28. Corporations ⟹ 181(8)

In determining the scope of inspection, the court may consider the information previously furnished by the corporation, as well as the degree of certainty of the stockholder's intent to buy or sell his shares in the corporation.

29. Corporations ⟹ 181(1), 181(8)

The fact that the demanding shareholder previously made "low end" valuations of the corporation as a potential buyer does not bar its statutory inspection right when the demanding shareholder is in the position of a potential seller.

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David C. McBride, Esquire, and Bruce L. Silverstein, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; and Kenneth B. Forrest, Esquire, Ben M. Germana, Esquire, and Stephen R. Blacklocks, Esquire, of Wachtell, Lipton, Rosen & Katz, New York, New York, of counsel, for defendant.

JACOBS, *Vice-Chancellor*

This is an action brought by Thomas & Betts Corporation ("Thomas & Betts") pursuant to 8 Del. C. § 220, to inspect certain books and records of Leviton Manufacturing Co., Inc. ("Leviton"). Leviton is a Delaware corporation engaged in the business of manufacturing electronics and electrical wiring devices. Thomas & Betts is a New Jersey corporation listed on the New York Stock Exchange and that is also engaged in the electronics business. Thomas & Betts owns a 29% interest in Leviton, represented by a combination of Leviton Class A Common Stock, Class B Common Stock and Preferred Stock.

On February 8, 1995, Thomas & Betts delivered to Leviton a formal demand to inspect a detailed list of Leviton's books and records for four purposes. First, Thomas & Betts seeks a stockholder list to communicate with Leviton stockholders on matters of mutual concern regarding the corporation's "underperformance." Second, Thomas & Betts needs the books and records (a) to value its investment; (b) to

account properly to its own shareholders for its investment in Leviton; and (c) to investigate allegations of waste and mismanagement on the part of Leviton's directors and officers.

By letter dated February 17, 1995, Leviton rejected Thomas & Betts' demand. Following expedited discovery, this action was tried between June 5 through June 15, 1995. This is the decision of the court, following post-trial briefing, on the merits of Thomas & Betts' § 220 inspection claims.

I. FACTS

Both before and after Thomas & Betts became a minority shareholder, Leviton has been a private corporation owned, controlled and operated by the Leviton family. Leviton has two wholly-owned subsidiaries, Pacific Electrorod Company and American Insulated Wire Corporation, that represent about one half of Leviton's consolidated revenue and profits. Leviton's dominant shareholder, President, and Chief Executive Officer is Mr. Harold Leviton, who, together with his wife, currently holds 76.45% of Leviton Class A (voting) stock in a voting trust of which he is the trustee. Before Thomas & Betts entered upon the scene, all of Leviton's stockholders were members of the Leviton family and affiliated persons. Included in that latter category was Thomas Blumberg ("Blumberg"), Leviton's former Group Vice President, who is married to Harold Leviton's niece.

For several years, Thomas & Betts had expressed an interest in acquiring Leviton. Both companies had shared numerous common distributors, and Thomas & Betts had been a fairly significant Leviton customer. During the summer months in 1993, Kevin Dunnigan, Thomas & Betts' Chief Executive Officer ("Dunnigan"), and Clyde Moore, its President and Chief Operating Officer ("Moore"), met with Harold Leviton to explore possible joint venture opportunities as well as a friendly acquisition of Leviton. No agreement was ever reached, however.

In April 1994, without Harold Leviton's knowledge or authorization, Mr. Blumberg approached Thomas & Betts to explore a possible merger between Leviton and Thomas & Betts, or, alternatively, an acquisition by Thomas & Betts of the Blumbergs' Leviton stock. The Blumberg family owned approximately 29.1% of Leviton's outstanding shares, including 23.55% of Leviton's Class A (voting) stock. Over several confidential discussions, the parties negotiated a sale.

Thomas & Betts wanted to purchase the Blumbergs' interest to establish a "beachhead" toward acquiring all of Leviton. Mr. Dunnigan stated as much to the Blumbergs' financial adviser:

> Our (Thomas & Betts') key driving force is ... to acquire the complete company, and not simply to put Leviton in play so as to achieve a onetime financial gain, which would do little for the long term interests of our shareholders versus the substantial risks we would be taking.

During their negotiations, Blumberg furnished Thomas & Betts with confidential financial information regarding Leviton and its operations. Included were the contents of a twelve month management statement containing non-public financial information (including confidential material disclosing the cost of certain Leviton operations); information concerning the value of Leviton's wholly-owned subsidiary, American Insulated Wire Corporation; a confidential strategic planning document; a corporate personnel data base; updated Leviton income figures; and other information of a similar character derived from internal financial statements of Leviton and its subsidiaries.

Based upon that information, Thomas & Betts calculated a price that it was willing to pay for the Blumbergs' 29.1% minority stock interest. Mr. Dunnigan then recommended that the Board authorize the purchase of the Blumbergs' minority interest. At that time Dunnigan sought Board authorization, he knew that Leviton did not pay dividends and that it did not follow generally accepted accounting principles ("GAAP") in consolidating the quarterly financial statements for Leviton and its wholly-owned subsidiaries. He also knew that Harold Leviton had the controlling stock position in Leviton and that the corporation was run as a privately owned family business. Blumberg did not, nor could he, assure Thomas & Betts that Leviton would change any of its management or accounting policies if Thomas & Betts became a Leviton minority shareholder, and Thomas & Betts did not seek such assurances.

As earlier noted, Thomas & Betts considered the purchase of the Blumbergs' 29.1% interest as a first step towards eventually acquiring all of Leviton. Consistent with that objective, on June 27, 1994, Dunnigan wrote a memorandum advising the Thomas & Betts Board of Directors that:

> In general, the terms of the purchase of the initial interest of 29.1% are a $50 million initial payment in stock ... and when we complete the purchase, we would pay [to

Blumberg] up to an additional $20 million depending on the purchase price for the balance of the company.

At a special Board meeting, the directors authorized Mr. Dunnigan to proceed with the Blumberg purchase, as the initial step of an eventual acquisition of Leviton. On July 12, 1994, Thomas & Betts entered into a formal agreement with the Blumbergs to purchase their 29.1% stock interest for $50 million dollars. The purchase agreement provided that the Blumbergs would be paid an additional $20 million if Thomas & Betts acquired control of, or sold its interest in, Leviton. That same day the purchase was consummated.

The following day, Dunnigan informed Harold Leviton that Thomas & Betts had purchased the Blumbergs' minority interest. At a meeting held at Leviton's offices in Long Island, Dunnigan suggested to Mr. Leviton that the two companies explore certain joint business ventures, as well as a friendly acquisition of Leviton by Thomas & Betts. Harold Leviton rebuffed that suggestion, offering instead to buy out Thomas & Betts' stock position in Leviton.

The revelation that the Blumbergs had sold their 29.1% stock interest to Thomas & Betts came as a complete -- and unpleasant -- surprise to Harold Leviton. Angered at Thomas Blumberg's disloyalty, Harold Leviton fired him on the spot, then rehired him, and then days later, fired Blumberg (and his children) again, this time permanently.

On July 15, 1994, Thomas & Betts issued a press release announcing that it had purchased the Blumbergs' interest in Leviton and that it intended to account for that investment on an equity basis.[8] To employ equity accounting, Thomas & Betts would need up-to-date financial information regarding Leviton and its subsidiaries.[1]

From July 1994 through February 1995, Mr. Moore of Thomas & Betts and Ralph DeBiasi, Leviton's Group Vice President of Finance ("DeBiasi"), met several times to discuss the new relationship between the two companies. Harold Leviton, who remained upset about Thomas & Betts' unwanted presence as a stockholder, did

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[8]"Equity accounting" is a method of financial reporting whereby an investor initially records its investment in the investee at cost. Thereafter, the investor adjusts the carrying amount of the investment to recognize the investor's proportionate share of the investee's net earnings or losses, which are included in the determination of the investor's net income. Dividends received from an investee reduce the carrying amount of the investment.

[1]Thomas & Betts had provided Leviton a draft of its press release. When Leviton's Vice President of Finance reviewed the press release, he proposed that Thomas & Betts delete the reference to equity accounting, and advised Thomas & Betts that Leviton would not assist it in that regard.

[start - revised page - January 3, 1996]

not participate in those discussions. Included among the matters discussed was the internal financial information to which Thomas & Betts wanted access on a periodic basis.

On October 6, Mr. Dunnigan sent to Thomas & Betts' Board of Directors a memorandum apprising them of his negotiations with Leviton. Mr. Dunnigan stated that he intended to attempt to persuade Harold Leviton to negotiate a possible acquisition of Leviton. One of the contemplated forms of "persuasion" would be a formal demand to inspect Leviton's books and records:

> On the Leviton front, we are moving to the next phase. I will write to Harold Leviton next week to give him a rationale on why it is in everyone's best interests to start a dialogue. <u>We will follow this up with a legal request to review all the books and records of Leviton which will start either a dialogue or a lawsuit.</u>

(emphasis added).

On October 17, 1994, Mr. DeBiasi responded to Mr. Dunnigan, reaffirming Harold Leviton's unalterable position that he was not interested in pursuing a negotiated acquisition of Leviton.

Near the end of October, Messrs. DeBiasi and Moore met again, and agreed the Leviton would furnish its annual financial statement and its unaudited quarterly reports to Thomas & Betts. After the meeting, Mr. Moore then asked that that information be provided earlier than had been previously agreed. He also requested that the unaudited quarterly financials be "prepared in accordance with [GAAP] consistently applied." Mr. DeBiasi responded that the reporting dates that Thomas & Betts was requesting came sooner than the dates to which Leviton had

[end - revised page - January 3, 1996]

agreed, and well before the dates on which Leviton had promised to furnish that same information to its own creditors. Mr. DeBiasi also told Mr. Moore that although Leviton generally follows GAAP in preparing its annual accounting statements, it did not utilize GAAP in preparing its quarterly statements and that Leviton would not change its normal accounting practice to accommodate Thomas & Betts' demands.

On November 7, 1994, Harold Leviton and Mr. Dunnigan met to discuss their dispute over access to Leviton's books and records. The

meeting was not amicable. Harold Leviton remained highly displeased over Thomas & Betts' surreptitious purchase of the Blumbergs' Leviton shares, and he refused to change Leviton's accounting practices to accommodate his new shareholder. Mr. Dunnigan also suggested that Leviton pay a dividend, to which Harold Leviton is said to have replied:

> I have no intention of paying a dividend. And I intend to make your investment in the Leviton Manufacturing Corporation ... a worthless piece of paper.

After the November 7 meeting, Thomas & Betts began pursuing more actively its demand to inspect Leviton's books and records. In December 1994, Mr. Moore approached Mr. DeBiasi and asked for certain financial records to which Thomas & Betts claimed that it was entitled, and that Thomas & Betts claimed it needed to protect its investment in Leviton. Ultimately, Leviton refused to provide Thomas & Betts with the documents it requested.

On February 8, 1995, Mr. Moore, on behalf of Thomas & Betts, delivered to Mr. DeBiasi, as a representative of Leviton, a formal demand to inspect the following Leviton books and records:

1. Leviton's stockholder list,
2. minutes of Leviton shareholder and directors meetings as well as written consents,
3. audited financial statements for Leviton and its subsidiaries,
4. internal financial statements for the current fiscal year provided on a monthly basis,
5. tax returns filed for Leviton and its subsidiaries,
6. organizational charts for Leviton and its subsidiaries,
7. documents relating to interested party transactions between Leviton or its subsidiaries and its shareholders, directors or officers,
8. documents relating to "key man" life insurance policies taken out by Leviton,
9. material contracts between Leviton and its subsidiaries,
10. documents relating to Leviton leases for real estate or equipment.

One week later, on February 16, 1995, Mr. Dunnigan wrote to Harold Leviton personally, offering to purchase the balance of the company's stock for $250 million, net of expenses. Under that proposal Harold Leviton would become a member of Thomas & Betts' Board of

Directors, and would also end up as Thomas & Betts' largest individual stockholder. However, Dunnigan's February 16 offer also concluded with a cryptic threat of litigation if the offer were refused:

> You are forcing us down a road where given a choice, I am sure neither of us wants to go. Often, once this process gets started, it ends up with consequences that were never intended. Watch! -- it won't be long before the lawyers, the government and the courts are completely in charge, and in the end neither you nor I will have much say in the outcome. There will be only victims, but it won't be the lawyers.

Leviton formally rejected Thomas & Betts' claims for inspection, as well as its acquisition offer, on February 17, 1995. On February 27, 1995, Thomas & Betts filed this action to compel inspection of Leviton's books and records pursuant to 8 Del. C. § 220.

II. THE DEMAND TO INSPECT LEVITON'S STOCKHOLDER LIST.

[1-4] I first address the plaintiff's demand to inspect Leviton's stockholder list. Thomas & Betts claims that its purpose in seeking that list is to communicate with other Leviton shareholders on a variety of issues relating to their interests as Leviton shareholders. Those issues include Leviton's "underperformance," alleged waste and mismanagement by its officers and directors, Leviton's failure to pay a dividend, and whether the other shareholders might have an interest in buying or selling Leviton stock. Leviton defends on the basis that because the demand letter lacks specificity, Thomas & Betts has not adequately established a proper purpose.

8 Del. C. §220 entitles a shareholder of a corporation to:

> ...inspect for any proper purpose the corporation's stock-ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A proper purpose means a purpose reasonably related to such person's interest as a stockholder...

8 Del. C. §220(b). To become entitled to inspect a corporation's shareholder list, a shareholder must make a demand under oath that states a purpose reasonably related to its interest as a shareholder. 8 Del. C.

§ 220(b); Northwest Industries, Inc. v. B.F. Goodrich Co., Del. Supr., 260 A.2d 428 (1969); Warner Leroy v. Hardwicke Companies, Inc., Del. Ch., C.A. No. 7023, Longobardi, V.C., (February 16, 1983). A shareholder seeking to inspect a shareholder list is presumed to have a proper purpose, and the corporation has the burden to prove that the shareholder's purpose is improper. See 8 Del. C. §§ 220(b) and (c); Levy v. Recognition Equipment Inc., Del. Ch., C.A. No. 6802, Brown, C., Letter Op. at 6 (June 23, 1982). Any doubts will be resolved in favor of the statutory inspection right. Compaq Computer Corp. v. Horton, Del. Supr., 631 A.2d 1, 3 (1993) (citations omitted). Where, however, the stated purpose is "so indefinite, doubtful, uncertain or vexatious as to warrant denial of the right of inspection," the presumption may be rebutted. See Compaq Computer Corp. v. Horton, 631 A. 2d at 5; State ex rel. Miller v. Loft, Inc., Del. Super., 156 A. 170 (1931); State ex rel. Linihan v. United Brokerage Co., Del. Super., 101 A. 433, 437 (1917).[2]

[5] I am satisfied that Thomas & Betts has established a proper purpose for seeking inspection of Leviton's shareholder list. As a minority shareholder, Thomas & Betts cannot be assured that Leviton will ever generate an income stream sufficient to provide an adequate return on Thomas & Betts' $50 million investment. Therefore, Thomas & Betts' only likely options will be either to acquire sufficient additional shares to obtain a controlling interest, or sell its minority interest in Leviton to someone else. Because there will be no significant public market for a minority stock position in a private corporation that does not pay dividends, the only likely potential purchasers of Thomas & Betts' minority interest would be Leviton's existing shareholders. If only for that reason, Thomas & Betts would be entitled to inspect a shareholder list in order to communicate with those potential purchasers. Accordingly, Thomas & Betts' stated purpose for inspecting Leviton's shareholder list -- to learn the identity of, and contact, Leviton's shareholders to explore either acquiring their shares or selling its (Thomas & Betts') Leviton shares to them -- is proper. Mite Corporation v. Heli-Coil Corp., Del. Ch., 256 A.2d 855, 856 (1969).

[6-7] The plaintiff having stated a proper purpose, the burden then rests upon the corporation to prove that the purpose is improper. See Mite Corporation v. Heli-Coil Corp., 256 A.2d at 857. Leviton asserts that it has met that burden because the demand letter lacks specificity, and

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[2]The shareholder's purpose must be pled with sufficient specificity to enable the Court to determine whether the stated purpose is related to his or her interest as a shareholder. Thus, a statement that the shareholder intends to communicate with other shareholders, without more, is insufficient. See Northwest Industries, Inc. v. B.F. Goodrich Co., 260 A.2d at 429.

because that defect was not cured in the depositions or at trial. However, in the depositions, at trial, and in its post-trial memoranda, Thomas & Betts did articulate and establish its purpose with specificity. See E.L. Bruce Co. v. State ex rel. Gilbert, Del. Supr., 144 A.2d 533 (1958); Mite Corp. v. Heli-Coil Corp., supra. Therefore, any arguable technical deficiency in Thomas & Betts' demand letter was cured. See Skouras v. Admiralty Enterprises, Inc., Del. Ch., 386 A.2d 674, 678 (1978).

Accordingly, Thomas & Betts will be entitled to inspect Leviton's list of Class A common stockholders, Class B common stockholders, and Preferred stockholders, since Thomas & Betts owns shares of each class. I now turn to the plaintiff's claim of entitlement to inspect Leviton's books and records.

III. THE DEMAND TO INSPECT LEVITON'S BOOKS AND RECORDS.

Thomas & Betts advances three purposes for seeking to inspect Leviton's books and records: (i) to value its investment in Leviton, (ii) to account properly for that investment on its own balance sheets and earnings statements, and (iii) to investigate possible waste and mismanagement. Leviton defends on two grounds: (a) Leviton is a privately-held corporation and would be harmed if Thomas & Betts is given access to Leviton's books and records; and (b) none of Thomas & Betts' stated purposes for seeking inspection is factually or legally *bona fide*.

[8-10] Where the subject of the demanded inspection are the corporation's books and records (as distinguished from its stockholder list), the shareholder has the burden of establishing a proper purpose. CM & M Group, Inc. v. Carroll; Del. Supr., 453 A.2d 788, 792 (1982); Ostrow v. Bonney Forge Corp., Del. Ch., C.A. No. 13270, Allen, C., Mem. Op. at 27-28 (Apr. 6, 1994). The purpose must not be adverse to the corporation's interest. Skoglund v. Ormand Industries, Inc., Del. Ch., 372 A.2d 204, 207 (1976). The Court will compel production only of those books and records that are "essential and sufficient" for the shareholder to effectuate his or her purpose. Helmsman Management Services, Inc. v. A & S Consultants, Inc., Del. Ch., 525 A.2d 160, 167 (1987) (citing Neely v. Oklahoma Publishing Company, Del. Ch., C.A. No. 5293, Brown, V.C. (Aug. 15, 1977); State ex rel. Rogers v. Sherman Oil Co., Del. Super., 117 A. 122 (1922)).

A. The Defense That Thomas & Betts Will Abuse Leviton's Confidential Information.

Before addressing the merits of Thomas & Betts' inspection claims, the Court first considers Leviton's threshold defense, which is common to all those claims. Leviton contends that disclosure of the information Thomas & Betts seeks would be detrimental, because Leviton is a privately held corporation that has an interest in maintaining the confidentiality of its financial information. Leviton contends that Thomas & Betts would use the information to harm Leviton, including disclosing it to a third party that could use the information to Leviton's detriment. Leviton asks this Court to conclude, in this instance, that Leviton's privacy rights outweigh Thomas & Betts' interest as a shareholder in inspecting Leviton's books and records.

[11] Any judicially compelled disclosure of a corporation's non-public information in a § 220 action could be argued as posing some risk to the corporation. See Thorpe v. Cerbco, Inc., Del. Ch., C.A. No. 11713, Allen, C. (Oct. 29, 1993). Circumstances could arise where a privately held corporation would have an exceptionally strong interest in maintaining the confidentiality of its financial information. See Carroll v. CM & M Group, Del. Ch., C.A. No. 6351, Marvel, C., Letter Op. at 6 (Sept. 24, 1981), aff'd in part and rev'd in part on other grounds, Del. Supr., 453 A.2d 788 (1982) ("Carroll I"); Stroud v. Grace, Del. Supr., 606 A.2d 75, 89 (1992). However, that risk will not normally operate to bar the statutory inspection right, and in any event no such compelling circumstances have been established here. On the contrary, Leviton has offered no evidence to support its claim that Thomas & Betts would use the information to Leviton's detriment. Leviton asserts that because it and Thomas & Betts are both in the electronics business, granting inspection relief would harm Leviton because Thomas & Betts is a competitor. However, Mr. DeBiasi's uncontroverted testimony was that Thomas & Betts and Leviton were not competitors in any significant way.

[12] Leviton's contention that Thomas & Betts would disclose this information to a third party is also unsupported. Thomas & Betts is now a substantial shareholder of Leviton. Leviton has not demonstrated that Thomas & Betts would act to harm its own interest. Moreover, Thomas & Betts has offered to inspect Leviton's books and records subject to a confidentiality agreement, which, in my view, is a reasonable way to address Leviton's privacy concerns.[3]

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[3]Leviton suggests (but has not demonstrated) that because Thomas & Betts is a public corporation, it may be legally required to disclose some of the confidential information derived

Therefore, the Court rejects Leviton's threshold defense, and turns to Thomas & Betts' purposes for seeking inspection.

B. Thomas & Betts' Purpose To Investigate Possible Waste And Mismanagement

The first of Thomas & Betts' stated purposes is to investigate possible waste and mismanagement. Thomas & Betts contends that Leviton's financial performance is substandard, because Leviton pays no dividends, has a poor cash flow, and has higher-than-average overhead expenses. Those circumstances, Thomas & Betts argues, constitute sufficient reason to suspect waste and to justify further inquiry. Thomas & Betts also contends that the record suggests that (a) Leviton has paid for the Leviton family's personal expenses, including its use of the company's accounting firm for tax and estate planning purposes; (b) Leviton has been overcompensating its officers and directors at the shareholders' expense; and (c) Leviton's lease agreements with members of the Leviton family are self-dealing transactions. On that basis, Thomas & Betts claims, it is entitled to inspect Leviton's wholly-owned subsidiaries' books and records to investigate these allegations.

Leviton responds that Thomas & Betts' waste and mismanagement claims are so lacking in record support that they cannot justify permitting it to inspect Leviton's, or its subsidiaries', books and records. For the reasons now stated, I agree.

[13-14] Investigating possible waste and mismanagement is a proper purpose under 8 Del. C. § 220. See Nodana Petroleum Corp. v. State, Del Supr., 123 A.2d 243, 246 (1956); Skouras v. Admiralty Enterprises, Inc., Del. Ch., 386 A.2d 674, 678 (1978). Where there is the purpose, however, the demanding shareholder has a greater-than-normal evidentiary burden, because the shareholder must adduce evidence from which a credible possibility of mismanagement and waste may be inferred. Ostrow v. Bonney Forge, Mem. Op. at 31; Helmsman Management Services, Inc., 525 A.2d at 166; Neely v. Oklahoma Publishing Company, supra. I conclude that Thomas & Betts has failed to adduce specific evidence of waste and mismanagement that warrants going forward with a § 220 inspection.

[15] Thomas & Betts bases most of its suspicions upon hearsay statements attributed to Thomas Blumberg during the negotiations leading to the purchase of the Blumberg shares. Those statements are said to

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from the books and records inspection. That concern finds no support in the record and is purely speculative.

concern allegedly irregular management practices that he observed while employed at Leviton. Because Blumberg did not testify at the trial, the Court is asked to disregard the testimony attributed to him as hearsay. Those statements are hearsay. See D.R.E. 801(c); Del. Ch. R. 43. But even if the hearsay character of the Blumberg statements would not bar their use for purposes of establishing the possibility of mismanagement, because of Blumberg's significant financial interest that is strongly tied to Thomas & Betts,[4] I do not regard the statements as sufficiently reliable to create a credible inference of waste and mismanagement. Because Thomas & Betts has not adduced any other evidence of possible mismanagement, insofar as its inspection purpose rests on that ground it fails for lack of record support.

[16] Nor has Thomas & Betts adduced any other evidence sufficient to create a credible inference of waste and mismanagement. Thomas & Betts had no specific knowledge of any impropriety, illegality or irregularity in the Leviton leases, and it proffered no credible evidence to support that claim. Thomas & Betts' effort to predicate its waste and mismanagement claims upon Leviton's financial performance similarly fails for lack of credible evidence. That a corporation's performance may fall below an industry norm does not, in and of itself, evidence waste or mismanagement. Moreover, when Thomas & Betts acquired the Blumberg's Leviton stock, it knew that Leviton paid no dividends. That policy has not changed. Finally, Thomas & Betts has not adduced sufficient evidence from which to infer that Leviton has improperly compensated its directors and officers. In short, the record discloses that Thomas & Betts' waste and mismanagement claims are factually unsupported and highly opportunistic.[5]

Accordingly, Thomas & Betts' request for inspection relief to investigate possible waste and mismanagement will be denied.[6]

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[4]Thomas Blumberg and the Blumberg family stand to gain $20 million dollars if Thomas & Betts sells its shares to a third party or acquires control of Leviton. In either event, Blumberg's interest is tied to Thomas & Betts' ability to either become a majority shareholder or divest its shares in Leviton. Thus, the Blumbergs have a significant financial interest in helping Thomas & Betts achieve either goal -- an interest enhanced by the fact that Thomas & Betts employed Blumberg after Leviton acrimoniously terminated him.

[5]Thomas & Betts displays true *chutzpah* by first praising Leviton's business performance and offering Harold Leviton a seat on its board of directors, and then, only after its offer to purchase Leviton was rebuffed, suggesting to this Court that Harold Leviton is guilty of waste and mismanagement.

[6]That ruling is equally applicable to the request to inspect the books and records of Leviton's wholly-owned subsidiaries. Thomas & Betts has provided no evidence that the subsidiaries are being used to commit a fraud or other inequity, or that they lack an independent business purpose. See Skouras v. Admiralty Enterprises, 386 A.2d at 681.

C. Thomas & Betts' Equity Accounting Purpose

Next, Thomas & Betts seeks to inspect Leviton's and its wholly-owned subsidiaries' books and records to enable Thomas & Betts to account for its Leviton stock. Thomas & Betts argues that as a public company it must properly account to its public shareholders for its $50 million investment. Based upon its (highly disputed) interpretation of the applicable GAAP standards, Thomas & Betts contends that its investment should be accounted for under the equity method, and points out that its outside auditor, KPMG Peat Marwick, agrees. Finally, Thomas & Betts claims that its ability to account by the equity method will be severely limited unless it is granted the information it seeks. I conclude that none of these contentions has merit.

[17] First, Thomas & Betts' equity accounting purpose is premised not upon its status as a Leviton shareholder, but, rather, upon its relationship *inter sese* with its own shareholders. Therefore, the purpose Thomas & Betts seeks to further is individual, and not one relating to its status as a Leviton shareholder. See Catalano v. T.W.A., Del. Ch., C.A. No. 5352, Hartnett, V.C. (Nov. 3, 1977); Lynn v. EnviroSource, Inc., Del. Ch., C.A. No. 11770, Chandler, V.C. (May 10, 1991), aff'd, Del. Supr., 608 A.2d 728 (1991). For that reason alone, Thomas & Betts' stated "equity accounting" purpose is legally improper.

[18] Second, Thomas & Betts' claimed inability to utilize the equity accounting method without § 220 relief is a problem of its own making. At the time it purchased the Blumberg shares, Thomas & Betts had certain of Leviton's internal financial statements, and it knew that those statements did not conform to GAAP standards. Leviton consistently employed -- both before and after Thomas & Betts became a stockholder -- the "cost method" of accounting.[7] There is no contention or testimony that Leviton is required by law to follow GAAP, or that the cost method of accounting is improper. Thomas & Betts' position boils down to a

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[7]The "cost method" is a method of accounting presentation whereby an investor initially records its investment at cost. The cost method allows the investor to recognize only the dividends actually distributed to it from the investee's net earnings after the date of acquisition. Dividends are considered to be a return on investment and are recorded as a reduction of the cost of the investment. Unlike the equity accounting method, an investor that utilizes the cost method of accounting will be unable to include in its earnings its proportionate share of the investee's net earnings. Rather, the adjustment will be limited to the net dividends actually distributed by the investee entity and received by the investor. Thus, the equity method would be more favorable to Thomas & Betts than the cost method, since under the equity method, Thomas & Betts' reported earnings would increase, but under the cost method they would not.

contention that it would prefer the equity method of accounting. However, a Section 220 action cannot serve as a vehicle to force a corporation to change its accounting practices.[8] A stockholder may not use the 220 action as a means "to invade the corporate board room." Radwick Pty. Ltd. v. Medical Inc., Del. Ch., C.A. No. 7610, Berger, V.C., Mem. Op. at 8 (Nov. 7, 1984).

Third, the factual *bona fides* of Thomas & Betts' contention that it needs to account for its investment by the equity accounting method, are highly suspect. Mr. Cohen testified that an investor may use the equity accounting method only if it has "the ability to exercise significant influence over [the corporation's] operating and financial policies." Under GAAP there is a rebuttable presumption that a shareholder that owns at least 20% of the corporation's stock is able to exert significant influence sufficient to warrant equity accounting. That presumption appears to have been rebutted in this case. Even though Thomas & Betts owns over 29% of Leviton's shares, its influence over Leviton's operations is negligible. Thomas & Betts plays no role in Leviton's management, it has no Board representation, and it does not engage in inter-firm ventures or transactions. Harold Leviton completely dominates Leviton's business policies and activities. The evidence establishes to my satisfaction that Thomas & Betts presently wields no influence over Leviton's operations.

[19] The Court concludes that Thomas & Betts has not met its burden of establishing its claimed need to inspect Leviton's books and records in order to employ the equity method of accounting for its investment in Leviton.

D. Thomas & Betts' Valuation Purpose.

Finally, Thomas & Betts seeks to inspect Leviton's books and records for the purpose of valuing its investment. Thomas & Betts argues

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[8]Thomas & Betts argues that this Court lacks subject matter jurisdiction to decide whether or not equity accounting for the Leviton investment is appropriate, because its accounting procedures are prescribed by the Securities Exchange Act of 1934, which only the federal courts have exclusive jurisdiction to enforce. See 15 U.S.C.A. § 78a, Investment Associates, Inc. v. Standard Power & Light Corp., Del. Supr., 51 A.2d 572 (1947). The argument is misguided. Jurisdiction is based not upon issues ultimately decided, but upon the substantive claims for relief being asserted. Here, plaintiff seeks to compel a books and records inspection under § 220 for the purpose of accounting for its Leviton shares. That statutory state law claim is one that this Court has jurisdiction to decide. See Wright, Miller & Cooper, Federal Practice and Procedure § 3527 (1984). That necessarily empowers the Court also to decide the subsidiary issue of whether a stockholder's preference to use equity accounting is a proper purpose within the meaning of § 220.

three separate valuation grounds. First, it claims that a valuation of its interest is needed to discharge its fiduciary duty to its own shareholders to account accurately for the value of the Leviton investment. Second, it contends that it must value its Leviton shares to facilitate its own long range planning. Third, Thomas & Betts asserts that it needs to value those shares to determine whether or not to acquire additional Leviton shares, sell its minority stake, or take some other action to protect its investment.

[20] Thomas & Betts' first purpose -- to account to its own shareholders for its Leviton investment -- has already been rejected on its merits. See Part III C, supra. Repackaging that claim as a "valuation purpose" does not improve it. Thomas & Betts' second stated purpose -- to facilitate long range planning -- is wholly unspecific, and for that reason alone, is insufficient. See Weisman v. Western Pacific Industries, Inc., Del. Ch., 344 A.2d 267 (1975). In addition, that purpose is internal to Thomas & Betts as a business enterprise, and therefore is improper, as it is unrelated to Thomas & Betts' interest as a shareholder. Therefore, only Thomas & Betts' third stated valuation purpose -- to determine whether to buy additional shares, sell its stake, or take other action to protect its investment -- is in issue.

[21] Leviton challenges the *bona fides* of that purpose. It argues that Thomas & Betts has proffered no evidence of any present intention to sell its Leviton shares. It also argues that Thomas & Betts' sole purpose is to value the company as a whole, and not its 29.1% minority interest, in order to pursue a hostile takeover -- a purpose found improper in BBC Acquisition Corp. v. Durr-Fillauer Medical, Inc., Del. Ch., 623 A.2d 85 (1992) ("BBC Acquisition Corp."). In that case this Court denied a shareholder's application to inspect corporate books and records for the stated purpose of valuing its shares, because that stated purpose, while proper on its face, was not in fact the demanding shareholder's true purpose. That is because the demanding shareholder had made a trivial investment (100 shares) solely as a vehicle to seek the target corporation's non-public information to further the shareholder's strategic goal of pursuing a hostile takeover of the corporation.

[22-23] Valuation of a stockholder's investment in a corporation, particularly where the corporation is privately held, has long been recognized as a proper purpose under 8 Del. C. § 220. CM & M Group, Inc. v. Carroll, Del. Supr., 453 A.2d 788, 792 (1982). Because they do not receive the mandated, periodic disclosures associated with a publicly held corporation, minority shareholders in a privately held corporation face certain unique risks. Such shareholders may, therefore, have a legitimate need to inspect the corporation's books and records to value

their investment, in order to decide whether to buy additional shares, sell their shares, or take some other action to protect their investment. See BBC Acquisition Corp., 623 A.2d at 91; Clark Enterprises, Inc. v. Hollywell Corp., Del. Ch., C.A. No. 6554, Brown, V.C. (Apr. 13, 1982).[9]

That Thomas & Betts became a Leviton shareholder for the purpose of ultimately acquiring corporate control cannot be seriously disputed. The record also establishes that Thomas & Betts' initial primary purpose in seeking a books and records inspection was not to value its minority shareholdings, but, rather, to exert pressure on Harold Leviton to negotiate a sale of his controlling interest or, alternatively, the entire company. If that continued to be Thomas & Betts' primary purpose, the analysis could end at this point and inspection relief would be denied summarily. BBC Acquisition Corp., 623 A.2d at 91. However, as matters now stand, the issue is not that simple.

Although Thomas & Betts initially became a stockholder and initially demanded a wide-ranging inspection of Leviton's books and records to further its goal of acquiring Leviton, the circumstances have now changed and as a result, so have Thomas & Betts' primary interests and goals. It has now become crystal clear that Thomas & Betts cannot gain control of Leviton so long as Harold Leviton is its majority stockholder and is unwilling to sell control to Thomas & Betts. As a result, Thomas & Betts is now relegated to the status of a "locked-in" minority stockholder. The question thus becomes whether because of its initial improper purpose Thomas & Betts is entitled to no relief, or whether because of its changed circumstances Thomas & Betts should be permitted to seek the information to which any similarly situated (but non-control-motivated) minority stockholder would be entitled.

[24-25] In my view, the policy underlying § 220 requires the latter result. That result gives effect to the reality of Thomas & Betts' present position, by recognizing that now that Thomas & Betts' aspiration to gain control has been frustrated, it nonetheless has a legitimate need to value its investment and to have information essential and sufficient for that purpose. That is because Thomas & Betts' principal viable option (other than continuing to hold a $50 million "captive" minority investment in a company that pays no dividend) is to sell its shares. And while Thomas

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[9]This Court has recognized on several occasions that because of the absence of a publicly traded market, a shareholder in a closely held corporation has no ability to value his or her shares, yet would need to make an initial valuation, if only to determine whether the shares are marketable, and if so, at what price. Helmsman Management Serv. v. A & S Consultants, 525 A.2d at 165, see also Radwick Pty., Ltd. v. Medical Incorporated, Mem. Op. at 6-7, Macklowe v. Planet Hollywood, Inc., Del. Ch., C.A. No. 13450, Jacobs, V.C. (Sept. 29, 1994), Mem. Op. at 8.

& Betts' control-acquiring motive may give Leviton continued reason to be concerned, that concern is more properly addressed by adjusting the scope of relief than by denying relief altogether.

I now turn to the scope of the relief to which Thomas & Betts is entitled.

IV. THE SCOPE OF RELIEF

Thomas & Betts seeks access to several categories of corporate books and records to support its valuation purpose, and claims that all of the demanded categories are essential and sufficient for that purpose. Leviton responds that Thomas & Betts needs no additional books and records, because it already has been furnished sufficient information to have enabled it to determine Leviton's value on two occasions, first to make the Blumberg purchase, and second, to advance Dunnigan's February 16 acquisition proposal. Leviton further argues that the information it has already agreed to provide -- its annual audited financial statements and its unaudited quarterly financial statements -- are sufficient.

[26-28] A stockholder's statutory right to compel an inspection of corporate books and records is to be narrowly construed. Willard v. Harrworth Corp., Del. Ch., 258 A.2d 914, 915 (1969); Catalano v. T.W.A., Del. Ch., C.A. No. 5352, Hartnett, V.C., Mem. Op. at 4 (Nov. 3, 1977). Thomas & Betts has the burden to justify each category of books and records whose production it seeks to have compelled. Only those records that are essential and sufficient will be required. Helmsman Management Servs. Inc., 525 A.2d at 167. In determining the scope of inspection, the Court may consider the information previously furnished by the corporation, as well as the degree of certainty of the stockholder's intent to buy or sell his or her shares in the corporation. Neely v. Oklahoma Publishing Co., Del Ch., C.A. No. 5293, Brown, V.C. (June 30, 1977).

[29] I reject Leviton's argument that all relief should be denied because Thomas & Betts was twice able to place a value on Leviton. In both instances, those valuations were based on assumptions predicated on minimal information and made for a different purpose -- to buy shares (or, in the second case, control) at the lowest possible price. Because of its position as a buyer, and recognizing the incompleteness of its information, Thomas & Betts used the low end of an extremely wide range of possible values to make both offers. To put it differently, although the information available to Thomas & Betts as a potential buyer enabled it to value the Blumbergs' shares at the low end of that

range, now that Thomas & Betts is in the position of being a potential seller, it legitimately needs more complete information. The fact that Thomas & Betts previously made "low end" valuations of Leviton should not, therefore, bar its statutory inspection right. See Carroll I. Thus, the question boils down to what additional information is essential and sufficient for Thomas & Betts to value its investment in Leviton.

As Mr. Moore testified, only certain of the demanded categories relate to Thomas & Betts' valuation purpose. Those categories include the minutes of directors and shareholders' meetings; audited financial statements of Leviton and its subsidiaries; tax returns; transactions between Leviton and its subsidiaries, shareholders or officers; material contracts; and lease agreements.

Having considered the evidence presented, the Court finds only the following documents to be essential and sufficient for Thomas & Betts' valuation purpose, and as to those documents will grant inspection:[10]

- audited financial statements of Leviton for the last three fiscal years (including the current fiscal year), pursuant to item (D) of the demand letter;
- audited financial statements of all direct and indirect Leviton subsidiaries for the last three years (including the current fiscal year), pursuant to item (E) of the demand letter; and
- all federal tax returns filed by Leviton for the last three years, pursuant to item (H) of the demand letter.

The Court also finds the following document categories not to be essential and sufficient for Thomas & Betts' valuation purposes, and as to these categories will deny inspection:

- any and all written consents and minutes of the Leviton Board of Directors meetings for the current year, as well as the three previous years, pursuant to item (B) of the demand letter;
- any and all written consents and minutes of the Leviton shareholders' meetings for the current year, as well as the three previous years, pursuant to item (C) of the demand letter;
- records relating to interested director transactions pursuant to items (J), (K), (L), (M) and (N) of the demand letter;

[10]Those documents shall be in addition to those currently being voluntarily furnished by Leviton.

- material contracts and lease agreements, and real estate agreements, pursuant to items (Q), (R) and (S) of the demand letter;
- internal Leviton financial statements on a monthly basis, for the current fiscal year, pursuant to item (F) of the demand letter;
- internal Leviton financial statements for its direct and indirect subsidiaries on a monthly basis, for the current fiscal year, pursuant to item (G) of the demand letter; and
- books and records regarding "key man" or other life insurance policies, pursuant to item (O) and (P) of the demand letter.

Thomas & Betts has failed to persuade me that the foregoing information is essential to a valuation of Leviton. The audited annual financial statements and quarterly reports of Leviton and its subsidiaries, and the tax returns, should provide Thomas & Betts with all the information it needs. The minutes of the directors and shareholders meetings have not been shown to be essential to a valuation, nor have the monthly financial statements for Leviton and/or its subsidiaries, most or all of which information is captured by the annual (and quarterly) audited statements for the parent company and its subsidiaries. The essentiality of the "key man" and other life insurance policies to a valuation continues to elude the Court, and the demanded information relating to the "self-dealing" transactions between Leviton and its officers, directors, and stockholders appears overbroad and more related to Thomas & Betts' waste and mismanagement purpose than to its purpose of valuing the corporation.

In so concluding, I recognize that in other cases, on different facts, this Court has permitted the inspection of one or more of these document categories for valuation purposes. However, in this case Thomas & Betts' ulterior motive, its history of demanding books and records to create leverage, and the opportunistic overbreadth of its demand, all point to the need for caution. Accordingly, the Court has resolved all reasonable doubts against inspection and has granted relief only as to those document categories whose essentiality appears certain.

V. CONCLUSION

For the foregoing reasons, the Court finds Thomas & Betts entitled to inspect Leviton's shareholder list, as well as the corporate books and

records described above. Counsel shall submit a form of order implementing the rulings made herein.

WELLS FARGO v. FIRST INTERSTATE BANCORP

No. 14,696

IN RE FIRST INTERSTATE BANCORP
SHAREHOLDER LITIGATION

No. 14,623 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

January 18, 1996

Defendants filed a motion to dismiss plaintiff's claim for failure to state a claim upon which relief could be granted.

Plaintiff sought injunctive relief against defendants to prevent proposed merger. In support of the injunctive relief, plaintiff asserted that (1) breaches of defendants' fiduciary duties, (2) violations of the Unocal standard, and (3) material disclosure violations of defendant's 14D-9. Plaintiff also sought a declaratory judgment that (1) it would not be subject to a Section 203 statutory restriction, and (2) a consent solicitation would not constitute tortious interference with the proposed merger. Plaintiff further alleged that the acquiring corporation aided and abetted the target corporation in the alleged acts of wrongdoing.

The court of chancery, per Chancellor Allen, denied defendants' motion to dismiss without decision on the preliminary injunction issue. The court held that although Revlon duties were not implicated, a heightened judicial scrutiny was required by Unocal and the proposed threat was a question of fact not to be decided on the pleadings. The declaratory judgment issues were dismissed.

1. Pleading ⟹ 192(1)

Relevant complaints stated a claim for relief when they asserted that a refusal to redeem First Interstate's stock rights plan was a step that could not satisfy the judicial review standard of Unocal.

2. Corporations ⟹ 202, 320(1), 320(2)

Although the claim may be derivative, it nevertheless is not one that requires a pre-suit demand upon the First Interstate board before a shareholder may properly maintain the action against the board.

3. Corporations ⟹ 310(1)

The fact that the First Interstate board may have talked to other possible transaction partners does not itself constrain the usual scope of board authority and does not invoke the special duties required by Revlon.

4. Corporations ⟹ 307, 310(1)

Although special Revlon duties do not exist, board members did have a duty to proceed advisedly in a good faith attempt to advance the corporation's interests and not to foster their own interests at a cost to the corporation.

5. Corporations ⟹ 310(1), 310(2)

The enhanced judicial scrutiny contemplated by Unocal applies whenever the record reflects that a board of directors took defensive measures in response to a perceived threat to corporate policy and effectiveness which touches upon issues of control.

6. Corporations ⟹ 320(11)

Upon proof of facts from which a fact finder could conclude that the alleged acts were defensive in nature, the burden will shift to the director defendants to satisfy, by a preponderance of the evidence, the two-part test of "enhanced business judgment" review that Unocal articulates.

7. Pleading ⚷ 8.1
Corporations ⚷ 310(1)

Whether there were reasonable grounds for concluding that a threat was posed and whether the response was proportional to that threat are generally questions of fact to be decided at trial, not on the pleadings.

8. Corporations ⚷ 320(4)

Where the remedy in a shareholder action will necessarily affect all shareholders, not only is such a case permissible as a class claim (Rule 23(b)(1)) but protection of all interests require that it be litigated once, for all (Rule 23.1). A derivative characterization accomplishes that result. DEL. CH. CT. R. 23.1.

9. Corporations ⚷ 320(4)

To state an individual action, as distinguished from a derivative action, a plaintiff must allege either an injury which is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder which exists independently of any right of the corporation.

10. Corporations ⚷ 320(4)

To determine whether a claim is an individual claim or a derivative action requires the court to look ultimately to whether the plaintiff has alleged "special injury," in whatever form.

11. Declaratory Judgment ⚷ 5, 62

Ripeness in the declaratory judgment context always presents a question of judgment. Courts await for presentation of actual disputes arising from settled facts.

12. Declaratory Judgment ⚷ 68, 69

There is no good reason to resolve a legal ambiguity that, if it is to present an operational issue, will do so only after a number of contentious issues are resolved in several courts and in other agencies.

13. Declaratory Judgment ⟹ 62, 96

Whether there is tortious interference cannot be determined until the acts that might arguably constitute such interference have occurred and a claim of such interference, direct or implicit, is made.

14. Corporations ⟹ 310(1)

Issues of materiality are generally held to be mixed questions of law and fact, but predominantly questions of fact. They are matters that in many instances require a rich factual context to responsibly decide.

15. Corporations ⟹ 307, 310(1)

Contrary to plaintiff's assertion that defendant had a fiduciary duty to disclose the improper purpose that allegedly motivated defendant's repurchase activity, directors are not required to "draw legal conclusions implicating themselves in a breach of fiduciary duty from surrounding facts and circumstances prior to formal adjudication of the matter."

16. Conspiracy ⟹ 1

In order to assert a claim for "civil conspiracy," the plaintiff must plead facts from which it could be inferred that First Bank knew these actions or failure to act were a breach of fiduciary duty, and knowing that, cooperated in the course of action by which the First Interstate board sought to accomplish that result.

17. Conspiracy ⟹ 1
Pleading ⟹ 34(1)

The signing of the merger agreement combined with the alleged stock market activity is sufficient under the liberal pleading rules to support a valid claim for aiding and abetting.

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ALLEN, *Chancellor*

On November 13, 1995, Wells Fargo & Company, a corporation registered under the Bank Holding Company Act of 1956 that is currently seeking to acquire First Interstate Bancorp, which is also a registered bank holding company, filed this action against First Interstate, the members of its board of directors and others. The suit seeks declaratory and injunctive relief with respect to measures allegedly taken by First Interstate in response to proposals made by Wells Fargo to acquire First Interstate.[1] Most pertinently, it is alleged that the directors of First

[1]Wells Fargo purports to bring this action both in its capacity as the owner of one hundred shares of First Interstate common stock and as a person interested in entering into an acquisition transaction with the First Interstate shareholders directly or with the company itself. Five additional shareholders apparently unrelated to Wells Fargo also filed class action complaints against First Interstate and its board of directors. These actions were consolidated

Interstate breached their fiduciary duties by responding to Wells Fargo's proposal by entering into a merger agreement with First Bank System, Inc. at a lower value than Wells Fargo's proposal offered; by thereafter failing to redeem a defensive stock rights plan ("poison pill"), which redemption would arguably allow shareholders more directly to choose between the two offers; and by granting First Bank contractual rights to a break-up fee and a stock option designed, it is said, impermissibly to impede the possible success of any competing proposal.

First Bank is named as a defendant on the theory that it has knowingly participated in and aided the alleged breach of duty by the First Interstate board. In that connection it is alleged that following the signing of the First Bank merger agreement First Bank materially increased its program of buying its own stock on the open market; that was done to keep the price of the its stock high in order to make the deal look better to First Interstate shareholders; and that Wells Fargo knew about this repurchase program and its purpose. In conclusion it is alleged that, in failing to disclose these facts in its 14D-9 filing, the First Interstate board breached a duty of candor to its shareholders and that First Bank knowingly participated.

The defendants, First Interstate, the members of its board of directors, and First Bank, answered and moved to dismiss all of the respective claims against them, asserting that Wells Fargo had failed to allege facts that constituted a claim upon which relief may be granted. These motions, in this case and in a parallel shareholders representative action, were presented on January 10, 1996. This is the court's opinion denying the motion to dismiss the complaint. In doing so, however, I take the occasion to rule on the legal adequacy of several aspects of the relevant complaints, concluding that certain matters attempting to state claims upon which relief may be granted, fail to do so.

I. Background Facts

Based upon the allegations of the complaints the facts relevant to this motion appear as follows.

1. Wells Fargo's Original Approach:

On October 17, 1995, Wells Fargo delivered a letter to First Interstate describing its interest in undertaking a tax-free merger. The

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with Wells Fargo's actions. In this memorandum opinion I refer to the most recent complaints in all of these actions as the relevant complaints.

letter outlined a proposal to exchange 0.625 shares of Wells Fargo stock for each share of First Interstate, a 26% premium over the market value of First Interstate common stock at the time. In response, First Interstate's Chairman and CEO, William Siart, announced that he was not satisfied with the offer. Mr. Siart also began discussions with potential alternative merger partners, including First Bank.

On October 26, 1995, Siart met with Wells Fargo's Chairman and CEO, Paul Hazen to discuss a potential merger. Mr. Hazen indicated a willingness to increase the exchange ratio from 0.625 to 0.65. Siart wanted .70 shares, but Hazen was unwilling to offer that. Five days later, the two men met again and Mr. Siart indicated that he would recommend a merger if Wells Fargo increased its proposed exchange ratio to 0.68. No deal was struck and talks broke down after this meeting.

2. The First Bank Merger Agreement:

On November 6, 1995, First Interstate announced it had entered into a merger agreement with First Bank and Eleven Acquisition Corporation, a wholly-owned subsidiary of First Bank, pursuant to which First Interstate would be merged with Eleven Acquisition, with First Interstate surviving the merger. The proposed merger provided for the exchange of 2.6 shares of First Bank stock for each share of First Interstate. Based on the most recent closing prices at the time, First Bank's exchange ratio represented a price of $132.28 per share while Wells Fargo's exchange ratio of 0.65 represented $137.96 per share at current market prices. In connection with signing the merger agreement, First Interstate also amended its shareholder rights plan to render it inapplicable to the proposed First Bank merger. There are approximately 76 million shares of First Interstate stock outstanding, making the value of the proposed First Bank acquisition approximately $10 billion.

The merger agreement provided for reciprocal break-up fees, reciprocal stock options, and the resolution of certain governance issues. With respect to the break-up fees, each party agreed to pay the other party up to $100 million if certain triggering events occur before or after termination of the merger agreement. Each party also agreed to grant the other an option to purchase shares, exercisable upon the acquisition by any third party of beneficial ownership of 20% or more of the outstanding common stock of the issuer of the option. In the case of First Interstate, the option it granted covered approximately 15 million shares, which if exercised would constitute 18% of the company's outstanding stock. The exercise price was $127.75. While the complaints do not say what the market price of the First Interstate stock

was prior to the execution of the merger agreement, it does allege that the value of the deal proposed at that time was $132.28 per share. The options are capped so that the total profit received by the holder may not exceed $100 million. Thus, it could potentially cost First Interstate up to $200 million to back out of the proposed merger with First Bank, a cost representing approximately 2% of the transaction value. The merger agreement contained a fiduciary out provision.

Finally, First Interstate and First Bank agreed that after the acquisition the surviving entity would retain the First Interstate name, that ten of First Interstate's fifteen directors would sit on the board of the holding company, and that Mr. Siart would be President and Chief Operating Officer of the holding company.

The day after this merger proposal was announced, First Bank allegedly commenced a series of repurchases of its own stock. Although First Bank had a pre-existing repurchase program in place, it is alleged that the repurchases initiated at this time were of a much greater magnitude than previously.

3. Wells Fargo's Exchange Offer:

Thwarted in its attempts to negotiate a friendly acquisition, Wells Fargo announced on November 13, 1995, its intention to commence an exchange offer for all First Interstate shares. Under the terms of this still to be forthcoming offer, Wells Fargo will offer to exchange two-thirds of a share of Wells Fargo common stock for each share of First Interstate common stock. Based on the closing price of Wells Fargo stock on the last day of trading prior to this announcement, the market value of the offer was $143.58 per share of First Interstate common stock. Impeding the closing of such an exchange offer by Wells Fargo is a shareholder rights plan adopted as a general planning matter by the First Interstate board in 1988. The rights plan allegedly precludes Wells Fargo from going forward with its exchange offer unless First Interstate's board redeems or amends the rights plan.

On this same date, Wells Fargo also announced its intention to solicit First Interstate stockholders for (1) proxies to vote against approval of the merger between First Interstate and First Bank and, if necessary, (2) written consents to remove the First Interstate Board and replace it with nominees of Wells Fargo who are committed to removing impediments to a merger with Wells Fargo.

On November 20, 1995, following Wells Fargo's announcement of its exchange offer, First Interstate filed a Schedule 14D-9 with the Securities Exchange Commission in which it declined to recommend the

Wells Fargo exchange offer and stated its support for the proposed merger with First Bank. That filing listed sixteen factors that First Interstate considered material in preferring the proposed First Bank merger over a transaction with Wells Fargo.

II. Wells Fargo's Claims

Wells Fargo asserts four types of claims for injunctive and/or declaratory relief against First Interstate and its directors.[2] In addition to claims against First Interstate, Wells Fargo seeks injunctive and declaratory relief against First Bank for aiding and abetting breaches of fiduciary duty on the part of the First Interstate directors.

Briefly the four types of claims against First Interstate are as follows: First, Wells Fargo claims that First Interstate's board has breached its fiduciary duties by knowingly choosing a merger that provides less financial benefit to the company's shareholders than the proposal that it offers. Second, Wells Fargo asserts that First Interstate's board has entered into the First Bank merger agreement as a defense to its proposal; as such it claims that judicial review of that merger must satisfy what has been called the enhanced business judgment rule announced in *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), which according to Wells Fargo it cannot do. Third, Wells Fargo asserts that First Interstate has breached a fiduciary duty of candor by failing to disclose in its 14D-9 filing the alleged fact that First Bank has brought its own stock on the market in order to artificially keep the price up. Fourth, Wells Fargo asserts that its proposed transaction, if closed, would not be subject to the provisions of Section 203 of the Delaware Corporation Law, which if it applies would restrict the ability to effectuate a merger between Wells Fargo and First Interstate. Wells Fargo seeks a declaratory judgment confirming that position. In addition, Wells Fargo asserts that its intended exchange offer, proxy solicitation, and consent solicitation would not constitute tortious interference with the First Bank/First Interstate merger and requests a declaratory judgment to that effect.

With respect to its claims against First Bank, Wells Fargo alleges that First Bank had knowledge of the purported breaches of fiduciary duties by First Interstate and its directors and assisted in such breaches by repurchasing large blocks of its own stock immediately after the proposed

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[2]At the time the parties briefed this motion to dismiss, Wells Fargo voluntarily abandoned four counts of its amended complaint.

First Bank merger was announced and by failing to disclose that fact (effectively helping to conceal the purported breaches).

[1-2] For the reasons that follow I conclude that, at the least, the relevant complaints state a claim for relief when they assert that the refusal to redeem First Interstate's stock rights plan is a step that, in the circumstances, must, but cannot, satisfy the judicial review standard of *Unocal*. I further conclude that, assuming that such a claim is a derivative claim, it nevertheless is not one that requires a pre-suit demand upon the First Interstate board before a shareholder may properly maintain the action against the board. So concluding, I must find that the relevant complaints may not be dismissed at this stage. In order to manage the trial of the case more effectively, however, I further address other aspects of the relevant complaints in order to trim from the trial matters that present questions of law, assuming the facts alleged to be true.

III. "*Revlon* Claims"

Defendants characterize the loyalty claims said to arise from the board's decision to seek out and accept First Bank's proposal as a "Revlon" claim. They assert moreover that the recent case of *In re Santa Fe Pacific Corp Shareholder Litigation*, Del.Supr. No. 224, Veasey, C.J. (1995), makes it clear that no "Revlon duties" arise in the circumstances of this stock for stock merger. That is, in this instance the closing of the merger will not effect a removal of corporate control from the public market. Therefore they assert that under that case, *Paramount Communications v. QVC Network*, Del.Supr., 637 A.2d 34 (1993), and other, there are no special "Revlon" duties of any sort present here. In using this difficult phrase I mean, as recent cases teach, a duty for the board to strive in good faith to achieve a transaction that offers the highest present value reasonably available, including the duty to talk to all responsible buyers.[3]

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[3]What I take to be distinctive about this state of affairs [when "Revlon" duties apply] is three things principally. First, in this situation the board must seek to achieve greatest available current value; it may not, in effect, trade achievable current value for a prospect of greater future value, as it may normally do in the exercise of its good faith business judgment. Historically, one would say that courts would be slow to impose this limitation except in limited circumstances. *See Robinson v. Pittsburgh Oil Refining Corp.*, Del.Ch., 126 A.2d 46 (1924). And indeed despite the fact that commentators tended to treat the *Revlon* case as revolutionary, recent cases have made clear that it did not deviate from this tradition very greatly. Second, when in this situation, a board's duty to be informed will require it to fully consider alternative transactions offered by any responsible buyer. Third, in part "Revlon

[3] Defendants are certainly correct that under the teaching of *QVC* and *Santa Fe* the special considerations present when Revlon duties are triggered are not present in this case, in which no change in corporate control is implicated. The fact that, as alleged, the First Interstate board talked to a number of other possible transaction-partners does not itself constrain the usual scope of board authority and does not invoke the special duties referred to in footnote 3. Thus the special considerations of the *Revlon* case will have no bearing on the relief sought in the complaints. Specifically that means that this court will have no occasion here to assess the economic value of these competing transactions for the purpose of enforcing a duty to accept the proposal that represents the higher current value.

[4] While I have confidence that no "*Revlon*" duties exist under the facts alleged, to say that is not, of course, to say that the members of the First Interstate board have no duty, both in turning away from the Wells Fargo opportunity and in securing the First Bank proposed merger, to proceed advisedly in a good faith attempt to advance the corporation's interests and not to foster their own interests at a cost to the corporation. Respecting the duty of loyalty more broadly conceived than the "Revlon duty," I note that the complaint does not allege fact that suggest that the First Bank merger agreement was in any classic sense self-interested (meaning no conflicting ownership or other interests are alleged). Thus, (in the absence of allegations of eccentric facts dealing with strange motivations such as hatred, lust, vengeance or other interesting human weaknesses rarely directly encountered in the quiet residential precincts of corporation law), if the board or some members of it is to be charged with disloyalty it is because those board members are alleged to have a personal interest in the transaction in the indirect sense of an interest in maintaining their seats on the board of First Interstate or otherwise benefiting indirectly from the taking of the First Bank option to the exclusion of the Wells Fargo option. But this sort of loyalty claim — customarily referred to as an entrenchment claim — is treated independently in the complaints and is dealt with in the next section in this memorandum.

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duties" are not distinctive board duties at all, but a changed standard of judicial review. That is when "Revlon duties" are triggered a burden will shift to the directors and the court will undertake more active review of the traditional directorial duties of care and loyalty under a reasonableness standard. *Paramount Communications v. QVC Network*, Del.Supr., 637 A.2d 34 (1993).

IV. Entrenchment Claims

Plaintiffs claim that the First Interstate directors' steps to achieve the First Bank deal and thwart a Wells Fargo deal are "defensive" under *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and not reasonable in relation to any threat that the Wells Fargo proposal presents. With respect to this charge defendants assert two arguments on this motion to dismiss. First, defendants argue that the allegations of the relevant complaints, even if true, show that both aspects of *Unocal*'s enhanced scrutiny have been met here. Thus they claim that the relevant complaints simply fail to state a claim for breach of any duty owed by a director to the corporation or its shareholders. Second, defendants assert that such a claim has not properly been brought in all events; they claim that such a claim is derivative in nature and must comply with Rule 23.1, with respect to pre-suit demand on the board, which has not been done. I put that argument to the side for the moment and turn to the substantive argument first, accepting as true for these purposes the allegations of the relevant complaints.

1. Reasonableness of "Defensive" Acts.

[5] As our Supreme Court has made clear, the enhanced judicial scrutiny contemplated by *Unocal* applies "whenever the record reflects that a board of directors took defensive measures in response to a 'perceived threat to corporate policy and effectiveness which touches upon issues of control.'" *Unitrin, Inc. v. American Gen. Corp.*, Del.Supr., 651 A.2d 1361, 1372 n.9 (1995); *Stroud v. Grace*, Del.Supr., 606 A.2d 75, 82 (1992); and *Gilbert v. El Paso Co.*, Del.Supr., 575 A.2d 1131, 1144 (1990). The corporate control referred to in this context is apparently a different concept than the change in corporate control that triggers "*Revlon*" duties, as the holding in the recent *Santa Fe* case seems to demonstrate.

[6] Most notably the complaints charge that (1) the refusal of the board to redeem the First Interstate's stock rights plan is an act (a conscious refusal to act) that is defensive in the relevant sense and that (2) the First Bank merger agreement itself is defensive in this sense. For purposes of this motion to dismiss, I accept that both of these steps may be defensive acts that will trigger the *Unocal* form of judicial review. That means that upon proof of facts from which a fact finder could conclude that either or both of these acts were defensive, the burden will shift to the director defendants to satisfy, by a preponderance of the evidence, the two-part test of "enhanced business judgment" review that *Unocal* articulates. The

second, more innovative prong of this tests asks whether the action taken was reasonable in relation to a threat. Such an inquiry will of course quite often be ill-suited to pre-trial resolution since the question of reasonableness is necessarily highly contextual.

The defendants claim that, even if taken as true, the allegations of Wells Fargo's amended complaint show that the defendants met both parts of the *Unocal* inquiry. That is, the allegations themselves establish that (1) "the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and (2) "the board of directors' defensive response was reasonable in relation to the threat posed." *See Unitrin*, 651 A.2d at 1373. For instance, the defendants argue that a showing of "good faith and reasonable investigation" satisfies the first prong of the *Unocal* analysis, *see Unocal* 493 A.2d at 955, and that the facts as alleged — namely that the decision was made by a majority of outside directors with advice of legal and financial advisors — "constitute a *prima facie* showing of good faith and reasonable investigation." *See Polk v. Good*, Del.Supr., 507 A.2d 531, 537 (1986). In addition, the defendants suggest that there are no allegations in the amended complaint from which it could reasonably be inferred that the break-up fees, stock options, and rights plan are coercive or preclusive, or outside a range of reasonableness. One might well be tempted to agree with the defendants with respect to the break-up fees and stock option provisions of the merger agreement; the effect of the rights plan, however, plainly is a different order of magnitude.

[7] In all events, whether there were reasonable grounds for concluding that a threat was posed and whether the response was proportional to that threat are generally questions of fact to be decided at trial, not on the pleadings. *See In re Santa Fe Pacific Corp. Shareholder Litig.*, Del.Supr., No. 224,1995 slip op. at 32, Veasey, C.J. (Nov. 22, 1995) ("[Unocal] scrutiny will usually not be satisfied by resting on a defense motion merely attacking the pleadings."). Contrary to the defendants' arguments, I find that a conclusion as to these issues cannot be made simply by examining to the well-pleaded allegations of Wells Fargo's complaint.

2. Is an Entrenchment Claim Derivative or Direct?

Secondly, defendants argue that Wells Fargo and the shareholder plaintiffs lack standing to bring claims of entrenchment because these are derivative claims concerning which neither Wells Fargo nor the shareholder plaintiffs has made demand upon the board. *See* Del.Ct.Ch.R. 23.1. They are derivative claims, according to the

defendants, because neither Wells Fargo nor the shareholder plaintiffs have or will suffer special injury in their capacity as stockholders.

The characterization of corporate law claims as derivative or direct has potentially significant consequences under substantive and procedural law. The rules and principles by which this distinction is drawn are, however, quite imperfect. The broad outline of what makes a claim corporate is simple enough: if the suit seeks recovery for an injury done to the corporation, it is certainly corporate. If it seeks a remedy to compensate for the invasion of a property right of a stockholder, the recovery will be for the stockholder. But in a number of contexts, especially where equitable relief is sought, the distinctions grow quite unclear: consider for example an action claiming that directors sold a block of new stock to a chum at a bargain price in order to protect their incumbency? The suit seeks cancellation. Surely the corporation itself is injured by the sale of stock at a price less than good faith effort would have raised. But just as clearly the individual shareholders have suffered a direct injury in the unfair dilution of their voting power. Equally problematic is the conceptualization of alleged wrongs in connection with a stock for stock merger. The merger is a corporate act, but in the merger the stock (property interest) of all of the shareholders of at least one of the constituent corporations will be fundamentally altered. Consider specifically a reverse triangular merger in which the business of the target company continues to be operated in the same corporate form but its former shareholder now owns stock in its parent. While, of course, a whole range of corporate structure or governance alterations might be effectuated in that connection as well, it is possible that the only practical effect of the merger is the conversion of the property interest of the shareholders of the target corporation. If the merger were accomplished through a breach of duty, does it not seem plausible that the injury is direct not derivative?

[8] Perhaps the best way to view these kinds of cases is to consider the remedy that may be appropriate. Where the remedy in a shareholder action will necessarily affect all shareholders (such as the rescission of a merger) not only is such a case permissible as a class claim (Rule 23(b)(1)) but, speaking prudentially, protection of all interests require that it be litigated once, for all (Rule 23.1). A derivative characterization accomplishes that result.

[9-10] The decided cases reflect the difficult of this distinction. As set forth in *Moran v. Household Int'l*, to state an individual action, a plaintiff "must allege either 'an injury which is separate and distinct from that suffered by other shareholders,' ... or a wrong involving a contractual right of a shareholder ... which exists independently of any right of the

corporation." *See Moran v. Household Int'l, Inc.*, Del.Ch., 490 A.2d 1059, 1070 (quoting 12B Fletcher Cyclopedia Corps. §5921, at 452 (Perm. Ed. 1984)). Later the Supreme Court of Delaware recognized that *Moran* does not establish the only test for determining whether a claim is individual or derivative in nature. *Lipton v. News Int'l, PLC*, Del.Supr., 514 A.2d 1075, 1078 (1986). "Rather, ... we must look ultimately to whether the plaintiff has alleged 'special' injury, in whatever form." *Id.* The Delaware Supreme Court has noted that "[t]he line between derivative and individual actions can become particularly vague in the area of suits challenging defensive takeover tactics." *Kramer v. Western Pacific Indus.*, Del.Supr., 546 A.2d 348, 352 n.3 (1988).

In my opinion it is unnecessary to attempt to characterize the claims of breach of duty that remain for trial. The principal claims I find in these complaints are the entrenchment/*Unocal* claim treated above and the disclosure claim noted below. With respect to the entrenchment claim, it seems clear that factual allegations which, if true, are sufficient to shift the burden to defendants to meet the "enhanced business judgment" test of *Unocal* are similarly sufficient to raise a reasonable doubt concerning the board's ability to make a binding business judgment, whether one focuses on a judgment to resist the Wells Fargo offer or on the hypothetical judgment that this board would make it asked to institute this law suit. *Aronson v. Lewis*, Del.Supr., 473 A.2d 805 (1984). Thus, even if this suit were best characterized as a derivative suit seeking equitable and declaratory relief, I would not grant the pending motion. The relevant complaints do state facts sufficient to excuse demand in this instance and the corporation itself is a party defendant. Thus, the functionally significant elements of a well pleaded derivative suit are satisfied in this instance. With respect to the disclosure claim, such claims are quite obviously individual as they affect the right to vote or the personal right to determine if one will sell or not one's investment.

V. Declaratory Judgment Concerning 8 Del.C. §203 and Tortious Interference With a Contract

In a tireless attempt to assist its business objective, Wells Fargo's novella length amended complaint contains a number of paragraphs directed speculatively to future states of the world. For example, the complaint alleges that "to the extent First Interstate modifies the First Bank Proposed Merger ... the defendant directors will have a duty to eliminate the break-up fee, [and] the Lock-Up Stock Option ... in order to avoid...breaching their fiduciary duties." First Amd. Cplt. Pars. 34,65-

68. Or: "First Interstate's current Board could frustrate the power of any future Board ... by ... adding a "Dead Hand" provision .... The adoption of any such amendment would violate ... fiduciary duties [because ...]. Pars. 43-45, 90, 93. Or: the claim that a nominating bylaw cannot be applied to a consent solicitation, without any allegation that the Company claims that it does apply to consent solicitations. Pars. 46-47, 98-103. The likelihood of these future states of the world in which these requested rulings would have actual pertinence are surely different, but all equally unknown.

Among these claims looking to a future set of facts is a claim seeking a declaratory judgment that, if Wells Fargo were to come to own a majority of First Interstate's stock and sought within three years thereafter to complete a transaction covered by Section 203 of the Delaware General Corporation Law, that Section 203(b)(6) would apply to exempt any such transactions from the remaining provisions of that statute. Defendants seek to have this claim dismissed as unripe. I agree. [11-12] Ripeness in the declaratory judgment context always presents a question of judgment. The relevant considerations are set forth in *Stroud v. Milliken Enterprises, Inc.*, Del.Supr., 552 A.2d 476 (1989) and *Schick Inc. v. Amalgamated Clothing & Textile Union*, Del.Ch., 533 A.2d 1235 (1987). Here, I accept that there may be doubt in the minds of Wells Fargo's officers and attorneys as to the scope of the Section 203(b)(6) exemption. Those doubts, however, are the kind that are the ordinary condition of a world of imperfect information. Every commercial transaction may encounter uncertainty as to the scope and meaning of applicable positive law. Lawyers are trained and licensed in order to mitigate such doubts and risks. But the legal system does not undertake to remove all ambiguity from transactions at early stages. Rather, courts await the presentation of actual disputes arising from settled facts. Here, with respect to the meaning of Section 203 as applied to a future Wells Fargo merger or other covered transaction, there is in my judgment no good reason to impose on the other parties and the public the cost of undertaking presently to resolve legal ambiguity that, if it is to present an operational issue, will do so only after a number of contentious issues are resolved in several courts and in other agencies.

Another purported claim concerns Wells Fargo's possible liability to First Bank in the event it prevails in its efforts to acquire First Interstate. The claim that it seeks present comfort on would be a claim for tortious interference with a contract. The theory is that, under the law of whatever state is determined to apply, it has a privilege to induce shareholders to seek the proposal that it offers which it says offers to them materially better consideration. It is not alleged that First Bank has

asserted that Wells Fargo has interfered with its contracts by actions that create liability.

[13] In my opinion there are not facts alleged to have occurred that would permit the sensible adjudication of any tortious interference case yet. Whether there is tortious interference cannot be determined until the acts that might arguably constitute such interference have occurred and a claim of such interference, direct or implicit, is made. These theories too will not be the subject of evidence at the trial.

VI. Claims of Misdisclosure

In its complaint, Wells Fargo contends that the directors of First Interstate breached a fiduciary duty of candor by failing to disclose material information to the corporation's stockholders with respect to the proposed merger between First Interstate and First Bank.[4] In particular, Wells Fargo claims that these directors failure to disclose material information in a Schedule 14D-9 filing by the company, which filing recommended against tendering into a forthcoming Wells Fargo exchange offer. That filing listed some sixteen factors that reportedly lead the First Interstate board to conclude that the First Bank merger represented a preferred transaction to the Wells Fargo exchange offer. The principal focus of the claimed non-disclosure is the assertion of fact that First Bank had engaged in materially greater purchases of its own stock following the signing of the First Interstate-First Bank merger agreement; that the purpose of those purchases was to support or raise the market price of First Bank's stock; and that First Interstate knew of these material facts.

Defendants assert that these allegations fail to state a claim because the alleged nondisclosures are immaterial as a matter of law. More specifically, the defendants surmise that nothing in Wells Fargo's complaint "supports an inference that 'suspiciously timed' repurchases of [First Bank] stock in November 1995 will 'significantly alter the total mix of information made available' to a First Interstate stockholder voting on the [proposed First Bank merger] several months later." The defendants also argue that disclosure of any alleged improper purpose behind this repurchasing activity would require the board of directors to engage in "self-flagellation" and therefore falls outside any fiduciary duty of disclosure. *See, e.g., Margolies v. Pope & Talbot, Inc.*, Del.Ch., C.A. No. 8244, slip op. at 20, Hartnett, V.C. (Dec. 23, 1986); *Weingarden &*

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[4]Both parties assumed there was a state law duty of disclosure under these circumstances. For purposes of this motion, I proceed on that same assumption.

Stark v. Meenan Oil Co., Del.Ch., C.A. Nos. 7291 & 7310, slip op. at 10, Berger V.C. (Jan. 2, 1985).

[14] A question of materiality is difficult to treat as a question of law on a motion to dismiss. In fact, issues of materiality are generally held to be mixed questions of law and fact, but predominantly questions of fact. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). They are matters that in many instances require a rich factual context to responsibly decide. *See Bronson v. Exide Elec. Corp.*, Del.Supr., C.A. No. 457,1992, 1994 Del. LEXIS 129, Holland, J. (Apr. 25, 1994) (order)(finding that questions of materiality "generally cannot be resolved on a motion to dismiss, but rather ... must be determined after the development of an evidentiary record). For this reason, considering only the allegations of the complaint (and specifically not considering questions of timing of disclosure or other information available to the market) I cannot now conclude that the matter allegedly omitted from the Schedule 14D-9 was immaterial as a matter of law. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Rosenblatt v. Getty Oil Co.*, Del.Supr., 493 A.2d 919 (1985).

[15] To the limited extent Wells Fargo claims that First Interstate has a duty to disclose the improper purpose that allegedly motivated First Bank's repurchase activity, I agree with defendants that such disclosure is not required. Directors are not required to "draw legal conclusions implicating [themselves] in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter." *Stroud v. Grace*, Del.Supr., 606 A.2d 75, 84 n.1 (1992).

VII. Claims of First Bank Aiding Breach

Wells Fargo and the shareholder plaintiffs allege, in the relevant complaints, that First Bank had knowledge of the purported breaches of fiduciary duty by the First Interstate defendants and assisted those breaches by (1) engaging in substantial repurchases of its own stock — inflating the value of that stock and misleading First Interstate shareholders, and (2) agreeing to the break-up fee and lock-up stock option in connection with the First Interstate/First Bank merger agreement. In the alternative, the plaintiffs allege that First Bank aided and abetted First Interstate's breaches by "failing to inform First Interstate about the repurchases and their effect on the First Bank stock or by failing publicly to acknowledge them and their effect on the First Bank stock when First Interstate failed or refused to do so."

As grounds for state law liability for assisting in the knowing breach of fiduciary duty, these allegations seem thin indeed. The

question, however, is whether under any state facts that may be proven in support of these allegations First Bank could be guilty of knowing participation in a breach.

[16] As determined above, the relevant complaints state a claim that the First Interstate defendants breached their fiduciary duties by embracing the First Bank transaction and taking "defensive" steps (or failing to take steps in the case of the rights plan) to preclude Wells Fargo from pursuing an alternative deal at this time. The relevant complaints also state a claim for beach of the fiduciary duty of candor in connection with the First Interstate defendants' failure to disclose First Banks' repurchasing activity. In order for plaintiffs to state a claim that First Bank aided and abetted in one of these alleged breaches, they must plead facts from which it could be inferred that First Bank knew these actions or failures to act were a breach of fiduciary duty, and knowing that, cooperated in the course of action by which the First Interstate board sought to accomplish that result. *See Weinberger v. Rio Grand Indus., Inc.*, Del.Ch., 519 A.2d 116, 131 (1986).

I call the "civil conspiracy" claim thin because nothing has been alleged to show that the merger agreement between First Bank and First Interstate was other than an arms' length negotiation. First Bank's alleged affirmative actions taken after the merger agreement was consummated, in the form of its repurchasing activities, have no tendency, standing alone in my view, to show that First Bank was involved in more than arm's length negotiations with First Interstate and self-serving conduct thereafter. Although the effect of these repurchases might have been to support the market price of First Bank stock, such effect was clearly in the self-interest of First Bank and does not, in and of itself, tend to show that First Bank was involved in any conspiracy with First Interstate to embrace a deal for entrenchment purposes.

[17] The question on this point comes down to pleading "knowing" participation, and on the question of pleading knowledge, however, Rules 12(b)(6) and Rule 9(b) are very sympathetic to plaintiffs. We have here more than simply signing a merger agreement, which alone I could not sustain as stating a claim for knowing participation; the additional element — the alleged stock market activity — is however sufficient in my opinion under the liberal pleading rules generally followed to conclude that a valid claim has been stated against First Bank.

Defendants will submit an order implementing the foregoing on notice.

NEW AND UNJUSTIFIED RESTRICTIONS ON DELAWARE DIRECTORS' AUTHORITY

BY ELLEN TAYLOR*

TABLE OF CONTENTS

*Associate Professor, Georgia State University College of Law. I appreciate the thoughtful comments of William J. Carney, Patricia T. Morgan and Anne M. Rector on earlier drafts of this article and the able research assistance of Heidi K. Wambach, a student at Southern Methodist University School of Law.