

NORBERG v. SECURITY STORAGE CO.: STRETCHING
THE LIMITS OF THE DOCTRINE OF ACQUIESCENCE
IN FREEZE-OUT MERGERS

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ABSTRACT

Pursuant to the doctrine of acquiescence, a stockholder who tenders his shares and accepts the benefits of a transaction may be barred from seeking equitable relief. Thus, if the stockholder is fully informed of all

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material information relevant to a given transaction, the doctrine of acquiescence may result in an equitable estoppel precluding the stockholder who accepted the benefits of the transaction with knowledge of the alleged inequitable conduct from challenging the transaction.

*The Delaware Court of Chancery decision in **Norberg v. Security Storage Co.** (Norberg I) represents the first decision of a Delaware court to apply the affirmative defense of acquiescence to bar a minority stockholder who did not vote in favor of a merger from pursuing a claim for breach of fiduciary duty by a majority stockholder in connection with a freeze-out merger. In so doing, Norberg I also became the first time a Delaware court barred claims of a minority stockholder in a freeze-out merger based on the affirmative defense of acquiescence where the merger was approved by the consent of the majority stockholder without any vote of the minority stockholders; the merger was neither conditioned upon the approval of a majority of the minority stockholders or negotiated by a special committee of directors; the complaint raised an issue of "unfair dealing"; and there was no judicial determination that there were no material misstatements or omissions in the defendants' disclosures relating to the merger. The fact that all of these circumstances were present in Norberg I makes the decision particularly significant.*

This article concludes that the mere fact that a fully-informed minority stockholder surrenders his or her stock certificates for the merger consideration following the consummation of a freeze-out merger should not, standing alone, support the application of the affirmative defense of acquiescence. Furthermore, this article highlights the split of authority in the decision of the Delaware Court of Chancery and calls upon the Delaware Supreme Court for a resolution.

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I. INTRODUCTION

In *Norberg v. Security Storage Co. (Norberg I)*,¹ the Delaware Court of Chancery (by a jurist who is now a sitting member of the Delaware Supreme Court) held, as a matter of law, that the plaintiff was barred from pursuing claims of breach of fiduciary duty in connection with a freeze-out merger² based upon the defendants' assertion of the affirmative defense of acquiescence. The sole basis for the court of chancery's decision in *Norberg I* was that the plaintiff surrendered his stock certificates for the cash into which his shares had been converted upon consummation of the merger seventeen months after filing suit for breach of fiduciary duties in connection with the freeze-out merger.³

As discussed more fully herein, although the significance of this fact seems to have passed unnoticed in *Norberg I*, the decision represents the first instance in which a Delaware court has applied the affirmative defense of acquiescence to bar a minority stockholder who did not vote in favor of a merger from pursuing a claim for breach of fiduciary duty by a majority stockholder in connection with a freeze-out merger. In this article, we trace the historical development of the doctrine of acquiescence in Delaware corporate law. We also question whether the doctrine should be available to bar claims of breach of fiduciary duty asserted by fully-informed minority stockholders who do not vote in favor of a freeze-out merger, but who surrender their stock certificates following the consummation of a freeze-out merger in order to receive the cash into which their equity

¹No. 12,885 (Del. Ch. Sept. 19, 2000), *reprinted in* 27 DEL. J. CORP. L. 378 (2002).

²As used herein, the term "freeze-out merger" refers to a merger in which minority stockholders are eliminated for cash and the majority stockholder acquires ownership of the entire enterprise.

³*See Norberg I*, slip op. at 2-3, *reprinted in* 27 DEL. J. CORP. L. at 379.

interest in the corporation already has been converted by operation of law.⁴ Based upon our analysis of the historical development of the doctrine of acquiescence, we conclude that the mere fact that a fully-informed minority stockholder surrenders his or her stock certificates for the merger consideration following the consummation of a freeze-out merger should not, standing alone, support the application of the affirmative defense of acquiescence. We reach this conclusion for the three reasons discussed below.

First, prior to *Norberg I*, the Delaware Court of Chancery has affirmatively held that the mere fact that a fully-informed minority stockholder surrenders his or her stock certificates for the merger consideration after the consummation of a freeze-out merger will *not* bar that stockholder from pursuing a claim for breach of fiduciary duty in connection with the merger. The court of chancery has indicated, however, that a fully-informed minority stockholder may be barred from pursuing a claim for breach of fiduciary duty if the minority stockholder surrenders his or her stock certificates for the merger consideration after the merger is consummated, but those indications were only in the form of dicta. Moreover, prior to *Norberg I*, the Delaware Supreme Court never sustained the application of the affirmative defense of acquiescence to bar a fully-informed minority stockholder from pursuing a claim for breach of fiduciary duty in connection with a freeze-out merger—even if the stockholder voted in favor of the merger.⁵

⁴For ease of reference, we hereafter use the term "merger consideration" as a short-hand for the cash into which a minority stockholders' shares are converted into the right to receive in a freeze-out merger. As a technical matter, the cash actually paid to the minority stockholders is not the consideration for the merger. Rather, the consideration for the merger is the agreement by the majority stockholder (or acquisition vehicle) to pay the cash into which the minority stockholders' shares are to be converted into the right to receive in the merger. The actual conversion of the minority stockholders' shares into the right to receive cash occurs by operation of Delaware law, pursuant to whichever merger statute might be employed. Moreover, the surviving corporation's obligation to pay the cash to stockholders who transmit their stock certificates to the corporation is unconditional. If, however, each and every minority stockholder failed and/or refused to transmit their stock certificates to the corporation, the merger would not fail for lack of consideration. This is because the consideration—in the form of the acquiror's promise to pay—has already been received before the merger was consummated.

⁵We recognize that the Delaware Supreme Court's decisions in *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987), and *Kahn v. Household Acquisition Corp.*, 591 A.2d 166 (Del. 1991), are widely viewed as holding that the doctrine of acquiescence may apply to bar the claims of fully-informed minority stockholders who vote in favor of a freeze-out merger or accept the merger consideration after the merger is consummated. As set out more fully herein, however, neither *Bershad* nor *Kahn* actually espouses such a holding, and neither decision resulted in the rejection of any otherwise actionable claim for breach of fiduciary duty on the basis of acquiescence.

Second, a minority stockholder who surrenders his or her stock certificates for the merger consideration following the consummation of a freeze-out merger is not making any exchange or otherwise electing one option over another. A minority stockholder whose equity interest in a corporation is eliminated in a freeze-out merger has no right to retain his or her equity. From the moment the freeze-out merger is consummated, the minority stockholders' stock certificates are converted, by operation of law, into the right to receive the amount of cash per share that the majority stockholder agreed and committed to pay in the agreement of merger. This conversion is caused without the consent of minority stockholders who do not vote in favor of the merger.⁶

Third, a minority stockholder who surrenders his or her shares for the merger consideration following the consummation of a freeze-out merger does not do so voluntarily. Rather, the minority stockholder surrenders his or her stock certificates in order to avoid a number of adverse consequences. The consequences of not doing so include (1) the loss of interest on the merger consideration (which typically will not be paid by the surviving corporation without regard to how long a minority stockholder might wait to surrender his or her shares, and without regard to the reason why the minority stockholder might have delayed in doing so); and (2) incurring "phantom" income on any taxable gain realized as a consequence of the conversion of the stockholder's shares upon consummation of the merger.

II. HISTORY OF THE ACQUIESCENCE DEFENSE IN CONNECTION WITH FREEZE-OUT MERGERS

Although the doctrine of acquiescence can be traced to equity jurisprudence predating the nineteenth century, Delaware courts did not

⁶In the case of a freeze-out merger conditioned upon the vote of a majority of the minority stockholders, those minority stockholders who vote in favor of the merger facilitate the merger by their vote. In such a circumstance, fully informed minority stockholders who vote for the merger plainly should be barred from pursuing relief based on the doctrine of acquiescence. Moreover, in such a case, it is arguable that even the minority stockholders who did not vote in favor of the merger should be barred from pursuing a claim for breach of fiduciary duty based on the related doctrine of ratification—without regard to whether non-assenting minority stockholders later surrender their stock certificates for the merger consideration. To date, the parameters of the affirmative defense of ratification have not been fully established by the Delaware courts, and we could devote an article to that subject alone. For present purposes, it is sufficient to note that shares of minority stockholders who do not vote in favor of a freeze-out merger are converted into the right to receive the merger consideration without any action on the part of such stockholders—without regard to whether the merger is effected unilaterally by the majority stockholder or with the affirmative vote of a majority of the minority stockholders.

consider the application of the doctrine in the context of corporate actions affecting the ownership interests of stockholders until the late 1930s.⁷ Moreover, since Delaware law did not authorize freeze-out mergers until 1967,⁸ the law of acquiescence, as it applies to such transactions, truly is a modern development in Delaware jurisprudence.

The Delaware Court of Chancery's decision in *Trounstone v. Remington Rand, Inc.*⁹ is the first reported decision in which a Delaware court applied the doctrine of acquiescence to bar a stockholder from seeking judicial relief from corporate actions affecting the rights associated with the ownership of stock. Thereafter, the Delaware Supreme Court adopted and applied the reasoning in *Trounstone* in a trilogy of appeals decided in the early 1940s.¹⁰ As discussed more fully below, none of these cases involved a stockholder who claimed that a challenged corporate action involved a breach of fiduciary duty, much less any breach by a majority stockholder. Moreover, in *Trounstone, Bay Newfoundland Co. v. Wilson & Co.*,¹¹ and *Frank v. Wilson & Co.*,¹² a non-assenting stockholder had the right to maintain the *status quo* as to his or her interest in the corporation if the stockholder did not wish to participate in the challenged corporate action, and in *Federal United v. Havender*¹³ the plaintiff had a statutory appraisal remedy that it elected to forego.¹⁴

It was not until the Delaware Court of Chancery's decision in *Kahn v. Household Acquisition Corp. (Kahn I)*¹⁵ that a Delaware court first

⁷See *Trounstone v. Remington Rand, Inc.*, 194 A. 95 (Del. Ch. 1937).

⁸Prior to 1967, Delaware law authorized a freeze-out merger only in the limited circumstance where an acquiring corporation owned at least 90% of the shares of the target corporation (i.e., short-form mergers). All other mergers were required to be stock-for-stock transactions. See *Stauffer v. Standard Brands Inc.*, 178 A.2d 311, 314 (Del. Ch. 1962), *aff'd on other grounds*, 187 A.2d 78 (Del. 1962) ("a majority stockholder may not under § 251 or § 252 eliminate minority stockholders as participants in the continuing enterprise"). As discussed more fully below, the Delaware General Corporation Law was comprehensively revised in 1967. At that time, the merger statutes were revised to permit the payment of cash for shares. Although there was the potential prior to 1967 for a majority stockholder in a short-form merger to argue that stockholders who accepted the merger consideration had acquiesced in the transaction, no decision of the Delaware Supreme Court appears to have addressed this issue.

⁹194 A. 95 (Del. Ch. 1937).

¹⁰See *Bay Newfoundland Co. v. Wilson & Co.*, 37 A.2d 59, 62 (Del. 1944); *Frank v. Wilson & Co.*, 32 A.2d 277, 281 (Del. 1943); *Federal United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940).

¹¹37 A.2d 59 (Del. 1944).

¹²32 A.2d 277 (Del. 1943).

¹³11 A.2d 331 (Del. 1940).

¹⁴*Bay Newfoundland*, 37 A.2d at 62; *Frank*, 32 A.2d at 281; *Federal United*, 11 A.2d at 343; *Trounstone v. Remington Rand, Inc.*, 194 A. 95 (Del. Ch. 1937).

¹⁵No. 6293 (Del. Ch. Jan. 19, 1982), *reprinted in* 7 DEL. J. CORP. L. 324 (1982).

considered the potential application of the doctrine of acquiescence in connection with a minority stockholder's challenge to a freeze-out merger. In *Kahn I*, the court declined to extend *Trounstine* to bar claims of breach of fiduciary duty asserted by a minority stockholder who did not vote in favor of a challenged freeze-out merger, but did surrender her stock certificates for the merger consideration following the consummation of the merger.¹⁶ In the nearly two decades following *Kahn I*, the Delaware Court of Chancery revisited the issue in a number of cases, and the Delaware Supreme Court provided guidance—albeit in *dicta*—in *Bershad* and *Kahn*. As previously noted, however, it was not until *Norberg I* that a Delaware court actually applied the doctrine of acquiescence to bar a fully-informed minority stockholder from pursuing a claim for breach of fiduciary duty solely because the stockholder surrendered his shares for the merger consideration following the consummation of the merger.

In the pages that follow, we trace the development of the doctrine of acquiescence (as it applies to corporate actions affecting the ownership rights associated with stock) by the Delaware courts, beginning with *Trounstine* and leading up to the Delaware Court of Chancery's decision of *Norberg I*.

A. *Trounstine*: *Engrafting the Equitable Doctrine of Acquiescence onto Delaware Corporate Law*

The decision in *Trounstine v. Remington Rand, Inc.*¹⁷ is the first reported decision in which a Delaware court applied the doctrine of acquiescence to bar a stockholder from seeking judicial relief from corporate actions affecting the rights associated with the ownership of stock. The plaintiff, Lewis Trounstine, sought to invalidate a stock reclassification implemented to eliminate dividends in arrears on a class of preferred stock.¹⁸ Notably, Mr. Trounstine's complaint was not based upon any alleged breach of fiduciary duty. Rather, Mr. Trounstine argued that the challenged reclassification was void for statutory invalidity.¹⁹

Mr. Trounstine initially filed suit in New York and sought a preliminary injunction in advance of any vote on the proposed reclassification.²⁰ Before Mr. Trounstine's application was heard by the

¹⁶*Id.*

¹⁷194 A. 95 (Del. Ch. 1937).

¹⁸*Id.* at 96-97.

¹⁹*Id.* at 97.

²⁰*Id.*

New York courts, the Delaware Court of Chancery decided *Keller v. Wilson & Co.*,²¹ where the court upheld the statutory validity of a stock reclassification similar to that involved in *Trounstone*.²² Upon learning of the decision in *Keller*, Mr. Trounstone voluntarily dismissed his New York lawsuit.²³

Notwithstanding the fact that the proposed reclassification may have been statutorily permissible, the law was clear that the stock reclassification was not binding on stockholders who neither voted in favor of the reclassification nor thereafter elected to receive the new shares created in the reclassification.²⁴ Accordingly, Mr. Trounstone voted against reclassification and held onto his shares.²⁵ Almost a year after the reclassification was implemented, however, the market value of the new shares exceeded the redemption value of the old shares (including the dividends in arrears), and Mr. Trounstone elected to exchange his old shares for new ones.²⁶

After Mr. Trounstone exchanged his shares, the Delaware Supreme Court reversed the Delaware Court of Chancery's decision in *Keller*.²⁷ Thereafter, Mr. Trounstone filed a second suit challenging the statutory validity of the reclassification.²⁸ The corporate defendant sought the dismissal of Mr. Trounstone's complaint based, among other things, upon the doctrine of acquiescence.²⁹ In sustaining the defendant's position, the court of chancery reasoned:

In the matter of reclassification of stocks of the type here under review, it is to be supposed that some consideration in lieu of cash is given to the class of stockholders who were entitled to dividend arrearages, for the waiver by them

²¹180 A. 584 (Del. Ch. 1935).

²²See *Trounstone*, 194 A. at 97.

²³See *id.*

²⁴*Id.* In the years since *Trounstone* was decided, the Delaware Code has been amended to permit amendments to the certificate of incorporation, of the type sought to be implemented in *Trounstone*, with the consequence that the reclassification would be binding on all stockholders of the corporation—without regard to whether they vote in favor of the reclassification or voluntarily accept the results of the reclassification. See DEL. CODE ANN. tit. 8, § 242(a)(4) (1974).

²⁵See *Trounstone*, 194 A. at 96.

²⁶See *id.* at 97.

²⁷See *id.*

²⁸See *id.*

²⁹See *Trounstone*, 194 A. at 98. The defendant also put forth the affirmative defense of laches.

of their right to cash payments. The new securities received in lieu of the old must in reason be regarded as acceptable to the holders of the old in liquidation of all capital and dividend rights theretofore belonging to them. No other sensible view of the matter can be entertained. He who accepts the new rights ought to be regarded as expressing an agreement to let go of the old ones.

The complainant in this case, however, under the head we are now considering, wishes to retain the old rights in part (to the extent of the old dividends) and to keep in toto all of the new rights given in lieu of all the old ones. His position does not appeal to me as tenable. As a matter of fact, he did not conclude to participate in the new plan of stock classification, until time had demonstrated that what he could receive in exchange for his old stock was worth more on the current market than was the redemption value of his old stock which included all the arrearages thereon. It looks very much as if the complainant was indulging in speculative delay.

Whether the complainant's conduct be considered as showing acquiescence or whether it be considered as showing estoppel, is a matter of words. It appears to me, so far as the present branch of the case is concerned, as more properly falling within the conception of acquiescence, to which is added an element often times present in estoppel, viz., the element of speculative waiting to see which of two courses it would be more to the profit of the complainant to adopt.

Having made his choice, I am of the opinion a court of equity should hold him to his selection.³⁰

B. Bay Newfoundland, Frank *and* Federal United:
The Delaware Supreme Court Embraces Trounstone

The Delaware Supreme Court adopted and applied the reasoning of *Trounstone* in *Bay Newfoundland Co. v. Wilson & Co.*,³¹ *Frank v. Wilson & Co.*,³² and *Federal United Corp. v. Havender*.³³ As in *Trounstone*, these

³⁰*Id.* at 99-100.

³¹37 A.2d 59, 62 (Del. 1944).

³²32 A.2d 277 (Del. 1943).

³³11 A.2d 331 (Del. 1940).

cases involved a stock reclassification designed to eliminate dividend arrearages.

Like *Trounstine*, *Bay Newfoundland* and *Frank* arose out of a classic stock reclassification in which stockholders who did not vote in favor of the transaction were legally entitled to retain their pre-reclassification shares. Citing *Trounstine*, the Delaware Supreme Court in *Bay Newfoundland* observed that "[t]he dissenting shareholder, in such case, is in a position to assert that it is not within the power of the majority to bind him by the amendment; but his right to relief may be lost through his acquiescence, by ratification or by laches."³⁴ Similarly, in *Frank*, the supreme court approvingly cited *Trounstine* and concluded:

The non-assenting stockholders, therefore, were in a position to assert that it was not within the power of the majority to bind them by the amendment; but, clearly, the corporate action was one which could be subsequently ratified by a stockholder who had at the first not consented to it, or his rights might be lost through his laches.³⁵

The transaction in *Federal United* was somewhat more complicated. Recognizing that reclassification effected by amendment to the certificate of incorporation would not be binding upon non-assenting stockholders, the defendants in *Federal United* sought to bind all stockholders by proposing a stock-for-stock merger between the corporation and a wholly-owned shell subsidiary.³⁶ The plaintiff claimed that a merger of the type implemented was statutorily impermissible.³⁷ After disposing of the plaintiff's statutory claim,³⁸ the Delaware Supreme Court went on to consider the implications of the decision in *Trounstine*. In this connection, the court instructed:

Even if we had been compelled to hold that a merger of a parent corporation with its wholly-owned subsidiary was not within the contemplation of Section 59, and that the corporate proceeding was no more than an attempt at a reclassification of shares under Section 26, the act was void only as against dissenting shareholders; and no supposed public policy would have sufficed to declare the plan to be void and the

³⁴*Bay Newfoundland*, 37 A.2d at 62 (citing *Trounstine*, 194 A. at 97).

³⁵*Frank*, 32 A.2d at 281 (citing *Trounstine*, 194 A. at 97).

³⁶*Federal United*, 11 A.2d at 337.

³⁷*Id.*

³⁸*Id.* at 337-43.

conversion of shares a nullity if all of the interested shareholders had assented.³⁹

In addition, the Delaware Supreme Court expressly noted that the plaintiff did not contend that the terms of the merger were unfair or inequitable.⁴⁰ As such, *Federal United* did not involve any claim for breach of fiduciary duty.⁴¹

The Delaware Court of Chancery's decision in *Trounstone* and the Delaware Supreme Court's decisions in *Bay Newfoundland*, *Frank* and *Federal United* illuminate the significance of the fact that the challenged transactions in *Bershad* and *Kahn* were preceded by a vote of the minority stockholders. Moreover, the majority stockholders in *Bershad* and *Kahn* implemented procedural safeguards designed to ensure "fair dealing" and left open only the question of "fair price" to be litigated by dissenting stockholders, if any, in a statutory appraisal action.

C. *The 1967 Revision to the Delaware General Corporation Law:
Delaware Gives Birth to the Freeze-Out Merger*

In 1967, the Delaware General Corporation Law (DGCL) underwent a comprehensive revision to modernize Delaware corporate law. As a result of the 1967 revisions to the DGCL, a number of corporate actions became permissible that were previously prohibited. Among the most significant revisions was an amendment to section 251 of the DGCL. The change authorized mergers in which the equity interest of stockholders in a constituent corporation were converted into the right to receive only cash.⁴² With this amendment to section 251, the freeze-out merger was born in Delaware.

In its infancy, the freeze-out merger spawned a number of legal issues new to Delaware corporate law. For example, could a majority

³⁹*Id.* at 343 (citing *Trounstone v. Remington Rand, Inc.*, 194 A. 95 (Del. Ch. 1937)).

⁴⁰*Federal United*, 11 A.2d at 343.

⁴¹Notwithstanding the fact that the plaintiff did not assert any claim for breach of fiduciary in *Federal United*, the plaintiff did have the right to withdraw from the corporation and obtain a statutory appraisal. *Id.* at 337-38. Pursuant to explicit statutory provisions, however, the right to seek an appraisal is limited to stockholders who neither vote for a merger nor surrendered their shares for the merger consideration. As such, the loss of appraisal rights caused by the surrender of shares for merger consideration is not the result of any application of the doctrine of "acquiescence." Rather, it is the result of a strict application of the provisions of the appraisal statute. As will later become apparent, this fact is of significance in understanding the import of the Delaware Supreme Court's decisions in *Bershad* and *Kahn*.

⁴²DEL. CODE ANN. tit. 8, § 251 (2000).

stockholder effect a freeze-out merger for the sole purpose of eliminating minority stockholders, or was a business purpose required? What standard of judicial review would govern claims for breach of fiduciary duty in connection with a freeze-out merger? What is the legal consequence of providing minority stockholders with a veto right? What is the legal consequence of the majority stockholder negotiating the terms of the merger with a special committee of disinterested and independent directors? Is a statutory appraisal the exclusive remedy available to minority stockholders in a freeze-out merger? And, what application will equitable concepts of acquiescence, ratification, and laches have in the context of a freeze-out merger?

While an entire article could be written on the manner in which the Delaware courts have dealt (and are continuing to deal) with each of these issues, we limit our discussion herein to the issue of acquiescence. We believe that the doctrine should be applied to bar only the claims of fully-informed minority stockholders who vote in favor of a freeze-out merger, and that the doctrine should not be applied to bar claims of breach of fiduciary duty asserted by non-assenting minority stockholders who surrender their stock certificates for the merger consideration after the consummation of a freeze-out merger.

*D. Kahn I: The Court of Chancery Declines to Extend
the Doctrine of Acquiescence to Freeze-Out Mergers to Bar the Claims
of a Non-assenting Minority Stockholder Who Surrenders
Her Stock Certificates for the Merger Consideration
after the Consummation of a Freeze-Out Merger*

The Delaware Court of Chancery's decision in *Kahn v. Household Acquisition Corp. (Kahn I)*⁴³ is the first decision of a Delaware court to consider the applicability of the doctrine of acquiescence in a freeze-out merger. The plaintiff in *Kahn* did not vote in favor of the freeze-out merger challenged in that case, but did surrender her shares for the merger consideration after the merger was consummated.⁴⁴ The defendants sought to dismiss the plaintiff's claims of breach of fiduciary duty on the basis of acquiescence.⁴⁵ The court of chancery concluded that the doctrine of acquiescence did not apply to bar the plaintiff's claims.⁴⁶

⁴³No. 6293 (Del. Ch. Jan. 19, 1982), *reprinted in* 7 DEL. J. CORP. L. 324 (1982).

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

Because the decision in *Kahn I* represents the first effort by a Delaware court to consider the significance of *Trounstine* in the circumstances of a freeze-out merger, we quote liberally from the court's decision. As the court explained:

For authority, defendants rely on the case of *Trounstine v. Remington Rand, Inc.* In theory, their motion is based on the doctrine of acquiescence. It is their position that by accepting payment and surrendering her shares subsequent to the consummation of the merger, plaintiff has acquiesced in and accepted the benefits of the acts of the defendants complained of in her suit, and that as a consequence she has forfeited her standing to maintain the action further.

Defendants liken her position to that of one who seeks appraisal rights following a merger, but who thereafter surrenders his shares and accepts payment of the merger price. The law is clear that by so doing such person loses his right to continue with his appraisal claim. Defendants argue that this and the decision in *Trounstine* reflect a policy against permitting a litigant to pursue a "no lose" position by accepting the benefits of a transaction while continuing with a suit to obtain more.

The reference to the appraisal statutes seems distinguishable, however. There the sole issue is one of value, and the appraisal right exercised does not involve necessarily a contention of breach of fiduciary duty as much as it reflects a difference of opinion. More importantly, however, the appraisal statute expressly provides that the appraisal claim is terminated by a withdrawal of the demand and acceptance of the merger consideration. No statute is cited which would similarly govern plaintiff's situation here.

Thus, for plaintiff's complaint to be dismissed here, the dismissal must be justified under some common law theory such as estoppel, laches or acquiescence. Defendants stake their present position on acquiescence. But in the present context of matters, I cannot conclude that plaintiff has acquiesced in all acts complained of against defendants simply because she has accepted payment for her shares at the merger price. I say this because she did so while her suit attacking the merger was pending and being actively pursued by her.

Initially, she attempted to enjoin the merger vote. Her application was denied for considerations pertaining to preliminary injunctive relief, including a failure to demonstrate the threat of irreparable injury under the circumstances. Thereafter the merger was approved, as it was sure to be since the defendants owned and controlled sufficient shares to assure approval from the outset. (The vote was not structured to require approval by a majority of the minority shareholders.) Thus, in accepting payment of the merger price, plaintiff did no more than accept the amount she was powerless to do anything about until such time as she could present her evidence and obtain a decision in this case.

Moreover, the plaintiff's complaint is not bottomed solely on a value dispute, as is the situation in an appraisal action. She is also relying on an alleged lack of proper purpose for the merger and a general contention that the majority shareholder breached a fiduciary duty owed the minority by using its majority position to accomplish the merger on the terms imposed upon the minority. It does not follow that by accepting an amount that she was temporarily unable to do anything about the plaintiff thereby acquiesced in all other conduct of the defendants unrelated to the fixing of the merger price.

These factors also serve, I think, to distinguish the *Trounstine* case. There the plaintiff voted against a proposal to reclassify his preferred shares and thereafter filed suit to set aside the reclassification. Then, significantly, he dismissed his suit and some months later surrendered his shares in exchange for those authorized by the reclassification. After accepting the benefits of the exchange for several months more, he filed a second suit in his Court to undo the reclassification. His complaint was dismissed on the basis that by his conduct he had acquiesced in the reclassification scheme and thus was barred from attacking it. (A reading of the decision would indicate that an element of estoppel was also present.)

Had the plaintiff here dismissed her suit, surrendered her shares and accepted the merger price, in the absence of any claim of material misrepresentations, etc., and then reinstated her cause of action, her situation might well fall under the *Trounstine* rationale. The difference is, however,

that defendants are attempting to dismiss her original, ongoing, first-and-only action based solely upon her acceptance of payment of the challenged merger price while her suit was pending. However, the fact that she elected to take payment while pursuing her suit — under protest so to speak — negates the existence of an element critical to the *Trounstine* decision. It belies any thought to acquiescence.

Since the defendants' motion to dismiss is based on the theory of acquiescence and since on the naked facts argued the acceptance of the merger price, standing alone, does not unequivocally indicate acquiescence, at least as I view it, I conclude that the motion must be denied.⁴⁷

The court of chancery in *Kahn I* was of the view that a fully-informed stockholder who does not vote in favor a freeze-out merger, but who does surrender his or her stock certificates for the merger consideration after the merger is consummated, should not be barred by the doctrine of acquiescence from pursuing a claim for breach of fiduciary duty in connection with the merger. Because the plaintiff had brought suit to enjoin the freeze-out merger and surrendered her shares for the merger consideration only after her preliminary injunction application was denied by the court, however, the court of chancery's analysis prior to the final two paragraphs quoted above is arguably *dictum*.

E. *The 1981 Amendments to the DGCL: Liberalizing the Statutory Appraisal Remedy*

In 1981, section 262 of the DGCL (the appraisal statute) was repealed and replaced by an amended version of the statute.⁴⁸ The most significant change affected by the amendment was that it liberalized the standard for determining fair value by mandating that the court "shall consider all relevant factors."⁴⁹

Prior to the 1981 amendment to the appraisal statute, the Delaware courts had adopted a relatively mechanical formula for determining value, known as the "block method."⁵⁰ By 1981, however, the investment

⁴⁷*Id.*, slip op. at 2-5, reprinted in 7 DEL. J. CORP. L. at 326-28 (citing *Trounstine v. Remington Rand, Inc.*, 194 A.95 (Del. Ch. 1937); DEL. CODE ANN. tit. 8, § 262(i) (2000)).

⁴⁸DEL. CODE ANN. tit. 8, § 262 (1981) (amended 2000).

⁴⁹*Id.* § 262(h); 63 Del. Laws 14(h) (1981).

⁵⁰The Delaware block method is a three part analysis where the courts look at asset value, market value, and earnings value. See generally Joseph Evan Calio, *New Appraisals of*

community had developed much more sophisticated methods for valuing a business. Valuation results reached under the block method were no longer consistent with economic reality. The statutory appraisal process began to incorporate valuation methodologies utilized in the investment community.⁵¹

Today, Delaware courts routinely consider valuation methods such as discounted cash flow, comparable trading value, and comparable transaction value.⁵² In addition, the Delaware courts have wrestled with the issues raised by the concepts of minority discounts and control premia.⁵³ These are the same methods routinely employed by investment bankers in connection with the valuation of various businesses.

F. Weinberger: *The Supreme Court Extends the "Liberalized" Appraisal Remedy to Stockholders Who Did Not Demand an Appraisal Pre-Weinberger*

In 1983, the Delaware Supreme Court decided the landmark appeal of *Weinberger v. UOP, Inc.*⁵⁴ Although *Weinberger* is significant for a number of reasons, its significance for purposes of the present discussion of acquiescence lies in the fact that *Weinberger* created an extraordinary equitable remedy. This remedy extended the "liberalized" appraisal remedy created by the Delaware legislature in 1981 to stockholders who previously failed to demand an appraisal.⁵⁵ The Delaware Supreme Court labeled this extraordinary remedy "quasi-appraisal." The court explained:

Obviously, there are other litigants, like the plaintiff, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved. Accordingly, the quasi-appraisal remedy we grant the plaintiff here will apply only to: (1) this case; (2) any case now pending on appeal to this Court; (3) any case now pending in the Court of Chancery

Old Problems: Reflections on the Delaware Appraisal Proceeding, 32 AM. BUS. L.J. 1 (1994) (discussing the role of the block method in determining a stock's fair value).

⁵¹See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983) (holding that the Delaware block method was not the exclusive tool for appraisals); see also *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 940 (Del. 1985) (clarifying that *Weinberger* did not abolish the block method, but rather "only it's [sic] exclusivity as a tool of valuation").

⁵²See, e.g., *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513 (Del. 1999).

⁵³See, e.g., *Rapid-American Corp. v. Harris*, 603 A.2d 796 (Del. 1992); *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989).

⁵⁴457 A.2d 701 (Del. 1983).

⁵⁵See *id.* at 714-15.

which has not yet been appealed but which may be eligible for direct appeal to this Court; (4) any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983; and (5) any proposed merger to be presented at a shareholders' meeting, the notification of which is mailed to the stockholders on or before February 23, 1983. Thereafter, the provisions of . . . [section] 262, as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cash-out merger.⁵⁶

Thus, under *Weinberger*, a limited class of minority stockholders whose equity interest in a corporation was eliminated in a freeze-out merger would be entitled to pursue a quasi-appraisal even though they otherwise failed to identify any actionable breach of fiduciary duty in connection with the merger, and even though they had not demanded an appraisal at the time of the merger.

G. Bershad: *Limiting Weinberger's Quasi-Appraisal Remedy to Fully-Informed Stockholders Who Neither Voted in Favor of the Freeze-Out Merger Nor Surrendered Their Stock Certificates for the Merger Consideration*

Less than two months after the Delaware Supreme Court decided *Weinberger*, the Delaware Court of Chancery decided *Bershad v. Curtiss-Wright Corp. (Bershad I)*.⁵⁷ Significantly, the freeze-out merger in *Bershad I* had been conditioned upon a vote of a majority of the minority stockholders. Seeking to avoid the consequence of the vote of the minority stockholders, the plaintiff in *Bershad I* claimed that the defendants failed to provide adequate disclosure to the minority stockholders in connection with the freeze-out mergers.⁵⁸ In addition, the plaintiff asserted a claim that the freeze-out merger lacked a proper business purpose.⁵⁹

The defendants in *Bershad I* moved for summary judgment, arguing that (1) their disclosures were adequate, as a matter of law; and (2) there was no business purpose requirement for a freeze-out merger.⁶⁰ The court

⁵⁶*Id.* (citing DEL. CODE ANN. tit. 8, § 262 (2000)).

⁵⁷No. 5827, 1983 Del. Ch. LEXIS 461 (Del. Ch. Mar. 21, 1983).

⁵⁸*Id.* at *2.

⁵⁹*Id.*

⁶⁰*Id.*

of chancery found for the defendants on both counts.⁶¹ The court then considered the availability of *Weinberger's* quasi-appraisal remedy in *Bershad I*. Emphasizing the fact that the freeze-out merger in *Bershad I* (unlike the merger in *Weinberger*) was approved by an informed vote of a majority of the minority stockholders, the Delaware Court of Chancery concluded that the quasi-appraisal remedy should be made available only to those minority stockholders who would be eligible for a statutory appraisal but for the fact that they had made no demand for appraisal—i.e., only those stockholders who neither voted in favor of the merger nor surrendered their stock certificates for the merger consideration. The court explained:

In light of the elimination of the business purpose rule and my finding of complete disclosure, the Plaintiffs are in the precarious position of merely challenging the fairness of the \$23.00 price. It is significant that the Supreme Court has adopted a more liberal approach to valuation in appraisal and other stock value proceedings. In rejecting the "Delaware block" method as the exclusive remedy, the court has returned to the former established principles relegating a stockholder to the basic remedy of appraisal. . . . Accordingly, the provisions of the appraisal statute, . . . [section] 262, as construed by the Supreme Court, *including the means for perfecting appraisal rights*, shall govern the financial remedy available in a cash-out merger. . . .

But, in all of this, the court recognized that there would be other plaintiffs like *Weinberger* who have renounced an appraisal and whose rights to challenge the value of the stock must be preserved.

Fairness and the timetable as set by the Supreme Court dictates that the Plaintiffs' rights to challenge the value of the stock in this instance must survive. However, unlike *Weinberger*, those entitled to such appraisal remedy appear to be those who did not vote in favor of the merger and those who did not accept any benefit from the merger. Those stockholders who voted for the merger have been determined herein to have been informed voters. Although the Supreme Court has relaxed the requirement of perfecting appraisal rights in pending cases which are eligible for direct appeal to

⁶¹*Bershad I*, 1983 Del. Ch. LEXIS 461, at *17.

the Supreme Court, it cannot be said that the Supreme Court intended a result which would allow informed voters to be entitled to relief. . . . In *Weinberger*, the class was enlarged to include those who had voted for the merger because the approval by a majority of the minority was found to be meaningless, i.e., an uninformed vote.⁶²

Significantly, the court of chancery in *Bershad I* did not mention the doctrine of acquiescence and did not cite, much less discuss, the decisions in *Trounstone*, *Bay Newfoundland*, *Frank*, *Federal United*, or even *Kahn I*. We submit that the reason for this conspicuous omission in *Bershad I* is because the court of chancery's determination to exclude stockholders who surrendered their stock certificates for the merger consideration from participating in a quasi-appraisal was not driven by the doctrine of acquiescence. Rather, as the court of chancery expressly explained, the decision was driven by the fact that such stockholders would not have been eligible to participate in a statutory appraisal action if they had made a demand for appraisal. Moreover, since minority stockholders asserted no actionable claim for breach of fiduciary duty in *Bershad I*, the court of chancery was unwilling to deviate from the rule of the appraisal statute that would preclude stockholders who surrendered their stock certificates for merger consideration from participating in the quasi-appraisal created in *Weinberger*. This is the limited aspect of the decision in *Bershad I* that deals with the consequence of a minority stockholder surrendering his or her shares for the merger consideration after the consummation of a freeze-out merger.

A year later, the Delaware Court of Chancery reached the same result in *Schlossberg v. First Artists Production Co.*⁶³ This case involved facts materially identical to *Bershad I* insofar as the issue of the availability of a quasi-appraisal was concerned. In *Schlossberg*, the Vice Chancellor who decided *Bershad I* reiterated his reasoning:

The recent holding in *Bershad v. Curtiss-Wright*, although not cited by the parties, supports this holding. There, on a motion for summary judgment, the Court concluded that alleged proxy non-disclosure claims and breach of fiduciary claims were meritless. Furthermore, an allegation of

⁶²*Id.* at *18-19 (emphasis added) (citations omitted) (citing DEL. CODE ANN. tit. 8, § 262 (2000)).

⁶³No. 6670 (Del. Ch. May 22, 1984), reprinted in 9 DEL. J. CORP. L. 491 (1984).

improper business purpose was dismissed because it had been eliminated by *Weinberger v. UOP, Inc.* The only claim left was a challenge to the fairness of the merger price. The minority stockholders in *Bershad* were also entitled to a majority of the minority vote condition. Although *Bershad* did not expressly involve a class certification issue, this Court reasoned that the class should be limited: ". . . it cannot be said that the Supreme Court intended a result which would allow informed voters to be entitled to relief."⁶⁴

H. Serlick: *Declining to Apply the Doctrine of Acquiescence to Bar Claims of Breach of Fiduciary Duty by Stockholders Eliminated in a Freeze-Out Merger That Was Not Conditioned upon a Vote of a Majority of the Minority Stockholders*

*Serlick v. Pennzoil Co.*⁶⁵ is the first decision of the Delaware Court of Chancery after *Weinberger* to consider the potential application of the affirmative defense of acquiescence in the context of a freeze-out merger. In *Serlick*, the court of chancery (by a jurist who is now a sitting member of the Delaware Supreme Court) concluded that the doctrine of acquiescence has no application with respect to fully-informed minority stockholders who do not vote in favor of a freeze-out merger, but do surrender their stock certificates for the merger consideration after the merger is consummated if the merger is not conditioned upon a vote of a majority of the minority stockholders. The court explained:

[W]here a merger is subject to an informed majority of the minority vote a shareholder who votes in favor of the merger and surrenders his shares thereby acquiesces in the corporate merger. However, in the absence of an informed majority of the minority approval the surrender of shares, in itself, does not demonstrate acquiescence.⁶⁶

Therefore, the court stated that a different result may apply if the freeze-out merger is conditioned upon a vote of a majority of the minority

⁶⁴*Id.*, slip op. at 14-15, reprinted in 9 DEL. J. CORP. L. at 498 (citations omitted) (citing *Bershad v. Curtiss-Wright*, No. 5827 (Del. Ch. Mar. 21, 1983); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (quoting *Bershad*, No. 5827, slip op. at 15).

⁶⁵No. 5986 (Del. Ch. Nov. 27, 1984), reprinted in 10 DEL. J. CORP. L. 314 (1985).

⁶⁶*Id.*, slip op. at 7-8, reprinted in 10 DEL. J. CORP. L. at 319 (citation omitted).

stockholders.⁶⁷ Inasmuch as the freeze-out merger in *Serlick* was not so conditioned, however, this aspect of the court's opinion is *dictum*. The strict holding of *Serlick* is that the mere fact that a fully-informed minority stockholder surrenders his or her stock certificates for the merger consideration following the consummation of a freeze-out merger should not, standing alone, support the application of the affirmative defense of acquiescence where the merger is not conditioned upon the vote of a majority of the minority stockholders.

I. *The Supreme Court Affirms Bershad: Much Ado about Nothing*

In 1987, in *Bershad v. Curtiss-Wright Corp.*,⁶⁸ the Delaware Supreme Court affirmed the Delaware Court of Chancery's decision in *Bershad I*. In *Bershad*, the Delaware Supreme Court held that the plaintiffs had asserted no actionable claim for breach of fiduciary duty in connection with the freeze-out merger and that minority stockholders who voted for the merger or surrendered their stock certificates for the merger consideration would not be permitted to participate in a quasi-appraisal.⁶⁹ The court explained:

Plaintiff, John Bershad, brought this action against the defendants, Curtiss-Wright Corporation ("Curtiss-Wright") and Dorr-Oliver Incorporated ("Dorr-Oliver"), in the Court of chancery, challenging a 1979 cash-out merger of Dorr-Oliver by its parent, Curtiss-Wright. Bershad alleged (1) that the merger was effectuated without a proper business purpose; and (2) that the shareholder vote approving the merger was invalid since Dorr-Oliver's proxy statement failed to inform minority stockholders that Curtiss-Wright had a strict policy against selling its 65% holdings in Dorr-Oliver.

The Vice Chancellor held that under *Weinberger v. UOP, Inc.*, Bershad's improper purpose claim failed. In addition, the trial judge found that defendants did not breach their fiduciary duty of candor since the proxy statement fully informed minority shareholders of all material facts regarding the merger. The Court of chancery then dismissed the claims of Bershad and all stockholders who either voted in favor of

⁶⁷*Id.*

⁶⁸535 A.2d 840 (Del. 1987).

⁶⁹*Id.* at 842.

the merger or accepted its benefits by tendering their shares for payment under the merger agreement.⁷⁰

Significantly, the decision affirmed by the Delaware Supreme Court in *Bershad* did not turn on any application of the doctrine of acquiescence. The Delaware Supreme Court's decision was merely a noncontroversial affirmation of a determination that stockholders who voted in favor of a merger or accepted a merger consideration, and who did not have a cognizable cause of action for breach of fiduciary duty in connection with a merger, would not be granted the equitable remedy of a quasi-appraisal created in *Weinberger*. The decision in *Bershad* did not cut off the rights of any stockholder who otherwise possessed an actionable claim for breach of fiduciary duty based on the act of voting for a merger or accepting a merger consideration.

Notwithstanding the fact that the decision affirmed in *Bershad* did not involve an application of the doctrine of acquiescence, the Delaware Supreme Court did cite to *Trounstone* and state that the plaintiff had "acquiesced in the transaction."⁷¹ This aspect of the Delaware Supreme Court's decision, however, does not even comprise a single paragraph of the court's nine-page published opinion. Moreover, the court never specifically stated that it was applying the doctrine of acquiescence and provided no discussion concerning the elements of acquiescence. As such, it is difficult to say what significance, if any, the Delaware Supreme Court intended by its citation to *Trounstone*.

It is arguable that the doctrine applicable in *Bershad* was the doctrine of ratification, which cuts off claims of minority stockholders where the challenged transaction is approved by a vote of disinterested stockholders.⁷² For example, in *Frank v. Wilson & Co.*,⁷³ the Delaware Supreme Court explained that the central difference between the defenses of acquiescence and ratification is that "[a]cquiescence properly speaks of assent by words or conduct during the progress of a transaction, while ratification suggests an assent after the fact," and noted that "acquiescence may rest on the

⁷⁰*Id.* at 841 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)).

⁷¹*Id.* at 848.

⁷²*Accord* *Bay Newfoundland Co. v. Wilson & Co.*, Del. Supr., 37 A.2d 59, 63-64 (1944) (applying acquiescence in setting similar to *Trounstone*, and noting significance of facts that stockholders voted and transaction was "ratifiable"). Notably, the court of chancery recently cited the supreme court's decision in *Bershad* as providing potential guidance respecting the issue of whether the ratification doctrine will bar minority stockholders from pursuing otherwise actionable claims for breach of the duty of loyalty by a majority stockholder in a freeze-out merger. *See* *Solomon v. Armstrong*, 747 A.2d 1098, 1116-17 (Del. Ch. 1999).

⁷³32 A.2d 277 (Del. 1943).

principle of ratification."⁷⁴ Inasmuch as acquiescence depends upon action taken "during the progress of a transaction," it is difficult to understand how application of the doctrine could be triggered by surrendering stock certificates for merger consideration in a freeze-out merger when this act does not (and cannot) occur until *after* the consummation of the merger. By contrast, the act of voting in favor of a freeze-out merger—which has repeatedly been recognized as giving rise to a bar to the pursuit of equitable relief in connection with the merger—does occur "during the progress of the transaction," and may properly implicate the doctrine of acquiescence.

In any event, it is clear from the Delaware Court of Chancery's decision in *Bershad I* that the Delaware Supreme Court's decision did not result in cutting off any minority stockholder from pursuing an otherwise actionable claim for breach of fiduciary duty, but merely affirmed the court of chancery's equitable limitation upon the pool of former stockholders entitled to participate in the quasi-appraisal action created in *Weinberger*. Moreover, because the minority stockholders in *Bershad* had asserted no actionable claim for breach of fiduciary duty, they could be viewed as having made an election similar to that made by the plaintiff in *Trounstone* when they abjured the appraisal remedy and accepted the merger consideration.

Significantly, one of the three members of the panel of the Delaware Supreme Court that decided *Bershad* was the same jurist who previously decided *Serlick*. Of equal significance, the Delaware Supreme Court emphasized the fact that the freeze-out merger in *Bershad* was conditioned upon the vote of a majority of the minority stockholders (unlike the freeze-out merger in *Serlick*),⁷⁵ and the court expressed no disagreement with *Serlick*, which would limit the application of any rule announced in *Bershad* to mergers involving such a condition.

J. Kahn: *Specifically Applying the Doctrine of Acquiescence
with Respect to the Quasi-Appraisal Remedy*

In *Kahn v. Household Acquisition Corp.*,⁷⁶ the Delaware Supreme Court (by a jurist who is not a sitting member of the Delaware Supreme Court) found, after a trial on the merits, that the defendants committed no actionable breach of fiduciary duty in connection with the freeze-out merger challenged in that case. Thereafter, in reliance upon *Bershad*, the

⁷⁴*Id.* at 283.

⁷⁵See *Bershad*, 535 A.2d at 843.

⁷⁶No. 6293 (Del. Ch. May 6, 1988), reprinted in 14 DEL. J. CORP. L. 343 (1989).

defendants moved to limit the class of minority stockholders entitled to participate in the quasi-appraisal to those stockholders who neither voted in favor of the merger nor surrendered their stock certificates for the merger consideration after the merger was consummated.⁷⁷ The court of chancery followed the Delaware Supreme Court's decision in *Bershad* and held that all stockholders who voted in favor of the merger would be barred from sharing in the quasi-appraisal remedy.⁷⁸ With respect to stockholders who did not vote for the merger, however, the court of chancery held that only those stockholders who actually voted (without regard to whether they voted against the merger) would be barred from participating in the recovery based upon their subsequent receipt of the merger consideration.⁷⁹ Stated differently, the court held that a stockholder who does not vote cannot be deemed to have acquiesced in the freeze-out merger—without regard to whether the stockholder thereafter accepted the merger consideration.⁸⁰

In addition, the court stated that the doctrine of acquiescence cannot be used to bar claims of fully informed stockholders who voted against the freeze-out merger if the merger implicates the fair dealing prong of the entire fairness test.⁸¹ Because the court in *Kahn II* found that the defendants did deal fairly with the minority stockholder (by, among other things, negotiating the merger with a special committee), this aspect of the court's opinion is *dictum*.

⁷⁷See *Kahn v. Household Acquisition Corp.*, No. 6293 (Del. Ch. Mar. 1, 1990), reprinted in 16 DEL. J. CORP. L. 810 (1991) (*Kahn II*).

⁷⁸*Id.*, slip op. at 3-4, reprinted in 16 DEL. J. CORP. L. at 812.

⁷⁹*Id.*

⁸⁰This aspect of the court's decision is consistent with the notion that acquiescence requires an act taken "during the progress of a transaction." *Frank*, 32 A.2d at 283.

⁸¹*Kahn II*, No. 6293, slip op. at 4, reprinted in 16 DEL. J. CORP. L. at 812 (acquiescence applies to cut-off quasi-appraisal remedy only where the sole issue is fair price). The distinction between fair price and fair dealing claims in the context of acquiescence is akin to the distinction between due care and loyalty claims in the context of ratification. See, e.g., *Solomon v. Armstrong*, 747 A.2d 1098, 1116-17 (Del. Ch. 1999); *In re Wheelabrator Tech., Inc. S'holders Litig.*, 663 A.2d 1194, 1202-03 (Del. Ch. 1995), approvingly cited in *Williams v. Geier*, 671 A.2d 1368, 1379 (Del. 1996). Recently, in *Solomon v. Armstrong*, Chancellor Chandler noted that *Bershad* does not address the issue of whether a fully informed stockholder who votes for a freeze-out merger by a majority stockholder will be barred from pursuing a claim arising under the duty of loyalty, which, by definition, includes claims implicating the unfair dealing prong of the entire fairness test. See *Solomon*, 747 A.2d at 1117. As such, under *Solomon*, it is arguable that even a fully informed minority stockholder who votes in favor of a freeze-out merger will not be barred from pursuing a claim for breach of fiduciary duty. *A fortiori*, a minority stockholder who does not vote in favor of such a merger would not be barred from pursuing such a claim simply because he or she exchanged his or her shares for the merger consideration following the consummation of the merger.

On appeal in *Kahn*, the Delaware Supreme Court (1) affirmed the Delaware Court of Chancery's determination that the freeze-out merger did not involve any actionable breach of fiduciary duty; (2) affirmed the Delaware Court of Chancery's determination to exclude from the quasi-appraisal remedy those fully-informed minority stockholders who voted in favor of the merger; and (3) reversed the Delaware Court of Chancery's determination to exclude from the quasi-appraisal those stockholders who did not vote in favor of the merger, but did surrender their stock certificates for the merger consideration after the merger was consummated.⁸² The court explained:

This is an appeal from a decision of the Court of Chancery, after trial, in a class action by minority shareholders of Wien Air Alaska, Inc. ("Wien") arising out of the merger of Wien with its principal shareholder, Household Acquisition Corporation ("HAC"), a wholly-owned subsidiary of Household Finance Corporation ("HFC") (collectively "Household"). Plaintiff-below, Ruth Kahn ("Kahn"), on behalf of the class, alleged that HAC breached its fiduciary duty to the minority class by manipulation of the timing and terms of the merger and through non-disclosure of essential financial data. The Court of Chancery rejected the fiduciary claims but ruled that minority shareholders who did not vote for the merger or tender their shares were entitled to a "quasi-appraisal" remedy and fixed the fair value of Wien stock at \$7.27 per share.

Kahn appeals from certain of the Court of Chancery's rulings relating to non-disclosure of proxy information and rejection of plaintiff's expert's conclusion on valuation. Kahn also contends that the Court of Chancery erred in excluding certain members of the class from sharing in the increased valuation by reason of tendering their shares or voting for the merger. Household cross-appeals from the Court of Chancery's determination of value in excess of the \$6 merger price, and the court's allowance of a quasi-appraisal remedy in the absence of a finding of unfair dealing. We affirm the rulings of the Court of Chancery with respect to the fiduciary

⁸²See *Kahn v. Household Acquisition Corp.*, 591 A.2d 166 (Del. 1991).

claims and valuation, but reverse as to the exclusion of certain members of the plaintiff class.⁸³

As with the Delaware Supreme Court's decision in *Bershad*, when the decision in *Kahn* is viewed in the context of the decision affirmed therein, the decision is no more than a noncontroversial affirmation of a determination that stockholders who voted in favor of the merger, *and who did not have a cognizable cause of action for breach of fiduciary duty in connection with the merger*, would not be granted the equitable remedy of a quasi-appraisal created in *Weinberger*. Moreover, based on the peculiar facts in *Kahn*, the Delaware Supreme Court held that stockholders who did not vote in favor of the merger, but did thereafter surrender their stock certificates for the merger consideration, would not be barred from participating in the quasi-appraisal. As in *Bershad*, the decision in *Kahn* did not cut off the rights of any stockholder who otherwise possessed an actionable claim for breach of fiduciary duty based on the act of voting for the merger or accepting the merger consideration.

Unlike the Delaware Supreme Court's decision in *Bershad*, the decision in *Kahn* did specifically discuss the doctrine of acquiescence.⁸⁴ As such, even though the strict holding of the Delaware Supreme Court's decision in *Kahn* does not involve the application of the doctrine with respect to otherwise actionable claims of breach of fiduciary duty, the decision does represent guidance from the Delaware Supreme Court respecting the application of the doctrine in the context of a freeze-out merger. Accordingly, we pause here to consider the significance of that guidance.

The Delaware Supreme Court's discussion of acquiescence comprises but a portion of the last few pages of the court's thirteen-page published opinion in *Kahn*, in which the court also discussed the related concept of estoppel.⁸⁵ Moreover, the portion of the court's opinion dealing with the consequence of a stockholder's surrender of his or her stock certificates for the merger consideration (as contrasted with the consequence of voting in favor of the merger) comprises only six short paragraphs of the court's opinion.⁸⁶ Because these six paragraphs represent the only explicit guidance from the Delaware Supreme Court respecting the potential application of the doctrine of acquiescence, as applied to

⁸³*Id.* at 168.

⁸⁴*See id.* at 176-77.

⁸⁵*See id.*

⁸⁶*See Kahn*, 591 A.2d at 176-77.

stockholders who do not vote in favor of a freeze-out merger but do surrender their stock certificates for the merger consideration, we quote the court's analysis in its entirety:

Acquiescence on the part of the shareholder by, for example, tendering shares and accepting the benefits of the transaction, even though the corporation's conduct is a breach of some duty owed to the shareholder, may also serve to bar the shareholder's right to equitable relief.

The act of surrendering shares is not, however, inequitable conduct which precludes assertion of rights to attack the underlying merger transaction under the facts of this case. Here, the rights of the plaintiff-class must be measured by their status at the time of the merger announcement. In particular, the November 24, 1980 proxy statement advised minority shareholders that class litigation on behalf of the minority shareholders had been commenced in the Court of Chancery asserting lack of a proper business purpose and attacking the fairness of the merger price. The effort to preliminarily enjoin the merger did not succeed, because the Court of Chancery viewed plaintiff's grievance as a claim of inadequate price which, under pre-*Weinberger* jurisprudence, could be remedied notwithstanding the consummation of the merger. However, the court recognized the ability of the minority shareholders "to receive \$6.00 per share to have and invest as they see fit while the case is proceeding." The court also noted that if the merger were enjoined "all minority shareholders will be deprived of the opportunity to presently receive something of value for their shares."

It thus seems clear that, at the inception of this litigation, the Court of Chancery, in permitting the merger vote to proceed, viewed the minority shareholders' plight as substantially ameliorated by their ability to accept the tendered price without prejudice to their right to improve their lot through the later unfolding of the class action. In short, the court anticipated the events which came to pass in this case: despite the effectuation of the merger, the tender price has been deemed inadequate.

The Vice Chancellor recognized that shareholders who relinquished their shares following the 1982 decision of then

Vice Chancellor Brown may have been misled into believing that, like plaintiff, Kahn, they could surrender their shares and benefit from future recovery. In our view, class entitlement arose as well by reason of the 1980 decision which rejected injunctive relief, in part, on the rationale that acceptance of the merger price would not bar further relief. In applying the equitable defenses of estoppel or acquiescence, the court should consider what a reasonable minority shareholder was entitled to assume at the time the merger was permitted to proceed and not limit that analysis to a later date when the defense of standing was raised. Accordingly, all members of the class who did not vote in favor of the merger but who abjured their appraisal right in favor of an expanded equity action should share in the result of the quasi-appraisal process without limitation based on the surrender of shares that was anticipated as a consequence of denial of the effort to enjoin the merger.

Our decision to permit all members of the class to participate in the increased valuation is to a large extent *sui generis*, *i.e.*, a result required by the particular facts presented. As noted previously, this case has an unusual history because of the jurisprudential changes which have occurred during the ten years it has been pending in the Court of Chancery as well as the two pretrial rulings, which, inferentially at least, addressed standing. In doing equity, the court must be alert to the need to fashion relief appropriate to the circumstances of each case.

Given the unusual history and circumstances of this case, we conclude that it was error for the trial court to foreclose equitable relief to any shareholder who surrendered his or her shares for payment of the merger price by exclusion from the class of minority shareholders entitled to share in the quasi-appraisal remedy. All class members who did not vote in favor of the merger should receive the increased valuation of \$7.27 per share fixed by the court.⁸⁷

⁸⁷*Kahn*, 591 A.2d at 177-78 (citing *Trounstine v. Remington Rand Inc.*, 194 A. 95, 99 (Del. Ch. 1937) (quoting *Kahn v. Household Acquisition Corp.*, No. 6293, 1980 Del. Ch. LEXIS 622, at *11-13 (Del. Ch. Dec. 12, 1980) (citing *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981))).

As can be seen from the court's analysis in *Kahn*, the court observed only that the defense of acquiescence *may* serve as a bar to a stockholder who accepts the benefits of the merger, and did not hold that the defense *shall* apply in all such cases. The *Kahn* court's only example of when acquiescence *may* apply to bar the claim of a stockholder who does not vote in favor of a challenged transaction is *Trounstine*—where the assertion of a claim challenging a corporate transaction was inconsistent with accepting the benefit of the transaction. Finally, the court indicated that there must be a basis for finding the plaintiff's conduct in surrendering his or her stock certificates for the merger consideration was "inequitable."

The Delaware Supreme Court's decision in *Kahn* also is significant for what it does not say. Notably, the supreme court expressed no disagreement with either *Serlick* or the aspect of *Kahn II* which held that acquiescence does not apply to bar otherwise actionable claims of breach of fiduciary duty in connection with a freeze-out merger where the merger is not conditioned upon a vote of a majority of the minority stockholders. The court's silence respecting this issue is particularly noteworthy when one considers that the author of the Delaware Supreme Court's opinion in *Kahn* was Justice Walsh, the former member of the Delaware Court of Chancery who decided *Serlick*. In addition, the supreme court in *Kahn* expressed no disagreement with the court of chancery's observation in *Kahn II* that the doctrine of acquiescence will not bar an otherwise actionable claim for breach of fiduciary duty asserted by a stockholder who does not vote for the merger and that implicates the fair dealing prong of the entire fairness test.

K. Siegman, Iseman, and Turner: *The Court of Chancery's Dicta Breathe New Meaning into the Supreme Court's Decisions of Bershad and Kahn*

After the Delaware Supreme Court decided *Bershad* and *Kahn*, there do not appear to be any further cases in which the parties litigated the availability of a pre-*Weinberger* quasi-appraisal remedy. In the years that followed *Bershad* and *Kahn*, the battleground shifted to the issue of whether the doctrine of acquiescence would bar otherwise actionable claims of breach of fiduciary duty in a freeze-out merger asserted by or on behalf of fully informed minority stockholders who did not vote in favor of the merger, but did surrender their stock certificates for the merger consideration after the consummation of the merger.

Two years after the Delaware Supreme Court decided *Kahn*, the Delaware Court of Chancery (by a jurist who is now a former member of

the Delaware Supreme Court) decided *Siegman v. Columbia Pictures Entertainment, Inc.*⁸⁸ In *Siegman*, the court of chancery examined the history of the development of the doctrine of acquiescence, beginning with *Trounstone*, moving through *Serlick* and *Kahn II*, and concluding with the Delaware Supreme Court's decisions in *Bershad* and *Kahn*.⁸⁹ Based upon this examination of the law, the court of chancery concluded that the Delaware Supreme Court's decisions in *Bershad* and *Kahn* implicitly "have the effect of precluding a determination of whether a particular shareholder who surrenders his shares intended to acquiesce."⁹⁰

Significantly, the court of chancery in *Siegman* did not conclude that the Delaware Supreme Court's decisions in *Bershad* or *Kahn* overruled the aspect of the court of chancery's original decision in *Kahn I*, which declined to apply the doctrine of acquiescence to bar otherwise actionable claims of breach of fiduciary duty asserted by minority stockholders who did not vote in favor of a freeze-out merger, but did surrender their stock certificates for the merger consideration after the merger was consummated. Nor did the court of chancery in *Siegman* conclude that the Delaware Supreme Court's decisions in *Bershad* or *Kahn* overruled either (1) *Serlick* respecting the inapplicability of the doctrine of acquiescence to bar the claims of a non-assenting minority stockholder where a freeze-out merger is not conditioned upon the vote of a majority of the minority stockholders; or (2) *Kahn II* with respect to its holding that stockholders who did not vote in favor of a cash-out merger, but did surrender their stock certificates for the merger consideration, would not be barred from pursuing otherwise actionable claims of breach of fiduciary duty implicating the fair dealing prong of the entire fairness test.⁹¹ Moreover, inasmuch as the court of chancery in *Siegman* declined to conclude that the minority stockholders in that case were fully informed,⁹² any discussion in *Siegman* of the potential consequences of a contrary conclusion is *dictum*.⁹³

⁸⁸No. 11,152 (Del. Ch. Jan. 12, 1993), *reprinted in* 18 DEL. J. CORP. L. 1171 (1993).

⁸⁹*See id.*, slip op. at 16-19, *reprinted in* 18 DEL. J. CORP. L. at 1180-82.

⁹⁰*Id.*, slip op. at 20, *reprinted in* 18 DEL. J. CORP. L. at 1182. *But see* *Salomon Bros., Inc. v. Interstate Bakeries Corp.*, 576 A.2d 650, 654 (Del. Ch. 1989) (holding, in a different context, that "acquiescence requires at least conduct reasonably implying intent to acquiesce").

⁹¹*See Siegman*, No. 11,152, slip op. at 21, *reprinted in* 18 DEL. J. CORP. L. at 1182.

⁹²*See id.*

⁹³In addition, while the fact does not appear to have played a role in the court of chancery's conclusion in *Siegman*, the court did begin its analysis of the acquiescence issue by noting that the merger therein was the second step of a two-step transaction commenced with a tender offer, and that the plaintiff had voluntarily tendered half of his shares into the first-step tender offer. *See id.*, slip op. at 16, *reprinted in* 18 DEL. J. CORP. L. at 1180. This fact arguably would tend to demonstrate the plaintiff's lack of opposition to the second-step merger.

A month later, the Delaware Court of Chancery (by a jurist who is now a sitting member of the Delaware Supreme court) decided *Iseman v. Liquid Air Corp.*,⁹⁴ which reinforced *Siegman's* dictum. *Iseman* involved a short-form merger, accomplished pursuant to Section 253 of the Delaware General Corporation Law.⁹⁵ Arguing acquiescence, the defendants moved for summary judgment based upon the fact that the plaintiffs (and proposed intervenors) had exchanged their shares for the merger consideration.⁹⁶ The court of chancery in *Iseman* noted its inability to determine whether the Information Statement distributed in connection with the short-form merger was materially accurate and complete and denied the defendants' motion.⁹⁷ Although the court of chancery's discussion of the doctrine of acquiescence in *Iseman* suggests that the court would have found the plaintiffs' claims to be barred in the face of proper disclosure, any such suggestion is *dictum* insofar as the court of chancery rejected the application of the doctrine on the basis of disclosure.⁹⁸

More recently, the court of chancery's decision in *Turner v. Bernstein*⁹⁹ reconfirmed *Siegman's* dictum. As such, *Turner* is to the same effect as *Iseman*.¹⁰⁰

*L. Wood v. Best: The Chancellor Emphasizes the Significance
of the Question of Whether a Stockholder's Acceptance
of the Merger Consideration Was "Voluntary"*

The next decision to address the issue came in the form of a letter ruling, issued in connection with a discovery dispute, in *Wood v. Frank E. Best, Inc.*¹⁰¹ The court of chancery held in *Wood* that the doctrine of

⁹⁴No. 9694 (Del. Ch. Feb. 11, 1993), reprinted in 18 DEL. J. CORP. L. 1025 (1993).

⁹⁵See *id.*, slip op. at 2, reprinted in 18 DEL. J. CORP. L. at 1028.

⁹⁶See *id.*, slip op. at 3-4, reprinted in 18 DEL. J. CORP. L. at 1030.

⁹⁷See *id.*, slip op. at 4, reprinted in 18 DEL. J. CORP. L. at 1030.

⁹⁸See *Iseman*, No. 9694, slip op. at 3-4, reprinted in 18 DEL. J. CORP. L. at 1029-38.

⁹⁹No. 16,190 (Del. Ch. Feb. 9, 1999), reprinted in 24 DEL. J. CORP. L. 1276 (1999).

¹⁰⁰See *id.*, slip op. at 21-22, reprinted in 24 DEL. J. CORP. L. at 1293-94 (citing *Bershad*, *Siegman*, and *Iseman* for the proposition that a fully informed stockholder who surrenders his or stock certificates for the merger consideration will be deemed to have "waived" the right to seek equitable relief, but finding that summary judgment was inappropriate because there were material issues of fact regarding the adequacy of the defendants' disclosures); see also *Andra v. Blount*, No. 17,154, slip op. at 27-28 (Del. Ch. Mar. 29, 2000), reprinted in 26 DEL. J. CORP. L. 215, 235 (2001) (citing *Bershad*, and noting that "[a]bsent an effective challenge to the disclosures in connection with the tender offer, tendering stockholders may well be subject to the defense that they are estopped from challenging the fairness of a transaction whose benefits they willingly accepted").

¹⁰¹No. 16,281 (Del. Ch. Sept. 7, 1999).

acquiescence could not be applied to bar the claim of a minority stockholder based solely upon the fact that he or she accepted the merger consideration unless it could be determined that the acceptance was "voluntary."¹⁰² This ruling is consistent with *Trounstone* and the Delaware Supreme Court's decisions in *Bay Newfoundland*, *Frank*, and *Federal United*.

In a related field of the law, the federal courts have recognized that the surrender of stock certificates converted into the right to receive cash in a freeze-out merger does not constitute a voluntary exchange for purposes of short swing profit regulations.¹⁰³ In so holding, the federal courts have relied upon the rationale that "[a]n exchange pursuant to a merger is 'involuntary' where the unsuccessful party has the 'utter inability . . . to control the course of events.'"¹⁰⁴

In addition, it is noteworthy that a minority stockholder eliminated in a freeze-out merger faces a real risk of being taxed on any gain realized in the transaction in the year in which the merger occurs, without regard to whether the stockholder surrenders his or her shares for the merger consideration.¹⁰⁵ One author stated:

The simplest form of consideration, and the form which most completely terminates the seller's interest in the sold business, is cash. This can be cash on hand of the acquiror, cash on hand of the target itself, or cash raised by borrowing incurred (by either the buyer of the target) to finance the acquisition. In any case, the sellers will not be holding any debt, equity or other instruments of the buyer or the target issued in connection with the acquisition; hence, all tax consequences to them occur at the time of the acquisition.¹⁰⁶

¹⁰²*Id.*, slip op. at 1-2.

¹⁰³*See, e.g.,* *Colan v. Prudential-Bach Sec., Inc.*, 577 F. Supp. 1074, 1082 (N.D. Ill. 1983).

¹⁰⁴*Id.* (omission in original).

¹⁰⁵*See, e.g.,* Phillips & Rothman, 7770-2nd T.M., *Structuring Corporate Acquisitions—Tax Aspects* (1999).

¹⁰⁶*Id.* at A-20. A minority stockholder whose shares are converted into the right to receive cash in a freeze-out merger can avoid the realization of a taxable gain at the time of the merger by demanding an appraisal. In a case where a statutory appraisal remedy is inadequate, however, it would not be fair or equitable to require a stockholder to perfect a statutory appraisal claim simply to avoid the realization of taxable gains, when the stockholders' real objective is to pursue a claim for breach of fiduciary duty in connection with the merger. In any event, the statutory appraisal remedy is a benefit extended by the Delaware legislature, which "supplements" the common law remedies available for breach of fiduciary duty. It would turn the statutory the legislative intent underlying the appraisal remedy on its head to conclude that

If a minority stockholder eliminated in a freeze-out merger would recognize taxable gain without regard to whether he or she actually surrenders his or her stock certificates for the merger consideration, the stockholder who declined to receive the merger consideration while pressing a claim for breach of fiduciary duty would be required to pay tax on the "phantom" gain realized in the year of the merger. As such, the stockholder would be penalized for declining to accept the merger consideration while litigation challenging the merger progresses; thus, it is difficult to understand how a stockholder's acceptance of the merger consideration could be viewed as a "voluntary" act.¹⁰⁷

III. THE DELAWARE COURT OF CHANCERY'S DECISION OF *NORBERG V. SECURITY STORAGE CO.*

Norberg I was the Delaware Court of Chancery's first decision discussing the doctrine of acquiescence following *Wood*.¹⁰⁸ In *Norberg I*, the court of chancery acquiesced in the dictum in *Siegman, Iseman, and Turner* and dismissed an otherwise actionable claim for breach of fiduciary duty in a freeze-out merger based solely upon the fact that a fully-informed stockholder surrendered his stock certificates for the merger consideration after the merger was consummated.¹⁰⁹ The merger in *Norberg I* had all the earmarks of a transaction that classically would result in the rejection of an asserted defense of acquiescence.¹¹⁰ The merger was accomplished by the consent of a majority stockholder without a minority vote.¹¹¹ The complaint asserted claims of unfair dealing, with the burden of proof

the appraisal remedy "supplants" the common law, and that a minority stockholder must demand a statutory appraisal in order to preserve a claim for breach of fiduciary duty. Plainly, this is not the law. As the Delaware Court of Chancery aptly recognized in *Kahn I*, there is a material difference between cutting off a stockholder's statutory appraisal remedy based on the stockholder's receipt of the merger consideration and cutting off an otherwise actionable claim for breach of fiduciary duty. In the former circumstance, the result is mandated by statute. In the latter circumstance, however, there is no statutory or common law principle that dictates such a result.

¹⁰⁷*But see*, *Norberg v. Security Storage Co. (Norberg II)*, No. 12,885, slip op. at 3 (Del. Ch. Jan. 12, 2001) (finding that the plaintiff's acceptance of the merger consideration was, in fact, voluntary, notwithstanding the fact that he would be required to suffer adverse tax consequences by failing to accept the merger consideration).

¹⁰⁸*But cf.* *Turner v. Bernstein*, No. 16,190, slip op. at 29 n.31 (Del. Ch. June 6, 2000) (noting that defendants' assertion of the defenses of "waiver" and "ratification" might be better termed "acquiescence").

¹⁰⁹*Norberg I*, No. 12,885, slip op. at 2-3, reprinted in 27 DEL. J. CORP. L. at 379.

¹¹⁰*Id.*

¹¹¹*See id.*, slip op. at 2, reprinted in 27 DEL. J. CORP. L. at 379.

falling upon the defendants to prove the entire fairness of the merger.¹¹² There were even issues of disclosure that had not been resolved in favor of the defendants.¹¹³ What, then, went wrong with the plaintiff's case?

According to the court in *Norberg I*, the plaintiff—unlike any other former stockholder in that case—exchanged his shares for the merger consideration "17 months after filing suit detailing a laundry list of reasons why the majority breached their fiduciary duties of disclosure and loyalty to the minority."¹¹⁴

Consistent with the *dictum* in court of chancery's prior decisions in *Siegman*, *Iseman*, and *Turner*, the court in *Norberg I* stated the rule of acquiescence:

Generally under the doctrine of acquiescence, a shareholder who tenders his shares and accepts the benefits of a transaction *may be barred* from seeking equitable relief. In order for the defense to operate as a bar, the shareholder must have been adequately informed of all material facts relevant to the transaction. In other words, acquiescence *may* result in an estoppel precluding the acquiescing shareholder, who accepted the pecuniary benefits of a transaction with knowledge of the alleged inequitable conduct, from challenging the transaction's validity.¹¹⁵

The court of chancery in *Norberg I* then proceeded to look only to the question of whether the plaintiff was "fully informed" when he exchanged his shares for the merger consideration.¹¹⁶ Finding that the plaintiff was so informed, the court of chancery granted summary judgment to the defendants on the issue of acquiescence.¹¹⁷ In so doing, the court reasoned:

I agree with the defendants' assertion that our Supreme Court's ruling in *Bershad* is controlling with regard to shareholder acquiescence on its own and similar facts.

¹¹²*See id.*

¹¹³*See Norberg I*, No. 12,885, slip op. at 3, reprinted in 27 DEL. J. CORP. L. at 379.

¹¹⁴*See id.*, slip op. at 2-3, reprinted in 27 DEL. J. CORP. L. at 379.

¹¹⁵*Id.*, slip op. at 14, reprinted in 27 DEL. J. CORP. L. at 385-86 (emphasis added) (footnotes omitted).

¹¹⁶*See id.*, slip op. at 18, reprinted in 27 DEL. J. CORP. L. at 388.

¹¹⁷*See Norberg I*, No. 12,885, slip op. at 14-17, reprinted in 27 DEL. J. CORP. L. at 385-

Bershad, like this case, involved a minority shareholder challenging a cash-out merger in a pleading styled as a class action. *Bershad* alleged, *inter alia*, that the shareholder vote approving the merger was invalid since the proxy statement omitted material facts. On summary judgment, the Court of Chancery dismissed the claims of *Bershad* and "all stockholders who either voted in favor of the merger or accepted its benefits by tendering their shares for payment under the merger agreement." In other words, *Bershad* forfeited any rights he had to seek rescission of the merger by accepting the merger consideration. This Court found that the proxy statement fully informed the minority shareholders of all material facts regarding the merger. On appeal, the Supreme Court affirmed the Court of Chancery's finding that the minority shareholders were adequately informed of all material information. After determining the shareholder vote was an informed one, the Supreme Court held that when informed shareholder's either vote in favor of the merger or accept the benefits thereof, they are precluded from attacking the fairness of the transaction. Thus, *Bershad* logically could not challenge the fairness of the transaction because after being made aware of all facts material to the merger he tendered his shares and accepted the merger consideration.¹¹⁸

Notably, the plaintiff in *Norberg I* specifically argued that "the doctrine of acquiescence can not be applicable to an involuntary cash-out merger transaction where the minority interests are squeezed out by the majority shareholder."¹¹⁹ The court rejected this argument, stating:

In this circumstance, *Norberg* contends, even an informed shareholder surrendering his shares has no other alternative but to accept the merger consideration. However, even if he could not vote against the merger, rather than tendering his shares and accepting the consideration, he could have maintained his appraisal action and/or continued to litigate his fairness claim. Instead, he abandoned his appraisal claim, challenged the fairness of the price and the process and later,

¹¹⁸*Id.*, slip op. at 17-18, reprinted in 27 DEL. J. CORP. L. at 387-88 (footnotes omitted) (quoting *Bershad*, 535 A.2d at 841).

¹¹⁹*Id.*, slip op. at 19, reprinted in 27 DEL. J. CORP. L. at 389.

despite his declared assessment of the unfairness of the transaction, freely and voluntarily accepted the merger consideration. I conclude that under these circumstances, Norberg's tender constitutes acquiescence.¹²⁰

The plaintiff in *Norberg I* moved for reargument. In denying that motion in *Norberg v. Storage Security Co (Norberg II)*,¹²¹ the court of chancery offered the following observation:

The doctrine of acquiescence may work harshly at times. The teaching of *Bershad* is straightforward: A shareholder who tenders his shares and accepts the benefits of a transaction *will be barred* from seeking equitable relief if the shareholder at the time of his tender was adequately informed of the material facts relevant to the underlying transaction.¹²²

When the plaintiff moved for reargument, he sought to establish that his decision to accept the merger consideration was not voluntary—even if the court believed it was fully informed. The court in *Norberg II* rejected this effort, stating:

The reason for Mr. Norberg's decision to tender his shares was explained during argument on the motion for reargument. His shares were held by his IRA custodian. When the IRA custodian refused to continue holding the shares after termination of the appraisal proceedings, Mr. Norberg was confronted with the unhappy choice of: (i) taking custody of his shares and suffering adverse tax consequences; or (ii) accepting the merger consideration. He chose the latter. However, unfortunate the choice, it was Mr. Norberg's choice. The fact that his IRA custodian may have placed him in a difficult position does not alter the status of his knowledge of Defendants' alleged conduct or the simple fact that his decision was voluntary.¹²³

¹²⁰*Id.*, slip op. at 19-20, reprinted in 27 DEL. J. CORP. L. at 389. The court in *Norberg I* went on to conclude that the plaintiff's claim was barred by the separate and additional defense of "waiver." See *id.*, slip op. at 20-22, reprinted in 27 DEL. J. CORP. L. at 389-90.

¹²¹No. 12,885 (Del. Ch. Jan. 12, 2001).

¹²²*Norberg II*, No. 12,885, slip op. at 2 (emphasis added) (footnote omitted).

¹²³*Id.*, slip op. at 3.

Significantly, the defendants in *Norberg I* did not assert the affirmative defense of acquiescence in their answer to the complaint.¹²⁴ As such, it may well be that the defense was waived as to minority stockholders who received the merger consideration before the answer was filed, and it is unclear whether the court of chancery would otherwise have extended the result in *Norberg I* to reach the other minority stockholders if the defendants had raised the defense in a more timely manner. Insofar as acquiescence was applied only to the one plaintiff who exchanged his shares for the merger consideration seventeen months after the litigation was commenced, any suggestion that acquiescence could have applied to the other stockholders would be *dictum*.¹²⁵

IV. WERE *NORBERG I* AND *NORBERG II* CORRECTLY DECIDED?

As previously noted, *Norberg I* represents the first decision of a Delaware court to apply the affirmative defense of acquiescence to bar a minority stockholder who did not vote in favor of a merger from pursuing a claim for breach of fiduciary duty by a majority stockholder in connection with a freeze-out merger. In so doing, *Norberg I* also became the first decision of a Delaware court to bar claims of a minority stockholder in a freeze-out merger based on the affirmative defense of acquiescence where (1) the merger was approved by the consent of the majority stockholder without any vote of the minority stockholders; (2) the merger was neither conditioned upon the approval of a majority of the minority stockholders or negotiated by a special committee of directors; (3) the complaint raised an issue of "unfair dealing"; and (4) there was no judicial determination that there were no material misstatements or omissions in the defendants' disclosures relating to the merger. The fact that all of these circumstances were present in *Norberg I* makes the decision particularly significant. The court in *Norberg I* extended the acquiescence doctrine beyond the specific facts and context present in *Kahn I*, *Bershad I*, *Schlossberg*, *Serlick*, *Kahn II*, and the Delaware Supreme Court's decisions in *Bershad* and *Kahn*.¹²⁶

¹²⁴*Norberg I*, No. 12,885, slip op. at 13, reprinted in 27 DEL. J. CORP. L. at 385.

¹²⁵See *id.*, slip op. at 2-3, reprinted in 27 DEL. J. CORP. L. at 379.

¹²⁶Moreover, the broad strokes of the court of chancery's extension of the existing law in *Norberg I* were swung wider in *Norberg II*, which paints the Delaware Supreme Court's fact-specific inquiry in *Bershad* and *Kahn* into a black-letter rule of equity jurisprudence, which the court acknowledged may provide harsh results. The authors respectfully submit that it should be a very rare case in which the application of an equitable defense operates in a harsh manner. Inasmuch as the court of chancery has the equitable authority (if not the obligation) to reject

The decision in *Norberg I* is consistent with the dictum of the court of chancery in *Siegman*, *Iseman*, and *Turner*. In each case, the court of chancery cited the Delaware Supreme Court's decision(s) in *Bershad* and/or *Kahn* for the proposition that a fully-informed stockholder who surrenders his or stock certificates for the merger consideration after the consummation of a freeze-out merger may be equitably barred from pursuing otherwise actionable claims of breach of fiduciary duty, even if the stockholder did not vote in favor of the merger. As explained above, however, no stockholder in either *Bershad* or *Kahn* was barred, for any reason, from pursuing an otherwise actionable claim for breach of fiduciary duty in connection with a freeze-out merger. The issue decided by the Delaware Supreme Court in *Bershad* and *Kahn* was not whether fully-informed minority stockholders whose shares were eliminated in a freeze-out merger could be barred from suing for breach of fiduciary duty on the basis of their acceptance of the merger consideration. Rather, the issue decided in both *Bershad* and *Kahn* was whether fully-informed minority stockholders who surrendered their stock certificates for the merger consideration after the freeze-out merger was consummated, and had not asserted an actionable claim for breach of fiduciary duty in connection with the merger, should nonetheless be permitted to participate in the quasi-appraisal remedy crafted in *Weinberger* as a substitute for the statutory appraisal remedy the minority stockholders had not demanded. In *Bershad*, the Delaware Supreme Court affirmed the court of chancery's determination that stockholders who accepted the merger consideration would not be permitted to obtain the benefit of the quasi-appraisal remedy.¹²⁷ In *Kahn*, the Delaware Supreme Court determined, for reasons particular to that case, that stockholders who accepted the merger consideration should be permitted to obtain the benefit of the quasi-appraisal remedy.¹²⁸ In neither case, however, did the Delaware Supreme Court hold that a fully-informed minority stockholder who stated an actionable claim for breach of fiduciary duty in connection with a freeze-out merger could be denied the right to pursue a recovery based upon the fact that the stockholder received the merger consideration after the merger was consummated. Indeed, the Delaware Supreme Court did not even hold that a fully informed stockholder who voted for the merger would be barred

legal defenses when doing otherwise would be inequitable, it is difficult to understand why the court would apply an equitable defense in a manner the court viewed to produce a harsh result.

¹²⁷See *Bershad*, 535 A.2d at 848.

¹²⁸See *Kahn*, 591 A.2d at 166.

from pursuing a claim for breach of fiduciary duty in connection with the merger.¹²⁹

If one were to read the acquiescence discussion in the Delaware Supreme Court's decisions in *Bershad* and *Kahn* as providing guidance in cases involving actionable claims of breach of fiduciary duty in a freeze-out merger (as opposed to being limited to cases involving the narrow question raised in *Bershad* and *Kahn* of the availability of the quasi-appraisal remedy in the absence of an otherwise actionable claim for breach of fiduciary duty) there are further limitations to the applicability of that discussion that cannot be overlooked. Specifically, (1) the freeze-out merger in *Bershad* was conditioned upon a vote of the majority of the minority stockholders,¹³⁰ and (2) the freeze-out merger in *Kahn* was negotiated with a special committee of disinterested directors.¹³¹ In addition, neither *Bershad* nor *Kahn* involved a transaction approved by the consent of a majority stockholder without a vote of the minority stockholders. Finally, there is nothing "inequitable" (a term used by the Delaware Supreme Court in *Kahn*) about a minority stockholder surrendering his or her stock certificates for the merger consideration after a freeze-out merger is consummated, while simultaneously pursuing a claim for breach of fiduciary duty in connection with the merger.¹³²

We discuss the potential significance of each of these factors, in turn, below.

*A. The Significance of the Fact That the Freeze-Out Merger
in Bershad Was Conditioned upon the Vote of a Majority
of the Minority Stockholders*

Because the freeze-out merger in *Bershad* was conditioned upon the vote of a majority of the minority stockholders, the minority stockholders (as a group) had the ability to prevent the merger by withholding their vote.¹³³ As such, in the absence of an actionable claim for breach of the fiduciary duty of loyalty, even minority stockholders who did not vote in favor of the merger were barred from pursuing any claim for relief based

¹²⁹See *Solomon v. Armstrong*, 747 A.2d 1098, 1117 (Del. Ch. 1999) (observing that *Bershad* does not address the issue of whether a fully informed stockholder who votes for a freeze-out merger by a majority stockholder will be barred from pursuing a claim for breach of the duty of loyalty).

¹³⁰See *Bershad*, 535 A.2d at 843.

¹³¹See *Kahn*, 591 A.2d at 169.

¹³²See *id.* at 177.

¹³³See *Bershad*, 535 A.2d at 848.

upon the doctrine of ratification. The Delaware Supreme Court in *Bershad* affirmed the Delaware Court of Chancery's determination that the plaintiffs stated no actionable claim for breach of fiduciary duty, whatsoever.¹³⁴ As such, the claims of all minority stockholders plainly were barred by the doctrine of ratification.¹³⁵ Significantly, this fact serves to highlight that the court's decision in *Bershad* (involving the availability of the quasi-appraisal remedy) must be limited to its facts. Otherwise, the claims of all minority stockholders—including those who never received the merger consideration—would have been barred.

Moreover, the Delaware Supreme Court in both *Bershad* and *Kahn* identified *Trounstine* as the guiding authority for determining when it would be inequitable to permit a minority stockholder to obtain equitable relief after accepting the benefit of the challenged transaction. As noted above, however, *Trounstine* involved a challenged corporate action from which a non-assenting minority stockholder had the right to refrain from participating. By contrast, in a freeze-out merger that is not conditioned upon the vote of a majority of the minority stockholders, the merger is effected and the equity interest of all minority stockholders is extinguished and converted into right to receive cash by operation of law, and without any action on the part of the minority stockholder. As such, it is difficult to understand the manner in which *Trounstine* would apply to non-assenting minority stockholders in the case of a freeze-out merger that is not conditioned upon a vote of a majority of the minority stockholder. Indeed, the Delaware Supreme Court in *Kahn* refused to allow the doctrine enunciated in *Trounstine* to be applied to such stockholders, even to extinguish their participation in a quasi appraisal remedy.

Further indication of the significance of the fact that the freeze-out merger in *Bershad* was conditioned upon the vote of a majority of the minority stockholders is found in the Delaware Court of Chancery's decision in *Serlick*, which the Delaware Supreme Court did not criticize or purport to overrule in *Bershad* (where the author of *Serlick* was a member of the three-Justice panel) or *Kahn* (where the author of *Serlick* authored the Delaware Supreme Court's opinion). Given the Delaware Supreme Court's undeniable knowledge of the *Serlick* decision, it is difficult to imagine that the Delaware Supreme Court would have failed to mention *Serlick* if the court intended to overrule *Serlick*.

¹³⁴See *id.*

¹³⁵See *id.*

B. *The Significance of the Fact That the Freeze-Out Merger in Kahn Was Negotiated by a Special Committee of Directors*

Kahn was decided three years before the Delaware Supreme Court decided, for the first time, that negotiating a freeze-out merger with a special committee of disinterested and independent directors would not restore the protections of the business judgment rule.¹³⁶ Significantly, at the time the Delaware Supreme Court decided *Kahn*, dicta in prior decisions of both the Delaware Supreme Court and Delaware Court of Chancery suggested that the business judgment rule might protect a freeze-out merger negotiated by a special committee of independent and disinterested directors.¹³⁷ If the business judgment rule did apply in such a circumstance, minority stockholders eliminated in a freeze-out merger negotiated by a special committee would have had no viable cause of action for breach of fiduciary duty, and would be relegated to a statutory appraisal remedy (which requires no claim of wrongdoing).¹³⁸

¹³⁶See *Kahn v. Lynch Communication Sys., Inc.*, 638 A.2d 1110 (Del. 1994) (*Lynch Communication*). In the past few years, the court of chancery has recognized that, under *Lynch Communication*, minority stockholders eliminated in a freeze-out merger "need not demonstrate inadequacy of the appraisal remedy to survive a motion to dismiss" where their complaint "plead[s] facts sufficient to indicate a breach of fiduciary duty, which they seek to bring against not only the surviving corporation but against individual directors or majority shareholders as well." *Wood v. Frank E. Best, Inc.*, No. 16,281, slip op. at 15 (Del. Ch. July 9, 1999).

¹³⁷See, e.g., *Marciano v. Nakash*, 535 A.2d 400, 405 (Del. 1987) (stating, in the context of an action challenging a transaction with an arguably controlling stockholder group, that "approval by fully-informed disinterested directors under section 144(a)(1) . . . permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction"); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937-38 (Del. 1985) (noting that the existence of arm's length negotiations conducted by disinterested directors "is of considerable importance when addressing ultimate questions of fairness, since it may give rise to the proposition that the directors' actions are more appropriately measured by business judgment standards"); *In re Trans World Airlines, Inc. S'holders Litig.*, No. 9844 (Del. Ch. Oct. 21, 1988) (declining to apply business judgment rule in freeze-out merger by majority stockholder only because the special committee did not properly exercise its fiduciary responsibility to seek to negotiate the best price); *In re Resorts Int'l S'holders Litig.*, No. 9605 (Del. Ch. Sept. 7, 1988) (approving settlement of claims asserted against majority stockholder challenging various transactions negotiated by a special committee of independent and disinterested directors, and observing that "[t]he Delaware Supreme Court has consistently held that where a disinterested board or special committee, fully informed and expertly advised, makes a considered business decision, that decision will be entitled *prima facie* to the presumptions and protections of the business judgment rule") (emphasis added); see also *Puma v. Marriott*, 283 A.2d 693 (Del. Ch. 1971) (applying business judgment rule to asset transaction between corporation and controlling stockholder group where transaction was negotiated and approved by board composed of a majority of disinterested directors).

¹³⁸In recent years, the Delaware Court of Chancery has come to view *Lynch Communication* and other Delaware Supreme Court decisions as signaling a retreat from what

C. The Significance of the Fact That Minority Stockholders in Bershad And Kahn Were Provided an Opportunity to Vote

In a freeze-out merger approved by the consent of a majority stockholder, minority stockholders are not even provided the opportunity to voice their opposition to the merger by voting against it, or even by withholding their vote. In such a case, the minority stockholders do nothing to facilitate the merger during the progress of a transaction.¹³⁹

D. There Is Nothing "Inequitable" about a Minority Stockholder Surrendering His or Her Stock Certificates for the Merger Consideration after a Freeze-out Merger Is Consummated, While Simultaneously Pursuing a Claim for Breach of Fiduciary Duty in Connection with the Merger

In a case where minority stockholders are provided no opportunity to vote (as in a freeze-out merger approved by the consent of a majority stockholder), and in cases where the appraisal remedy is inadequate (because, for example, an equitable claim may give rise to rescissory damages or other remedies unavailable in a statutory appraisal), there is nothing inconsistent or otherwise "inequitable" (the term used by the Delaware Supreme Court in *Kahn*) about a minority stockholder pursuing a claim for equitable relief after submitting his or her stock certificates for the merger consideration after a freeze-out merger is consummated, while simultaneously pursuing a claim for breach of fiduciary duty in connection with the merger. In such a case, the former stockholder's right to receive the merger consideration is absolute, and would continue to exist even if the court ultimately were to find that the merger was entirely fair.¹⁴⁰

once may have been viewed as the holding of *Weinberger* respecting the exclusivity of the statutory appraisal remedy, and have concluded that minority stockholders eliminated in a freeze-out merger retain the ability to pursue relief outside the confines of a statutory appraisal action even where the stockholders' only claim for breach of fiduciary duty related to the fair price prong of the entire fairness test. See, e.g., *Nagy v. Bistricher*, No. 18,017, slip op. at 16-17 (Del. Ch. Nov. 22, 2000). As such, it is arguable today that the holding in *Lynch I* respecting the survival of a claim for breach of fiduciary duty implicating the fair dealing prong of the entire fairness test applies with equal force to a claim involving only the fair price prong of the test. Moreover, in view of the "unitary" nature of the entire fairness test, it is entirely unclear whether there is such an animal as a claim arising exclusively under the fair price prong of the test. Indeed, it is arguable that any freeze-out merger accomplished at an unfair price necessarily involves an element of unfair dealing.

¹³⁹See *Frank v. Wilson & Co.*, 32 A.2d 277, 283 (Del. 1943).

¹⁴⁰If a number of years pass before the litigation is concluded, of course, the merger

Moreover, if the stockholder's suit were successful, any award of damages would be offset by the amount of the merger consideration—thereby reducing the defendants' exposure to pre-judgment interest on the portion of the judgment that would otherwise be represented by the forfeited merger consideration.

In *Trounstone*, and in every case prior to *Norberg I* where the affirmative defense of acquiescence has been applied to bar a plaintiff from pursuing relief from an extraordinary corporate transaction, non-assenting minority stockholders had the choice to accept the benefits of the challenged transaction or maintain the status quo as to their interest.¹⁴¹ In the case of a freeze-out merger effected by a majority stockholder without any vote of the minority stockholders, the transaction was legally effective (and not a nullity) as against all minority stockholders without regard to whether they ever receive the merger consideration. As such, and as previously noted, even if all minority stockholders were to refuse to surrender their stock certificates for the merger consideration while prosecuting a lawsuit involving claims of breach of fiduciary duty, the merger still would be effective and the minority stockholders still would not retain their equity interest in the corporation. In a very real sense, no exchange occurs when minority stockholders surrender their stock certificates for the merger consideration after a freeze-out merger is consummated. When the merger is consummated, the equity interest of all minority stockholders is extinguished and "converted" into the right to receive the merger consideration (subject only to the statutory appraisal right) by operation of law, and without any action on the part of the minority stockholders. The minority stockholders are powerless to prevent this conversion. Moreover, the minority stockholders' right to receive the merger consideration would survive even if a court later were to conclude

consideration due to a minority who does not surrender his or her stock certificates to the surviving corporation may escheat to the state. In such a case, the minority stockholder will need to deal with the particular laws of whatever state receives the merger consideration before he or she may receive the merger consideration. In the end, however, the merger consideration unqualifiedly belongs to the minority stockholder.

¹⁴¹See *Trounstone v. Remington Rand, Inc.*, 194 A. 95 (Del. Ch. 1937). But cf. *Turner v. Bernstein*, No. 16,190 (Del. Ch. Feb. 9, 1999), reprinted in 24 DEL. J. CORP. L. 1276 (1999); *Iseman v. Liquid Air Corp.*, No. 9694 (Del. Ch. Feb. 11, 1993), reprinted in 18 DEL. J. CORP. L. 1025 (1993); and *Siegman v. Columbia Pictures Entm't, Inc.*, No. 11,152 (Del. Ch. Jan. 12, 1993), reprinted in 18 DEL. J. CORP. L. 1171 (1993), stating that it would hold the plaintiffs' claims to be barred if they were fully informed of all material facts respecting the freeze-out mergers therein. As noted herein, however, the court of chancery's statement in these cases was *dictum*, because the court was unable to find that adequate disclosure had been made. As such, the court in none of these cases was called upon to make the hard judgment of whether to bar an otherwise actionable claim based on full disclosure.

that the defendants generously overpaid in the merger.¹⁴² Other than to preserve a statutory appraisal claim, it would be a meaningless act for minority stockholders eliminated in a freeze-out merger to continue to hold their stock certificates (which no longer represent an equity interest in the corporation).

Moreover, unlike the plaintiff in *Trounstone*, minority stockholders eliminated in a freeze-out merger have no prospect, much less a right, to retain their equity interest in the corporation as a consequence of the litigation. In essence, the minority stockholders have no choice but to accept the merger consideration and sue for breach of fiduciary duty.¹⁴³ Admittedly, the minority stockholders could elect to pursue an appraisal, but that choice would not be meaningful in a case where appraisal is not an adequate remedy. Hence, the court of chancery recognized in *Kahn I* that acquiescence will not apply in freeze-out mergers involving issues of fair dealing. By definition, appraisal is an inadequate remedy in such a case. As such, a minority stockholder's acceptance of the merger consideration is not a voluntary choice.¹⁴⁴ Indeed, it would be inequitable to the plaintiff if his only choices were (1) to elect an inadequate appraisal, or (2) to accept inadequate merger consideration.¹⁴⁵

In the case of a freeze-out merger accomplished without a vote of the minority stockholders, and where there are actionable claims of breach of fiduciary duty by the majority stockholder, the only equitable result is to allow minority stockholders to accept the inadequate merger consideration and sue for breach of fiduciary duty (with the defendants receiving a credit against any judgment in the amount of the merger consideration). Plainly, there is nothing inconsistent or inequitable in the minority stockholders doing so. Unlike the plaintiff in *Trounstone*, a minority stockholder eliminated in a freeze-out merger does not seek to have his cake and eat it too. Rather, the stockholder simply seeks to be made whole.

¹⁴²In an analogous setting, the Delaware Court of Chancery has recognized that accepting the benefit of a judgment will not operate as a waiver of the right to an appeal if there is no risk that the appeal would result in a lesser recovery. See, e.g., *Falcon Steel Co. v. HCB Contractors, Inc.*, No. 11,557, slip op. at 11-12 (Del. Ch. Apr. 4, 1991).

¹⁴³*Trounstone v. Remington Rand, Inc.*, 194 A. 95 (Del. Ch. 1937).

¹⁴⁴See *Colan v. Prudential-Bach Sec., Inc.*, 577 F. Supp. 1074, 1082 (N.D. Ill. 1983).

¹⁴⁵*Accord In re* Petition of Kara B. Rubenstein, 637 A.2d 1131, 1134 n.2 (Del. 1994) (noting that a party's acceptance of one of two inadequate alternatives—characterized by the court as a "Hobson's Choice"—will not give rise to an estoppel).

V. CONCLUSION

Without regard to whether the court reached the correct conclusion as to the particular plaintiff in *Norberg I* and with respect to the peculiar facts presented therein, serious questions are raised by the sweeping generality of the court of chancery's analysis. As set out more fully herein above, we submit that the analysis in *Norberg I* and *II* was not mandated by the Delaware Supreme Court's opinions in *Bershad* or *Kahn*. Indeed, it is arguable that the analysis in *Norberg I* and *II* runs contrary to the court of chancery's prior decisions, and there is no question that the analysis is contrary to the court of chancery's analysis in *Serlick* and *Kahn II*. At this time, there is a split of authority in the decisions of the Delaware Court of Chancery. With the possible exception of *Wood*, the post-*Kahn* decisions of the court of chancery (including decisions by two sitting members of the Delaware Supreme Court) would apply the doctrine of acquiescence to any stockholder who accepts the merger consideration, provided there has been full disclosure. The pre-*Kahn* decisions (also including decisions by two sitting members of the Delaware Supreme Court) would not apply the doctrine in a freeze-out merger where minority stockholders are afforded no vote and where there are actionable claims of unfair dealing. Ultimately, this split of authority will need to be resolved by the Delaware Supreme Court.

Post Script—

Prior to the publication of this article, an advance copy was submitted to the court of chancery in the case of *In re Best Lock Corp. Stockholder Litigation*,¹⁴⁶ in connection with the court's consideration of the defendants' motion to dismiss based on the doctrine of acquiescence. The court of chancery's decision which denied the defendants' motion employs reasoning materially similar to the analysis set forth herein.¹⁴⁷

¹⁴⁶No. 16,281, 2001 Del. Ch. LEXIS 134 (Del. Ch. Oct. 29, 2001).

¹⁴⁷See *id.*