

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Tate, Joseph Shuster, Lyle
Evanson and John Ayers, individually
and on behalf of all other individuals
similarly situated,

Civil File No. 09-cv-02076 (MJD/JJG)

Plaintiffs,

vs.

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
PUNITIVE DAMAGES**

Restaurant Technologies, Inc.,
Parthenon Capital LLC, Jeffery R.
Kiesel, John C. Rutherford, Jonathan
O. Grad, Zachary F. Sadek, Philip A.
Clough and Robert E. Weil,

[FILED UNDER SEAL]

Defendants.

*“[W]e should discuss live vs email given legal situation.”
-Jonathan Grad, email to Zachary Sadek Feb. 6, 2008.*

INTRODUCTION

Plaintiffs Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers (“Plaintiffs”) submit this Memorandum in support of their Motion to Amend the Complaint to assert a claim for Punitive Damages against Defendants Parthenon Capital LLC (“Parthenon”), Jeffrey Kiesel (“Kiesel”), Jonathan Grad (“Grad”) and Zachary Sadek (“Sadek”) (collectively “Defendants”).¹

¹ At this time, Plaintiffs are not seeking punitive damages against Defendants John Rutherford, Philip Clough and Robert Weil. Discovery is continuing in this matter and, should evidence be forthcoming justifying an assertion of punitive damages against these Defendants, Plaintiffs may approach the Court in the future.

As controlling shareholders and/or officers and directors serving on RTI's Board, Defendants owed fiduciary duties to Plaintiffs and the putative class. Defendants' demonstrable contempt for these duties constitutes *prima facie* evidence that Plaintiffs and the putative class are entitled to seek punitive damages. Despite their well-defined fiduciary duties of loyalty to all Restaurant Technologies, Inc. ("RTI") shareholders, Defendants violated these duties by consistently and intentionally pursuing their own interests to the detriment of the Plaintiffs and the proposed Class. Defendants' conduct reveals a pattern of pervasive self-dealing, concealment and deliberate misrepresentation that justifies an amendment to assert a claim for punitive damages.

PROCEDURAL BACKGROUND

This case was originally filed in state court and was removed to federal court by the Defendants. A motion to dismiss was briefed, argued and ruled upon. (Dkt. # 54.) Subsequently, Plaintiffs filed an Amended Complaint adding Defendants Parthenon and Sadek. (Dkt. # 58.) All of the Defendants, with the exception of Parthenon, have now answered the Amended Complaint. (Dkt. # 67.)

The parties have exchanged approximately 200,000 pages of documents along with other written discovery. Each of the proposed Class representatives, the Chairman of the RTI Board of Directors (Kenneth Larson), another member of the RTI Board (John Grunewald), a major investor in RTI (Gemini), a representative of Piper Jaffray and an officer of McDonald's Corporation have all been deposed. Approximately 15 additional depositions are scheduled to occur prior to the factual discovery cutoff date of July 1, 2010.

A motion for class certification is scheduled to be heard on June 24, 2010.

Defendants recently filed a motion for partial summary judgment. Plaintiffs now seek to amend their Complaint to assert a claim for punitive damages against Defendants Parthenon, Kiesel, Grad and Sadek.²

FACTUAL BACKGROUND

A. The Parties.

Plaintiffs are owners of common stock in RTI. (First Amended Complaint, ¶¶ 1-4 (Dkt. # 58).) Plaintiffs Schuster and Tate were founders of RTI and served on its Board of Directors for several years. Collectively, the named Plaintiffs invested nearly one million dollars in RTI common stock from 1998 through 2002. (*Id.*) Plaintiffs seek to represent RTI class A and common stock shareholders. (*Id.* at ¶¶ 15-21.)

RTI provides distribution services for cooking oil to high-volume companies such as McDonald's, Chili's, and McCormick & Schmick's. (*Id.* at ¶ 22.) The company also removes the used cooking oil, commonly referred to in the industry as "yellow grease" and recycles it. (*Id.*) There are many purposes for yellow grease, but its use in the production of biofuels is one reason that RTI will continue to enjoy success in the future.

Defendant Kiesel is Chief Executive Officer of RTI. Defendants Grad and Sadek serve on the RTI Board of Directors. Defendants Grad and Sadek are affiliated with Defendant Parthenon, a private equity firm based in Boston. (*Id.* at ¶¶ 6, 10.)³

² Pursuant to a Stipulation and Order, the date to file this motion was extended until June 1, 2010. (Dkt. ## 55, 59.)

³ All of these facts are essentially undisputed in Defendants' Answer. (Dkt. # 67.)

Until late 2008, RTI shareholders were convincingly informed of RTI's success and prospects. (*Id.* at ¶ 24.) Defendant Kiesel repeatedly touted the company's prospects in communications to RTI's shareholders. (*Id.*) Indeed, RTI's revenue stream, earnings before interest, taxes, and depreciation ("EBITDA") and overall growth increased throughout RTI's history. (*Id.* at ¶ 23.)

Because of RTI's rich prospects, Defendants engaged in a long-term effort to lull RTI shareholders by singing praises and raising expectations while simultaneously engaging in a series of surreptitious acts designed to seize control of RTI's potential for themselves. As set forth below, these acts included purchasing RTI stock without affording RTI common shareholders similar rights and trying to get RTI common shareholders to voluntarily forfeit their shares, and ultimately culminated in a fraudulent and unfair "merger" and recapitalization process.

B. Parthenon is a Controlling Shareholder of RTI and Designated Sadek and Grad to Serve on the RTI Board.

Parthenon is a private equity firm with offices in Boston and San Francisco. Parthenon has repeatedly acknowledged its position as RTI's controlling shareholder. For example, Parthenon's founder Rutherford told RTI shareholders in 2007 that he "called the shots" at RTI even though he was not on RTI's Board. (Affidavit of Larina A. Alton, dated May 13, 2010 ("Alton Aff."), Ex. 4, p. 68 and Ex. 5, p. 97.) In early 2009, a Parthenon principal acknowledged that "we do control the company." (Alton Aff., Ex. 6.)

Parthenon's controlling ownership in RTI stems from its majority purchase of RTI Series A-1 preferred stock in 2001.⁴ One rationale for Parthenon's investment in class A preferred stock was to "maintain control" of RTI because of its "upside potential." (*Id.*, Ex. 7.) In fact, according to audited financial statements, Parthenon "effectively (could) exercise control over significant transactions affecting the Company." (Alton Aff., Ex. 8 at 077576.) Consistent with that control, the former Chief Financial Officer of RTI testified that, after 2001, Parthenon could "veto" or "block" certain types of financing and sale arrangements which RTI could have otherwise pursued. (Alton Aff., Ex. 3, pp. 288-90.) By the end of 2005, over 50% of the outstanding RTI stock was held by Parthenon and another private equity firm, ABS Capital. (Dkt. # 11, Ex. 1, pp. 56-58.)

Parthenon's Series A preferred stock purchases gave Parthenon the right to designate members of the RTI board. (Alton Aff., Ex. 10.) Parthenon designated members of the RTI Board of Directors starting in 2001. By 2005 Parthenon and ABS Capital designated a majority of the RTI board.⁵ Defendants Grad and Sadek are officers of Parthenon designated by Parthenon to serve on RTI's Board of Directors in 2006 and early 2008 respectively. Kiesel, while not a principal of Parthenon, became Chief Executive Officer of RTI in 2005 with the approval of Parthenon.⁶

⁴ Parthenon made subsequent purchases of other Series A preferred stock in 2002, 2004 and 2005.

⁵ Defendant Jeffrey Kiesel admits that Parthenon has the ability to designate a majority of the Board of Directors. (Alton Aff., Ex. 9, Req. Nos. 7 & 8.)

⁶ These facts have all been admitted to in Defendants' Answer (Dkt. # 67) or in Requests for Admissions (Alton Aff., Ex. 9, Req. Nos. 11-15).

C. Parthenon Directs RTI's Future as Early as 2002.

Parthenon representatives on the RTI Board acted to enhance Parthenon's bottom line (regardless of what their fiduciary obligations to other RTI shareholders might demand) as early as 2002. In that year, RTI officers met with Bunge Corporation. Bunge Corporation expressed an interest in purchasing RTI for \$32 per common share, which could have paid RTI common shareholders millions of dollars. But the offer was never considered. When asked why the Bunge Corporation offer was not seriously evaluated, Mr. John Ruelle, the former Chief Financial Officer of RTI, testified that Parthenon did not have any interest in the Bunge offer because Parthenon had just invested in RTI a year earlier and it was too soon for Parthenon "to have an exit." (Alton Aff., Ex. 3, pp. 288-89.) Parthenon had the power to block such a sale, and so it did. (*See id.*) Parthenon blocked the potential sale of RTI to Bunge Corporation not because such a transaction would not benefit RTI or its shareholders, but because it conflicted with Parthenon's favored investment strategy. (*Id.*) Parthenon's control of RTI continued after Bunge's proposal, and Parthenon was able to (and did) price offerings of RTI stock for its own benefit. (Alton Aff., Ex. 11.)

D. Parthenon, Grad and Sadek Deliberately Disregarded RTI Common Shareholders' Rights Through Self-Dealing Conduct.

Defendants' historical disregard for the rights of other RTI shareholders' interests coalesced into a plan that would allow Parthenon to exit the company with a maximum return on its investment no matter what happened to other RTI shareholders. Despite Defendants' fiduciary duties to RTI shareholders, Defendants scuttled an RTI initial

public offering (“IPO”) for the exclusive benefit of Parthenon and to the detriment of other holders of RTI securities.

Parthenon initially expected to successfully exit its investment in RTI through an initial public offering (“IPO”) in which all preferred shares would necessarily be converted into common shares for purposes of distributing IPO proceeds. (Alton Aff., Ex. 12.) In an IPO, pursuant to RTI’s articles of incorporation, all preferred shares would be converted to common and both preferred and common shareholders would have been paid the same price for their shares. (Dkt. # 11, Ex. 1 at Ex. G.)⁷ According to investment banking firms, such an IPO would have generated great returns for all RTI shareholders, and throughout 2007 the company was engaged in an extensive program to make itself IPO ready. (Alton Aff., Ex. 2, pp. 285-86; Ex. 13; Ex. 14.) But Defendants Parthenon, Sadek and Grad realized that if they sold the company instead of pursuing an IPO, Parthenon would achieve a greater return on its RTI investment. (Alton Aff., Ex. 12.) In the event of a “liquidation, dissolution or winding up” of RTI, Parthenon felt it had the right to receive certain liquidation preferences (or “accreted value”) on its preferred stock. If a majority of preferred shareholders so elected, the following two types of transactions could be deemed a liquidation, dissolution or winding up:

- (A) a sale or other similar disposition of all or substantially all of the consolidated assets of the Corporation; or (B) a consolidation or merger of the Corporation or sale or other transfer of Common Stock of the Corporation in one transaction or a series of related transactions, resulting in a majority of the Corporation’s outstanding Common Stock

⁷ Dkt. # 11 contains the bulky proxy memorandum mailed out to RTI shareholders on May 13, 2009.

(determined on an as-converted basis) being beneficially held by persons or entities other than the persons and entities that beneficially held, directly or indirectly, a majority of the Common Stock (determined on an as-converted basis) immediately prior to such merger, consolidation, sale or transfer.

(Dkt. # 11, Ex. 1 at G.) Absent such a liquidation, dissolution or winding up, a preferred shareholder like Parthenon had no contractual right to receive liquidation preferences (and a realization of its accreted value). Accreted values varied among the Series A preferred stock offerings, but ranged between 20% to 27% annually. (Alton Aff., Ex. 8 at 77575.)⁸

Because Parthenon would be able to receive liquidation preferences (accreted value) before common shareholders obtained any return in the event of an RTI sale, liquidation, or winding up, Parthenon could increase its own return from a sale while simultaneously decreasing the return to RTI's common shareholders. As Defendants Sadek and Grad—*while both were serving on the RTI board of directors*—explained in a February 5, 2008 internal Parthenon email chain:

(a)s you will see, our current thinking is that we are most likely to sell RTI in a private sale rather than an IPO. The reason for this change in our thinking is that although we are valuing the company at a lower value than we were at the end of Q3 (due to the company's below plan Q4 performance), Parthenon proceeds are higher than they were in a Q3 valuation because we no longer have to assume the conversion of our preferred stock (such a conversion is mandatory in an IPO).

⁸ RTI Board minutes reveal that at least one Board member described the accretion rates as "onerous." (Alton Aff., Ex. 15.)

(Alton Aff., Ex.12 (emphasis added).) The reason for Parthenon’s higher proceeds, Grad explained, is “[w]e’ve just shifted the write-down to the common. The common gets written down drastically (ie to zero).” (Alton Aff. Ex. 12.) The next day, Grad also acknowledged to Sadek and another Parthenon managing partner that Parthenon’s plan raised legal concerns and emphasized the need to avoid creating a written record of the scheme: “We’re going to end up selling this [company] ... There are implications for each tranche of equity investors but we should discuss live vs email given legal situation.” (Alton Aff., Ex. 16.)

By the end of February 2008, having made its decision to “shift the write-down” of common shareholder equity value to zero, Parthenon (through Sadek and Grad and its other designees on the RTI Board) wielded its control of RTI to arrange yet another round of preferred equity financing (Series B-1) at a 30% accretion rate in order to maximize Parthenon’s returns in advance of the planned sale. (Alton Aff., Ex. 17.) Throughout this time period, Parthenon considered itself to have 61.4% “effective ownership” of RTI, which was calculated by dividing Parthenon’s expected proceeds by RTI’s total equity value. (Alton Aff., Ex. 18.)

Parthenon, Grad and Sadek discussed giving the Series B-1 stock a 2x’s liquidation preference, but decided that “2x would seriously inflame the common” and that it “[s]eems a little unreasonable to get 2x . . . given our plans for immediate sale.” (Alton Aff., Ex. 19.) Sadek informed Grad that Parthenon’s investment committee “would be willing to go down to 25%” in setting the accretion rate of the Series B-1 issuance. (*Id.*) In other words, in February 2008, RTI board members Sadek and Grad

were aware of the fact that RTI could have raised the Series B-1 equity at a 25% accretion rate. However, this fact was never brought to the attention of the rest of the RTI board, and instead the April 2008 Series B-1 issuance carried a 30% accretion rate. (Alton Aff., Ex. 17.) Similarly, the B-1 offering provided that it would be paid before any other class of outstanding shares. Thus, after deliberately ignoring the opportunity to secure less onerous financing, failing to notify their fellow fiduciaries and board members of the opportunity, and failing to inform other shareholders of the near-term sale plans, RTI issued the Series B-1 preferred stock—of which Parthenon purchased approximately 43%. (*See* Dkt. # 11, Ex. 1 at 10, 56.)

The Series B-1 offering was made in several stages, the first of which occurred in March 2008 and was offered only to Parthenon and ABS. (*See* Dkt. #11, Ex. 1 at Schedule 2.6.) The second stage of the Series B-1 offering occurred several months later and was provided to numerous RTI shareholders. Consequently, Parthenon was able to enjoy three months of 30% accretion before the Series B-1 stock was even offered to other shareholders. At the same time, Kiesel's letter to shareholders about the B-1 offering withheld details of the sale plans, ensuring that minority shareholders would not have this material information, which would have added an incentive to invest in Series B-1 and thus dilute Parthenon's investment.⁹ When, not unexpectedly, the entirety of the

⁹ The anticipated sale price of RTI as projected by its investment banking firm in the spring of 2008 was between \$300 and \$340 million, so the Defendants expected to receive all of Parthenon's investment in B-1 with a 30% return in a relatively short time. (Alton Aff., Ex. 21.) Only insiders like Kiesel, Grad and Sadek knew the expected sales price.

B-1 offering was not sold out, Parthenon immediately purchased the remainder of the B-1 offering. (Alton Aff., Ex. 20.)

In conjunction with the decision to scrap the planned IPO and pursue a near-term sale of the company, Parthenon made the arbitrary and self-serving determination that the common shareholders' equity would be wiped out. In February 2008 Rutherford told Grad and Sadek that he had determined "that the common are too far under to count."¹⁰ (Alton Aff., Ex. 22.) Notwithstanding this view, the estimated sale price of RTI was anticipated to be in the \$300-million range—a figure that, *but for the 30% accretion of the Series B-1 stock* that Parthenon had issued to itself in anticipation of an RTI sale and sales bonuses insisted upon by Kiesel—would have returned millions of dollars to common shareholders. (Alton Aff., Ex. 21.) As anticipated, in September 2008, the company did in fact receive an arm's-length \$300 million offer; however, the sale was not completed due to the 2008 nationwide credit crisis. (Alton Aff., Ex. 23.)

Grad and Sadek were well aware that their actions in 2008 – namely, dictating the terms of the Series B-1 issuance and deciding to pursue a sale instead of an IPO – crossed fiduciary lines and created significant legal exposure. Defendants' knowledge of this is reflected in an internal draft of Parthenon's "Investment Committee Review" PowerPoint presentation from October 2008, which indicates that Parthenon had earmarked 3.3% (approximately \$10 million) of the \$300 million sale proceeds as "other" transactional expenses of the proposed RTI sale which would be "used to settle any intra-shareholder

¹⁰ In 2006 and 2007, the common stock of RTI had an appraised value of between \$21 and \$26 per share. (Alton Aff., Ex. 26)

litigation.” (Alton Aff., Ex. 24 at PC137003.) After reviewing the early draft of the presentation, Sadek instructed a Parthenon representative to delete the “reference to proceeds used for intra-s/holder stuff” and to replace it with the phrase “Assumption made for intra-shareholder issues *to be discussed live.*” (Alton Aff., Ex. 25; Ex. 27 at RTI 190805 (emphasis added).) Further reinforcing Defendants’ conscious appreciation of their self-inflicted legal predicament, the same Parthenon “Investment Committee Review” also expresses the viewpoint that a future equity investment in RTI “[s]hould be able to solve existing shareholder issues through negotiated settlement with common.” (Alton Aff., Ex. 27 at 190818.)

Despite Parthenon’s internal recognition of its obligations to common shareholders and their knowledge that the onerous B-1 accretion rates would continue to deplete any portion of sale proceeds that would otherwise flow to the putative Class, Defendants took no steps to address, remedy or even acknowledge their fiduciary obligations. Instead, by November 2008 Defendants jettisoned any appearance of attempting to properly “solve existing shareholder issues” and decided to wholly disregard the rights of RTI minority shareholders by engaging in a self-dealing “recapitalization” designed to hijack RTI’s equity.

E. Parthenon, Grad and Sadek Utterly Disregard the Rights of Other RTI Shareholders by Orchestrating Still Another Preferred Stock Offering and Planning the Recapitalization.

Thus, the sale that could have assured Parthenon a realization of all of its accreted value was not realized at the end of 2008. But Parthenon, Sadek and Grad still knew that there was potentially one other avenue pursuant to which Parthenon could be paid its

accreted value before any payment to “old preferred” or common stock: a merger. RTI’s governing documents provided that Parthenon’s preferred stock could receive liquidation preference in a sale **OR** “a consolidation or merger . . . resulting in a majority of the Corporation’s outstanding Common Stock . . . being beneficially held by persons or entities **other than** the persons and entities that beneficially held, directly or indirectly, a majority of the Common Stock . . . immediately prior to such merger, consolidation, sale or transfer.” (Dkt. # 11, Ex. 1 at Ex. G.) With a diligence and tenacity that might be admirable in a less ruthless context, Parthenon, Grad and Sadek continued their pursuit of Parthenon’s desired investment outcome. However, the recapitalization ultimately concocted **did not** contractually entitle Parthenon and other preferred investors to a liquidation payment of their accreted value because no change of control occurred – this was a recapitalization, not a merger. But the fact that Parthenon and other preferred investors were not entitled to liquidation preference in the recapitalization was never disclosed to shareholders. Instead, the shareholder-distributed materials inferred otherwise.

Grad candidly proposed the illegal recapitalization scheme that would occur in the following months:

Do you guys know enough to assume that if we went down a path in which we put a large slug of additional equity (say \$25M) into RTI but did it in which there was technically a change of control transaction, but in which we still ended up as controlling shareholders, that they would be ok rolling over. I ask because it is likely that the best way to solve our shareholder issues is to do a merger preceded by a shareholders meeting and vote in which shareholders would vote to cram themselves down. That produces the cleanest

result from a shareholder perspective but presumably requires refinancing the debt so we need their consent up front.

(Alton Aff., Ex. 28 (emphasis added).)¹¹ Parthenon essentially understood that it was going to incur significant legal exposure in carrying out a recapitalization designed to cram down the common shareholders, but decided that the potential reward outweighed the potential risk.¹²

Defendants decided to try essentially the same plan once again: offer a round of preferred stock (B-2), followed by a recapitalization that would cram down other shareholders and upstream RTI equity to those holding B-1 and B-2 stock. In view of the planned recapitalization Parthenon purchased additional shares – *again* at a high accretion rate and without offering the same opportunity to other shareholders. On December 30, 2008 Parthenon obtained Series B-2 stock. The terms included a 30% accretion rate and a “right of conversion” provision that if, within six months the company was recapitalized, Parthenon could convert 100% of the value (including accretion) of its Series B-2 stock into *preferred stock of the new entity*. (Alton Aff., Ex. 29.) Parthenon also gave itself voting rights as Series B-2 shareholders so that it could vote its Series B-2 stock in favor of the recapitalization it was planning to foist on the other shareholders. (*Id.*) This disproportionately increased Parthenon’s voting power

¹¹ Apparently Grad’s impulse to have legally problematic conversations verbally rather than by email was inconsistent. (*Compare* Alton Aff., Exs. 16 and 30 (PC164865) *with id.* at Ex. 28.)

¹² Unsurprisingly, the RTI Board (dominated by Parthenon representatives) raised the amount of director and officer insurance coverage soon after they made a decision to pursue recapitalization. (Alton Aff., Ex. 31.) Defendants clearly understood the risks they were taking, but tried to hedge the risk through increased insurance coverage.

because no other shareholders were offered Series B-2 stock in advance of the vote on the recapitalization. Thus, Parthenon ensured that its ownership interests would consume more and more of the equity belonging to other RTI shareholders and that, since it diluted the remaining shareholders' votes, the planned self-dealing recapitalization was, they hoped, assured.¹³

Sadek engaged in loan forbearance negotiations with RTI's lenders.¹⁴ In conducting these negotiations, Sadek did not meaningfully consult with non-Parthenon RTI board members, but instead negotiated terms with the lenders favorable to Parthenon. Parthenon's negotiations with RTI lenders regarding the structure of the proposed recapitalization was premised on the notion that any such negotiations should aim to accommodate Parthenon's interests. (*Id.*, Ex. 32.) According to the instructions given to Sadek and Grad by Parthenon, "[a]n important key to this is new equity structure. To move the lender negotiation on (**in our best interest**) perhaps our proposal contemplates 2 equity structures – 1. Existing structure stays in place and 2. **Structure with common and old preferred cram down . . .**." (Alton Aff., Ex. 32 (emphasis added).) The same Parthenon managing partner characterized the negotiations with the

¹³ The initial B-2 offering sale was done without the benefit of any outside investment banking firm opining on its value to RTI. Further, there is no evidence that Grad or Sadek ever recused themselves from any vote while serving on the RTI Board despite the obvious conflicts of interest.

¹⁴ RTI, along with most other companies in the country, suffered a temporary setback at the end of 2008 because of the unstable credit markets. RTI missed its earning projection and fell out of compliance with certain bank covenants because of depressed commodity pricing. However, according to Sadek, this did not affect the "fundamentals" of the company. (Alton Aff., Ex. 33.)

lenders as “saving their bacon as much as we are protecting ours; we need to convey that attitude and not let them bully us into giving up a bunch more economics.” (*Id.*, Ex. 34.) However, it was not *Parthenon’s* “economics” that were being given up, but those of the “common and old preferred” in the form of a deliberate cram down.

In order to cram down “the common and the old preferred,” Parthenon determined that a low enterprise value for RTI had to be utilized. Consequently, in his negotiations with the lenders and in all subsequent recapitalization documents, Sadek used a \$140 million enterprise value figure for RTI – a number which Parthenon internally called a “strawman.” (Alton Aff., Exs. 35 and 36.) Sadek told Grad and other Parthenon principals that the additional equity being contributed would “significantly depress [Parthenon’s] returns and most likely will *require* a lower [pre-merger] valuation.” (Alton Aff., Ex. 37 (emphasis added).) In other words, the \$140 million enterprise value placed on RTI was the product of a *Parthenon investment decision* – not a legitimate *valuation* of RTI – and was determined based on what Parthenon “required” for its own investment returns.

At no point in the spring of 2009 did RTI’s other board members or officers give any meaningful input on the negotiations conducted between the lenders and Parthenon/Sadek. Instead, Sadek and the lenders exchanged numerous “Summary of Indicative Terms” sheets which comprised the negotiated documents. (Alton Aff., Ex. 36.) The terms which Sadek “negotiated,” included:

- RTI's agreement to conduct a recapitalization and force common shareholders to sign releases in order to maintain any equity interest in the recapitalized entity.¹⁵
- Having RTI pay \$400,000 of closing costs to Parthenon at the time of the recapitalization.
- Having RTI agree to enter into a Management Services Agreement with a Parthenon subsidiary (PCap) in which RTI would pay PCap \$450,000 annually.
- Agreeing that Parthenon would get 1% of any subsequent sale price when RTI was eventually sold.
- Employing, for purposes of the merger, a \$140 million enterprise value which would wipe out existing shareholder value while quietly supplying the lenders with warrants to purchase equity in the recapitalized entity.
- Agreeing that, when a recapitalization occurred, the Series B-1 preferred stock, like the Series B-2 preferred stock, would be converted at 100% of value including liquidation preferences.¹⁶ In order to do that, the recapitalization would have to be called a "merger" even though no change of control would occur.

(*Id.* (emphasis added) (Dkt. # 11 at p. 22).) None of these terms benefited RTI, much less its shareholders other than Parthenon. However, having reached agreement with the lenders, the Defendants implemented the plan.

1. The Special Committee is formed, uninformed, and tainted.

Defendants called upon attorneys for help in carrying out the recapitalization/"merger" scheme. The attorneys decided that a Special Committee

¹⁵ Forcing RTI common shareholders to sign releases originated with Parthenon and its counsel. (Alton Aff., Ex. 9, Req. Nos. 200-201.)

¹⁶ While Parthenon held 43% percent of the Series B-1 offering, the lenders also owned certain Series B-1 preferred stock making the agreement that the B-1 stock would get 100% of accreted value in the recapitalization not surprising as Sadek carved up RTI's equity.

should be formed to assess the fairness of the recapitalization transaction. However, prior to the Special Committee's formation, a 12-day timetable for the preordained "approval" of the recapitalization by the Special Committee had already been established. (Alton Aff., Ex. 38.) The timetable, expressing a date for the Special Committee to "approve" of the transaction (not decide whether it should take place) was e-mailed to all of the Special Committee members. (*Id.*)

The Committee consisted of Board Chairman Ken Larson ("Larson"), Board member Jack Grunewald ("Grunewald") and Kiesel. The Special Committee of "Majority Common Shareholders" was formed, purportedly because a majority of the RTI board was designated by controlling shareholders and, in the sanitized language of the Proxy, "the recapitalization of the company would have a different impact on each of the classes and series of Stock, with the Common Stock being the most affected vis-à-vis the holders of the Series B-2 stock." (Dkt. # 11, Ex. 1 at 9.)

Special Committee member CEO Jeffrey Kiesel was tainted before the Special Committee's feeble efforts even began. Acknowledged to be a domineering personality, Kiesel had a direct stake in the outcome of the transaction. According to Grunewald, Kiesel became Chairman of the Special Committee. (Alton Aff., Ex. 1, p. 81.) What Grunewald did not know was that that on the evening prior to the Special Committee's first meeting, Sadek emailed Kiesel the details of a new management incentive plan that would be implemented upon completion of the recapitalization. (Alton Aff., Ex. 39 and Ex. 1, pp. 22, 29.) This incentive plan provided that Kiesel could expect to receive 35% to 40% of all outstanding stock options in the newly recapitalized entity. (*Id.*) In

describing the financial impact of the incentive plan on Kiesel, Sadek created and shared with Kiesel a spreadsheet suggesting an exit strategy by the end of 2010 in which RTI's value was projected to range as high as \$350 million. (*Id.*) According to the management incentive plan, Kiesel, the Chairman of the Special Committee, would receive millions of dollars in the event that the recapitalization and subsequent resale of RTI occurred as planned. (*Id.*)

Larson was also selected to be a special committee member. However, Larson was no friend of the RTI common shareholders. As he compliantly wrote to Grad on March 7, 2009 (several weeks before the special committee was formed): "John, I don't see things much differently than you do and really don't have much to discuss. My main concern is not to do or say anything that might cause a problem." (Alton Aff., Ex. 40 (emphasis added).) Larson testified that his knowledge and involvement with the terms negotiated by Sadek with the lenders were minimal:

Q: But did you know when negotiating with the bank that the Parthenon people were negotiating a management fee for themselves?

A: Not specifically, no.

...

Q: Did you ever ask why the \$140 million figure was used?

A: I don't recall.

(Alton Aff., Ex. 2, pp. 110, 125.)

Grunewald had served as *Parthenon's* representative/designee on the RTI Board for eight years until January 2009 when he was transformed into the common shareholder representative. (Alton Aff., Ex. 41.) Similar to Larson, Grunewald also testified about his total disconnect with the Parthenon/Sadek/lender negotiations:

Q: Have you ever seen drafts of something called a Summary of Indicative Terms?

A: No.

....

Q: Do you know anything about the negotiations that may have occurred with the banks involving their wanting to obtain certain warrants?

A: No I don't.

....

Q: Okay, what involvement did you have as a member of the Special Committee in the negotiations of the \$500,000 management fee payable to Parthenon Capital?

A: I never had any direct negotiations.

(Alton Aff., Ex. 2, pp. 71-71, 78, 80.)

Given Grunewald's past position as Parthenon's designee, Kiesel's self-interest and Larson's commitment to not make waves, it is not surprising the Special Committee met no more than three hours in its five meetings *combined* regarding the complex, manipulative transaction and did not negotiate a single term that would benefit the common and Series A shareholders. (*Id.*, pp. 110-118.)

2. The Special Committee elects to retain non-independent financial and legal advisors.

The Special Committee relied upon Dorsey & Whitney, RTI's counsel, to provide it with "independent" legal advice. (Alton Aff., Ex. 9, Req. No. 144; Ex. 2, p. 158.) The Special Committee had its initial meeting on April 1, 2009 at which four attorneys attended, including litigation counsel. (Alton Aff., Ex. 42.) At the first meeting, the Special Committee members were advised by litigation counsel that they needed to retain an "independent" financial advisor to assess the fairness of the transaction. (Alton Aff., Ex. 42 at RTI 191587.) Ultimately, Robert W. Baird & Co. Inc. ("Baird") was chosen to provide financial advice, but it was hardly "independent." Baird was working on an initial public offering with ABS Capital at the time and had other relationships with Parthenon. (Alton Aff., Ex. 43; Ex. 9 at Req. Nos. 78, 80.) Kiesel negotiated the terms of the Baird engagement which included paying them over \$250,000 for a "fairness" opinion that did not even assess "the fairness of the transaction to the shareholders." (Alton Aff., Ex. 44.)¹⁷ Baird was able to provide its preliminary conclusion that the transaction was fair to the company (as opposed to the shareholders) within three days of the execution of its engagement letter. (*Compare id.* Ex. 44 with Ex. 45.)

The Special Committee perfunctorily approved the recapitalization transaction with no change in its terms. All the terms which Sadek had negotiated with the banks on behalf of Parthenon remained in place, including the payment of a \$400,000 "closing fee"

¹⁷ The draft engagement letter had Baird opining about the fairness of the transaction to the common shareholders, but that was removed on the executed copy. (Alton Aff., Ex. 44 at RTI 057160.)

to Parthenon; the annual \$450,000 “management services fee” for a Parthenon subsidiary, PCap; the fabricated \$140 million valuation; the proposed *de minimus* 13¢ per-share payment to RTI common shareholders; obtaining a release from common shareholders; and Parthenon obtaining 1% in any subsequent sale of RTI. (Dkt. # 11, Ex. 1 at 22.) Grunewald, Larson and Kiesel did nothing to change or negotiate the transaction on behalf of RTI shareholders. In fact, Grunewald testified:

Q: . . . I’m just asking you a very simple question and that is: Can you name one thing you did that benefitted common shareholders, because they’re one of the stakeholders?

A: Uh-huh. I can't name anything specific.

(Alton Aff., Ex. 2, pp. 160-61.) Satisfied that they had met the form – if not precisely the spirit – of the law, Defendants then foisted the sham on RTI shareholders.

3. Defendants distribute misleading proxy materials

Having concocted the recapitalization/“merger,” the Defendants now had to obtain a vote and get RTI shareholders to “cram” down their own interest that would provide the clean result that Grad suggested months earlier. (Alton Aff., Ex. 46.) Sadek, Grad, and Kiesel all reviewed and approved the proxy materials that were mailed out to shareholders on May 13, 2009. Shareholders were to submit their vote, election form (stock in the post-recap RTI or cash), stock certificates, and (for at least the common shareholders that wished to continue as RTI owners) releases before the shareholder vote on June 12, 2009.

The proxy materials portrayed a bleak and dismal view of RTI. Kiesel conveyed the company's "deterioration," that the company would need to pursue a "restructuring or liquidation in bankruptcy" and that the company needed to "undergo a comprehensive equity recapitalization via merger." (Dkt. #11, Ex. 1 at i-iiii.)¹⁸

Sadek assumed a prominent and deceitful role with respect to the message conveyed to RTI shareholders in advance of the recapitalization. Sadek deleted entire sections of attorney-drafted proxy material that conveyed a positive view of the company. (*Compare* Dkt. No.11 Ex. 1 *with* Alton Aff. Ex. 47.) For example, Sadek deleted a section on "Recent Developments" and statements that RTI was a "compelling value." (*Id.*, Ex. 47, pp. 51-52 at footnotes 48 and 51.)

Sadek, a director with fiduciary duties to Plaintiffs and the putative class, was at times quite frank about his efforts to make RTI's prospects look far worse than they actually were. Sadek edited the PowerPoint slides that were presented to RTI shareholders at the Informational Meeting for RTI shareholders to be held before the vote on the recapitalization. Sadek immediately noted that the Informational Meeting presentation contained information that had been carefully removed or altered in the proxy materials, and, with some apparent alarm, noted that the presentation was "seriously flawed in terms of . . . the picture it presents." (Alton Aff., Ex. 48.) He decided that he had to perform "major surgery" on it (*see id.*), and meticulously flagged every piece of previously undisclosed material information contained in the slides for

¹⁸ The final version of Defendant Kiesel's letter to the shareholders was considerably different than the first draft which Defendant Sadek suggested "should be a more detailed story." (Alton Aff., Ex. 47, p. i at footnote 1.)

deletion or alteration. (Alton Aff., Ex. 49.) Sadek’s editorial efforts reveal his full awareness of the materiality of the information for shareholders:

Information contained in original draft of Shareholder Presentation	Sadek’s Comment
“Added oils represent 10,000+ future installations in available pipeline	“Not in Proxy” (p.7)
“Customer base analytics uncovered significant margin opportunities”	“Is this in Proxy?” (p. 9)
“\$850 k + cost reduction and gained a streamlined organization”	“Not in Proxy” (p. 11)
“since year-end, significant efficiency gains have been made . . .”	“Note: Project DRIVE not in Proxy” (p. 12)
Goal of \$4.2MM+ of operation savings and \$5MM working capital at cost of \$1.3M. On track for exceeding goals”	“Note: Project DRIVE not in Proxy” (p. 14)
“Account renewals at higher prices ... Current Pipeline represents 10,000+ installations”	“Inconsistent with Proxy” (p. 17)
“Improve pricing by shifting pricing protocol to actual versus modeled estimates”	“Is this true yet?” (p. 19)
Consolidated EBITDA in 2008 was \$11,521,925 (RTI174419); “[a]djusting for one-time items, 2008 EBITDA totals \$15.6M” (RTI174420); and total 2008 EBITDA is \$10.5 ((RTI174420).	“Confirm with Proxy” – an edit that ultimately resulted in the final shareholder presentation representing that 2008 EBITDA was only \$9.7 million
“2009 EBITDA Budget has \$4.8M of potential upside due to National Account growth, DRIVE cost savings and additional pricing improvements . . .EBITDA could reach \$25 on runrate basis by Q4 2009”	“In the Proxy? Delete” (p. 37)

Id. In the final shareholder presentation, each piece of positive material information flagged by director Sadek was stripped out. (Alton Aff., Ex. 50.)

At the same time this gloomy picture was presented to RTI shareholders, Kiesel and Sadek were quietly providing a radically different viewpoint to others. In January 2009, only a month before Sadek began negotiating with RTI’s lenders using a

“strawman” \$140 million figure for RTI and only four months after the company had received an arm’s-length \$300 million offer, he advised other investors that “nothing had fundamentally changed with RTI.” (Alton Aff., Ex. 33.) In May 2009 Kiesel told Cargill that RTI’s projected 2009 EBITDA could be over \$22 million while informing shareholders that RTI’s projected EBITDA for 2009 was \$17 million. (Alton Aff., Ex. 51.) Kiesel told Piper Jaffray that the revenue numbers provided to shareholders in the proxy materials for 2009 were \$40 million lower than his projections and that he expected EBITDA to grow 25% per year.¹⁹ (Alton Aff., Ex. 52.)

During or before the recapitalization, RTI was undergoing a number of positive events and transactions, none of which was disclosed to the shareholders in the proxy materials:²⁰

- A improved pricing arrangement with McDonald’s, RTI largest customer;
- A new [nationwide] contract with Jack in the Box;
- A new contract with Burger King;
- A savings program (DRIVE) which was going to save \$2 million in costs per year.

¹⁹ Compounding the confusing and misleading nature of the proxy materials, Defendants distributed proxy materials with an inaccurate version of the Delaware appraisal statute, a statute required by Delaware law to be included in such materials. Kiesel admitted in a recent letter to some shareholders that this problem needs to be addressed, but has not taken any steps to remedy the situation. (Alton Aff. Ex. 53.)

²⁰ Kenneth Larson, the Chairman of the Board, had to admit during his deposition that information on the recent positive developments taking place at RTI would be something an investor would like to know. (Alton Aff., Ex. 2, pp. 208-209.)

(See Alton Aff., Ex. 2, pp. 161, 193, 221.) Thus, Kiesel and Sadek conspired to convey a gloomy impression of RTI's condition and prospects while knowing that RTI had substantial value and that it had impressive prospects. They deliberately concealed this information from shareholders in order to obtain what they wanted: a "clean" slate, the end of their shareholder problems, and access to an exit strategy that would protect Parthenon's investment.

4. Sadek and Kiesel further conceal material information regarding RTI and the "merger" in supplemental information provided to shareholders.

In addition to the misleading shareholder information conveyed through the proxy materials and at the shareholder meeting, Kiesel instructed RTI's litigation counsel to write a letter for him to forward to all RTI shareholders prior to the June 12, 2010 vote.

(Alton Aff., Ex. 54.) Kiesel represented the following:

- The terms of the Management Services Agreement are the result of a negotiation between Parthenon and the Special Committee.
- "It is an appropriate condition for any common shareholder that elects to receive new warrants or post-recap common stock in exchange for their shares of pre-cap common stock to deliver a release to RTI."
- That there was no such thing as a purported 2006 IPO.
- Baird performed numerous "stress" tests on projects, and assumptions provided by the company in developing its fairness opinion.

(See *id.*)

These statements merely continued the pattern of conduct designed to hide the true value of RTI and upstream RTI's equity to Parthenon through breaches of duty of candor and self-dealing conduct by Grad, Sadek and Kiesel.

5. Defendants ram through and then ignore the shareholder vote.

The materials distributed to the shareholders stated that the “merger” would not be approved if more than 10% of the common voted against it. (Dkt. #11 at Ex. E Section 5.02.)²¹ But even after having been provided false and misleading information, 40% of common shareholders voted against the “merger.” The Parthenon-dominated RTI Board responded by deciding that, if the vote had not passed, they would simply change the rules and voted to quietly “waive” the 10% common-shareholder vote provision. (Alton Aff., Ex. 55.) Even the vote itself was fraught with duplicity. Votes submitted slightly incorrectly or slightly late that were in favor of the merger were counted; but votes that were submitted slightly incorrectly or slightly late against the merger were not. (Alton Aff., Ex. 56.)

²¹ The Agreement and Plan of Merger attached to the Offering Memorandum stated:

The obligation of the Company to consummate the transactions contemplated by this Agreement is subject to the satisfaction of the following condition at or before the Closing:

...

(b) The aggregate amount of Dissenting Shares (i) with respect to Common Stock, shall be less than 10% of the shares of Common Stock entitled to vote on the Merger and (ii) with respect to any series of Preferred Stock, shall be less than 10% of the shares of such series of Preferred Stock entitled to vote on the Merger; . . .

(See Dkt. # 11 at Ex. E, at Section 5.02. (emphasis added).) This language is repeated in the Offering Memorandum. (*Id.*, 21.)

The unfair scheme, concocted to serve the interests of Grad and Sadek's employer Parthenon, was perpetuated to swindle RTI's longstanding common and A-preferred shareholders.

ARGUMENT

A. LEGAL STANDARD

Minn. Stat. § 549.191 requires a court to grant the moving party permission to amend their complaint to add a claim for punitive damages “if the court finds prima facie evidence in support of the motion....” However, “[p]unitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights and safety of others.” Minn. Stat. § 549.20, subd. 1(a). In this context, clear and convincing evidence means “more than a mere preponderance but less than beyond a reasonable doubt.” *Allen v. Fidelity Fin. Servs.*, No. 98-1725, 1999 WL 33912315, at *1 (D. Minn. Sept. 9, 1999). When examining a motion to amend for punitive damages under Minn. Stat. § 549.191, this Court examines the evidence proffered in support of the motion, but should not make any credibility rulings or consider evidence submitted in opposition to the motion. *See Bauer v. Ford Motor Credit Co.*, No. 00-389, 2000 WL 34494805, at *2 (D. Minn. Nov. 22, 2000). Similarly, in order to determine if a plaintiff has made a sufficient showing to support a punitive damages award under Minnesota law, the evidence in support of the motion should be thoroughly examined, without considering the evidence submitted in opposition. *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 870 F. Supp. 1499, 1503 (D. Minn. 1994).

B. PLAINTIFFS' PUNITIVE DAMAGES CLAIM IS APPROPRIATE BECAUSE THERE IS EVIDENCE THAT DEFENDANTS ACTED WITH DELIBERATE DISREGARD FOR THE RIGHTS OF THE PUTATIVE CLASS.

The purpose of punitive damages is to punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior. *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001). Under the statute, one deliberately disregards the rights of others where:

- (1) The [offending party] knows or intentionally disregards facts that create a high probability of injury to the rights or safety of others; and
- (2) Deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others or deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b). Thus, in determining whether punitive damages should be allowed, the focus is on the wrongdoer's conduct. *Jensen*, 623 N.W.2d at 251.

Punitive damages are available where there is evidence of fraud. *Hanks v. Hubbard Broad.*, 493 N.W.2d 302, 311 (Minn. Ct. App. 1992) (punitive damages are available in fraud actions), *review denied* (Minn. Feb. 12, 1993); *Sullivan v. Ouimet*, 377 N.W.2d 24, 27 (Minn. Ct. App. 1985) (same). The same is true for allegations of a breach of fiduciary duty. *E.g.*, *Evans v. Blesi*, 345 N.W.2d 775, 781 (Minn. Ct. App. 1984); *Fiedler v. Adams*, 466 N.W.2d 39, 43 (Minn. Ct. App. 1991). Punitive damages are also available for violations of property rights, such as conversion. *Molenaar v. United Cattle Co.*, 553 N.W.2d 424, 427–30 (Minn. Ct. App. 1996) (“By including disregard of rights as well as disregard of safety, the statute permits punitive damages for

both property damage and personal injury.”); *Rahaman v. Weber*, No. 04-882, 2005 WL 89413, at *4–6 (Minn. Ct. App. Jan. 18, 2005) (finding an abuse of discretion and reversing the district court for failing to allow the amendment of the complaint to reflect punitive damages for the violation of a property right).

C. SHAREHOLDERS’ RIGHTS HAVE BEEN VIOLATED BY DEFENDANTS.

Shareholders have the right to receive fair disclosure of the material facts necessary to cast a fully informed vote. *Wayne County Employees’ Ret. Sys. v. Corti*, 954 A.2d 319, 329 (Del. Ch. 2008). Shareholders have the right to be treated with honesty, fairness, loyalty, and good faith by officers, directors, and controlling shareholders. *Singer v. Magnavox Co.*, 380 A.2d 969, 977 (Del. 1977), *overruled on other grounds in Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

A controlling shareholder includes a person who affirmatively attempt to dictate the future of an entity. *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 328 (Del. 1993) (overruled on other grounds by *Tooley v. Donaldson Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)); *see Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007) (“[S]tatus as de facto controller, combined with the allegation that [controlling shareholder] caused [the entity] to exercise that control to effect the [disputed transaction], establishes, for purposes of a motion to dismiss, that [controlling shareholder] owed fiduciary duties to [the entity] and its public shareholders.”). A “controlling shareholder” includes entities that are controlled by the controlling shareholder. *See Rhodes v. Silkroad Equity, LLC*, No. 2133, 2007 WL 2058736, at *5 (Del. Ch. Jul. 11, 2007).

Defendant Parthenon owed fiduciary duties to Plaintiffs and the class by virtue of its position as a controlling shareholder. Parthenon controlled RTI not merely by its dominance on the RTI Board, but by determining the nature of the financing RTI pursued and, whether and when RTI should transform itself in accordance with Parthenon's own exit strategy interest. Kiesel owed fiduciary duties to Plaintiffs and the class by virtue of his position as an RTI officer and director. Grad and Sadek owed fiduciary duties to Plaintiffs and the class by virtue of their positions as RTI directors.

Defendants have showed deliberate indifference to Plaintiffs' (and the putative class members') rights by: (1) engaging in self-dealing; (2) manipulating the recapitalization process; and (3) deliberately misleading shareholders. As demonstrated by the facts articulated and supported above, Defendants Grad and Sadek elevated the interests of Parthenon above those of other shareholders in all of their dealings with RTI despite their fiduciary obligations to RTI's other shareholders. They not only directed that the company would participate in a sale, rather than an IPO, based solely upon their own interests, but also directed the recapitalization in a manner that was both self-serving and detrimental to the other RTI shareholders. *See Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000) (finding that directors had violated their duty of loyalty to all shareholders by elevating the interests of their shareholder/employer above those of minority shareholders). Kiesel participated as a Special Committee member even though he anticipated being the beneficiary of an incentive plan that would potentially pay him millions of dollars if the recapitalization transaction closed.

The recapitalization was deliberately manipulated through (1) the selection of the \$140 million RTI “enterprise value” without any support other than what would be most beneficial to Parthenon’s interests; (2) the decision to have a recapitalization based upon a desire to end “shareholder issues” and deliberately “cram down” the equity interests of other shareholders that might otherwise negate the value that Parthenon could obtain from its exit strategy; (3) the Parthenon-originating requirement that any common shareholder desiring to maintain his or her shares in the company post-recapitalization execute a purported “release” of claims; (4) the issuance of shares of B stock to Parthenon and ABS without offering such shares to other shareholders directly before an exit event was expected to occur; (5) Parthenon’s non-negotiated arrangement that it would receive an annual “management services fee,” as well as a percentage of the proceeds for any future RTI sale; (6) the selection of Kiesel, an interested director, as a Special Committee member; (7) the procurement of interested, rather than independent, financial and legal advice for the Special Committee; (8) the determination that the recapitalization should be considered a “liquidation event” requiring shareholder preferences and payment of accreted value even though RTI governing documents did not provide for such rights; (9) disseminating false information to RTI shareholders that RTI’s enterprise value was \$140 million and stating at a shareholder meeting that RTI was not worth more than \$100 million in an effort to induce shareholders to vote in favor of the transaction; (10) failing to provide the correct version of the appraisal-rights statute to shareholders; (11) actively concealing positive business developments at RTI in order

to induce shareholders to vote in favor of the transaction; and (12) not counting certain votes and then waiving voting conditions.

The wrongful conduct abridging Plaintiffs' rights goes on . . . and on . . . and on.

D. DEFENDANTS' VIOLATION OF SHAREHOLDERS' RIGHTS WAS INTENTIONAL AND DELIBERATE.

Not only did Parthenon, Sadek, Grad and Kiesel violate RTI shareholders' rights, they *knew* they were doing it. Grad *knew* that he was violating RTI shareholders' rights when he indicated that discussions regarding his plan to sell the company instead of having an IPO should be had "live" in order to avoid legal problems because he *knew* he was only suggesting such a course of action in the interests of his employer, Parthenon, who would get its accreted value in the case of a sale (but not an IPO). Sadek *knew* that he was violating RTI shareholder rights when he instructed that Parthenon's plans to sell RTI despite "intra-shareholder" legal issues should be discussed live. And Sadek also *knew* he systematically removed all of the positive information about RTI from shareholder disclosures that he was misleading RTI shareholders. Kiesel *knew* that he could potentially obtain options worth millions of dollars if he managed to close the recapitalization/"merger" and had no business directing the activities of the "independent" Special Committee regarding whether the recapitalization should take place.

This conglomeration of breaches of fiduciary duty, fraud, conversion, and the frank display of willful disregard for any interests other than their own makes it appropriate for Plaintiffs to seek punitive damages on behalf of the putative class. The

record makes clear that Defendants acted as they did out of no regard for the law and in deliberate contravention of the rights of their fellow shareholders. Defendants openly discuss their efforts to get rid of their shareholder “issues” by getting rid of the shareholders themselves, and even discuss conversing orally rather than over email in an effort to avoid future liability for their conduct. If there ever was a case deserving of punitive damages, this one is a ripe candidate for the punishment of perpetrators who consciously broke the rules designed to ensure fair treatment of fiduciaries out of their own self-interest and arrogance.

CONCLUSION

Plaintiffs request that the Court grant their motion to amend the Amended Complaint to add a claim for punitive damages.

Dated: May 13, 2010

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