am unable to, and do not, so conclude. As earlier indicated, on that question "the proof will be in the pudding." At present, whether or not DPC offer is financeable is a matter of speculation. By January 9, 1990, however, the matter will be one of established fact.

* * *

Because Dataproducts has failed to demonstrate a probability of success on the merits of its claims, its motion for preliminary injunctive relief is denied.[13] IT IS SO ORDERED.

DAY v. QUOTRON SYSTEMS, INC.

No. 8502

Court of Chancery of the State of Delaware, New Castle

November 20, 1989

Plaintiff's amended complaint against the directors of Quotron Systems, Inc. (Quotron) alleged breach of the directors' fiduciary duties of due care, candor, and loyalty. Plaintiff alleged: (1) that the directors intentionally failed to become informed about the true value of Quotron's stock and so were unable to negotiate adequately with Citicorp, a potential acquiror; (2) that the directors further violated their duty of care by failing to defend against Citicorp's tender offer when the directors had already determined that Citicorp's

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13. Dataproducts has also advanced (not vigorously) two additional, subsidiary arguments which I have considered and also reject. The first is that DPC is estopped from continuing with its consent solicitation because of certain representations made by its counsel to the Court. Because I do not regard DPC's representations as inconsistent with any position DPC is taking now, there is no basis for invoking the doctrine of judicial estoppel. Dataproducts also argues that by commencing a tender offer that it has no intention of consummating, DPC is violating its covenant of good faith and unfair dealing implied in the Standstill Agreement. Dataproducts argues that DPC's actions, unless enjoined, will deprive it of the consideration it bargained for in the Agreement, namely, a contractual assurance that DPC would only use the confidential information to acquire the Company in a premium priced, all shares, tender offer commenced within a specified time period. That argument is a restatement, in somewhat different form, of Dataproducts' principal argument that has previously been rejected, for which reason it must be rejected here as well.

offer was inadequate; (3) that the directors failed to provide Quotron's stockholders with required material information regarding business prospects of Quotron and the company's value, thus forcing the Quotron stockholders to make an uninformed decision when responding to Citicorp's offer; and (4) that the directors placed their own interests above those of the Quotron stockholders because the directors anticipated lucrative compensation, fees, and stock options from Citicorp.

The court of chancery, per Vice-Chancellor Berger, denied defendant's motion for summary judgment on the duty of candor issue because the directors failed to inform the stockholders that an investment banker considered the tender offer price of $19 to be a "good price," that while the directors declared the $19 per share offer inadequate, they would have endorsed an offer at $20, and that the $19 offer was within the range of fair value. The court concluded that this information might have been material to the Quotron stockholders because it would have provided them a better basis from which to make their own determination as to the adequacy of the offer.

1. Pleading ⇨ 236(1)

Leave to amend under Delaware Chancery Court Rule 15 is to be freely granted when justice so requires and is a matter of discretion resting with the trial court. DEL. CH. CT. R. 15.

2. Pleading ⇨ 236(1)

The court may deny a motion to amend where the amendment would seriously prejudice the opposing party. However, prejudice to the adverse party must be balanced against any prejudice to the movant if leave to amend were denied.

3. Pleading ⇨ 236(2)

Generally, delay alone is insufficient reason to deny leave to amend unless the delay was motivated by bad faith or dilatory tactics.

4. Pleading ⇨ 236(1)

Where plaintiff's additional claims are first asserted in plaintiff's briefs and defendant fully answers all of these claims in its briefs

and plaintiff's delay is not motivated by bad faith or dilatory tactics, there is not sufficient prejudice to defendant to deny plaintiff's motion for leave to amend the pleadings.

5. Judgment ⇨ 181

To prevail on a motion for summary judgment, movant must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Any doubts as to the absence of a genuine issue of material fact are resolved against the movant.

6. Judgment ⇨ 185

If the movant puts into the record facts that would entitle it to summary judgment, the party opposing must dispute those facts with countervailing evidence and may not rest upon the mere allegations or denials of his pleading. DEL. CH. CT. R. 56(e).

7. Judgment ⇨ 181

Corporations ⇨ 307

Where the movant's outside investment banker has told movant that a tender offer price was a "good price" but has not included such a statement in its written report, the mere absence of such a statement from the written report does not constitute a material dispute of fact, for purposes of a summary judgment motion, with regard to whether or not the movant's directors were uninformed as to the company's true value.

8. Corporations ⇨ 307, 310(2)

Corporate directors owe an affirmative duty to the corporation and its stockholders to protect and defend their interests. Where, however, the unrefuted evidence is that the board informed itself as to the transaction and that the board was disinterested, the board is entitled to the protection of the business judgment rule for its decision not to enact a defensive measure against a tender offer.

9. Corporations ⊂ 307, 310(2)

Corporate directors owe an affirmative duty of candor to the stockholders, in a tender offer context, to disclose to the stockholders all material information, that is, information that would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

10. Corporations ⊂ 307

In the tender offer context, the acquiror's stated intention to retain the target company's directors and management following an acquisition does not render the target company's directors "interested" in the transaction by reason of their accepting normal directors' fees.

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David A. Drexler, Esquire, and Kenneth J. Nachbar, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Richard C. Warmer, Esquire, Richard G. Parker, Esquire, Saone B. Crocker, Esquire, and Thomas E. Donilon, Esquire, of O'Melveny & Myers, Washington, D.C., of counsel, for defendants.

BERGER, *Vice-Chancellor*

Over the past few years, stockholders have filed many actions objecting to defensive tactics adopted by corporate boards of directors to defeat takeover attempts, including cash tender offers. The claims in this case arise from the opposite fact pattern. The directors of defendant Quotron Systems, Inc. ("Quotron") are charged with having breached their fiduciary duties by failing to defend against an unsolicited all cash, all shares tender offer made by Citicorp.

Plaintiff, a stockholder of Quotron, filed this action in June, 1986, shortly after Citicorp commenced its $19.00 per share tender offer. After some discovery and a period of inactivity, defendants

filed a motion for judgment on the pleadings or for summary judgment in January, 1988. When that motion was argued, in January, 1989, it was evident that the theories plaintiff advanced to sustain her complaint had not been alleged. Accordingly, plaintiff was asked to submit a proposed amended complaint consistent with her arguments. She did so, and the parties submitted additional memoranda addressing both the propriety of granting a motion to amend at this late date and the adequacy of plaintiff's new allegations. Thus, the Court now has pending plaintiff's motion for leave to amend her complaint and defendants' motion for judgment on the pleadings or for summary judgment.

The relevant facts, as determined from the entire record, and from the allegations contained in plaintiff's proposed amended complaint, may be summarized as follows. Quotron and Citicorp discussed in 1983, and again in April, 1985, possible business combinations of the two companies. By July, 1985, they entered into a non-disclosure agreement with respect to confidential, technical and business information. In October, 1985, Citicorp proposed a cash merger with Quotron at $16.00 per share. After the Quotron directors, with the assistance of their outside legal counsel as well as their outside financial adviser, Goldman, Sachs & Co. ("Goldman, Sachs"), considered the proposal at two special board meetings, they rejected the Citicorp offer. Milton E. Mohr ("Mohr"), Quotron's Chief Executive Officer and Chairman of the Board, believed that the price offered was inadequate, and the entire board found the offer unacceptable because Citicorp refused to accept the risk of customer defection pending the Federal Reserve Board's approval of the proposed transaction.

In March, 1986, Citicorp again proposed a cash merger, this time at $19.00 per share. The Quotron board held a two-day special meeting to consider all aspects of the new offer and any alternatives the company might pursue. According to both the minutes of that meeting and Mohr's affidavit, Goldman, Sachs presented the board with both a written and an oral report that included a financial summary of the company, its common stock price history, comparisons of Quotron and its stock prices to other like companies, comparisons of the Citicorp offer to acquisitions of other computer related companies, other possible acquirors and the effect of an acquisition at different prices, and alternatives available to Quotron in responding to the Citicorp offer. According to Mohr, both he and the Goldman, Sachs representative stated that $19.00 per share was a good price.

Senior management representatives also advised the board of their views of the Citicorp offer.

According to the board minutes, there was a "developing consensus" that $19.00 was an inadequate price. Docket No. 31, Board Minutes of March 26-27, 1986, p. 9. Mohr provided a more positive description, stating that the board believed a higher price could be negotiated and decided not to endorse the Citicorp offer at that time. Mohr Aff., ¶ 22. In any event, the board asked for additional information (such as a five-year forecast for the company), instructed Goldman, Sachs to discuss a possible acquisition with selected other companies and accepted an invitation to meet with a Citicorp representative about the merger offer. The Quotron board stated, in a March 28, 1986 press release, that it believed the $19.00 price offered by Citicorp to be inadequate.

At the Quotron board's next meeting, on April 9, 1986, the board reviewed and discussed both management's five-year forecast and Goldman, Sachs' second written report. The directors were advised that a few of the companies approached about a possible acquisition of Quotron indicated some interest, but that no company indicated a strong interest in such a transaction. According to Mohr, after considering and discussing all this information, the Quotron directors decided that $19.00 per share was within the range of fair value but that they could obtain a better price for their stockholders. Accordingly, they instructed Goldman, Sachs to advise Citicorp's investment banker that they would unanimously support a $25.00 per share cash tender offer.

Quotron's counteroffer was rejected out of hand. On May 19, 1986, the Federal Reserve Board approved Citicorp's acquisition of Quotron, subject to divestment of certain Quotron operations, and on May 21 and 22, respectively, Citicorp announced and commenced a cash tender offer for all Quotron shares at $19.00 per share. On May 27, the board again considered the offered price and again concluded that $19.00 per share was inadequate "in the context of this particular transaction . . . ." Docket No. 35, Board Minutes of May 27, 1986, p. 3. The Quotron board authorized the chairman of its special committee to make a counteroffer of $20.00 per share, which Citicorp promptly rejected. The board then issued a press release announcing its conclusion that the $19.00 per share offer was inadequate, but also stating that the board had determined not to oppose the offer. Rather, as stated in the directors' letter to Quotron's stockholders, the board decided to remain neutral with respect to the Citicorp offer.

The proposed amended complaint includes four counts purporting to allege breaches of the fiduciary duty of due care, candor and loyalty. Count I alleges that the defendant directors never requested or received an assessment of the true value, or range of values, of Quotron's stock. Plaintiff alleges that the directors intentionally failed to become fully informed because they were interested in obtaining a "lucrative compensation package promised by Citicorp . . . ." Amended Complaint, ¶ 29. Plaintiff claims that the directors, as a result of their lack of information, were unable to negotiate adequately with Citicorp or other potential acquirors. In Count IV, plaintiff asserts an alternative duty of care claim based upon the directors' failure to defend against Citicorp's tender offer. Plaintiff claims that, because the board deemed the Citicorp offer inadequate, the directors were obliged to take whatever steps necessary to prevent the sale of Quotron at that inadequate price.

Count II of the amended complaint raises a disclosure claim. The directors stated in a Schedule 14D-9 that the price of $19.00 per share was inadequate but that they would not oppose Citicorp's tender offer. Plaintiff charges that the directors failed to provide Quotron's stockholders any information as to the board's reasoning, notwithstanding the fact that the directors "had four Goldman Sachs analyses of the offer, a management generated forecast of the business prospects of Quotron, management generated reports on alternatives to the Citicorp offer, reports from legal counsel and continuing access to the input and advice of Goldman Sachs and others." Amended Complaint, ¶ 34. Plaintiff alleges that defendants, by withholding the information contained in those reports and other materials, forced the Quotron stockholders to make an uninformed decision when responding to the Citicorp offer.

Finally, Count III alleges that the Quotron directors breached their duty of loyalty by acting in their own personal interests rather than protecting the best interests of Quotron's stockholders. Plaintiff alleges that the directors failed to oppose Citicorp's offer, or to obtain higher offers, in order to protect the fees and stock options they received as directors. The directors anticipated that they would continue to receive these benefits because Citicorp had promised to retain the present board after it acquired Quotron. In addition, the amended complaint alleges that Mohr received "substantial compensation" both as an officer and as a director of Quotron and that he anticipated receiving even greater compensation based upon a compensation package proposed by Citicorp.

I.

[1-3] Leave to amend under Chancery Court Rule 15 is to be freely granted when justice so requires, and is a matter of discretion resting with the trial court. *See Bokat v. Getty Oil Co.*, Del. Supr., 262 A.2d 246, 251 (1970). The Court may deny a motion to amend where the amendment would seriously prejudice the opposing party. *See Bowl-Mor Co. v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, 63, *appeal dismissed,* Del. Supr., 297 A.2d 67 (1972). However, prejudice to the adverse party must be balanced against any prejudice to the movant if leave to amend were denied. *See Paul v. Chromalytics Corp.*, Del. Super., 343 A.2d 622, 625 (1975). Generally, delay alone is insufficient reason to deny leave to amend unless the delay was motivated by bad faith or dilatory tactics. *Chrysler Corp. v. New Castle County*, Del. Super., 464 A.2d 75, 84 (1983).

Defendants oppose the motion to amend on the ground that the facts that form the basis of the amended complaint were known to plaintiff when document production was made several years ago, yet plaintiff failed to seek leave to amend until after defendants' dispositive motion had been briefed and argued. Defendants argue that, because plaintiff offers no good reason for the delay and because defendants were forced to incur unnecessary expense in moving against the original complaint, they have shown sufficient prejudice to justify denial of the motion to amend.

[4] It is most difficult for the Court, and I am sure for the opposing parties, to read a brief asserting claims not found in the complaint. Unfortunately, stockholder plaintiffs have created this problem on more than one occasion. However, as in this case, defendants tend to respond to plaintiffs' arguments as if their newly articulated claims were included in an appropriate pleading.[1] Plaintiff's disclosure claims surfaced for the first time in her answering brief, and defendants, after objecting to the new claims, responded to them in their reply brief. When plaintiff finally submitted her amended complaint, defendants noted that they had already re-

1. Perhaps, in future cases, if defendants were to call the Court's attention to a brief asserting claims not found in the complaint, this problem could be addressed at an earlier stage. Although plaintiffs likely would be allowed to amend their pleadings, given the applicable liberal standards, at least defendants would know exactly what claims were being asserted and an argument could be made that the Court should be less tolerant of any new claims, not contained in an amended complaint, that might be presented at oral argument, for example.

sponded to the disclosure claims in depth. Under these circumstances and in light of the fact that plaintiff's delay was not improperly motivated, I am unable to find that any prejudice to defendants is sufficient to deny plaintiff's motion for leave to amend.

II.

[5-6] Because both parties have relied upon documents outside the pleadings, defendants' motion for judgment on the pleadings or for summary judgment will be considered simply a motion for summary judgment. *See* Chancery Court Rule 12(c). To prevail on a motion for summary judgment, defendants must demonstrate that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Any doubts as to the absence of a genuine issue of material fact are resolved against the movant. *Brown v. Ocean Drilling & Exploration Co.*, Del. Supr., 403 A.2d 1114, 1115 (1979). If, however, defendants put into the record facts that would entitle them to summary judgment, plaintiff must dispute those facts by countervailing evidence, and may not "rest upon the mere allegations or denials of his pleading." Chancery Court Rule 56(e); *see also Feinberg v. Makhson*, Del. Supr., 407 A.2d 201, 203 (1979); *Tanzer v. International General Indus.*, Del. Ch., 402 A.2d 382, 385 (1979). Thus, statements of fact made in the Mohr affidavit, if uncontroverted by evidence presented by plaintiff, must be taken as true for purposes of this summary judgment motion.

A.

[7] The first count of the amended complaint charges the Quotron directors with violating their duty of care by failing to inform themselves as to Quotron's true value. Mohr states in his affidavit that Goldman, Sachs presented an analysis of Quotron's financial condition to the board at a special meeting on October 21, 1985, and that the investment adviser again reported to the board on Quotron's financial position and stock price history at a special meeting on March 26-27, 1986. During the March meeting, Goldman, Sachs advised the board that $19.00 per share was a good price and, at a special meeting held on April 9, 1986, management reported to the board on Quotron's future prospects and the board concluded that $19.00 per share was in the range of Quotron's fair value.

Plaintiff presented no evidence disputing Mohr's statements; indeed, she acknowledges in her amended complaint that the Quotron

directors had the benefit of numerous Goldman, Sachs analyses, management forecasts and other legal and financial advice. Amended Complaint, ¶ 34. Nonetheless, plaintiff takes issue with Mohr's statement that the Quotron board was told by its investment adviser that $19.00 per share was a "good price." Mohr Aff., ¶ 22. Plaintiff did not submit any affidavits or depositions controverting these statements. Instead, she relies upon the fact that neither Goldman, Sachs' presentation materials nor the minutes of the special meetings records such a statement.

I am not satisfied that this purported absence of evidence raises a dispute of fact for purposes of a summary judgment motion. The statement that Mohr attributes to Goldman, Sachs is not the type of statement that one would necessarily expect to find in an investment banker's report to a board of directors. Thus, the absence of such a statement in the Goldman, Sachs' reports does not contradict Mohr's affidavit. The board minutes likewise do not contradict Mohr's affidavit. In fact, they tend to support Mohr's statement that the board was informed by confirming that the adequacy of the $19.00 offer was discussed:

> Following the departure of the management (other than Mr. Mohr who remained), the Board and Goldman Sachs reviewed in detail the information which had been presented to the Board over the last two days. In addition, there was further discussion regarding the future prospects of the Company and the Citicorp offer, *including the adequacy of the price offered*, the uncertainty with respect to the length of the regulatory process and its ultimate outcome and the likelihood of negative consumer reaction. Mr. Zimmel [of Goldman, Sachs] also reviewed in detail those factors which militate in favor of accepting the Citicorp offer and those factors which militate against accepting the Citicorp offer. (Emphasis added.)

Docket Entry 31, Board Minutes of March 26-27, 1986 at p. 9. Thus, I find that plaintiff has failed to submit countervailing evidence tending to establish that the Quotron directors were uninformed as to the company's true value. Rather, the record establishes that the directors were well informed, both by outside experts and management, and are, therefore, entitled to the entry of summary judgment.

[8] Plaintiff also claims that the board violated its duty of care by not enacting defensive measures to block Citicorp's tender offer. The Court is mindful that corporate directors owe an affirmative

duty to the corporation and its stockholders to protect and defend their interests. *See, e.g., Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., 559 A.2d 1261, 1280 (1989); *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 872 (1985). Here, however, the unrefuted evidence is that the board informed itself as to the transaction and, as discussed below, that the board was disinterested. The board is therefore entitled to have its decision not to enact a defensive measure protected by the business judgment rule. *See Van Gorkom*, 488 A.2d at 872-73.

The record establishes that the Quotron directors found $19.00 per share to be within the range of fair value, but that they thought Citicorp would sweeten its offer. The directors considered a number of defensive alternatives and, with the advice of their financial and legal experts, made what they considered to be the most appropriate response to the Citicorp offer. The Quotron directors advised their stockholders that they believed the offer to be inadequate but that they were going to remain neutral. Had Citicorp increased its offer to $25.00 per share (or even to $20.00 per share) the Quotron directors were prepared to endorse that offer. It is reasonable to assume that, had the Citicorp offer been significantly lower than $19.00 per share, the Citicorp directors would have actively opposed it. As it happened, however, the $19.00 per share offer was within the range of fair value, the Quotron directors were unable to negotiate a higher price with Citicorp, and other potential acquirors were approached but failed to make a competing bid. Given these facts, there is simply no basis on which to impose liability on the Quotron directors for their decision not to enact defensive measures in response to the Citicorp offer.

B.

[9] Plaintiff's second claim charges defendants with breaching their duty of candor. This duty requires defendants to disclose to Quotron's stockholders "all germane or material information," *see Stroud v. Milliken Enterprises, Inc.*, Del. Supr., 552 A.2d 476, 480 (1989), that is, information that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Bershad v. Curtiss-Wright Corp.*, Del. Supr., 535 A.2d 840, 846 (1987).

The undisputed facts here are, first, that defendants disclosed to the stockholders their unanimous decision to express no opinion on and to remain neutral with respect to Citicorp's offer, and second, that defendants stated the board's belief that it would not be in the

stockholders' interest for Quotron to take action that might prevent them from making their own determination as to the adequacy of Citicorp's offer or desirability of tendering shares. *See* Exhibit 2 to Quotron's Schedule 14D-9. Third, the board disclosed its conclusion that the price of $19.00 per share was inadequate. *See* Quotron's Schedule 14D-9, at page 2. Fourth, the board disclosed the basis for its decision with respect to the $19.00 offer as follows:

> The Board of Directors has considered the effect of the Federal Reserve Board's approval [of Citicorp's acquiring Quotron], including its effect on the price of the Offer.
>
> In reaching its conclusions the Board of Directors has also considered the business, financial condition, results of operations, current business strategy and prospects of the Company, and the nature of the industry in which the Company operates. It has also reviewed with Goldman Sachs the prices paid in recent acquisitions of companies in the same industry as the Company, as well as a number of financial criteria used in assessing the adequacy of a tender offer price, including premiums over market price and a number of tender offers, which included partial tender offers and offers for all shares, and other acquisition transactions in recent years. Goldman Sachs also reviewed the historical market prices and recent trading patterns of the Common Stock and explored the possibility of business combinations between the Company and corporations other than Citicorp.

Quotron's Schedule 14D-9, at p. 2.

The above quoted disclosure tells the stockholders that the Quotron directors gave the subject serious consideration and reviewed a substantial amount of data. However, it does not tell the stockholders, for example, that Goldman, Sachs considered the tender offer price to be a "good price," that the directors would have endorsed an offer at $20.00 per share, or that $19.00 per share was within the range of fair value. These and other facts relating to the directors' decision may well have been material to the Quotron stockholders because it would have provided them a better basis from which to make their own determination as to the adequacy of the offer. Accordingly, summary judgment will not be entered in favor of defendants on this count.

C.

Plaintiff's third claim is one for breach of the duty of loyalty. She asserts that defendants failed to oppose Citicorp's offer, failed to "take appropriate steps to obtain higher offers," and failed to pursue potential suitors for Quotron, all to protect their positions as directors and, in defendant Mohr's case, as Chief Executive Officer. Mohr's affidavit refutes this claim. He states that the board instructed Goldman, Sachs to look for a buyer at a higher price, Mohr Aff., ¶ 22; that potential suitors were called, but gave no immediate and serious expressions of interest, *id.* at ¶¶ 25, 33, 39; that available defensive measures were reviewed with counsel and with Goldman, Sachs, *id.* at ¶¶ 28, 40; and that the board refused to discuss any management compensation proposals until the offer price was set. *Id.* at ¶¶ 31, 42. These statements of fact are echoed in the board's minutes of its meetings held on March 26-27, April 9, April 14 and May 20, 1986. As plaintiff has failed to refute the statements in Mohr's affidavit, this Court must, as stated before, treat them as true for this motion.

[10] Citicorp's stated intention to retain Quotron's directors and management following an acquisition does not render Quotron's outside directors "interested" in this transaction by reason of their accepting normal directors' fees. Moreover, the composition of the board—five outside directors and the CEO—indicates its disinterest as a body. Plaintiff has presented no evidence that would give rise even to an inference that the Quotron board was somehow "interested" in Citicorp's offer. In sum, there is no evidence to support plaintiff's claim of divided loyalties and all of the evidence shows that a majority of the directors had no conflicting self-interest.

Based on the foregoing, plaintiff's motion for leave to amend her complaint is granted; defendants' motion for summary judgment is granted with respect to plaintiff's claims of breach of the fiduciary duty of care and that of loyalty, but denied with respect to plaintiff's claims of non-disclosure or breach of defendants' duty of candor.

GROBOW v. PEROT

No. 8759 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

January 2, 1990

Plaintiffs, holders of General Motors Common and Class E stock, brought a shareholder derivative suit challenging General Motors' December 1986 repurchase of certain securities and notes owned by H. Ross Perot and other individual directors. Plaintiffs claimed that General Motors' directors had breached their fiduciary duty to the corporation and its shareholders by approving the transaction. Plaintiffs' subsequently amended complaint was dismissed for failure to meet the demand requirements of Delaware Court of Chancery Rule 23.1. Plaintiffs were permitted to amend their complaint a second time on the basis of newly discovered evidence, and defendants thereafter filed motions with the court to dismiss the second amended complaint on the basis that it failed to meet the demand requirements of Rule 23.1.

The court of chancery, per Vice-Chancellor Jacobs, held that the plaintiffs' second amended complaint failed to establish the futility of demand and granted defendants' motion to dismiss the complaint.

1. Corporations ⟸ 206(3), 211(3), 211(4), 211(6), 319(6)

To maintain a stockholder derivative action in which demand futility is claimed, the plaintiff's complaint must allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort. DEL. CH. CT. R. 23.1.

2. Corporations ⟸ 206(3), 211(4)

To establish "demand futility," the complaint must allege particularized facts sufficient to create a reasonable doubt that the directors were disinterested and independent at the time they approved the transaction, or that the challenged transaction was otherwise the product of a valid exercise of business judgment.

3. Corporations ⟸ 206(3), 211(4)

At the heart of the demand futility inquiry is the question of whether the complaint creates a reasonable doubt that the directors' action was entitled to the protection of the business judgment rule.

4. Corporations ⟸ 307, 310(2)

Only disinterested and informed directors who act in good faith and in the honest belief that their actions were in the best interests of the corporation may claim the protection of the business judgment rule.

5. Pleading ⟸ 233, 236(1), 252(2)

As a general matter, where leave to amend a complaint is granted under Delaware Court of Chancery Rule 15, the original pleadings are disregarded and all later motions are directed to the amended pleading. DEL. CH. CT. R. 15.

6. Pleading ⟸ 236(1), 236(4)

Under Delaware Court of Chancery Rule 60(b), the court's determination of whether or not to grant relief from final judgment of dismissal is a matter of sound judicial discretion. DEL. CH. CT. R. 60(b).

7. Pleading ⟸ 236(1), 236(4), 239(1), 239(2)

The extent of relief under Delaware Court of Chancery Rule 60(b) is a subject of discretion because Rule 60(b) envisions that post-judgment relief may be granted subject to just conditions. DEL. CH. CT. R. 60(b).

8. Pleading ⟸ 242, 246(1), 247

An amended complaint pursuant to a Rule 60(b) order must be based on newly discovered evidence and may not be used as a vehicle to reallege and reargue earlier pleaded claims or theories. DEL. CH. CT. R. 60(b).

9. Corporations ⟸ 310(1), 310(2)

In determining whether reasonable doubt exists as to directorial business judgment, the court will presume that the board properly exercised its business judgment, i.e., that the board acted on an informed basis, with no conflicting self-interest and in the good faith and honest belief that its actions would serve the corporation's best interests.

10. Corporations ⟸ 310(1)

Where a transaction is approved by a majority of independent, disinterested directors, that fact operates to bolster the presumption of the business judgment rule.

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Bruce M. Stargatt, Esquire, and David C. McBride, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; Evan R. Chesler, Esquire, Christopher M. Mason, Esquire, and Linda C. McClain, Esquire, of Cravath, Swaine & Moore, New York, New York, for defendant H. Ross Perot.

William O. LaMotte, III, Esquire, and Thomas Reed Hunt, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Stephen C. Neal, Esquire, Robert J. Kopecky, Esquire, and Helen E. Witt, Esquire, of Kirkland and Ellis, Chicago, Illinois, for defendants General Motors Corporation and Electronic Data Systems Corporation.

Michael J. Brasford, Esquire, Louis H. Lindeman, Jr., Esquire, of General Motors Corporation, Detroit, Michigan, for defendant General Motors Corporation.

E. Norman Veasey, Esquire, and Thomas A. Beck, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Dennis J. Block,

Esquire, Stephen A. Radin, Esquire, and James P. Rosenzweig, Esquire, of Weil, Gotshal & Manges, New York, New York, for General Motors Corporation director defendants, Anne L. Armstrong, Catherine B. Cleary, James H. Evans, Walter A. Fallon, Charles T. Fisher, III, Marvin L. Goldberger, John J. Horan, Howard H. Kehrl, Thomas A. Murphy, Edmund T. Pratt, Jr., James D. Robinson, III, John G. Smale, Leon H. Sullivan, Dennis Weatherstone, and Thomas H. Wyman.

Grover C. Brown, Esquire, and Mary M. Johnston, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for General Motors Corporation director defendants, Donald J. Atwood, F. James McDonald, Lloyd E. Reuss, F. Alan Smith, Roger B. Smith, and Robert C. Stempel.

JACOBS, *Vice-Chancellor*

Presently pending are motions to dismiss the second amended complaint in this consolidated shareholder derivative action brought on behalf of General Motors Corporation ("GM") and its wholly owned subsidiary, Electronic Data Systems Corp. ("EDS"). The plaintiffs, who are holders of GM Common and Class E Stock, challenge GM's December, 1986 repurchase of certain securities and notes owned by H. Ross Perot ("Perot") and certain other individual defendants. Named as defendants are GM, its individual directors, Perot, EDS, and certain of EDS' directors. The thrust of the complaint is that GM's directors, in approving the challenged transaction ("the buyout"), breached their fiduciary duty to GM and its shareholders.

This action marks another chapter in the highly controversial Perot buyout transaction that has spawned nationwide litigation. The original complaints in these actions were filed on December 4, 1986, and were first amended on March 2, 1987.[1] On April 13, 1987, this

1. Originally four separate actions were filed in this Court, of which three were consolidated: *Grobow v. Perot*, Del. Ch., C.A. No. 8759 (Dec. 4, 1986); *Russ v. Armstrong*, Del. Ch., C.A. No. 8760 (Dec. 4, 1986); and *Murray v. Smith*, Del. Ch., C.A. No. 8765 (Dec. 8, 1986). The fourth action, *Nitekman v. General Motors Corp.*, Del. Ch., C.A. No. 8762 (Dec. 5, 1986), was later dismissed without prejudice. Other actions were filed in various federal courts throughout the country, and were later consolidated by the panel on Multidistrict Litigation, in the United States District Court for the District of Delaware. *See In re General Motors Class E Stock Buyout Securities Litigation*, D. Del., 694 F. Supp. 1119 (1988).

Court dismissed the consolidated first amended complaint for failure to meet the demand requirements of Court of Chancery Rule 23.1. The Court held that the complaint did not allege particularized facts sufficient to establish that a demand would have been futile. The Supreme Court affirmed that ruling on March 15, 1988. *Grobow v. Perot*, Del. Ch., 526 A.2d 914 (1987), *aff'd*, Del. Supr., 539 A.2d 180 (1988) ("*Grobow I*").

On May 16, 1988, pursuant to Chancery Court Rules 60(b)(2) and 15, the plaintiffs moved for relief from the judgment of dismissal in *Grobow*, and moved also for leave to file a second amended complaint. The ground for those motions was that new material evidence had been uncovered during discovery proceedings in a related New York action.[2] On November 25, 1988, this Court granted both the Rule 60(b) motion, and the Rule 15 motion for leave to file a second amended complaint. *Grobow v. Perot*, Del. Ch., C.A. No. 8759, Jacobs, V.C. (Nov. 25, 1988). In that ruling, the Court deferred ruling upon the question of whether the proposed second amended complaint was sufficient to excuse the demand requirement of Rule 23.1. *Id.* at 5 n.2; *Grobow v. Perot*, Del. Ch., C. A. No. 8759, Jacobs, V.C., Letter Op. at 4 n.1 (Jan. 11, 1989).

The plaintiffs filed their second amended complaint on January 9, 1989. All defendants then moved to dismiss that complaint for failure to satisfy the demand requirements of Rule 23.1. This is the decision of the Court, after briefing and oral argument, on the defendants' motions.

I. The Facts

The underlying facts are derived from the second amended complaint.[3] As a result of a merger that occurred in the fall of 1984, EDS became a wholly owned subsidiary of GM. Second Am. Compl. ("Compl.") ¶¶ 12-13. In that merger, H. Ross Perot (who was EDS's Chairman), and defendants Morton H. Meyerson, Thomas Walter, Jr., and William K. Gayden (who were directors and officers of EDS), received, in exchange for their EDS stock, shares of newly

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2. The discovery was taken in *Hart v. General Motors Corp.*, Index No. 28039/86 (Sup. Ct. N.Y. Co. 1986), which was subsequently dismissed by order of the Appellate Division of the New York State Supreme Court. *See Hart v. General Motors Corp.*, 129 A.D.2d 179, 517 N.Y.S.2d 490 (1st Dep't), *leave to appeal denied*, 70 N.Y.2d 608, 521 N.Y.S.2d 225 (1987).

3. Other facts are discussed elsewhere in this Opinion in connection with the particular "demand futility" arguments to which they relate.

created GM Class E stock, plus contingent notes that would mature in 1991.[4] In addition, Perot retained his position as EDS' Chairman and also became a member of GM's Board of Directors. The Class E shares that Perot received in the merger made him GM's single largest shareholder. (Compl. ¶ 18).

The securities that Messrs. Perot, Meyerson, Walter, and Gayden received in the GM-EDS merger had several unique features. Dividends on the Class E stock are to be determined solely on the basis of EDS's profitability. The contingent notes bear no interest, and their value is set to assure Class E stockholders a prescribed minimum rate of return. Also, the notes are not callable until 1991. (Compl. ¶ 19).

Despite its merger into GM, EDS retained substantial autonomy, which helped to preserve EDS's profitability and competitive force. EDS's autonomy also minimized the potential conflict between the GM Board's duty to its common shareholders (which was to negotiate favorable purchase terms for GM, EDS's then largest customer) and its duty to its Class E shareholders (which was to maximize EDS's profits on its sales to GM). (Compl. ¶ 20). After the merger, GM and EDS senior management negotiated for EDS's continued operational and managerial independence, and during 1985 and early 1986, agreements were reached to ensure that EDS's management would retain significant control over EDS's internal affairs. (Compl. ¶¶ 21, 26).

Despite the apparent success of the merger, thorns soon developed in the GM-EDS relationship. Disputes arose between the two companies over the issues of audits, executive compensation, contract terms, and pricing. Perot became openly critical of GM, its management and their policies. (Compl. ¶¶ 28-36). Although by the middle of 1986 GM and Perot had achieved some measure of agreement over these disputed issues (Compl. ¶¶ 37-38), Perot continued publicly to criticize Roger Smith, GM's Chairman and Chief Executive Officer, and other high-level GM managers.

Eventually, GM's management decided that EDS should no longer be permitted to function autonomously and that the relationship between Perot and GM should be severed. (Compl. ¶ 39). GM

4. In the GM/EDS merger, each outstanding share of EDS's common stock not owned by GM was converted, at the holder's election, into either cash, or a combination of cash, Class E stock, and contingent notes. (Compl. ¶ 14).

then attempted to sell EDS to American Telephone & Telegraph, but those negotiations broke down in November 1986.

By that point, Perot had become interested in selling his GM holdings, and began negotiating for GM to buy him out. (Compl. ¶¶ 40-42). During the negotiations Perot allegedly made demands that he believed GM would never accept. The Board however, accepted most of Perot's terms at the December 1, 1986 Board meeting at which Perot had intended to criticize management's salaries, bonuses, and other perquisites. (Compl. ¶¶ 42-43). On November 30, 1986, the terms of the proposed buyout were disclosed to the oversight sub-committee of the GM Board's audit committee.[5] On December 1, 1986, the full GM Board approved the buyout proposal at its regularly scheduled meeting, to which Perot was not invited.

Ultimately, GM repurchased the Class E shares and contingent notes that were held by Perot and his associates. Of the total $729.9 million purchase price, $389.1 million (approximately $33 per share) was attributed to the Class E stock, $277.1 million ($23.50 per share) was allocated to the contingent notes, and $63.7 million ($5.90 per share) was attributed to "Special Interest" compensation for certain federal tax consequences of the repurchase. (Compl. ¶¶ 44-46).

In addition to transferring his securities to GM, Perot also covenanted that (a) he would not criticize GM's management and would pay an up to $7.5 million fine, if found by an arbitration panel to have violated that covenant, (b) he would not acquire more GM stock or engage in a proxy contest to replace GM's Board of Directors for five years, (c) he would not compete with EDS in the same lines of business in the same geographic areas for 3 years, and (d) he would resign as Chairman of EDS and as a GM director. (Compl. ¶ 49).

On December 2, 1986, the *Wall Street Journal* published a statement, attributed to Perot, that, to afford the GM Board the opportunity to review and reconsider its decision to approve the buyout, Perot would hold the repurchase price in escrow until December 15,

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5. In their (now dismissed) first amended complaint, the plaintiffs alleged, and this Court specifically found for purposes of the pending dismissal motion, (526 A.2d 919, 926), that on November 30, 1986, a Special Review Committee, consisting of three GM directors and chaired by one of the outside directors, considered and approved the proposed buyout. Inexplicably, the plaintiffs have deleted the fact of the Special Review Committee's review and approval of the buyout from their second amended complaint.

1986. (Compl. ¶ 45). The Board, however, adhered to its original decision.

II. Applicable Legal Principles

[1] The plaintiffs concede that they did not submit to GM's Board of Directors a demand that it rescind the buyout transaction, or, alternatively, that it cause GM to sue those directors responsible for its approval. Therefore, to maintain this derivative action, the plaintiffs must satisfy the requirements of Rule 23.1, which pertinently states:

> The complaint [must] allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

[2-4] To establish "demand futility," the complaint must allege particularized facts sufficient to create a reasonable doubt that the directors were disinterested and independent at the time they approved the transaction, or that the challenged transaction was otherwise the product of a valid exercise of business judgment. *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 814 (1984); *Pogostin v. Rice*, Del. Supr., 480 A.2d 619, 624 (1984); *Grobow I*, 539 A.2d at 186. At the heart of the demand futility inquiry is the question of whether the complaint "create[s] a reasonable doubt that the directors' action was entitled to the protection of the business judgment rule." *Aronson*, 473 A.2d at 808. Only disinterested and informed directors who act in good faith and in the honest belief that their actions were in the best interest of the corporation, may claim that protection. *Grobow I*, 539 A.2d at 186.

The plaintiffs allege that the GM Board, particularly its "management" directors, were disabled from impartially considering a demand, because (a) they were interested in the buyout, (b) they were not independent, and because (c) the transaction was not otherwise the product of a valid exercise of business judgment. In response, the defendants argue that the second amended complaint fails to allege particularized facts that are sufficient to validate these positions under the foregoing legal standard.

III. What Claims Are Cognizable on This Motion

Before the Court can address the parties' contentions, it must first resolve the threshold issue of whether certain of the plaintiffs'

claims and allegations are foreclosed by virtue of the Court's earlier judgment of dismissal in *Grobow I*. From the briefs it is apparent that the parties now dispute the precise effect of this Court's November 25, 1988 decision and order vacating that judgment of dismissal and granting the plaintiffs leave to file a second amended complaint. *Grobow v. Perot*, Opinions of November 25, 1988 and January 11, 1989, *supra*. The defendants argue that the Court must first decide whether there exists newly discovered evidence that would justify reopening that final judgment. The defendants' argument rests upon their apparent (and incorrect) belief that the Court has not decided that question.

In response, the plaintiffs argue that the Court has decided that their newly discovered evidence merited the filing of a second amended complaint. Therefore, plaintiffs urge, the only issue to be addressed on this motion is whether the particularized allegations of the second amended complaint will suffice to excuse a demand. Plaintiffs contend that the Court, in addressing that issue, should disregard both its earlier dismissal rulings, and the previously adjudicated deficiencies of the first amended complaint, and that it should treat the entire second amended complaint as a *tabula rasa*.

Having considered both conflicting positions, I conclude that neither is entirely correct.

As stated, the Court, in its November 25, 1988 letter Opinion, did grant the plaintiffs' motion for relief from the *Grobow I* judgment of dismissal. That ruling was based upon newly discovered evidence, namely, the depositions of two GM directors taken in a companion New York Supreme Court action, and a recently published book about the Perot buyout, *Call Me Roger*. The Court found that the newly discovered evidence was material, and that it formed a sufficient basis for new allegations that had not been made in the earlier, dismissed, complaint.

However, in granting that relief, the Court did not intimate any view as to whether the proposed amended complaint satisfied the demand requirements of Rule 23.1. That question was specifically deferred to this stage. Nor did the Court intend by its ruling to allow the plaintiffs to replead and reargue legal theories and arguments previously advanced, or to plead variants of those theories that could have been, but were not, previously alleged and argued in connection with the earlier Rule 23.1 dismissal motion. Manifestly, the plaintiffs could not have achieved that result if they had filed a new action, because they would have been barred by the doctrine of *res judicata*. *Ezzes v. Ackerman*, Del. Supr., 234 A.2d 444, 445-6

(1967); *Maldonado v. Flynn*, Del. Ch., 417 A.2d 378, 383 (1980). No different result should be permitted in these circumstances, where a similar effort is attempted in the same case.

[5] In reaching that conclusion, I am fully mindful that the plaintiffs were allowed to file their second amended complaint pursuant to Rule 15, by reason of a grant of relief from the *Grobow I* judgment under Rule 60(b). It is also correct that, as a general matter, where leave to amend a complaint is granted under Rule 15, the original pleadings are disregarded and all later motions are directed to the amended pleading. *See Stein v. Orloff*, Del. Ch., C.A. No. 7276, Hartnett, V.C. (May 30, 1985), *appeal refused*, Del. Supr., 504 A.2d 572 (1986); 6 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1476, at 389-390 (1971); 3 J. Moore, *Moore's Federal Practice*, ¶ 15.08[7] 15-95 to 15-96 (2d ed. 1988). However, the result sought by plaintiffs here—to treat the newly amended complaint as a *tabula rasa* in all respects—was never intended.

[6-8] Under Rule 60(b), this Court's determination of whether or not to grant relief from a final judgment of dismissal was a matter of sound judicial discretion. 7 *Moore's Federal Practice*, ¶ 60.19, at 60-149. The extent of that relief was also a subject of discretion, because Rule 60(b) envisions that post-judgment relief may be granted subject to just conditions. *Id.* at 60-166. Essentially the Court here granted the plaintiffs leave to file a new complaint, subject to the condition that only those claims that were based upon newly discovered evidence—the only rationale for granting Rule 60(b) relief at all—would be cognizable. To allow the plaintiffs to convert their newly amended complaint into a vehicle to reallege and reargue earlier pleaded claims or theories (or to assert theories or claims that could have been, but were not, alleged and argued at that earlier stage), would run counter to that rationale and defeat the very purpose for granting the Rule 60(b) remedy.[6]

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6. It is now clear, but only in retrospect, that the scope of the Order granting relief under Rule 60(b) should have been clarified before briefing on the Rule 23.1 dismissal motion was allowed to go forward. Unfortunately, the "scope" issue was not previously raised in a manner that alerted the Court to this precise problem. As a result, briefing on these Rule 23.1 motions was completed before this threshold dispute—involving the scope of the very matters properly in issue—crystallized. I mention this not to berate counsel, but to emphasize the need to bring to the Court's attention the procedural significance of distinctions, such as that between "opening" and "vacating" a judgment, that counsel argued in connection with the appropriate form of order implementing the Rule 60(b) determination. *See Grobow v. Perot*, Del. Ch., C.A. No. 8759, Jacobs, V.C. (Jan. 11, 1989).

To summarize, only those claims that based upon newly discovered evidence are cognizable, and will be addressed, in these proceedings.

IV. The Sufficiency of the Plaintiffs' Claims

The plaintiffs advance four principal claims in their second amended complaint. Only two of these are derived from newly discovered evidence, namely: (1) the plaintiffs' claim that GM's outside directors lacked independence because the inside directors manipulated and misled them about the true reasons for the buyout and the status of the disputes between GM and Perot, and (2) the claim that the outside directors approved the buyout transaction in a grossly negligent manner, because they were ill-informed and misinformed about the status of the disputes between GM and Perot and of the purposes and consequences of the buyout. The plaintiffs' other claims, which are treated in Section IV A below, are not based upon newly discovered evidence, and, therefore, may not be considered.

A. Claims Not Based Upon Newly Discovered Evidence

1. Entrenchment

The plaintiffs allege that the GM Board, in approving the buyout, were motivated by entrenchment considerations. The plaintiffs made similar allegations in their first amended complaint, but argue, nonetheless, that any adjudicated deficiencies in their earlier entrenchment claim are now cured, because their present complaint now alleges that Perot forcibly and publicly advocated that the GM Board should be replaced. Those claims, however, are not derived from new evidence and could have been alleged in the earlier complaint. For that reason, the plaintiffs' entrenchment claim falls outside the scope of the Rule 60(b) decision and Order, and may not be relitigated here.[7]

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7. That allegation, even if it could be reconsidered, would not create a reasonable doubt as to the Board's motives. Perot owned only .8% of GM stock. It is not alleged that Perot took or threatened to take any concrete action to unseat the Board, such as commencing a tender offer or a proxy or consent solicitation. The plaintiffs have not, therefore, adequately alleged that Perot posed a genuine

2. Egregious Waste

The plaintiffs also seek to revive their earlier claim that the Perot buyout was a waste of GM's assets so egregious that "no person of ordinary, sound business judgment would deem [the consideration GM received] worth that which the corporation paid." *Grobow I*, 526 A.2d at 928 (quoting *Stein v. Orloff*, Del. Ch., C.A. No. 7276, Hartnett, V.C., slip op. at 4 (May 30, 1985) (citing *Saxe v. Brady*, Del. Ch., 184 A.2d 602 (1962), *appeal denied*, Del. Supr., 504 A.2d 572 (1986)). The second amended complaint elaborates in considerable detail the plaintiffs' contention that the contingent notes and Perot's various covenants had no significant value. (*See* Compl. ¶ 59). Those allegations, it is urged, adequately support the plaintiffs' conclusion that the consideration attributed to the contingent notes included an enormous premium so manifestly wasteful that it could not have been the product of a sound business judgment. On that basis, the second amended complaint is claimed sufficient to excuse the requirement of a demand.

The difficulty with this contention is that the first amended complaint contained similar allegations, which were found insufficient by this Court, and later the Supreme Court, in *Grobow I*. This newest variant of that claim is not based upon new evidence. Essentially, it is an improvement upon its predecessor, cast in the form of a better crafted, more finely-honed argument and analysis of the terms of the buyout and the contingent notes. Because those embellished allegations could have been, but were not, made in the earlier pleading, the "egregious waste" claim falls outside the scope of those claims that are permissible under this Court's Rule 60(b) Order.

I next turn to those claims that are cognizable because they do derive from newly discovered evidence.

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threat to the Board; indeed, their present complaint alleges the contrary:

> Even Perot does not have the financial resources to purchase a controlling interest in GM. That would cost more than $615 billion. The threat of a Perot proxy fight for control of GM is equally an illusion, Perot has never attempted or publicly threatened to gain control of GM by purchasing a controlling interest or waging a proxy contest. The opposite is true. Perot's public statements about GM make it clear that while he delights in criticizing GM and its management, the last thing he has expressed any interest in doing is controlling GM.

Compl. ¶ 59(d)(iv).

B. Claims Based Upon New Evidence

1. Lack of Director Independence

The plaintiffs allege in their second amended complaint that the GM Board was not independent. Specifically, they aver that the inside (management) directors "dominated" and "controlled" the outside directors (who comprised the majority of the Board) by deceiving them about the status of various matters, such as the ongoing GM/EDS disputes, certain audits, pricing issues, executive compensation, and the true purpose for the Perot buyout.

Both at the time the buyout was approved and when these actions were filed, the GM Board (Perot excluded) consisted of 21 directors, of which 7 were "inside," and 14 were "outside," directors. It follows that so long as at least 11 of the 21 directors were independent, the GM Board would have been capable of impartially considering a demand.[8] The question is whether the particularized facts alleged in the second amended complaint create a reasonable doubt as to the independence of 11 of those directors. I conclude, for the following reasons, that they do not.

The plaintiffs' position labors under several infirmities. First, they cite no authority to support the validity of their legal theory, which appears to be that directors who are otherwise independent become "dominated" and "controlled" as a result of being deceived. That theory, even if conceptually valid, is of no legal significance here, because the pleaded facts would adversely implicate only 2 of GM's 14 outside directors. That is, even if the plaintiffs' theory were accepted, at most only 9 directors would arguably have lacked independence. The 12 remaining directors, *i.e.*, the majority of GM's Board, would have remained independent.

Second, the alleged deception concerns facts that, in this context, were not material. The plaintiffs allege that the Board was deceived as to (i) the extent to which the Perot-GM dispute over EDS's future had been resolved, and (ii) the extent to which the GM-EDS disputes arose because of GM's failure to honor its promise to treat EDS as an independent, autonomous subsidiary. The complaint implies that if the Board had known this information, it would have acted dif-

8. For this purpose Perot is excluded, because he did not attend the December 1, 1986 board meeting at which the buyout was approved, and he immediately thereafter resigned from the Board.

ferently. However, the plaintiffs also, and inconsistently, allege that the GM Board knew that by approving the buyout, it would be ending the dispute with Perot and any independence that EDS had enjoyed. (Compl. ¶¶ 53-55). Because the board was exercising its business judgment (to end the disputes) in a manner that it presumably believed would best serve the interests of GM, whether GM was to blame for those disputes with EDS was a question of no discernible importance. At least the plaintiffs have not shown how or why the assignment of blame would have been material to the Board in deciding whether or not to approve the buyout.

For these reasons, the second amended complaint is not sufficient to create a reasonable doubt as to whether a majority of the directors were independent, or were misled as to a material fact, at the time they approved the buyout.

2. Whether The Directors Approved The Buyout In A Grossly Negligent Manner

Lastly, the plaintiffs allege that GM's "outside" directors, in approving the buyout, failed to exercise the requisite degree of care. That argument appears to rest, in large measure, upon the same factual basis as plaintiffs' contention that the Board, by being deceived as to certain matters, became disabled from exercising independent judgment. But the plaintiffs also allege that Board was grossly negligent because it took no affirmative steps to investigate the proposed buyout before approving it, and because it acted hastily and without the benefit of Perot's input. The plaintiffs conclude that these pleaded facts are sufficiently specific to raise reasonable doubts as to whether the outside directors approved the buyout in a grossly negligent manner.

[9-10] The "second prong" of the *Aronson* analysis focuses upon whether the complaint creates a reasonable doubt that the challenged transaction, viewed substantively, was the product of a valid exercise of directorial business judgment. In making that inquiry, the Court will not assume that the transaction was a wrong to the corporation requiring corrective measures. Rather, it will presume that the Board properly exercised its business judgment, *i.e.*, that the Board acted on an informed basis, with no conflicting self-interest and in the good faith and honest belief that its actions would serve the corporation's best interests. *See Grobow I*, 539 A.2d at 187, 189; *Aronson*, 473 A.2d at 812. Where, as here, the transaction is approved by a majority of independent, disinterested directors, that fact operates to bolster that presumption. *Grobow I*, 539 A.2d at 190.

Having reviewed the pertinent allegations of the second amended complaint (*see* Compl. ¶¶ 1, 21-24, 26-30, 37-38, 47, 61-66), I find them insufficiently particularized to draw into reasonable question the informed nature of the decision of the majority of GM's directors. As previously found, no specific facts are alleged that create a reasonable doubt that the misinformation allegedly given to the directors was material. Moreover, the allegations that the outside directors were ill-informed and misinformed are, by and large conclusory. At best they adversely implicate only two directors (Messrs. Wyman and Evans),[9] which would have disabled only 9 out of the 21 GM directors. Accordingly, the plaintiffs have failed to establish a reasonable doubt that at least 11 GM directors failed to exercise due care in approving the buyout transaction.

Finally, the plaintiffs allege that the Board acted in undue haste and wrongly refused to allow Perot to attend the meeting and express his views during their deliberations on the buyout.[10] Those conclusory allegations show, at most, that Messrs. Wyman and Evans were confused and that the plaintiffs disagree with the business judgment of the remaining GM Board members. That will not suffice to draw into reasonable question the integrity of the GM Board's decision-making process.

Similarly deficient is the plaintiffs' contention that Perot should have been allowed to attend the December 1 Board meeting (Compl. ¶ 70). Plaintiffs allege no particularized facts to support their claim that a 21 member Board, of which 14 members were independent, was disabled from making a valid business judgment without first hearing the views of Mr. Perot—the one director clearly interested in the transaction. Nor do they cite authority for their suggestion that Perot's presence was legally required—a proposition that, in

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9. While the deposition testimony of directors Wyman and Evans provides some equivocal support to plaintiffs' argument that those two directors acted without fully informing themselves, it is not sufficient to create a reasonable doubt as to whether the other members of the Special Committee, or the full Board, were sufficiently informed at the time the buyout was recommended and approved.

10. Some of the allegations underlying this claim are not based on new evidence and could have been made in the first amended complaint. For example, the allegations that the Special Committee had only one day to consider the buyout, that some directors did not know the terms of the buyout until the day they approved it, and that the full Board did not consult outside advisors (*see* Compl. ¶¶ 44, 68-69), could have been included in the first amended complaint that was the subject of the earlier *Grobow I* dismissal proceedings.

these circumstances, must be rejected. *Levine v. Smith*, Del. Ch., Civil Action No. 8833, Jacobs, V.C. (November 27, 1989).

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Because the allegations of the second amended complaint are insufficient to establish the futility of a demand, the defendants' motion to dismiss that complaint under Rule 23.1 is granted.[11] IT IS SO ORDERED.

HIGHLAND CAPITAL, INC. v. LONGVIEW FIBRE CO.

No. 11,321

Court of Chancery of the State of Delaware, New Castle

January 22, 1990

Plaintiff, Highland Capital, Inc., sought a preliminary injunction against the holding of the annual stockholders' meeting of defendant, Longview Fibre Company. At the scheduled meeting, defendant shareholders were to vote on a resolution authorizing a merger of their company into a wholly owned subsidiary incorporated under the laws of Washington. Plaintiff, in support of its petition, presented two arguments: (1) the real motive of the merger, which was not reflected in the proxy materials, was to entrench the then existing board; and (2) the board's adoption of a ninety-day notice requirement for any stockholder resolution sought to be presented before the annual meeting was to delay the meeting since it would preclude shareholders from mounting a proxy contest.

The court of chancery, per Chancellor Allen, in denying the preliminary injunction, held that the plaintiff did not have a reasonable likelihood of success on its claim. The court held that the organization of the proxy statement was sufficient to inform the shareholders of all material information. Regarding the ninety-day notice requirement, the court found the potential effects of the pro-

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11. As a consequence it becomes unnecessary to address defendant Perot's separate motion to dismiss.

vision too speculative and unable to support the relief requested.

1. Injunction ⟸ 138.21

To issue a preliminary injunction, the court must be persuaded that plaintiff has a reasonable likelihood of ultimate success on its claim and that unless an injunction is issued, it will suffer injury that cannot be remedied adequately by an award of damages or the shaping of later equitable relief. Moreover, the court must, in every case, balance the equities. That is, it must consider the risks to defendant, other interested persons, or the public generally that issuance of the remedy might occasion.

2. Corporations ⟸ 310(1), 316(4)

Whenever the board of directors puts a matter before the shareholders for their consideration and action, the board has a duty to supply to the shareholders the material information within the company's control that is reasonably necessary for an informed decision to be made.

3. Securities Regulation ⟸ 49.19, 49.21

A showing of "materiality" requires a showing of a substantial likelihood that, under all of the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

4. Corporations ⟸ 310(1), 316(4)

A proxy statement that is short and relatively uncomplicated and that fairly and completely discloses the antitakeover effect a merger is likely to have satisfied the materiality requirements necessary to fulfill the directors' obligation of candor.

William Prickett, Esquire, and Michael Hanrahan, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; and

Elliot B. Newman, Esquire, T. Barry Kingham, Esquire, Janice W. Neale, Esquire, and Janine L. Pollack, Esquire, of Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, for plaintiff.

Lewis S. Black, Jr., Esquire, Lawrence A. Hamermesh, Esquire, and Frederick H. Alexander, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and William F. Cronin, Esquire, of Bogle & Gates, Seattle, Washington, for defendants.

ALLEN, *Chancellor*

Highland Capital, Inc. seeks a preliminary injunction against the holding of the annual meeting of stockholders of Longview Fibre Company. The meeting is scheduled for January 23, 1990. At that meeting, the shareholders of Longview Fibre will be asked to vote upon a resolution authorizing a merger of the Company with and into a wholly owned subsidiary incorporated under the laws of the State of Washington. It is claimed that that subsidiary has a number of antitakeover devices built into its charter and that the real purpose of the merger and the change in domicile it will effect is to entrench the existing board in office in pursuit of self-interested motives.

This purpose, it is said, is not disclosed in the Company's proxy solicitation materials, nor is the antitakeover effect of the merger appropriately called to the attention of the Company's shareholders. Thus, the vote to be taken will be invalid, plaintiff says, and should be enjoined now.

While non-disclosure or misleading disclosure is plaintiff's primary theory of recovery, plaintiff offers another theory as well. Immediately following the 1989 annual meeting, the board of Longview Fibre amended the corporation's bylaws to require 90 days' notice of any stockholder resolution sought to be brought before the annual meeting. Plaintiff claims that that bylaw precludes any shareholder from mounting a proxy context to unseat the current board and that as a consequence the scheduled meeting should be delayed.

For purposes of this motion, I assume the relevant facts to be as follows. At a meeting of the Longview Fibre board of directors on September 5, 1989, the board, which had earlier put in place the 90-day notice provision and a shareholder rights plan, considered the advisability of recommending that the Company's certificate of incorporation be amended to create a board with staggered terms and to preclude removal of directors except for cause. Thereafter, following receipt of advice from a proxy solicitation firm that such proposals were likely to be approved by the shareholders but perhaps

only by a narrow margin, the board at a November 13 meeting resolved to recommend that the Company engage in the transaction that is now scheduled to be before the annual meeting. The Washington State subsidiary has a staggered board and a removal only for cause provision in its charter. Thus, the merger may be seen as an alternative technique to achieve the ends considered at the November 13 board meeting.

A brief press release was issued following the November 13 meeting. It did not specify the terms of the subsidiary's charter and thus did not alert shareholders to the antitakeover effects that the merger would have.

On December 13, the board fixed the date of the annual meeting for January 23, 1990 and mailed notice of that meeting and a proxy statement to shareholders of record.

This suit was filed on January 12, 1990. At about the same time, plaintiff submitted a draft proxy statement to the Securities Exchange Commission, with the hope, it says, of conducting a proxy fight on the issue of the merger. Plaintiff has, in the weeks since receiving the Company's proxy statement, been purchasing options on the Company's stock.

* * * *

[1] The test for the granting of a preliminary injunction is well-developed. To issue such a remedy, the court must be persuaded that plaintiff has a reasonable likelihood of ultimate success on its claim and that unless an injunction is issued, it will suffer injury that cannot be remedied adequately by an award of damages or the shaping of later equitable relief. Moreover, the court must, in every case, balance the equities. That is, it must consider the risks to defendant, other interested persons, or the public generally that issuance of the remedy might occasion. *Ivanhoe Partners v. Newmont Mining*, Del. Supr., 535 A.2d 1334 (1987); *Revlon v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173 (1986).

* * * *

I turn first to the principal claim—the assertion that the purpose and effect of the merger is not appropriately disclosed in the Company's proxy statement.

[2-3] Analysis of this point begins with recognition that whenever the board of directors puts a matter before the shareholders for their consideration and action, the board has a duty to supply to the shareholders the material information within the company's control that is reasonably necessary for an informed decision to be made. *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 890 (1985). The

test of materiality under our law is the same as that employed by the Supreme Court of the United States under the federal securities laws. A showing of "materiality" requires:

> A showing of a *substantial likelihood* that, under all of the circumstances, the omitted fact *would* have assumed *actual significance* in the deliberations of a reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact *would have been viewed* by the reasonable investor *as having significantly altered the "total mix of information available."*

Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929, 944-45 (1985), *quoting TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1978) (emphasis supplied). *See also Anderson Clayton Shareholders' Litigation*, Del. Ch., 519 A.2d 680, 690 (1986); *Weinberger v. Rio Grande Industries, Inc.*, Del. Ch., 519 A.2d 116 (1986).

Plaintiff's argument in this instance is unusual for it admits that each of the specific effects of the merger that it claims contributes to the undisclosed entrenchment effect is in fact disclosed in the Company's proxy statement. The principal flaw in the proxy statement according to plaintiff, however, resides in its organization. That is, it is claimed that the proxy statement fails to make clear to shareholders the cumulative antitakeover effect that accomplishment of the merger will have. These effects are "scattered" and "buried." Nowhere does the proxy statement collect all of them in one place as would be done, it is said, if the intention had truly been to inform the shareholders. Rather than place the antitakeover effects at a prominent place in the very front of the proxy statement, the antitakeover effect is not mentioned until page 8 of the proxy statement.

Plaintiff characterizes the proxy statement's remarks about antitakeover effects as scattered through the proxy statement and as inconsistent with a clear statement of the effects of the merger. *Compare* SEC Release No. 15,230 [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,748 (Oct. 13, 1978).

The failure to call the effects of the merger to the stockholders' attention in an effective way is, it is asserted, exacerbated by the misleading quality of the proxy statement's incomplete and misleading statement of the "Principal Reasons for the Proposed Change in Domicile" (p. 6), which is as follows:

> Through the Change in Domicile, the Company intends to further its identification with the state in which

> the Company's business originated, its principal business is conducted and over 64% of its employees are located. Since the Company's incorporation in the State of Delaware in 1926, the laws of the State of Washington have developed into a system of comprehensive and flexible corporate laws that are currently more responsive to the needs of businesses in the state. For a more complete description, see "Certain Differences in Corporate Laws" below.
>
> After considering the advantages and disadvantages of the proposed Change in Domicile, the Board of Directors concluded that the benefits of moving to Washington outweighed the benefits and detriments of remaining in Delaware, including the continuing expense of Delaware's annual franchise tax (the Company paid $56,000 in franchise taxes in fiscal year 1988, whereas the "annual renewal fee" for all Washington corporations is $50.00). In light of these facts, the Board of Directors believes it is in the best interests of the Company and its stockholders to change its domicile from Delaware to Washington.

This statement, it is charged, is incomplete at best and more accurately, is false. It is claimed that the franchise tax is a *de minimis* expense and could not constitute a serious reason for proposing the merger, and that identification with the State of Washington (insofar as such identification may arise from local incorporation) is also a pretext for the entrenchment effect which really motivates this proposal. Similarly, it cannot be shown that Washington law, even as now more fully developed, is "currently more responsive to the needs of businesses in the state." Thus, shareholders are not told, it is claimed, why management in fact proposes this transaction.

To this, defendants answer that all of the significant points concerning an antitakeover effect are included in the proxy statement. In bold face on page 8, the proxy statement reads:

> The Longfibre [the Washington subsidiary] Articles of Incorporation and Bylaws may have significant effects on the ability of stockholders of the Company to change the composition of the incumbent Board of Directors and to benefit from certain transactions which are opposed by the incumbent Board. Accordingly, stockholders are urged to read carefully the following sections of this Proxy Statement, which describe the principal revisions and their purposes and effects, and Exhibit B hereto, which sets forth the full

text of the Articles of Incorporation, before voting on this proposal.

Further at pages 9-11 it is stated:

> The authorized but unissued shares of Common Stock or preferred stock could be used by the incumbent Board of Directors to make a change in control of the Company more difficult. Under certain circumstances, such shares could be used to frustrate persons seeking to effect a takeover or otherwise gain control of the Company. For example, it may be possible to privately place shares with purchasers who might assist the Board in opposing a hostile takeover bid.
>
> * * * *
>
> The classification of directors will have the effect of making it more difficult to change the composition of the Board of Directors. At least two stockholder meetings, instead of one, will be required to effect a change in the majority control of the Board and at least three stockholder meetings will be required to effect a change in the entire Board of Directors, except in the event of vacancies resulting from resignation, removal for cause or other reasons (in which case the remaining directors will fill the vacancies so created—see "Removal of Directors; Filling Vacancies on the Board of Directors" below).
>
> * * * *
>
> The provisions of the Longfibre Articles of Incorporation and Bylaws relating to the removal of directors and the filling of vacancies on the Board will preclude a third party from removing incumbent directors without cause and simultaneously gaining control of the Board by filling the vacancies created by removal with its own nominees. These provisions will also reduce the power of stockholders generally, even those with a majority interest in the Company, to remove incumbent directors and to fill vacancies on the Board without the support of the incumbent directors.
>
> * * * *
>
> The provisions of the Longfibre Articles of Incorporation and Bylaws discussed above are designed to make it more difficult and time-consuming to change majority control of the Board and thus to reduce the vulnerability of the Company to an unsolicited proposal for a takeover

> or an unsolicited proposal for the restructuring or sale of all or part of the Company. As more fully described below, the Board believes that, as a general rule, such proposals are not in the best interests of the Company and its stockholders.

Defendants further argue that where all the significant antitakeover points are included, the organization of the proxy is irrelevant, as a director should be able to assume a shareholder will read all of the proxy statement.

[4] I need not accept this view as a general proposition in order to conclude as I do in this instance that the proxy statement does fairly and completely disclose the antitakeover effect the merger is likely to have. That is, given the short (17 pages) and relatively uncomplicated nature of this proxy statement, I cannot conclude that the rearrangement of information in the way that plaintiff urges is required would "significantly alter the total mix of information available." This is not to say that organization may not itself be pertinent in some instances in determining whether an obligation of candor has been satisfied. Surely, matters of urgent importance or significance should have a prominent place in a proxy statement and should not be "buried." But even accepting that view, I cannot accept that that is what is occurring here.

Plaintiff cites *Eisenberg v. Chicago Milwaukee Corp.*, Del. Ch., 537 A.2d 1051 (1987) in support of its assertion that a misleading statement of purpose may be material to a shareholder's choice. The court in that case did not focus particularly upon the materiality of the misstatement of purpose, although its discussion of the coercive effect of the disclosure demonstrated its importance. In any case, it hardly needs citation of authority to establish that purpose can be highly material. But, questions of materiality are inherently case-specific or fact-driven. Here, even were I to conclude that the "principal reasons" listed in the proxy statement ought to have included a statement that through the merger the board sought to achieve the antitakeover effects set forth at pages 9-11, which I think is a rather natural inference from reading pages 6 through 15 of the proxy statement, I cannot conclude that such omission is meaningful (that is, material as defined above) in these circumstances.

* * * *

Plaintiff's other theory—that the bylaw requiring 90 days' notice of shareholder originated action is unlawful—may be dealt with briefly. I need not express a view concerning the validity of that

bylaw since its existence is immaterial to plaintiff's current posture. That is, if one were to assume that that bylaw had not been adopted, plaintiff would as a practical matter be in an identical situation now. It received notice of the proposed merger in a timely way in December .

An attempt to oust the incumbent board might (absent the 90 day bylaw) be a response that one might consider. Assuming, however, that one could marshal enough votes to oust the board, such a campaign to oust the board would be unnecessary, because plaintiff could instead launch a contest to defeat the proposal. That contest would be unaffected by the 90 day bylaw. Indeed, the principal path for stockholders who oppose a plan such as that proposed by defendants is to vote against it. Nevertheless, plaintiff has not been able to move quickly enough to conduct a proxy contest to defeat the proposal. How then can the existence of the 90 day notice provision which affects matters such as proxy contests to replace a board be thought material to the vote on the proposed merger? In my opinion, it cannot. Such matters as might be affected by the 90 day bylaw provision appear at this time to be entirely speculative and unable to support the relief requested.

For these reasons, the application will be denied. It is so ordered.

LEVINE v. SMITH

No. 8833

Court of Chancery of the State of Delaware, New Castle

November 27, 1989

A derivative action was brought against General Motors Corporation (GM), its board of directors, and H. Ross Perot (Perot) to challenge GM's repurchase of GM Class E stock and contingent notes owned by Perot and others. Plaintiff formally demanded that the GM Board rescind the repurchase, such demand being unanimously rejected by the GM Board. The plaintiff, in an amended complaint, alleged that GM directors breached their fiduciary duties of care and loyalty to the corporation and its shareholders in ap-

proving the repurchase. In response, GM defendants moved to dismiss the amended complaint under Delaware Chancery Court Rule 23.1, arguing that the complaint failed to allege particularized facts sufficient to create a reasonable doubt that the GM Board wrongfully rejected the plaintiff's pre-suit demand. Defendant Perot also filed a separate motion to dismiss the amended complaint pursuant to Delaware Chancery Court Rules 9(b), 12(b)(6), and 23.1.

The court of chancery, per Vice-Chancellor Jacobs, held that GM defendants' motion to dismiss under Chancery Court Rule 23.1 must be granted because the plaintiff's amended complaint did not allege, in a legally sufficient manner, that the board's rejection of plaintiff's demand was wrongful. The court concluded that this holding made it unnecessary to address Perot's separate motion to dismiss.

1. Corporations ⟹ 203, 211(3), 211(6)

Pleading ⟹ 34(2)

Delaware Chancery Court Rule 23.1 mandates that in a derivative action the complainant shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort. DEL. CH. CT. R. 23.1.

2. Corporations ⟹ 203, 310(1)

Pleading ⟹ 34(2)

The purpose of Delaware Chancery Court Rule 23.1 is to require shareholders to seek redress of their grievances through the corporation's board of directors or, alternatively, to justify their entitlement to act on the corporation's behalf independently of the board. The rule is consistent with, and is designed to effectuate, the fundamental principle that the board of directors normally controls the corporation's actions and policies. DEL. CH. CT. R. 23.1.

3. Corporations ⟹ 202, 310(1)

Whether or not a corporation should bring a lawsuit is a question normally addressed to the directors' business judgment, for which

reason shareholders normally lack the legal managerial power to bring a suit to enforce a corporate claim.

4. Corporations ⟸ 202, 207

The derivative action device is an exception to the rule that directors usually decide whether or not a corporation should bring a lawsuit and may be invoked only in those cases where the board is legally disabled from acting on the corporation's behalf due to circumstances that would deprive its decision of the business judgment rule's protection.

5. Corporations ⟸ 202

In a "demand refused" procedural setting, the plaintiff will be permitted to proceed with his derivative suit if the court is satisfied that the board's rejection of the demand was wrongful.

6. Corporations ⟸ 206(4), 211(2)

The determination of whether the board's rejection of the demand was wrongful is based upon the allegations of the complaint itself.

7. Corporations ⟸ 206(1), 206(4), 310(1)

In both "demand futility" and "demand refused" cases, the judicial inquiry is the same, *viz.*, to determine whether the board is legally disabled from making a decision that would be protected under the business judgment rule.

8. Corporations ⟸ 211(1), 310(1)

Unlike its Delaware Chancery Court Rule 12(b)(6) counterpart, a motion to dismiss under Rule 23.1 is not intended to test the legal sufficiency of the plaintiff's substantive claim. Rather, its purpose is to determine who is entitled, as between the corporation and its shareholders, to assert the plaintiff's underlying substantive claim on the corporation's behalf. That latter determination hinges upon

whether there is reasonable doubt that the challenged board action is protected by the business judgment rule. Such reasonable doubt must be based upon particularized facts alleged in the complaint. DEL. CH. CT. R. 12(b)(6), 23.1.

9. Corporations ⟸ 202, 206(1), 310(1)

In a "demand futility" ("demand required") case, the inquiry focuses upon whether the business judgment rule protects the directors' initial decision to approve the challenged transaction.

10. Corporations ⟸ 206(4), 310(1)

In a "demand refused" case, the focus is upon whether the business judgment rule protects the board's later decision to reject a shareholder demand.

11. Corporations ⟸ 211(5)

Pleading ⟸ 34(2)

In order to satisfy the Delaware Chancery Court Rule 23.1, the plaintiff's claim that directors were motivated by self interest must be supported by particularized pleaded facts creating a reasonable doubt that directors were tainted by financial self interest or were motivated by entrenchment considerations. DEL. CH. CT. R. 23.1.

12. Corporations ⟸ 307

A board of directors is not legally obligated to permit a demanding shareholder to make an oral presentation at a meeting. Corporate directors normally have only limited available time to deliberate, and a determination of what matters will (and will not) be considered must necessarily fall within the board's discretion.

13. Pretrial Procedure ⟸ 679

A motion to dismiss under Delaware Chancery Court Rule 23.1 must be overcome with particularized facts.

John M. Bader, Esquire, of Law Offices of John M. Bader, Wilmington, Delaware; Curtis V. Trinko, Esquire, and Kevin J. Yourman, Esquire, of Law Offices of Curtis V. Trinko, New York, New York, of counsel; James F. Koehler, Esquire, and John F. Hill, Esquire, of Gallagher, Sharp, Fulton & Norman, Cleveland, Ohio, of counsel, for plaintiff.

William O. LaMotte, III, Esquire, and Thomas Reed Hunt, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Stephen C. Neal, Esquire, Robert J. Kopecky, Esquire, and Helen E. Witt, Esquire, of Kirkland & Ellis, Chicago, Illinois; Michael J. Basford, Esquire, and Louis H. Lindeman, Jr., Esquire, of General Motors Corporation, Detroit, Michigan, of counsel, for defendant General Motors Corporation.

E. Norman Veasey, Esquire, and Thomas A. Beck, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Dennis J. Block, Esquire, Irwin H. Warren, Esquire, Stephen A. Radin, Esquire, and Timothy E. Hoeffner, Esquire, of Weil, Gotshal & Manger, New York, New York, for General Motors Corporation director defendants, Anne L. Armstrong, Catharine B. Cleary, James H. Evans, Walter A. Fallon, Charles T. Fisher, III, Marvin L. Goldberger, John J. Horan, Howard H. Kehrl, Thomas A. Murphy, Edmund T. Pratt, Jr., James D. Robinson, III, John G. Smale, Leon H. Sullivan, Dennis Weatherstone, and Thomas H. Wyman.

Grover C. Brown, Esquire, and Barbara MacDonald, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware; Roy L. Reardon, Esquire, and Joseph F. Tringali, Esquire, of Simpson, Thatcher & Bartlett, New York, New York, for General Motors Corporation director defendants, Donald J. Atwood, F. James McDonald, Lloyd E. Ruess, F. Alan Smith, Roger B. Smith, and Robert C. Stempel.

Bruce M. Stargatt, Esquire, and David C. McBride, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; Thomas D. Barr, Esquire, Evan R. Chesler, Esquire, and Christopher M. Mason, Esquire, of Cravath, Swaine & Moore, New York, New York, of counsel; Thomas W. Luce, III, Esquire, and M. David Bryant, Jr., Esquire, of Hughes & Luce, Dallas, Texas, of counsel, for defendant H. Ross Perot.

JACOBS, *Vice-Chancellor*

The plaintiff, a shareholder of General Motors Corporation ("GM"), brings this derivative action against GM and its Board of Directors (collectively, "GM defendants"), and H. Ross Perot ("Perot"), to challenge GM's repurchase, on December 1, 1986, of GM Class E stock and contingent notes owned by Perot and others. The plaintiff formally demanded, on December 11, 1986, that the GM Board rescind the repurchase. On January 5, 1987, the GM Board unanimously rejected that demand. On February 13, 1987, the plaintiff filed this derivative action, alleging that GM's directors, in approving the repurchase, breached their fiduciary duties of care and loyalty to the corporation and its shareholders.

On April 20, 1987, the GM defendants moved to dismiss the complaint, and also moved for a protective order staying discovery pending the outcome of their dismissal motion. On December 22, 1987, the Court granted the GM defendants' motion for a protective order and stayed all discovery. *Levine v. Smith*, Del. Ch., C.A. No. 8833, Jacobs, V.C. (December 22, 1987).

On January 26, 1988, after briefing had already gone forward, the plaintiff filed an amended complaint. In response, the GM defendants moved to dismiss the amended complaint under Chancery Court Rule 23.1, arguing that that complaint fails to allege particularized facts sufficient to create a reasonable doubt that the GM board wrongfully rejected the plaintiff's pre-suit demand. Defendant Perot also filed a separate motion to dismiss the amended complaint pursuant to Chancery Court Rules 9(b), 12(b)(6), and 23.1. Both motions were argued on February 1, 1988. This is the decision of the Court on those motions.

I. The Facts

The pertinent facts are as alleged in the amended complaint. Because the facts are largely as described in the earlier opinions of this Court and the Delaware Supreme Court in *Grobow v. Perot*, Del. Ch., 526 A.2d 914 (1987), *aff'd*, Del. Supr., 539 A.2d 180 (1988), they are given brief treatment here, except where necessary to highlight the differences between the present amended complaint and the complaint adjudicated in *Grobow*.

During the fall of 1984, GM and Electronic Data Systems ("EDS") consummated an Agreement and Plan of Merger in which

EDS became a wholly owned subsidiary of GM. (Am. Compl. ¶¶ 12-13). In that transaction, defendant Perot (who was EDS's Chairman) and defendants Morton H. Meyerson, Thomas Walter, Jr., and William K. Gayden (who were directors and officers of EDS) exchanged their EDS stock for newly-created GM Class E stock, plus certain contingent notes maturing in 1991. Perot remained EDS's Chairman and joined GM's Board of Directors (Am. Compl. 18-19), and the Class E Stock that he received in the merger made Perot GM's single largest shareholder.

Despite the merger, EDS retained substantial autonomy, which preserved EDS's profitability and competitive force. That autonomy also minimized GM's potential conflict that existed by virtue of its dual status as EDS's parent corporation and as its largest customer. (Am. Compl. ¶¶ 20-29).

The GM-EDS merger was initially successful in many respects. EDS provided GM with a broad range of data processing and telecommunication systems. For its part, GM provided EDS with approximately 75 percent of its total revenues, and GM's suppliers accounted for a large portion of EDS's other customers. (Am. Compl. ¶ 30). However, a conflict soon developed between the two companies which ended their amicable relationship. The companies' managements disputed over the pricing of EDS's services to GM, over certain long term contracts between EDS and GM, and over executive compensation, auditing, and management style. (Am. Compl. ¶ 31). Perot became increasingly and openly critical of GM's operations, business, and management (Am. Compl. ¶¶ 32-34). In May of 1986, Perot wrote to Roger B. Smith, GM's Board Chairman, proposing several options for settling the differences between GM and himself. Among these was the suggestion that GM buy him out. (Am. Compl. ¶ 35). Perot persisted in his criticisms of GM, and over the ensuing months, those criticisms became more pointed and received wide media attention. (Am. Compl. ¶¶ 37-41).

After Perot began to voice his criticisms publicly, GM negotiated to sell EDS to American Telephone and Telegraph. After those negotiations broke down in November of 1986, Perot took serious steps to resell his interest to GM (Am. Compl. ¶¶ 42-43). By November 30, 1986, Perot and GM had reached agreement on a buyout,[1] and the following day (December 1, 1986), GM's entire

1. The original complaint alleged that a Special Review Committee of three GM directors, chaired by GM Audit Committee Chairman defendant James H. Evans, had approved the buy-back proposal.

Board, a majority of whom were independent (Am. Compl. ¶¶ 5-6), approved the buyout transaction. (Am. Compl. ¶ 47).

Under the terms of the repurchase agreement, GM would repurchase approximately 12 million shares of its Class E stock, plus all of the contingent notes, held by Perot and three of his associates, for $61.90 per share. That represented a total cost of $742.8 million to GM. (Am. Compl. ¶¶ 47-48). The December 1, 1986 repurchase agreement also provided that: (i) for three years, Perot would not start a business that would compete with EDS; (ii) for 18 months Perot would not recruit EDS executives; (iii) for five years Perot would not acquire any GM stock or engage in a proxy contest against GM (Am. Compl. ¶ 51); (iv) Perot would (and did) resign from the GM Board and as EDS's Chairman, and Perot's three associates would (and did) resign from their executive positions with EDS (Am. Compl. ¶¶ 51-52); and (v) Perot would not criticize GM publicly, and would pay GM up to $7.5 million if he were found to have violated that covenant. (Am. Compl. ¶ 51).

The complaint alleges that the buyout agreement, and Perot's concomitant resignation from his positions at EDS and GM, occurred shortly before an anticipated major confrontation between Perot and the other GM directors over end-of-the-year senior management bonuses. (Am. Compl. ¶ 58). Shortly after the repurchase was consummated, Perot offered to hold in escrow, until December 15, 1986, the moneys he had received in exchange for his GM securities. That offer was made to give GM's directors time to "review the matter and the events that led to [the] decision." GM's directors, however, decided not to rescind the buyout agreement. (Am. Compl. ¶¶ 47,57).

On December 11, 1986, plaintiff submitted a written demand to the GM Board that it rescind the repurchase agreement.[2] By letter

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2. The full text of the plaintiff's December 11, 1987 demand letter is as follows:

We are writing to you on behalf of our client, Morton Levine, a common shareholder of General Motors Corp. . . . .

On behalf of our client, we hereby demand that GM take prompt action to rescind the buy-back of GM series "E" stock from H. Ross Perot, Morton H. Meyerson, J. Thomas Walter, Jr., and William K. Gaylord.

* * *

The monetary value given to Mr. Perot by the Company is grossly in excess of the present market value of his series "E" stock and notes. Our client regards these payments to Mr. Perot as a waste of corporate assets and a deprivation of corporate opportunity. Moreover, the failure of the Company to offer a similar acquisition package to other GM shareholders was discriminatory, unjust and con-

dated December 15, 1986, GM responded that the plaintiff's demand would be considered at the next regularly scheduled Board meeting on January 5, 1987. On December 16, 1986, plaintiff requested permission to make a formal presentation to the Board. By letter dated January 9, 1987, GM replied that its Board had considered the plaintiff's demand on January 5, 1987, and had unanimously rejected it, on the basis that neither litigation nor rescission of the repurchase would serve the corporation's best interests. In his amended complaint, the plaintiff alleges that the Board's determination to reject his demand was wrongful.

II. The Contentions

The defendants first argue that both the decision in *Grobow v. Perot*, Del. Ch., 526 A.2d 914 (1987), *aff'd*, Del. Supr., 539 A.2d 180 (1988), and the doctrine of res judicata, operate to preclude the plaintiff from contending that the Board wrongfully refused his demand. Alternatively, the defendants argue that in all events this action must be dismissed under Rule 23.1, because the amended complaint does not allege sufficiently particularized facts creating a reasonable doubt as to whether the Board's rejection of the demand

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stitutes a breach of the Board's fiduciary duties to all of the Company's shareholders.

Additionally, the prohibition on Mr. Perot's future ability to criticize GM and its management is nothing more than an attempt by the present Board of Directors to squelch constructive criticism of its business practices and philosophy. Not only is this a disservice to the Company and its shareholders, but it also reeks of improper personal motivations on the part of Mr. Smith and his cohorts, and is contrary to the principles of free speech and expression so precious to our society's and GM's future progress and growth.

Accordingly, Mr. Levine requests that the Board of Directors of GM rescind the contract with Mr. Perot and his associates immediately. Mr. Perot has foreseen the aforesaid injustices and has granted the Company time, until December 15, to reconsider the buy-back agreement, and, in fact, publicly appears to welcome such a rescission. Mr. Levine, on behalf of all of the Company's shareholders, as well as the Company itself, demands that the Board rescind the aforesaid contract. By rescinding the contract, there will be no damage or prejudice suffered by the Company, hundreds of millions of dollars in excessive "payoff" money will be returned to the Company's treasury, and the Company will not lose the comments, suggestions and insights of America's most successful entrepreneur.

We will be happy to meet with you to discuss these matters in greater detail. Moreover, we are certain that you will give significant consideration to the views expressed herein. However, please be advised that if you decide not to rescind the buy-back contract, we will have no alternative other than to seek the resolution of these issues in the appropriate forum. Therefore, unless you rescind the contract on or before December 15, we will be forced to take further action.