CASEY M. FRANK
16520 Briar St
Omaha, Nebraska 68136

Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

EDUCATION REALTY TRUST, INC.
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

RANDALL L. CHURCHEY
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

THOMAS TRUBIANA
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

JOHN V. ARABIA
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

KIMBERLY K. SCHAEFER
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

HOWARD A. SILVER
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

JOHN T. THOMAS
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

IN THE

CIRCUIT COURT

FOR

BALTIMORE COUNTY, MARYLAND

Case 03-C-18-008387

FILED

and

WENDELL W. WEAKLEY
c/o Cogency Global Inc.
1519 York Road
Lutherville, Maryland 21093

Defendants.

AMENDED CLASS ACTION COMPLAINT

Casey M. Frank ("Plaintiff"), by and through her attorneys, alleges the following upon information and belief, including the investigation of counsel and a review of publicly-available information, except as to those allegations pertaining to Plaintiff, which are alleged upon personal knowledge:

SUMMARY OF THE ACTION

1. Plaintiff brings the action individually and on behalf of similarly situated former holders of the common stock of Education Realty Trust, Inc. ("EdR" or the "Company"), against the former directors and certain officers of EdR (collectively, the "Individual Defendants" or "Board") for breaching their fiduciary duties in connection with the completed merger transaction by which an affiliate of Greystar Real Estate Partners LLC ("Greystar"), GSHGIF LTP, LP ("GSHGIF" or "Parent"), through GSHGIF's direct and indirect wholly-owned subsidiaries, acquired all of the outstanding stock of EdR and related interests of affiliates of EdR (the "Transaction").

2. Plaintiff further alleges that the *portion* of the bylaw adopted by EdR on June 24, 2018 that designated the Circuit Court for Baltimore City, Maryland and the United States District Court for the District of Maryland, Baltimore Division, as the sole *venues* for claims of this nature (the "Exclusive Venue Designation") exceeded the *jurisdiction*-selection permitted by Md. Corps.

&Ass'ns Code § 2-113 and contravened Maryland's venue statutes, and the Exclusive Venue Designation portion of the bylaw should therefore be declared void and unenforceable and the Individual Defendants should be enjoined from invoking or enforcing it. Additionally, the enactment of a bylaw in violation of Maryland law was itself a breach of fiduciary duty.

3. On June 25, 2018, EdR and Greystar jointly issued a press release announcing that EdR and GSHGIF had entered into a definitive Agreement and Plan of Merger ("Merger Agreement") pursuant to which each share of EdR common stock would be converted into the right to receive $41.50 (the "Merger Consideration"). The equity value of the Transaction was approximately $3.1 billion, and the total Transaction value including the assumption of debt was $4.6 billion.

4. During the sales and negotiation process, Greystar sought and was permitted to engage with The Blackstone Group L.P. and its affiliates (collectively, "Blackstone") regarding providing debt or equity funding for the acquisition of EdR. Greystar and Blackstone also discussed the terms of a potential transaction pursuant to which Greystar and Blackstone would form the Blackstone Asset Purchaser[1] and, simultaneously with closing, certain of the Company's off-campus assets would be transferred to the Blackstone Asset Purchaser, but such arrangement would not impact Greystar's purchase price of $41.50 per share. Ultimately, Blackstone was involved in the Transaction as follows: (i) the funds to complete the Transaction were financed through a combination of financing mechanisms, including a private investment of $400 million in OP Merger Sub[2] by the Blackstone Investor pursuant to an equity commitment letter, dated as of June 25, 2018; and (ii) on June 25, 2018, the Blackstone Asset Purchaser entered into the asset

[1]"Blackstone Asset Purchaser" refers to a 95%/5% joint venture led by an affiliate of Blackstone with an affiliate of Greystar.
[2]All capitalized terms not defined herein have the same meaning set forth in the Proxy Statement.

purchase and sale agreement with REIT Merger Sub, an affiliate of Parent, pursuant to and subject to the terms and conditions of which the Blackstone Asset Purchaser acquired certain of the Company's assets from the Operating Partnership (or its subsidiary, as designated by the REIT Merger Sub) for a purchase price of approximately $1.2 billion immediately prior to, but subject to, the closing of the Transaction.

5. The Merger Consideration paid to EdR's public stockholders in the Transaction was unfair and inadequate because, among other things, the intrinsic value of EdR common stock was materially in excess of the Merger Consideration given the Company's recent financial performance, standalone growth prospects, and valuable real estate holdings.

6. Furthermore, while a strategic buyer identified in the Proxy Statement as Party A expressed repeated interest in acquiring EdR and indicated it was considering an offer of between $42.00 and $43.00 per share, the Individual Defendants rejected and then ignored Party A's overtures and impeded Party A from competing with Greystar by giving Greystar preferential treatment, including by refusing to enter into a non-disclosure agreement with Party A and by entering into the Merger Agreement with Greystar despite being informed by Party A that it was seriously interested in submitting a superior proposal but would be unable to do so after a merger agreement with Greystar was agreed to.

7. The strategic review process was also tainted by significant conflicts of interest. First, EdR's named executive officers ("NEOs"), including Individual Defendants Randall L. Churchey ("Churchey"), Thomas Trubiana ("Trubiana") and non-parties Edwin B. Brewer, Jr., Christine Richards and Lindsey Mackie, continued their lucrative employment with the post-merger entity, but nevertheless also received a lump sum payment upon closing of the Transaction

equal to the amount that would have been paid to the NEO upon a termination without cause within one year after a change in control.

8. One of the NEOs who continued in his lucrative job, Individual Defendant Randall L. Churchey, EdR's Chief Executive Officer ("CEO") and Chairman, dominated and controlled the Company's strategic review process and was intricately involved in all decisions made during the process. As an experienced CEO, Churchey was undoubtedly aware that any transaction with a strategic buyer like Party A would almost certainly have resulted in him losing his lucrative job with the post-merger entity. Despite Churchey's glaring conflict of interest, the remaining members of the Board allowed him to dominate and control the Company's strategic review process and abdicated their important fiduciary oversight function.

9. The strategic review process was also tainted by a significant banker conflict of interest, which the Board failed to properly guard against. Specifically, although the Company's financial advisor, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("BofA Merrill Lynch"), had significant ties to Greystar and Blackstone and had received significant compensation from them and their affiliates in recent years, the Board was not made aware of this critical information until *months after* discussions with Greystar and Blackstone began.

10. Specifically, from June 1, 2016 through May 31, 2018, BofA Merrill Lynch and its affiliates derived aggregate revenues from Greystar and certain of its affiliates of approximately $19 million for investment and corporate banking services, and derived aggregate revenues from Blackstone and certain of its portfolio companies of approximately $390 million for investment and corporate banking services. It does not appear that the Board was made aware of the nature of BofA Merrill Lynch's relationship with Greystar until May 9, 2018, approximately *three months after* Greystar first expressed interest in a transaction with the Company. During those three

months, BofA Merrill Lynch was advising the Board regarding its discussions with Greystar and other interested parties, with the Board apparently unaware of the significant conflict of interest BofA Merrill Lynch faced. Furthermore, BofA Merrill Lynch did not disclose its material relationship with Blackstone and its affiliates, *including the $390 million it has made from such parties in the past two years alone*, until June 24, 2018, *the very same day* that BofA Merrill Lynch presented its so-called "fairness opinion" and the Board voted to approve the inadequate Merger Consideration. BofA Merrill Lynch waited until the same day it rendered its fairness opinion to make this disclosure to the Board, and the Board apparently failed to even inquire about such material information, despite the fact that Blackstone became involved in the strategic review process in March 2018. In other words, the Board completely failed to ensure the process was not tainted by a significant banker conflict of interest, and intentionally failed to act in the face of a known duty to act.

11. Simply stated, the sales process was marred by significant conflicts of interest which the Board failed to guard against, and which ultimately resulted in inadequate Merger Consideration for Plaintiff and the putative Class. The Board breached its fiduciary duties owed directly to the Company's stockholders by failing to fulfill its oversight function and protect the interests of the Company's stockholders.

12. On August 13, 2018, EdR filed a definitive proxy statement on Schedule 14A with the SEC in connection with the Transaction (the "Proxy Statement"), setting the special meeting of EdR stockholders to vote on the Transaction for September 14, 2018 (the "Stockholder Vote"). As described herein, the Proxy Statement failed to disclose certain material facts concerning the Transaction, preventing stockholders from casting a fully informed vote regarding the Transaction.

The Board breached its duty of candor by failing to include such material information, discussed in detail below, in the Proxy Statement.

13. On September 11, 2018, EdR supplemented the Proxy Statement in order to attempt to "moot" Plaintiff's disclosure claims and filed with the SEC a Current Report on Form 8-K (the "Supplemental Disclosures").

14. As alleged herein, the Supplemental Disclosures did not fully "moot" Plaintiff's claims because the Supplemental Disclosures did not cure *all* the deficiencies in the Proxy Statement.

15. On September 14, 2018, the Stockholder Vote was held and Defendants convinced EdR shareholders to vote in favor of the Transaction based upon a materially incomplete and deficient Proxy Statement. As a result, EdR shareholders were not fully informed when they voted to approve the Transaction.

16. On September 20, 2018 EdR announced the completion of the Transaction and shareholders of EdR received the inadequate Merger Consideration.

17. In sum, the Individual Defendants breached their fiduciary duties in at least three distinct ways. First, they failed to properly fulfill their fiduciary oversight function and failed to act in the face of a known duty to act by allowing the strategic review process to unfold in a patently conflicted manner, including by: (i) abdicating control of the sales process to the Company's patently conflicted CEO, Individual Defendant Churchey; (ii) impeding other interested parties, including Party A, from making the Company's stockholders a superior offer; and (iii) failing to guard against the significant banker conflict of interest that tainted the strategic review process. Second, to convince stockholders to vote in favor of the Transaction, the Individual Defendants authorized the filing of the materially incomplete Proxy Statement. And

third, the Individual Defendants authorized the enactment of the Exclusive Venue Designation, which violated Maryland law for the reasons set forth below. Each of the Individual Defendants therefore breached their fiduciary duties and/or aided the other Individual Defendants' breaches of their fiduciary duties. As a result, Plaintiff and the other public stockholders received inadequate consideration for their shares in the Transaction and lacked certain material information necessary to fairly consider the Transaction at the Stockholder Vote.

18. For these reasons and as set forth in detail herein, Plaintiff seeks to recover damages resulting from the Defendants' breaches of their fiduciary duties. Plaintiff further seeks an order declaring the Exclusive Venue Designation as invalid and unenforceable because it was in contravention of Maryland law, and an injunction enjoining the Individual Defendants from invoking the Exclusive Venue Designation in this litigation or future litigation.

JURISDICTION AND VENUE

19. This Court has jurisdiction over this matter because each Defendant conducted business in or maintained operations in Baltimore County via EdR, which maintained its principal office in this State in Baltimore County at 1519 York Road, Lutherville, Maryland 21093, and the Individual Defendants approved the Bylaw which designates courts within Maryland as the sole and exclusive venue for litigation of this nature, but have exceeded the scope of Md. Corps. & Ass'ns § 2-113 by limiting state court *venue* to solely the Circuit Court for Baltimore City, Maryland.

20. The Court also has personal jurisdiction over Defendants pursuant to Md. Cts. & Jud. Proc. § 6-102.1, which provides that directors of Maryland corporations, by serving as directors, are deemed "to have consented to the appointment of the resident agent of the corporation...as an agent on which service of process may be made in any civil action or

proceeding brought in the State…Against the individual for an internal corporate claim as defined in § 1-101 of the Corporations and Associations Article."

21. Venue is proper in this Court pursuant to Maryland Courts and Judicial Procedure § 6-201, because the principal office for Defendant EdR was located in Baltimore County at 1519 York Road, Lutherville, Maryland 21093.

THE PARTIES& RELEVANT NON-PARTIES

22. Plaintiff Casey M. Frank was, and had been at all times relevant hereto, a stockholder of EdR.

23. Defendant EdR was a Maryland corporation headquartered at 999 South Shady Grove Road, Suite 600, Memphis, Tennessee 38120. Post-Transaction EdR remains an owner, developer and manager of collegiate housing. Prior to the consummation of the Transaction, EdR was a self-administered and self-managed real estate investment trust that owned or managed 79 communities with more than 42,300 beds serving 50 universities in 25 states.

24. Individual Defendant Randall L. Churchey was Chairman of the Board and Chief Executive Officer of the Company and had been a director of the Company since January 2010. Churchey dominated and controlled the Company's sales process, and kept his lucrative job with the Company following the consummation of the Transaction.

25. Individual Defendant Thomas Trubiana was and had been a director of the Company since 2015. Trubiana also served as the Company's President, and has kept his lucrative job with the Company following the consummation of the Transaction.

26. Individual Defendant John V. Arabia ("Arabia") was and had been a director of the Company since 2014.

27. Individual Defendant Kimberly K. Schaefer ("Schaefer") was and had been a director of the Company since 2016.

28. Individual Defendant Howard A. Silver ("Silver") was and had been a director of the Company since 2010.

29. Individual Defendant John T. Thomas ("Thomas") was and had been a director of the Company since 2016.

30. Individual Defendant Wendell W. Weakley ("Weakley") was and had been a director of the Company since 2007.

31. Churchey, Trubiana, Arabia, Schaefer, Silver, Thomas, and Weakley are collectively referred to as the "Individual Defendants" or the "Board".

32. Non-party Greystar invests in, manages, and develops rental housing properties. Headquartered in Charleston, South Carolina, with offices throughout the United States, Europe, Latin America, and Asia- Pacific, Greystar is the largest operator of apartments in the United States, managing more than 435,000 conventional units and student beds in over 150 markets globally. Greystar also manages capital on behalf of institutional investors with nearly $26 billion in gross assets.

33. Non-party The Blackstone Group L.P. is a global investment firm. Blackstone provides asset management services including investment vehicles focused on private equity, real estate, public debt and equity, non-investment grade credit, real assets, and secondary funds.

THE INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES

34. By reason of the Individual Defendants' positions with the Company as officers and/or directors, they were in a fiduciary relationship with Plaintiff and the other public stockholders of EdR and, pursuant to Md. Code Ann., Corp. &Ass'ns § 2-405.1(c), owed EdR

stockholders a duty of good faith, loyalty, care and candor.

35. By virtue of their positions as directors and/or officers of EdR, the Individual Defendants, at all relevant times, had the power to control and influence EdR, did control and influence EdR, and caused EdR to engage in the practices complained of herein.

36. The duties of good faith, loyalty, and care require directors to act in the best interests of stockholders.

37. To diligently comply with their fiduciary duties, the Individual Defendants were required not to take any action that: (a) adversely affects the value provided to the Company's stockholders; (b) favors themselves or discourages or inhibits alternative offers to purchase control of the corporation or its assets; (c) adversely affects their duty to search and secure the best value reasonably available under the circumstances for the Company's stockholders; (d) will provide the Individual Defendants with preferential treatment at the expense of, or separate from, the public stockholders; and/or (e) contractually prohibits the Individual Defendants from complying with or carrying out their fiduciary duties.

38. In accordance with their duties of loyalty and good faith, the Individual Defendants were obligated to refrain from: (a) participating in any transaction where the Individual Defendants' loyalties are divided; (b) participating in any transaction where the Individual Defendants receive, or are entitled to receive, a personal financial benefit not equally shared by the public stockholders of the corporation; and/or (c) unjustly enriching themselves at the expense or to the detriment of the public stockholders.

39. Plaintiff alleges herein that the Individual Defendants, separately and together, in connection with the Transaction, knowingly or recklessly violated their fiduciary duties, including their duties of good faith, loyalty, and care owed to the Company's stockholders.

40. The duties of good faith, loyalty, and care also required the Board to disclose all material information to stockholders when soliciting stockholder approval for a transaction.

41. Here, the Individual Defendants failed to disclose material facts concerning the Transaction. The Individual Defendants knowingly or recklessly breached their fiduciary duties by failing to disclose all material information concerning the Transaction to the Company's stockholders.

CLASS ACTION ALLEGATIONS

42. Plaintiff brings this action on her own behalf and as a class action pursuant to Maryland Rule 2-231, on behalf of all former holders of EdR common stock who were harmed by Defendants' actions described below (the "Class"). Excluded from the Class are Defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants.

43. This action is properly maintainable as a class action because:

(a) The Class is so numerous that joinder of all members is impracticable. As of August 10, 2018, there were 80,604,618 shares of EdR common stock outstanding, held by hundreds to thousands of individuals and entities scattered throughout the country. The actual number of public stockholders of EdR will be ascertained through discovery;

(b) There are questions of law and fact which are common to the Class, including *inter alia,* the following:

i. whether the Individual Defendants breached their fiduciary duties of loyalty, good faith, and/or due care with respect to Plaintiff and the other members of the Class in connection with the Transaction;

ii. whether Plaintiff and the other members of the Class suffered injury because the Stockholder Vote was allowed to go forward without the material omissions in the Proxy Statement being fully remedied;

iii. whether Plaintiff and the other members of the Class are entitled to damages; and

iv. whether the Exclusive Venue Designation exceeded the jurisdiction-selection permitted by Md. Corps. & Ass'ns Code § 2-113, contravenes Maryland's venue statutes, and should therefore be declared void and unenforceable.

(c) Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature and will fairly and adequately protect the interests of the Class;

(d) Plaintiff's claims are typical of the claims of the other members of the Class and Plaintiff does not have any interests adverse to the Class;

(e) The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class; and

(f) Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

FURTHER SUBSTANTIVE ALLEGATIONS

A. Background and the Unfair Merger Consideration

44. As discussed by defendant Churchey in a June 27, 2018 Memphis Business Journal article entitled, *EdR CEO talks impact of billion-dollar deal on Memphis, employees, firm* "in late 2017 through April 2018, real estate investment trust (REIT) stocks, such as EdR, were trading at prices below the inherent value of companies." According to the article, "The share price for EdR was trading at about a 25 percent discount to published valuations of its assets, Churchey said."

45. In fact, EdR had no plans to enter into a strategic transaction or sale until Greystar called. According to the article:

> "We were not looking to sell, but we, like many REITs, were receiving a number of phone calls," Churchey said. "We fielded a phone call from Greystar. Immediately, our attitude was 'wow, this is a great organization that has a lot of firepower, but really doesn't have much in the way of United States student housing.' ... We thought they could pay a strong price but also benefit the organization going forward."

46. Therefore, the Transaction came at a time when EdR's recent and future success was not fully reflected by its share price. The Transaction cashed out EdR stockholders at a price that failed to adequately compensate them for the intrinsic value of their shares. The "premium" of 26.3% percent over the 90-day volume-weighted average share price ending May 31, 2018 cited in EdR and Greystar's joint press release announcing the Transaction is barely above the 25% discount to published valuations of EdR's assets in May 2018.

47. The Merger Consideration also provided virtually no premium compared to the Company's high closing price during the 52-week period preceding the announcement of the Transaction. Indeed, the Company's stock price closed at $40.38 on June 26, 2017, and closed at $39.91 on September 18, 2017.

48. Furthermore, the Merger Consideration was below the $42.00 to $43.00 per share offer Party A indicated it was prepared to make had the Individual Defendants fulfilled their fiduciary obligations and engaged with Party A in a fair and reasonable manner rather than erecting barriers for Party A to submit a superior offer.

49. Despite EdR's intrinsic value and growth prospects, the Individual Defendants agreed to sell the Company and deprived its stockholders of the ability to partake in the Company's future growth. The Individual Defendants breached their fiduciary duties owed to the Company's stockholders by agreeing to the Transaction for the unfair Merger Consideration, and by allowing the unfair and conflicted sales process to unfold in the manner that it did, which caused Plaintiff and the Class to receive the inadequate Merger Consideration.

B. <u>The Unfair and Conflicted Sales Process</u>

50. The Transaction was announced on June 25, 2018. Generally speaking, under the terms of the Merger Agreement, EdR's stockholders were to receive $41.50 per share in cash. In conjunction with the Transaction, a joint venture between an affiliate of Blackstone Real Estate Income Trust, Inc. ("BREIT") and an affiliate of Greystar acquired a portfolio of off-campus student housing assets, which are located adjacent to top-tier university campuses. The newly combined Greystar/EdR team continues to manage the assets. BREIT is a perpetual-life, monthly NAV REIT that, pro forma for this transaction, now owns an approximately $10 billion portfolio of stabilized, income generating real estate concentrated in U.S. markets with attractive growth as well as real estate debt securities.

51. The Transaction and inadequate Merger Consideration were a direct result of the Board's: intentional abdication of its oversight function and significant delegation of authority to the Company's conflicted CEO Churchey; its repeated failure to pursue a superior offer from other

interested parties, including Party A; its clear favoritism towards Greystar; and its failure to guard against the significant conflict of interest faced by its financial advisor, BofA Merrill Lynch, which was also intricately involved in the strategic review process.

52. In particular, the Board refused to grant Party A access to non-public information that it needed to increase its offer further, and repeatedly failed to meaningfully engage with Party A despite the numerous attempts Party A made to remain in the process after Individual Defendant Churchey told Party A that the Company would not engage with it on April 6, 2018. Indeed, the Proxy Statement is filled with references to Party A trying to meaningfully engage with Churchey and the Company's advisors, and each time there is absolutely no reference to any meaningful response given to Company A by Churchey, the Board, or any Company advisor; despite repeated efforts to engage with Churchey and the Company and make shareholders a superior offer, Company A was largely blown off, ignored, and impeded from doing so.

53. Specifically, Churchey and the Board: (i) refused to enter into a non-disclosure agreement so that Party A could gain access to non-public information regarding the Company and its assets, which Party A requested on or around March 19, 2018; (ii) had Mr. Churchey inform a representative of Party A that the Company was not prepared to engage in further discussions regarding an acquisition of the Company by Party A on April 6, 2018, despite the fact that Party A had continued to express serious interest in an acquisition; (iii) failed to meaningfully respond to the continued expressions of interest Party A made despite being told that the Company would not engage with it, including an email Party A sent on May 30, 2018 which reiterated that Party A remained very interested in acquiring the Company; (iv) failed to meaningfully respond to Party A's call to BofA Merrill Lynch on June 4, 2018, during which Party A informed BofA Merrill Lynch that it expected to submit a written proposal to acquire the Company and indicated that it

had engaged legal and financial advisors; (v) failed to meaningfully respond to Party A's June 6, 2018 acquisition proposal, during which it again asked for access to the Company's non-public information; (vi) failed to meaningfully respond to Party A's June 7, 2018 email to Churchey, during which it informed Churchey that it had the ability to increase its proposed purchase price above $40.50; (vii) failed to meaningfully respond to Party A's outreach on June 10, 2018, during which Part A's legal advisor contacted BofA Merrill Lynch to reiterate Party A's continued interest in acquiring the Company and expressed Party A's desire to participate in any pre-signing market check; (viii) failed to meaningfully respond to Party A's June 12, 2018 overture, during which Party A contacted Churchey to reiterate Party A's interest in acquiring the Company and indicated it had the ability to increase its proposed purchase price of $40.50 and also noted that it would not be able to participate in a post-announcement competitive process; (ix) failed to meaningfully respond to Party A's overture on June 13, 2018, during which its legal advisor contacted a representative of Morrison & Foerster to convey Party A's continued interest in acquiring the Company, indicated that Party A might be willing to offer between $42.00 and $43.00 per share, but that Party A's primary equity financing source would not participate in the submission of a written proposal to acquire the Company unless expressly invited to do so by the Company given such equity financing source's relationship with Greystar and that Party A would not be able to submit a superior proposal following any execution by the Company of a merger agreement with Greystar; (x) declined to allow the exclusivity agreement with Greystar to expire in order to engage in discussions with Party A, despite Party A's serious interest and indication it was willing to top Greystar's offer; (xi) failed to meaningfully respond to Party A's overture on June 15, 2018, during which a legal advisor to Party A emailed a representative of Morrison & Foerster to convey Party A's continued interest in acquiring the Company; and (xii) failed to meaningfully respond to Party

A's overture on June 21, 2018, during which a representative of Party A emailed Mr. Churchey to reiterate Party A's interest in acquiring the Company, but was again ignored or shot down.

54. Furthermore, in attempting to justify the Board's refusal to meaningfully engage with Company A, the Proxy Statement cites purported "uncertainty" regarding Party A's ability to fund an acquisition, yet the Proxy Statement notes that the very same day the Board declined to engage further with Party A (April 4, 2018, well before the Company entered into an exclusivity agreement with Greystar) it also requested greater clarity with respect to Greystar's indication of interest, proposed purchase price and equity and debt commitments. Thus, the purported "uncertainty" surrounding Party A's indication of interest was nothing more than a pretext intended to attempt to cover the preferential treatment and favoritism given to Greystar.

55. Simply stated, despite Party A's numerous and persistent attempts to engage with Churchey and the Company and make the Company's shareholders a superior offer, Churchey, the Board, and the Company's advisors (including its patently conflicted banker which had strong ties to Greystar and Blackstone) refused to meaningfully engage with Party A and impeded it from offering the Company's stockholders a better deal. The Board breached its fiduciary duties owed to the Company's stockholders by allowing the conflicted and biased sales process to unfold in the manner that it did, including by delegating significant authority to Churchey despite the clear conflict of interest he faced, refusing to meaningfully engage with Party A despite its repeated attempts to make the Company's' stockholders a superior offer, and by failing to guard against the significant conflict of interest BofA Merrill Lynch faced as a result of its strong ties to Greystar and Blackstone.

56. Furthermore, several other parties expressed interest in acquiring the Company but were rejected out of hand, ignored, or otherwise impeded from doing so. For example, a company

referred to as Party D tried to engage with Churchey and the Company and expressed interest in an acquisition in May of 2018. On May 22, 2018, Party D indicated its interest in a $40.00 per share offer price, yet a mere four days later Churchey contacted the representative of Party D to inform him that Party D's preliminary indication of interest was insufficient, after which there were no further discussions between the Company or its advisors and Party D. Party D was simply shut down after its preliminary, initial overture, and neither Churchey nor the Board made any effort to engage with Part D and create an active bidding process against Greystar.

57. Additionally, a party referred to as Party G contacted Individual Defendant Trubiana on June 7, 2018 and expressed interest in acquiring the Company and reiterated its interest on June 10, 2018. The Proxy Statement makes no reference to anyone from the Company so much as responding to Party G, and the Board did not even consider its overture before approving the Transaction. Party F and Party H also indicated interest in acquiring the Company on June 5, 2018.

58. Simply stated, the Individual Defendants ignored or impeded several other interested parties from making the Company's stockholders a superior offer. The Board also failed to procure a full "go-shop" provision, which would have enabled it to actively solicit a superior proposal. Instead, the Board was contractually prohibited from soliciting competing acquisition proposals. Further, the $118,147,254 termination fee payable by the Company upon the termination of the Merger Agreement, along with the Merger Agreement's matching rights provision, undoubtedly discouraged other potential bidders from making a competing bid to acquire the Company.

C. **<u>The Proxy Statement Omitted Certain Material Information and Shareholders Were Therefore Not *Fully* Informed When They Voted Regarding the Merger</u>**

59. The Board also breached its fiduciary duty of candor by disseminating a materially incomplete and misleading Proxy Statement to the Company's stockholders.

60. First, while the Proxy Statement noted that the Board expected the employment of the Company's NEOs, Randall L. Churchey, Thomas Trubiana, Edwin B. Brewer, Jr., Christine Richards and Lindsey Mackie, to continue following the Transaction (Proxy at 11, 65), the Proxy Statement and Supplemental Disclosures failed to disclose what the Board's "expectation" regarding the NEOs' continued employment was based upon, and *when* during the sales process discussions regarding the NEOs' continued employment occurred. The timing of such discussions was material information, necessary for shareholders to assess just how conflicted the sales process was and to properly understand the motivations that may have driven the process towards a deal with Greystar rather than other interested parties, including Party A.

61. Additionally, the Proxy Statement and the Supplemental Disclosures failed to disclose or provide any information regarding the appraisal values of the Company's properties. While the Proxy noted that the Company owns 67 collegiate housing communities, no information was provided regarding the appraisal value of such properties. Given that shareholders were asked to cash-out their shares in the Transaction, the property values of the Company's key assets were material information. Upon information and belief, the Company had appraisal values available for at least certain of its properties. EdR's most recent annual report notes:

> Results of operations for acquired collegiate housing communities are included in our results of operations from the respective dates of acquisition. *Appraisals*, estimates of cash flows and other valuation techniques are used to allocate the purchase price of acquired property between land, land improvements, buildings and improvements, furniture, fixtures and equipment and identifiable intangibles such as amounts related to in-place leases. Management assesses impairment of long-lived assets to be held and used whenever events or changes in circumstances indicate that the carrying amount of an asset

may not be recoverable. Management uses an estimate of future undiscounted cash flows of the related asset based on its intended use to determine whether the carrying value is recoverable. If we determine that the carrying value of an asset is not recoverable, the fair value of the asset is estimated and an impairment loss is recorded to the extent the carrying value exceeds estimated fair value (see Note 2 to the accompanying consolidated financial statements). Management estimates fair value using discounted cash flow models, *market appraisals if available*, and other market participant data.[3]

62. Furthermore, an article discussing JPMorgan's financing of the Transaction sets forth a specific estimated value of $1.5 billion for EdR's "pipeline" properties, including twelve that EdR wholly owns and seven that it owns with partners. That specific estimated value suggests the pipeline properties were appraised or otherwise independently valued. As the article states:

> [The Company's] value lies in its development pipeline. The company has 12 properties that it wholly owns that are under construction and another seven it owns with venture partners. In total, the properties have an estimated value of $1.5 billion.
>
> "The development pipeline is the opportunity," explained Bob Faith, Greystar's founder and chief executive.[4]

63. Furthermore, in the event the Board did not have or know the appraisal values of the Company's properties, that fact would have been material to the Company's shareholders and should have been disclosed. Indeed, a reasonable EdR shareholder would have found it important to know that the Board had agreed to sell the Company without any knowledge of the appraisal values of the properties the Company owns. In the event the Board agreed to sell the Company without knowing the appraisal value of its properties, shareholders should have been told of this material fact, which would have alerted them to the potential that the Company was being sold at

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[3] Education Realty Trust, Inc. Form 10-K Annual Report, February 27, 2018, at p. 43, 80, 96, https://www.sec.gov/Archives/edgar/data/1302343/000130234318000049/edr-20171231x10k.htm

[4] *JPMorgan to Lend $3Bln for Greystar's Education Realty Trust Buy*, COMMERCIAL REAL ESTATE DIRECT (June 25, 2018) http://www.crenews.com/top_stories_-_free/jpmorgan-to-lend-%243bln-for-greystars-education-realty-trust-buy.html

a price that did not account for the significant real estate value of its properties. Shareholders of companies with sizeable real estate holdings run the risk of being shortchanged when boards fail to account for the appraisal value of such property in connection with mergers, and in the event the Board failed to do so here, shareholders undoubtedly would have found that information to be material. Indeed, the fact that the Company's twelve to nineteen "pipeline" properties alone were valued at $1.5 billion makes it likely that the remaining properties' aggregate value could have exceeded the aggregate consideration EdR shareholders received in connection with the Transaction.

64. Additionally, the Proxy failed to disclose whether the Company's pipeline properties were accounted for in the projections that were included on page 61 of the Proxy, and if so, precisely how they were accounted for (*i.e.* the specific assumptions related to the pipeline properties in connection with preparing the projections). As Bob Faith, Greystar's CEO, made clear, EdR's development pipeline was a key driver of the Company's overall value. As noted in the above-cited article, the Company had approximately nineteen "pipeline" properties in development as of the time the Transaction was announced that were presumably not yet generating revenues but were expected to in the near future. However, the Proxy failed to disclose whether these "pipeline" properties were accounted for in the projections that were included in the Proxy, and, if so, how they were specifically accounted for. In the event the projections did not account for the "pipeline" properties, shareholders obviously would have found that fact material, as that would mean that the projections grossly undervalued the Company. And, in the event the "pipeline" properties were accounted for the in the projections, shareholders would have found it material to know the precise financial assumptions associated with the pipeline properties (*i.e.*, the

amount or percentage of the various projected financial metrics that were attributable to the pipeline properties).

65. With respect to the Selected Companies Analysis on page 57, the Proxy Statement and Supplemental Disclosures failed to disclose the individual multiples BofA Merrill Lynch observed for each of the selected companies. A fair summary of a Selected Companies Analysis required disclosure of the individual multiple for each company utilized, just like such individual multiples were included in the banker presentation to the Board. Without the individual multiples, shareholders were impeded from determining whether the banker applied a fair and reasonable multiple range.

66. With respect to Net Asset Value Analysis on Pages 57-58 of the Proxy Statement, the Proxy Statement and Supplemental Disclosures failed to provide any itemizations with respect to the estimated value of EdR's assets held for sale, recently developed projects, current and future development projects, unconsolidated joint ventures, land, management and development fee business, cash (including cash proceeds expected by EdR's management to be received by EdR from the settlement of certain equity forward contracts of EdR), cash equivalents and other tangible assets and the total estimated amount of EdR's indebtedness and other tangible liabilities. In other words, the "summary" of this analysis omitted virtually all of the key inputs utilized in the analysis, and thereby impeded shareholders from fairly assessing the analysis.

67. With respect to the Discounted Cash Flow Analysis on page 58, the Proxy Statement failed to disclose the rationale and basis for: (i) the range of implied perpetuity growth rates derived in the analysis; and (ii) the value of the Company's NOLs accounted for in this analysis, if at all. As a highly-respected professor explained in one of the most thorough law review articles regarding the fundamental flaws with the valuation analyses bankers perform in

support of fairness opinions, in a discounted cash flow analysis a banker takes management's forecasts, and then makes several key choices "each of which can significantly affect the final valuation." Steven M. Davidoff, *Fairness Opinions*, 55 AM. U.L. REV. 1557, 1576 (2006). Such choices include "the appropriate discount rate, and the terminal value..." *Id.* As Professor Davidoff explains:

> There is substantial leeway to determine each of these, and any change can markedly affect the discounted cash flow value. For example, a change in the discount rate by one percent on a stream of cash flows in the billions of dollars can change the discounted cash flow value by tens if not hundreds of millions of dollars....This issue arises not only with a discounted cash flow analysis, but with each of the other valuation techniques. *This dazzling variability makes it difficult to rely, compare, or analyze the valuations underlying a fairness opinion unless full disclosure is made of the various inputs in the valuation process, the weight assigned for each, and the rationale underlying these choices.* The substantial discretion and lack of guidelines and standards also makes the process vulnerable to manipulation to arrive at the "right" answer for fairness. This raises a further dilemma in light of the conflicted nature of the investment banks who often provide these opinions.

Id. at 1577-78.

68. In sum, the shareholder vote on the Transaction was not fully informed because the Proxy omitted certain material information. And while Defendants addressed certain disclosure deficiencies via the Supplemental Disclosures, they failed to address the above-referenced material disclosure deficiencies.

COUNT I

On Behalf of Plaintiff and the Class Against the Individual Defendants for Breaches of Their Fiduciary Duties

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

70. Pursuant to Md. Code Ann., Corp. & Ass'ns § 2-405.1(c), the Individual Defendants

owed Plaintiff and the Class the fiduciary duties of care, loyalty, good faith and candor. By virtue of their positions as directors and/or officers of the Company and/or their exercise of control and ownership over the business and corporate affairs of the Company, the Individual Defendants at all relevant times had the power to control and influence, and did control and influence and cause the Company to engage in the practice complained of herein. Each of the Individual Defendants was required to (i) use their ability to control and manage the Company in a fair, just, and equitable manner; (ii) act in furtherance of the best interest of EdR and its stockholders; and (iii) disclose all material information regarding the Transaction to the Company's shareholders so that they can exercise their corporate suffrage rights on a fully informed basis.

71. The Individual Defendants were obligated, in accordance with their fiduciary duties as set forth by Md. Code Ann., Corp. & Ass'ns § 2-405.1(c), to ensure that any sale of the Company is accomplished by a process that was in the best interests of EdR's stockholders.

72. By reason of the foregoing, the Individual Defendants failed to exercise and fulfill their fiduciary obligations toward Plaintiff and the other members of the Class. The Individual Defendants failed to fulfill their fiduciary oversight function by delegating significant control over the sales process to the Company's conflicted CEO Randy Churchey and failed to guard against the significant conflicts of interest faced by BofA Merrill Lynch. The Board further breached its fiduciary duties by impeding other bidders from making superior offers, failed to meaningfully pursue superior offers, and instead preferring a deal with Greystar despite the inadequacy of the Merger Consideration. The Board further failed to adequately inform EdR stockholders in advance of the Stockholder Vote by disseminating the materially incomplete and misleading Proxy Statement.

73. As a result of the actions by the Individual Defendants, Plaintiff and the Class were

harmed in that they were prevented from casting an informed vote at the Stockholder Vote.

74. As a result of the actions by the Individual Defendants, Plaintiff and the Class suffered damages, in an amount to be determined at trial, by virtue of the flawed and conflicted sales process, which resulted in inadequate Merger Consideration being paid to the Company's shareholders.

COUNT II

On Behalf of Plaintiff and the Class Against the Individual Defendants for Declaratory Relief Pursuant to Courts and Judicial Proceedings Article of the Annotated Code of Maryland § 3-401, *et seq.*

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

76. The Individual Defendants breached their fiduciary duties owed directly to Plaintiff and the Class in connection with the Transaction, and are liable therefore.

77. As a result of Individual Defendants' conduct as herein alleged, Plaintiff and the other members of the Class have suffered damages and harm, including harm for which they have no adequate remedy at law.

78. Pursuant to Courts and Judicial Proceedings Article of the Annotated Code of Maryland § 3-412, Plaintiff demands a declaration that: (a) the Individual Defendants and each of them breached their fiduciary duties owed directly to Plaintiff and the Class; (b) the Transaction was entered into in breach of Individual Defendants' fiduciary duties owed directly to Plaintiff and the Class and was therefore unlawful and unenforceable, and that the Merger Agreement and any other agreements in connection with, or in furtherance of, the Transaction should be rescinded and invalidated; (c) the Transaction, the Merger Agreement and/or related transactions contemplated thereby, should be rescinded and the parties restored to their original position; and (d) Plaintiff and

the stockholders should be granted such other and further relief as the nature of their cause may require.

COUNT III

On Behalf of Plaintiff and the Class Against All Defendants for Declaratory Relief Declaring the Exclusive Venue Designation Unenforceable Pursuant to Courts and Judicial Proceedings Article of the Annotated Code of Maryland § 3-401, *et seq.*

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

80. On June 24, 2018, the Individual Defendants authorized and approved the adoption of the bylaw containing the Exclusive Venue Designation, which states:

> Unless the Corporation consents in writing to the selection of an alternative forum, **the Circuit Court for Baltimore City, Maryland**, or, if that Court does not have jurisdiction, the United States District Court for the District of Maryland, Baltimore Division, shall be the sole and exclusive forum for (a) any derivative action or proceeding brought on behalf of the Corporation, (b) any action asserting a claim of breach of any duty owed by any director or officer or other employee of the Corporation to the Corporation or to the stockholders of the Corporation, (c) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation arising pursuant to any provision of the Maryland General Corporation Law, the Charter or these Bylaws, or (d) any action asserting a claim against the Corporation or any director or officer or other employee of the Corporation that is governed by the internal affairs doctrine.

81. The Exclusive Venue Designation exceeds the scope of *jurisdiction*-selection permitted by statute, and is therefore unenforceable. Specifically, on October 1, 2017, Md. Code Ann., Corps. & Ass'ns § 2-113 ("Section 2-113") became effective. Section 2-113 states in pertinent part (emphasis added):

> (b) **Jurisdiction. --**
>
> (1) Except as provided in paragraph (2) of this subsection, the charter or bylaws of a corporation may require, *consistent with applicable jurisdictional requirements*, that any internal corporate claim be brought only in ***courts*** sitting in one or more specified ***jurisdictions***.
>
> (2)
>
> (i) This paragraph does not apply to a provision contained in the

> charter or bylaws of a corporation on October 1, 2017, unless and until the provision is altered or repealed by an amendment to the charter or bylaws of the corporation, as applicable.
>
> (ii) **The charter or bylaws of a corporation may not prohibit bringing an internal corporate claim in the courts of this State** or a federal court sitting in this State.

82. By enabling corporations to require that internal corporate claims "*consistent with applicable jurisdictional requirements*" be brought only in "*courts* sitting in one or more specified *jurisdictions*," the statute allows for *forum* selection (*i.e.*, the designation of Maryland as the required forum), but not *venue* selection (*i.e.*, the designation of a particular circuit court). Indeed, the term "jurisdictions" is defined as "a system of law courts" or "a judicature", and the term is commonly utilized to refer to entire state court systems. Further, the use of the plural "courts" rather than "any court" also cuts against interpreting the statute to permit selection of a single venue in contravention of the Maryland venue statutes.

83. The Maryland Legislature has carefully crafted the State's venue statutes, and the Legislature's decisions regarding appropriate venue should not be allowed to be vacated by private litigants. *See Swanson v. Wilde*, 74 Md. App. 57, 63-65 (1988) (discussing a series of amendments to Maryland's venue statutes based upon public policy considerations). Indeed, the text of Section 2-113, including use of the word "jurisdictions," indicates that the Legislature intended to allow for the designation of Maryland courts as the exclusive jurisdiction for corporate claims, but intended for Maryland's venue statutes to govern the issue of venue.

84. Further, by attempting to limit venue to the Circuit Court for Baltimore City, the Venue Selection Bylaw runs afoul of the prohibition found in Section 2-113(b)(2)(ii)—it "prohibit[s] bringing an internal corporate claim in the courts of this State"—that is, it prohibits bringing such claims in every court of this State where venue would otherwise be proper pursuant

to Maryland's venue statutes.

85. Plaintiff seeks a declaratory judgement that the Exclusive Venue Designation portion of the bylaw was invalid and unenforceable, in that it exceeded the scope of its enabling statute, Md. Code Ann., Corps. & Ass'ns § 2-113, and designated a single venue for actions of this nature that is in contravention of the statutory venue parameters set forth in Md. Cts. & Jud. Proc. § 6-201 through 6-203.

86. Furthermore, in the event that the Court holds that the Exclusive Venue Designation is facially valid, Plaintiff seeks a declaratory judgment that this Court may nonetheless exercise jurisdiction over this action.

COUNT IV

On Behalf of Plaintiff and the Class for a Permanent Injunction Pursuant to Maryland Rule 15-502 Enjoining the Individual Defendants From Invoking the Exclusive Venue Designation

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

88. For the reasons set forth above, the Exclusive Venue Designation is invalid and unenforceable because venue selection within Maryland is not permitted by Md. Code Ann., Corps. & Ass'ns § 2-113.

89. Accordingly, Plaintiff seeks an injunction enjoining the Individual Defendants from invoking or otherwise attempting to enforce the Exclusive Venue Designation in this litigation or any future litigation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants jointly and severally, as follows:

A. Declaring this action to be a Class Action and certifying Plaintiff as Class representative and his counsel as Class counsel;

B. Declaring that the Exclusive Venue Designation portion of the bylaw is invalid and unenforceable;

C. Entering an injunction permanently enjoining the Individual Defendants from invoking or otherwise trying to enforce the Exclusive Venue Designation in this litigation or any future litigation;

D. Awarding the amount of damages sustained by Plaintiff and the Class as a result of the Defendants' breaches of fiduciary duties;

E. Granting Plaintiff and the Class rescissory damages;

F. Imposition of a constructive trust, in favor of Plaintiff and members of the Class, upon any benefits improperly received by Defendants as a result of their wrongful conduct;

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

H. Granting such other and further equitable relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Maryland Rule 2-325(a), Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: November 19, 2018

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By:______________________________

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