it had no experience with fairness opinions and, through its sister company, had an on-going relationship with FITG including auditing the FITG pension fund and providing advice to the FITG management and board regarding Sarbanes-Oxley issues.

587. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, the SCI Special Committee was not empowered to consider transactions other than with WLR or one of its affiliate companies and that this could lead to a lower value for SCI and the SCI minority shareholders than otherwise.

588. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessoni, Smith, Duerk, and RSM knew, or should have known, that the claimed "off-book" assets of FITG referenced above were not worth \$100 million or anything close to that amount, as referenced above.

589. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessori, Smith, Duerk, and RSM knew, or should have known, that the merger agreement was unfair to and lacked meaningful protections for SCI for the reasons set forth above.

590. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessori, Smith, Duerk, and RSM knew, or should have known, that Tessori had an economic interest in approving the merger, was not properly protecting the interest of SCI and its minority shareholders, and was not capable of managing the analysis/negotiation process as a special committee of one.

591. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessori, Smith, Duerk, and RSM knew, or should have known, that a single member special committee for SCI in these circumstances, and having Tessori as that single member, was incapable of protecting the interests of SCI and the SCI minority shareholders.

592. WLR, Ross, Gibbons, Storper, Wax, Gorga, Tessori, Smith, Duerk, and RSM knew, or should have known, that the Merger with FITG was not in the best interest of or fair to SCI and particularly the minority shareholders of SCI.

CLASS ALLEGATIONS

593. Plaintiffs bring this action on their own behalves and seek to bring it also as a class action. The proposed class ("Class") would be defined as the stockholders of SCI as of the Merger excluding Defendants and persons or entities affiliated with Defendants, and excluding all persons who would otherwise be members but whose damages do not exceed one hundred dollars – i.e., the Class would be defined as all minority stockholders of SCI (non-WLR affiliated stockholders) with damages in excess of \$100.

594. The proposed Class is so numerous that joinder of all members is impracticable. Upon information and belief, there are more than 500 members of the Class.

595. There are questions of law or fact common to the Class. The common questions include, but are not limited to, whether Defendants breached their fiduciary duties (including loyalty, due care, and good faith) to the minority stockholders who would constitute the Class including:

- A. By failing to review and analyze the Merger with the best interests of SCI in mind;
- B. By failing to consider, or allow the consideration of, alternatives to the Merger;
- C. By failing to ensure that the Merger was fair to SCI and the minority stockholders;
- D. By failing to ensure the Merger was properly evaluated and assessed by SCI and on behalf of SCI;

E. By failing to ensure that appropriately independent, disinterested, experienced, and skilled directors evaluated the transaction on behalf of SCI;

F. By failing to ensure that appropriately independent, disinterested, experienced, and skilled advisers were retained on behalf of SCI to evaluate the Merger on behalf of SCI;

G. By failing to ensure that proper due diligence was conducted on behalf of SCI on FITG;

H. By failing to ensure that information from FITG was accurate and reliable and warranted and guaranteed;

I. By failing to ensure that the projections of FITG used for its valuation were appropriately vetted by or for SCI;

J. By failing to ensure that the projections for FITG used for its valuation did not include "uncontractualized" deals or deals that had not been determined to be realistic;

K. By failing to ensure that FITG's business and future prospects were appropriately analyzed, tested and vetted by or for SCI;

L. By failing to review and analyze the financial analyses of RSM and SunTrust, which, even though flawed, showed the Merger was not appropriate;

M. By failing to ensure that a market test was conducted to ensure that SCI and FITG were appropriately valued in connection with the Merger;

N. By allowing the consideration of the so-called off-balance sheet assets of FITG in connection with its valuation even though the Merger was based on FITG as a going-concern;

O. By allowing the consideration of the so-called off-balance sheet assets without appropriate assessment or evaluation;

P. By approving the Merger at all;

Q. By approving the Merger when the combination of FITG and SCI did not make business sense for SCI;

R. By approving the Merger on terms where SCI gave consideration in excess of \$164 million for a company worth vastly less than that, and then allowing it to close;

S. By approving the Merger based on a valuation of FITG that was inaccurate and grossly excessive, and then allowing it to close;

T. By approving the Merger based on a valuation of SCI that was inaccurate and too low, and then allowing it to close;

U. By approving the Merger on terms that were unfair to SCI including, for example, no meaningful warranties or indemnities and no earn-out, and then allowing it to close;

V. To the extent any one of them was not aware of the financial situation of FITG, by failing to learn of it take it into account, or see that it was taken into account, with regard to the Merger and cancelling the Merger;

W. By approving the Merger based on a flawed Special Committee process and approval, and without ensuring that the Special Committee process and approval was conducted appropriately;

X. By allowing the Merger to close notwithstanding the financial condition of FITG;

Y. By allowing debt previously held by FITG (owed to WLR) to be transferred to the Combined Company and/or by allowing that debt to be converted into preferred stock

Z. By allowing or causing the renegotiation of SCI's credit facility to fund FITG and/or obtaining additional preferred stock in connection therewith;

AA. By unjustly enriching themselves at the expense of SCI and Plaintiffs and the other minority shareholders;

BB. By committing corporate waste; and

CC. By otherwise failing to protect the interests of SCI and the minority stockholders.

596. Additional questions of law or fact common to the Class including, but are not limited to:

(A) Whether Defendants were self-interested in the transactions at issue and therefore whether the "entire fairness" standard under Delaware law applies;

(B) Whether the Merger and the other actions at issue here satisfied the applicable standard of review ("entire fairness");

(C) Whether the burden of proof on Defendants to demonstrate that the Merger was "entirely fair" shifted to Plaintiffs to demonstrate that the Merger was not "entirely fair";

(D) Whether Defendants aided and abetted others (or themselves, to the extent they were at different times acting in different capacities) in breaching any of the others' fiduciary duties to the minority stockholders who would constitute the Class;

(E) Whether Defendants committed corporate waste;

(F) Whether, and the amount by which, Defendants were unjustly enriched by their actions;

(G) Whether Defendants conspired together to merge FITG into SCI;

(H) Whether RSM was grossly negligent or breached its fiduciary duty; and

(I) Whether, and the amount by which on a per share basis, the minority stockholders who would constitute the Class were damaged.

597. Plaintiffs' claims are typical of the claims of the minority stockholders who would constitute the Class, and Plaintiffs do not have any interests adverse to them.

598. Plaintiffs are adequate representatives of the minority stockholders who would constitute the Class and have retained competent counsel experienced in litigation of this nature and will fairly and adequately protect the interests of the minority stockholders.

599. The amount in controversy for each minority stockholder who would be part of the Class exceeds one hundred dollars.

DERIVATIVE AND DEMAND EXCUSED ALLEGATIONS

600. In parallel, as indicated below, Plaintiff (other than the Asiafs) bring each of the claims below as a derivative claim in the right and for the benefit of NITG to redress the Defendants' breaches of fiduciary duties, waste, and other violations of law.

601. Plaintiffs are owners of stock, as alleged above, and have been at all times relevant hereto.

602. This action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

603. Plaintiffs will fairly and adequately represent the interests of NITG and its shareholders in enforcing and prosecuting NITG's rights.

604. Plaintiffs have not made a demand on the NITG Board to institute this action against the Defendants.

605. Such demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

606. This issue is judged under Delaware substantive law since NITG is a Delaware corporation.

607. Under Delaware law, “futility of demand [is] established by any objective or subjective standard” and the “inquiry ceases” if it is an “‘interested’ director transaction, such that the business judgment rule is inapplicable to the board majority approving the transaction.” *Aronson v. Lewis*, 473 A2d. 805, 815 (Del. 1984).

608. The Merger was an “interested” director transaction.

609. Directors Ross, Gibbons and Storper were “interested” since they were (and are) employees and officers of WLR and through it controlled 85.4% of FITG. They profited through their employer which, as already noted, owned 14,310,497 shares of FITG and received 9,709,273 shares of SCI stock in the Merger, consideration worth approximately \$129 million at the time of the Merger, and profited through their personal ownership in the general partners of the WLR Funds referenced above.

610. Director Gorga was also “interested” since he owned directly or beneficially 213,750 shares of FITG stock and received 145,023 shares of SCI stock in the Merger, consideration worth approximately \$1.92 million at the time of the Merger.

611. Director Gorga was further “interested” because he was the President and CEO of FITG and was, prior to the Merger, designated to become the President and CEO of NITG after the Merger. Gorga was in effect saving his job with the Merger. This is significant given his total compensation from FITG/NITG as set forth above.

612. The fact that SCI involved a Special Committee composed only of Tessoni to approve the Merger does not make the business judgment rule applicable. The standard of review under Delaware law remains “entire fairness.” *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1115-18 (Del. 1994). This requires that the transaction be entirely fair in terms of both fair dealing and fair price. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983).

613. Demand is also excused under *Aronson* by reference to the board of NITG at the time of commencement of this action, as set forth below.

614. Under *Aronson*, demand is excused where, “in light of particularized facts alleged, a reasonable doubt is created that (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Demand is excused if a reasonable doubt exists as to either prong.” *Weiss v. Swanson*, 948 A.2d 433, 441 (Del. Ch. 2008), citing *Aronson v. Lewis*, 473 A.2d. 805, 814-15 (Del. 1984).

615. The second prong is satisfied since, as shown above, the business judgment rule does not apply to the Merger. The Merger is to be judged by the standard of “entire fairness.” See *Kahn, supra*.

616. Moreover, even if the business judgment rule did apply, the Merger could hardly satisfy it. It cannot be consistent with the business judgment rule for SCI to have given

consideration valued at more than \$167 million for a company (FITG) that had a value of much less than half that amount and probably even a negative value.

617. Even under a business judgment rule, the Merger constituted corporate waste.

618. As to the first prong of the *Aronson* test, the NITG Board is not “disinterested and independent.”

619. As of the commencement of this action, the NITG Board consists of eight directors: Ross, Gibbons, Storper, Wax, non-defendant Pamela Wilson, Gorga, Tessori, and non-defendant Stephen Bosworth.

620. A majority of these directors (Ross, Gibbons, Storper, Wax, and Wilson) are employees and officers of WLR and through it control more than 87.4% of the shares of NITG. The allegations as to the relationship between WLR and Ross, Gibbons, Storper and Wax are set forth above. Director Wilson is a Senior Vice President of WLR, and has held that position since 2000. (Prospectus, p. 246.)

621. As such, Ross, Gibbons, Storper, Wax, and Wilson cannot “objectively consider a demand” that NITG sue WLR, the entity to which they owe their livelihoods. *See Abraham v. Emerson Radio Corp.*, 901 A.2d 751, 757-58 (Del. Ch. 2006).

622. Defendant Gorga also falls into that category since he is so closely aligned with WLR that he is considered an “affiliate” in the Merger agreement and under the securities laws. His livelihood also depends on WLR.

623. Accordingly, Ross, Gibbons, Storper, Wax, Wilson, and Gorga are not disinterested and independent.

624. Further, seven of the eight directors personally profited from the transaction at issue and thus were involved in self-dealing.

625. As shown above, WLR profited from the Merger. In addition to Ross, Gibbons and Storper, who are discussed above, defendant Wax and non-defendant Wilson were also employees and officers of WLR and profited through it from the Merger, as it received consideration as a result of the Merger valued at approximately \$129 million as of the time of the Merger.

626. Likewise, as already noted, Director Gorga received consideration as a result of the Merger valued at approximately \$1.92 million at the time of the Merger.

627. In addition, Director Stephen Bosworth owned directly or beneficially 27,500 shares of FITG which were exchanged for 18,657 shares of SCI in the Merger. Hence, he received consideration as a result of the Merger valued at approximately \$250,000 as of the time of the Merger.

628. As such, these seven (of the eight) directors of NITG are not disinterested and independent.

629. Moreover, seven of eight NITG directors are alleged herein with particularity to have been deeply and personally involved in the wrongful actions at issue in respects that are not subject to indemnification by NITG under Delaware law.

630. Ross, Gibbons, Storper, Gorga, and Tessonni are alleged, among other things, to have breached their fiduciary duties to SCI including their duties of loyalty, due care, and good faith and thus are at risk of serious personal liability.

631. Further, defendant Tessonni was the single member of the SCI Special Committee that approved the Merger. While he may have been "independent" in a technical sense, his intimate involvement in the Merger demonstrates that in fact he was not "disinterested" and would require him, essentially, to make a decision as to whether he himself should be sued, as he has been here.

632. Wax, apart from being affiliated with WLR, is alleged to have aided and abetted others in breaching their fiduciary duties to SCI including the duties of loyalty and good faith and thus is at risk of serious personal liability.

633. Bosworth, while not named as a defendant, was deeply involved in the negotiations that led to the Merger (as set forth above) and likely knowledgeable as to FITG's condition. He may also have aided and abetted breaches of fiduciary duty or other wrongdoing and is at risk of serious personal liability.

634. Even Wilson, while not named as a defendant, was likely involved and knowledgeable as to FITG's condition by virtue of her position with WLR and the Board of FITG. Again, she may also have aided and abetted breaches of fiduciary duty or other wrongdoing and is at risk of serious personal liability.

635. As such, none of the current directors of FITG is disinterested and independent and able to fairly evaluate a demand.

CAUSES OF ACTION

CAUSES OF ACTION 1 AND 1A

– BREACH OF FIDUCIARY DUTY – Controlling Shareholder – Against WLR, Ross, Gibbons, Storper & Wax

636. The foregoing allegations are incorporated here by reference.

637. SCI was a Delaware corporation and, accordingly, governed by the Delaware law regarding fiduciary duty.

638. WLR, along with Ross, Gibbons, Storper and Wax, through their ownership and control of WLR) was the controlling shareholder of SCI and, under Delaware law, had fiduciary duties (including loyalty, due care, and good faith) to SCI and the minority stockholders including Plaintiffs. *See Gentile v. Rossette*, 906 A.2d 91 (Del. Supr. 2006).

639. Further, these Defendants were self-interested in the transactions and acts at issue. Accordingly, the “entire fairness” standard is applicable under Delaware law. *Id.*

640. Each of these Defendants, directly or indirectly through their companies, affiliates, or employees, breached their fiduciary duties to SCI and the minority stockholders including Plaintiffs in the respects alleged in the Complaint above, and as more specifically enumerated in Paragraphs 595.A-595.CC above.

641. The minority stockholders including Plaintiffs were damaged as a proximate result of these Defendants’ breaches of fiduciary duty and are entitled to actual and punitive damages in amounts to be determined by a jury.

642. In parallel, Plaintiffs allege on behalf of SCI (now NITG) that it was damaged as a proximate result of these Defendants’ breaches of fiduciary duty and is entitled to actual damages in an amount to be determined by a jury.

CAUSES OF ACTION 2 AND 2A
– BREACH OF FIDUCIARY DUTY – Directors, Officers, & Affiliates –
Against Ross, Gibbons, Storper, Gorga, Tessoni, Duerk, Wax and WLR

643. The foregoing allegations are incorporated here by reference.

644. WLR, Ross, Gibbons, Storper, Gorga, Tessoni, Duerk, and Wax owed fiduciary duties (including loyalty, due care, and good faith) to SCI and the minority stockholders including Plaintiffs as Directors and Officers of SCI and affiliates of WLR. Defendant WLR is responsible for the actions of these Defendants based on *respondeat superior*.

645. WLR, Ross, Gorga, Storper, Tessoni, Duerk, and Wax were self-interested in the transactions and acts at issue. Accordingly, the “entire fairness” standard is applicable under Delaware law. *Id.*

646. Each of these Defendants, directly or indirectly through their companies, affiliates, or employees, breached their fiduciary duties to SCI and the minority stockholders including Plaintiffs in the respects alleged in the Complaint above, and as more specifically enumerated in Paragraphs 595.A-595.CC above.

647. The minority stockholders including Plaintiffs were damaged as a proximate result of these breaches of fiduciary duty and are entitled to actual and punitive damages in amounts to be determined by a jury.

648. In parallel, Plaintiffs allege on behalf of SCI (now NITG) that it was damaged as a proximate result of these breaches of fiduciary duty and is entitled to actual damages in an amount to be determined by a jury.

CAUSES OF ACTION 3 AND 3A
– AIDING AND ABETTING BREACH OF FIDUCIARY DUTY –
Against Wax, Smith & RSM; Ross, Gorga, Storper, Gibbons & WLR

649. The foregoing allegations are incorporated here by reference.

650. The elements under Delaware law for a claim of aiding and abetting a breach of fiduciary duty are: 1) the existence of a fiduciary relationship; 2) a breach of an associated fiduciary duty; 3) knowingly participating in the breach by a Defendant who is not a fiduciary; and 4) damages proximately caused by the breach. *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006); *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

651. Wax was on the Board of FITG, and deeply involved in the affairs of FITG.

652. Wax was also involved in the due diligence by WLR and FITG on SCI and the negotiation and structuring of the Merger.

653. Further, he knew, or should have known, of the fiduciary duties that Ross, Storper, Gibbons, Tessoni, WLR, Gorga and Duerk, as well as he himself, owed to SCI by virtue of their positions and through WLR being controlling shareholder of SCI.

654. His actions taken in his capacity as an officer/director of WLR, as a director of the board of FITG, and on behalf of FITG, and as director of NITG, and on behalf of NITG aided and abetted the breaches by himself and other defendants of their fiduciary duties to SCI.

655. Wax knew, or should have known of, and knowingly participated in, the breaches of those duties, as alleged above.

656. Smith was on the Board of FITG and also the Chief Financial Officer of FITG.

657. Smith was also involved in the due diligence by WLR and FITG on SCI and the negotiation and structuring of the Merger.

658. Further, he knew, or should have known, of the fiduciary duties that Ross, Storper, Gibbons, Tessoni, WLR, Gorga and Duerk owed to SCI by virtue of their positions and Ross/WLR as controlling shareholder of SCI.

659. His actions taken in his capacity as an officer/director of the board of FITG, and on behalf of FITG, and as director of NITG, and on behalf of NITG aided and abetted the breaches by other defendants of their fiduciary duties to SCI.

660. Smith knew, or should have known of, and knowingly participated in, the breaches of those duties, as alleged above.

661. RSM was the financial adviser for SCI and was retained to advise the SCI Special Committee as to whether the Merger was fair, from a financial point of view, to the shareholders other than the WLR-affiliated shareholders.

662. RSM met with management of SCI and FITG "to discuss the business, operations, historical financial results and future prospects" of SCI and FITG and had considered "financial studies, analyses and investigations and financial, economic and market criteria." (Prospectus, C-1.) Further, RSM reviewed financial forecasts from both SCI and FITG as to the future financial performance of SCI and FITG. (Prospectus, C-2, emphasis added.)

663. Further, RSM knew, or should have known, of the fiduciary duties that Ross, Storper, Gibbons, Tessori, WLR, and Gorga owed to SCI by virtue of their positions, and through Ross/WLR being controlling shareholder of SCI.

664. RSM knew, or should have known, of the breaches of, and knowingly participated in the breaches of, those duties, as alleged above.

665. Ross was on the Board and an officer of FITG, and deeply involved in the affairs of FITG. He was also on the Board and an officer of SCI, and the controlling person for WLR.

666. On information and belief, he was also involved in the due diligence by WLR and FITG on SCI and the negotiation and structuring of the Merger.

667. Further, Ross knew, or should have known, of the fiduciary duties that Storper, Gibbons, Tessori, WLR & Gorga, as well as he himself, owed to SCI by virtue of their positions and through WLR being controlling shareholder of SCI.

668. His actions taken in his capacity as an officer/director of WLR, as a director and chair of the board of FITG, and on behalf of FITG, and as director and chair of NITG, and on behalf of NITG aided and abetted the breaches by himself and other defendants of their fiduciary duties to SCI.

669. Further, Ross knew, or should have known, of his own and the other defendants' breaches of and knowingly participated in the breaches of those duties, as alleged above.

670. Gorga was on the Board and an officer of FITG, and deeply involved in the affairs of FITG. He was also on the Board of SCI.

671. He was also involved in the due diligence by FITG on SCI and the negotiation and structuring of the Merger.

672. Further, Gorga knew of the fiduciary duties that Storper, Gibbons, Tessori, WLR & Ross, as well as he himself, owed to SCI by virtue of their positions and through WLR being controlling shareholder of SCI.

673. Gorga's actions taken in his capacity as an officer and director of FITG, and on behalf of FITG, and as an officer and director of NITG, and on behalf of NITG aided and abetted the breaches by himself and other defendants of their fiduciary duties to SCI.

674. Gorga knew, or should have known, of his own and the other defendants' breaches of and knowingly participated in the breaches of those duties, as alleged above.

675. Storper was an officer/director of WLR and involved in the affairs of FITG. He was also on the Board and of SCI.

676. On information and belief, he was also involved in or aware of the due diligence by WLR and FITG on SCI.

677. Further, he knew, or should have known, of the fiduciary duties that Ross, Gibbons, Tessori, WLR & Gorga, as well as he himself, owed to SCI by virtue of their positions and through WLR being controlling shareholder of SCI.

678. Storper's actions taken in his capacity as an officer/director of WLR, and on behalf of FITG (as a controlling person through WLR), and on behalf of NITG aided and abetted the breaches by himself and other defendants of their fiduciary duties to SCI.

679. Storper knew, or should have known, of his own and the other defendants' breaches of and knowingly participated in the breaches of those duties, as alleged above.

680. Gibbons was an officer/director of WLR and involved in the affairs of FITG. He was also on the Board and of SCI.

681. On information and belief, he was also involved in, or aware of, the due diligence by WLR and FITG on SCI.

682. Further, Gibbons knew, or should have known, of the fiduciary duties that Ross, Storper, Tessori, WLR & Gorga, as well as he himself, owed to SCI by virtue of their positions and through WLR being controlling shareholder of SCI.

683. Gibbons' actions taken in his capacity as an officer/director of WLR, and on behalf of FITG (as a controlling person through WLR), and on behalf of NITG, aided and abetted the breaches by himself and other defendants of their fiduciary duties to SCI.

684. Gibbons knew, or should have known, of his own and the other defendants' breaches of and knowingly participated in the breaches of those duties, as alleged above.

685. Plaintiffs and the other minority stockholders were damaged as a proximate result of these breaches of fiduciary duty and are entitled to actual and punitive damages in amounts to be determined by a jury.

686. In parallel, Plaintiffs allege on behalf of SCI (now NITG), that it was damaged as a proximate result of these breaches of fiduciary duty and is entitled to actual damages in an amount to be determined by a jury.

CAUSES OF ACTION 4 AND 4A

- WASTE -

Against WLR, Ross, Storper, Gibbons, Gorga, Tessori, and Duerk

687. The foregoing allegations are incorporated here by reference.

688. Defendants WLR, Ross, Storper, Gibbons, Gorga, Tessonni and Duerk caused or allowed SCI to provide consideration for FITG valued at more than \$167 million.

689. At the relevant times, FITG was worth much less than half that amount and had little or no value, or negative value.

690. Accordingly, these Defendants caused SCI (now NITG) to provide consideration for FITG so far in excess of FITG's value that no person of ordinary, sound business judgment could view the benefits SCI received in the transaction as a fair exchange for the consideration it paid.

691. Accordingly, these Defendants have committed corporate waste.

692. Plaintiffs and the other minority stockholders were damaged as a proximate result of this waste and are entitled to actual and punitive damages in amounts to be determined by a jury.

693. In parallel, Plaintiffs allege on behalf of SCI (now NITG), that it was damaged as a proximate result of this waste and is entitled to actual damages in an amount to be determined by a jury.

CAUSES OF ACTION 5 AND 5A
- UNJUST ENRICHMENT -
Against WLR, Ross, Storper, Gibbons, Wax, Gorga and Smith

694. The foregoing allegations are incorporated here by reference.

695. Defendants WLR, Ross, Storper, Gibbons, Wax, Gorga and Smith were unjustly enriched by the Merger when SCI was caused by them to provide more than \$167 million worth of its stock in exchange for the stock of FITG, when the FITG stock was essentially worthless, and from the other actions alleged above including the transfer from FITG to SCI of its debt to WLR.

696. As noted above, SCI's market cap prior to the Merger was approximately \$80 million.

697. If FITG had, in fact, been worth the \$164 million in consideration that SCI provided, the market cap of the combined companies would have been at least \$244 million.

698. However, by April 2008, long before the general drop in the market, had declined to approximately \$29 million, and today the company has a stockholder equity of negative \$95 million. (See Paragraphs 5-7 above.)

699. There was no justification for this enrichment of these Defendants.

700. To the extent there is no other remedy at law, Plaintiffs and the other minority stockholders are entitled to recover from these Defendants, jointly and severally, for this unjust enrichment in an amount to be determined by the jury.

701. In parallel, Plaintiffs allege on behalf of SCI (now NITG) that it is entitled to recover from these Defendants, jointly and severally, for this unjust enrichment in an amount to be determined by the jury.

CAUSES OF ACTION 6 AND 6A
– Civil Conspiracy –
Against All Defendants

702. The foregoing paragraphs are incorporated by reference.

703. The Defendants combined together in the actions alleged above for the purposes of injuring Plaintiffs and SCI (now NITG).

704. As a proximate result of these actions, as alleged above, Plaintiffs and SCI (now NITG) incurred special damages including, for example, for Plaintiffs the loss of the value of the shares of SCI and for NITG providing consideration valued at more than \$167 million for a company (FITG) that was worth well under half that amount and perhaps even a negative amount, losing its favorable credit facility, being loaded up with debt incurred for another company (FITG), extensive dilution of its stock as a result of terms imposed on it by WLR in the wake of the Merger, among other things, as alleged in this Amended Complaint and otherwise proven at trial.

705. In the event Plaintiffs are not compensated for these damages pursuant to another cause of action, Plaintiffs and the other minority stockholders are entitled to judgment from Defendants, jointly and severally, for actual and punitive damages in an amount to be determined at trial.

706. In parallel, in the event SCI (now NITG) is not compensated for its damages pursuant to another cause of action, Plaintiffs allege on behalf of SCI (now NITG) that it is entitled to judgment from Defendants, jointly and severally, for actual damages in an amount to be determined at trial.

CAUSES OF ACTION 7 AND 7A
– GROSS NEGLIGENCE –
Against RSM

707. The foregoing allegations are incorporated here by reference.

708. RSM was retained by the SCI Special Committee to provide advice as to whether the consideration to be paid to FITG in connection with the proposed Merger was fair, from a financial point of view, to the non-WLR shareholders.

709. RSM owed a duty to the SCI Special Committee and SCI, and to the minority shareholders of SCI, to act with reasonable care in the course of its duties and responsibilities as advisor to the special committee and by extension to SCI.

710. Regardless of whether the RSM Engagement Agreement (Tessoni Ex. 17) applies or not, there is no limitation on its liability for “gross negligence, willful misconduct or fraudulent acts.”

711. RSM’s actions constitute numerous examples of “gross negligence, willful misconduct or fraudulent acts,” and are hereby alleged as such. The following is a summary of instances of gross negligence by RSM:

A. By accepting this complex assignment when it had never done a fairness opinion before, and failing to advise Tessoni that it had never done a fairness opinion before;

B. By accepting this complex assignment when it had no significant experience in the textile or automobile industries, or with advising clients on greenfield expansions in China, Vietnam, or Nicaragua, and failing to advise Tessoni of that fact;

C. By accepting this complex assignment when it had a long-standing and close relationship, through a sister company, with the other party, FITG, and by failing to advise Tessoni of the full nature and extent of that relationship;

D. By choosing not to conduct due diligence on FITG, or see or recommend that it be conducted, and assuming, but failing to confirm, that SCI had conducted its own due diligence on FITG;

E. By choosing to rely on FITG’s projections without making certain that reliance was reasonable and justified, even though it “flagged” them as “optimistic” and “aggressive,” and noted that they were “contingent upon raising a substantial amount of outside equity and debt which could prove challenging given the current performance of the company,” in violation of normal practices, and disclaiming any such responsibility;

F. By choosing not to “vet” FITG’s numbers, notwithstanding having excused FITG from any obligation to warranty such information;

G. By choosing to base its valuation of FITG on projections from FITG that included deals that had been “neither agreed nor contractualized,” or, alternatively, by failing to discover that those projections included such deals, to factor that into its analysis, and to so inform Tessoni;

H. By choosing to accept projections from FITG that were unrealistic – a “compounded annual growth rate” from 2006 through 2010 in revenue of 16.2% and in adjusted EBITDA of 222.4% – and basing its valuation of FITG on them;

I. By choosing not to “vet” FITG’s projections and the contingencies, in spite of normal practice, even though it “flagged” them as “optimistic” and “aggressive,” and noted that they were “contingent upon raising a substantial amount of outside equity and debt which could prove challenging given the current performance of the company”;

J. By choosing not to obtain the appropriate expertise to properly evaluate FITG's business plan and projections and claimed off-book assets, and failing to recommend that such expertise be obtained;

K. By choosing to accept FITG's claim of \$100+ million in off-book assets without proper assessment or evaluation;

L. By choosing not to evaluate with respect to the economic fairness of the Merger the deficiencies in the legal agreement, specifically the absence of meaningful protections for SCI against breaches or warranties and representations and then the limitations on the mutual indemnification provisions;

M. By finding that the "projected time and magnitude of the capital raise [were] optimistic" but choosing not to factor the associated execution risk into its opinion;

N. By choosing not to factor into its valuation of FITG the "[e]xecution risk of [FITG's] pro forma projections";

O. By choosing not to factor into its valuation of FITG that the "[v]aluation drivers for ITG are back-end loaded 100%";

P. By choosing not to conduct a market test, or recommend that a market test be conducted (RSM-Choy 160);

Q. By choosing to base its fairness analysis on what was fair "fair to the stockholders of [SCI]" instead of what was fair to the minority stockholders of SCI;

R. By leading Tessonni to believe that it was rendering an opinion as to appropriateness of Merger in general and not just its fairness from an economic standpoint, and choosing not to clarify that point prior to the vote of the SCI Special Committee;

S. By choosing to disregard the fact (explicitly made known to it) that FITG had been valued just over a year before in a context in which WLR had not suggested a valuation of FITG, and when FITG had been performing much better, at \$6.78 a share or (\$114 million in total) and agreeing to a valuation in the Merger 45% higher than that;

T. By choosing to undervalue SCI including by failing to include a control premium;

U. By choosing to overvalue FITG including by:

i) Choosing to use different metrics than it used to value SCI;

ii) Choosing to disregard negative results in its analysis and valuation methods that produced negative values;

iii) Choosing to disregard the effects of the dilution from the debt and equity raises planned by FITG for 2006 and 2007;

iv) Choosing to disregard the execution risks associated with the planned debt/equity raises;

v) Choosing to disregard the execution risk associated with FITG's plans to move production overseas;

vi) Choosing to disregard (although claiming to consider) FITG's underfunded pension liability;

vii) Choosing to use inconsistent "free cash flow" and "net debt" numbers ("free cash flow" from January 1, 2007 and "net debt" from June 30, 2006), in its DCF;

viii) Choosing a discount rate that did not take into account the risk associated with FITG's business plan, as recognized by RSM as discussed above, and as recognized by the defendants themselves;

ix) Choosing not to assess FITG's claimed off-book assets;

V. By choosing to approve the Merger notwithstanding its own conclusions in the Script (Paragraphs 402-405 above) that

i) "book value" itself was a "distortion of true equity value,"

ii) that "ITG's current levels of earnings (EBITDA, EBIT and Net Income) do not support the implied equity valuation given to ITG,"

iii) that "[n]ear term, SCI would be contributing all of the positive free cash flows in the post-merger entity,"

iv) that "[p]ost-merger free cash flow will be lower when combined due to ITG 'drag,'"

v) that the "[e]xecution risk of planned debt and equity capital raise not factored into book value calculation,"

vi) that the "projected time and magnitude of the capital raise appears optimistic," that "[e]xecution risk of pro forma projections are not factored into book value calculation," and

vii) that the "[v]aluation drivers for ITG are back-end loaded 100%."

W. And in such other respects as determined in further analysis.

712. Such actions were not simply inadvertent but were a conscious failure to do that which RSM should have done, and were motivated by a desire to obtain future work from WLR and/or NITG.

713. The minority stockholders including Plaintiffs were damaged as a proximate result of this gross negligence and are entitled to actual and punitive damages in amounts to be determined by a jury.

714. In parallel, Plaintiffs allege on behalf of SCI (now NITG) that it was damaged as a proximate result of this gross negligence and is entitled to actual damages in an amount to be determined by a jury.

CAUSES OF ACTION 8 AND 8A
– BREACH OF FIDUCIARY DUTY –
Against RSM

715. The foregoing allegations are incorporated here by reference.

716. Tessoni gave extraordinary latitude to RSM and relied on its advice and due diligence in connection with the Merger and the negotiations regarding the Merger.

717. RSM's duties went beyond merely rendering fairness opinion services to advising SCI on a proposed purchase price and form of consideration, assisting SCI in structuring the transaction, and negotiating the financial aspects of the transaction. RSM accepted this role.

718. Tessoni looked to and relied on RSM for general guidance regarding the Merger and believed that RSM was advising him as to whether the deal should be done, and at what price, and not simply rendering a passive opinion as to whether the Merger was fair from an economic point of view. (See Tessoni Dep. 503-04.)

719. Indeed, Tessoni relied on RSM for advice and assistance in negotiations with the FITG Special Committee, even going so far as having RSM prepare the response to the FITG Special Committee's effort to renegotiate the deal and obtain a higher split, and having RSM speak on his behalf in negotiations with the FITG Special Committee, and RSM did these things.

720. As a result, RSM assumed a fiduciary duty toward SCI and the special committee to act for and give advice in their interests upon matters within the scope of the relationship. (*E.g., Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Securities Corp.*, 351 F. Supp. 2d 79, 102 (S.D.N.Y. 2004).)

721. RSM also became the agent of Tessoni and the SCI Special Committee, and assumed a fiduciary duty toward them by virtue of that agency relationship. (*Restatement of Agency*, §13 ["The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.].)

722. The limitation on liability in RSM's Engagement Agreement is inapplicable for the same reasons as alleged above and as a matter of public policy (RSM may not, for example, rely on information that is patently unreasonable and avoid liability for that by contract). *See Restatement (Second) of Torts*, §552 (Information Negligently Supplied For The Guidance Of Others)

723. Finally, the failure to fully and properly advise Tessoni of the full extent of its sister company's relationship with FITG renders the Engagement Agreement null and the limitation of liability void. (See Paragraphs 317-341 above.)

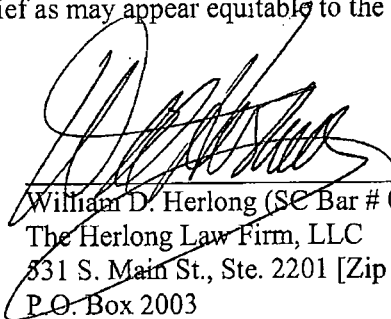
724. RSM violated its fiduciary duty by agreeing to and approving the Merger, and in the more specific respects set forth above (Paragraph 711 above).

725. The minority stockholders including Plaintiffs were damaged as a proximate result of these breaches of fiduciary duty and are entitled to actual and punitive damages in amounts to be determined by a jury.

726. In parallel, Plaintiffs allege on behalf of SCI (now NITG) that it was damaged as a proximate result of these breaches of fiduciary duty and is entitled to actual damages in an amount to be determined by a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays for (a) relief as hereinabove set forth, including but not limited to actual and punitive damages plus pre-judgment interest to Plaintiffs and class members on the direct claims; (b) actual damages plus pre-judgment interest to SCI (now NITG) on the derivative claims, along with punitive damages to the extent allowed by the law; (c) attorneys' fees, costs and other litigation expenses to the extent allowed by law; and (d) such other and further and injunctive relief as to the Court may appear just, equitable, and proper including an order of judicial dissolution or such alternative relief as may appear equitable to the Court.



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October 10, 2011

PLAINTIFFS HEREBY DEMANDS TRIAL BY JURY

In re International Textile Group
Merger Litigation,

) C.A. No. 2009-CP-23-3346
)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **FIRST AMENDED CONSOLIDATED COMPLAINT** upon defendants by email, with a courtesy copy also served by United States Mail, postage prepaid (to those who request), addressed as follows:

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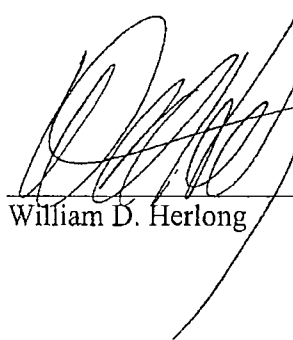
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