stockholders to ratify a blatantly illegal act — such as a board's decision to indemnify itself against personal liability for intentionally violating applicable environmental laws or bribing government officials to benefit the corporation — the vestigial exception for waste has little to do with corporate integrity in the sense of the corporation's responsibility to society as a whole. Rather, if there is any benefit in the waste vestige, it must consist in protecting stockholders.[72] And where disinterested stockholders are given the information necessary to decide whether a transaction is beneficial to the corporation or wasteful to it, I see little reason to leave the door open for a judicial reconsideration of the matter.

The fact that a plaintiff can challenge the adequacy of the disclosure is in itself a substantial safeguard against stockholder approval of waste.[73]

> inflexible inquiry into the relative proximity of the challenged activity to the corporation's stated purposes, the question of the permissible spheres of a corporation's activities are largely internalized within the corporation's governance system. Third parties without actual knowledge of any limitations in the corporation's charter are properly protected. Any significant and harmful departures from the corporation's stated purposes are an intramural matter in which the executives responsible for the *ultra vires* acts are answerable in damages, provided their conduct is beyond the protection of the business judgment rule.

J. D. Cox, T. L. Hazen, and F. H. O'Neal, 1 *Corporations* § 4.7, at 4.17 (1999); H. Hovenkamp, *Enterprise and American Law, 1836-1937*, 59-63 (1991) (describing the evolution of the *ultra vires* doctrine from one concerned with constraining corporations for public policy reasons to one designed to protect stockholders through shareholder-instituted litigation).

Furthermore, elimination of the waste vestige would not prevent the court from voiding a transaction that offends some specific public policy. The interests of creditors would also seem to be accounted for by other means, such as Delaware's Fraudulent Conveyances statute. 6 Del. C. § 1301 *et seq.*

[72]That the Delaware case law allows the ratification of "waste" by a unanimous vote demonstrates that the rationale for the exception must be based on the protection of minority stockholder interests, rather than the protection of society. The fact that the cases also arguably bar a non-dissenting, fully informed stockholder from attacking as wasteful a transaction he supported as a voter also bolsters this conclusion. *Bershad v. Curtiss-Wright Corp.*, Del. Supr., 535 A.2d 840, 848 (1987). As a matter of strict theory, a "void" act cannot be ratified by any vote because the act is beyond the lawful power of the corporation itself. *Pullman's Palace Car Co.*, 139 U.S. at 48-49. As a result, one leading treatise reads the Delaware cases as affording a unanimous vote an estoppel effect "depriving the shareholders of a cause of action on the issue." 2A *Fletcher* § 764, at 550; *cf.* 7A *Fletcher* § 3432, at 38 (noting that preventing ratification of *ultra vires* acts that are not illegal or void is "clearly unsound and erroneous since the only real basis of the [*ultra vires*] defense is protection of the shareholders").

[73]*See generally In re The Walt Disney Co. Derivative Litig.*, 731 A.2d at 369-72 (discussing how robust the duty of disclosure is under Delaware corporate law); *see also Matador Capital Management Corp. v. BRC Holdings, Inc.*, Del. Ch., 729 A.2d 280,295 (1998) (enjoining transaction in order to require dissemination to stockholders of additional disclosures where directors, when recommending that the stockholders accept a bid, failed to disclose information about their actions bearing on whether the directors fulfilled their fiduciary duty to seek the transaction offering the best value to the stockholders); *Sonet v. Plum Creek Timber Co.*, C.A. No. 16931, mem. op. at 19,33, 1999 Del. Ch. LEXIS 49, at *25, *45, Jacobs, V.C. (Mar. 18, 1999)

If the corporate board failed to provide the voters with material information undermining the integrity or financial fairness of the transaction subject to the vote, no ratification effect will be accorded to the vote and the plaintiffs may press all of their claims.[74] As a result, it is difficult to imagine how elimination of the waste vestige will permit the accomplishment of unconscionable corporate transactions, unless one presumes that stockholders are, as a class, irrational and that they will rubber stamp outrageous transactions contrary to their own economic interests.

In this regard, it is noteworthy that Delaware law does not make it easy for a board of directors to obtain "ratification effect" from a stockholder vote. The burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board.[75] Given the fact that Delaware law imposes no heightened pleading standards on plaintiffs alleging material nondisclosures or voting coercion and given the pro-plaintiff bias inherent in Rule 12(b)(6), it is difficult for a board to prove ratification at the pleading stage. If the board cannot prevail on a motion to dismiss, the defendant directors will be required to submit to discovery and possibly to a trial.

Nor is the waste vestige necessary to protect minority stockholders from oppression by majority or controlling stockholders.[76] Chancellor Allen recently noted that the justification for the waste vestige is "apparently that a transaction that satisfies the high standard of waste constitutes a *gift* of corporate property and no one should be forced against their will to make a gift of their property."[77] This justification is inadequate to support continued

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(enjoining transaction until misleading disclosures were corrected); *cf. In re Tri-Star Pictures, Inc. Litig.*, Del. Supr., 634 A.2d 319, 333-34 (1993) (emphasizing the ease with which plaintiffs can obtain monetary damages if they demonstrate a breach of the "duty of disclosure" negatively affecting economic or voting rights).

[74]*See, e.g.*, *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 893 (1985); *Solomon v. Armstrong*, mem. op at 59, 1999 Del. Ch. LEXIS 62, at *80.

[75]*Id.*

[76]*See Rogers v. Hill*, 289 U.S. 582, 591-92 (1933) (stating that "majority stockholders have no power to give away corporate property against the protest of the minority") (citation and quotations omitted).

[77]*Lewis v. Vogelstein*, 699 A.2d at 335-36; *see also Gottlieb v. Heyden*, 91 A.2d at 58-59 (If a transaction's reasonableness to the corporation is "within the realm in which reasonable men, fully informed and acting in good faith, may be expected to differ, then the court will enter judgment for the defendant. Within this realm the majority may enforce its will upon a dissenting minority; outside it they may not.").

Some older authorities imply that the waste vestige is subsumed within a larger *ultra vires* doctrine concern that minority stockholders should not have to assume the risk of investments or activities not authorized by the corporate certificate. As Ballantine stated:

> Nothing, therefore, is now more surely settled in the law of corporations than the doctrine that any unauthorized act or contract by the directors or a majority of the stockholders of a corporation, which will destroy the existence of the corporation, or render it unable to perform its functions, or any misapplication or diversion of

application of the exception. As an initial matter, I note that property of the corporation is not typically thought of as personal property of the stockholders, and that it is common for corporations to undertake important value-affecting transactions over the objection of some of the voters or without a vote at all.

In any event, my larger point is that this solicitude for dissenters' property rights is already adequately accounted for elsewhere in our corporation law. Delaware fiduciary law ensures that a majority or controlling stockholder cannot use a stockholder vote to insulate a transaction benefiting that stockholder from judicial examination. Only votes controlled by stockholders who are not "interested" in the transaction at issue are eligible for ratification effect[78] in the sense of invoking the business judgment rule rather than the entire fairness form of review.[79] That

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> assets to purposes not authorized by its charter, even though all other stockholders may consent, is a breach of obligation towards a dissenting stockholder, against which he is entitled to relief in equity. Any stockholder, therefore, may maintain a bill in equity in his own name, if he is not estopped, to enjoin a threatened misapplication or diversion of its assets, or to enjoin or set aside *ultra vires* acts or contracts which will result in such a misapplication or diversion, or which may destroy the corporation, or render it unable to carry out its objects. No majority of stockholders, however large, may ratify or sanction the misapplication of the capital to purposes unauthorized by the charter.

Ballantine § 187, at 615; *see also Lattin*, at 192-93 (describing the debate in England in the nineteenth century about whether even unanimous stockholder approval of a transaction between a corporation and a third party that was beyond a corporation's charter powers was sufficient to validate the contract). In general, however, the authorities do little to justify or explain the waste vestige; they simply state it as a given. *See, e.g., Michelson v. Duncan*, 407 A.2d at 219 (*citing* [18B] Am. Jur. 2d Corporations § 1497, which contains no justification); *Keenan*, 2 A.2d at 909; *Rosenthal v. Burry*, 60 A.2d at 109-10; *Kerbs v. California Eastern Airways, Inc.*, Del. Supr., 90 A.2d 652, 655 & 659 (1952); *Putterman v. Daveler*, Del. Ch., 134 A.2d 480, 484 (1957); *Saxe v. Brady*, 184 A.2d at 610; *Kaplan v. Goldsamt*, 380 A.2d at 567-68; 18B *Am. Jur. 2d Corporations* § 1497 (1999); 2A *Fletcher* § 764, at 550-5 1; E. L. Folk, R. Ward, Jr., and E. P. Welch, *Folk on the Delaware General Corporation Law* § 144.5.2 & 144.5.2.1 (hereinafter "Folk"); *Balotti & Finkelstein* § 4.35; D. A. Drexler, L.S. Black, Jr., and A.G. Sparks, III, *Delaware Corporation Law and Practice* § 15.05[4], at 15-23-24 (1999); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 5.02(a)(2)(D), Comments, & Reporter's Note (1994 and 1999).

[78]In using the word ratification in this opinion, I am keenly aware that "'classic ratification'" involves the voluntary addition of an independent layer of shareholder approval in circumstances where such approval is not legally required." *In re Wheelabrator Technologies Shareholders Litig.*, Del. Ch., 663 A.2d 1194, 1201-02 n.4 (1995). Indeed, my colleague Vice Chancellor Steele recently noted that it was oxymoronical to call a necessary stockholders' vote in advance of a transaction's consummation "advance ratification." *In re 3Com Corp. Shareholders Litig.*, mem. op. at 9. For want of better nomenclature, I use the term as describing a stockholder vote sufficient to invoke the business judgment rule standard of review. *In re Wheelabrator*, 663 A.2d at 1201-02 4 ("'[S]hareholder ratification' has now acquired an expanded meaning intended to describe any approval of challenged board action by a fully informed vote of shareholders, irrespective of whether that shareholder vote is legally required for the transaction to attain legal significance.").

[79]*E.g., Lewis v. Hat Corp. of America*, 150 A.2d at 752 n.3 (examining whether a majority

is, only the votes of those stockholders with *no* economic incentive to approve a wasteful transaction count.[80]

Indeed, it appears that a corporation with a controlling or majority stockholder may, under current Delaware law, never escape the exacting entire fairness standard through a stockholder vote, even one expressly conditioned on approval by a "majority of the minority." Because of sensitivity about the structural coercion that might be thought to exist in such circumstances, our law limits an otherwise fully informed, uncoerced vote in such circumstances to having the effect of making the plaintiffs prove that the transaction was unfair.[81] Doubtless defendants appreciate this shift, but it still subjects them to a proceeding in which the substantive fairness of their actions comes under close scrutiny by the court — the type of scrutiny that is inappropriate when the business judgment rule's presumption attaches to a decision.

Third, I find it logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction. The test for waste is whether any person of ordinary sound business judgment could view the transaction as fair.[82]

If fully informed, uncoerced, independent stockholders have approved the transaction, they have, it seems to me, made the decision that the transaction is "a fair exchange."[83] As such, it is difficult to see the utility of

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of the voters without an interest in the proposed transaction voted for it before giving ratification effect to the vote); *see generally Folk* § 144.5.2.3, at 144:14-16 (discussing fairness).

[80]A non-comprehensive review of the treatises suggests that the law earlier in the century was far less clear about whether "interested" persons could vote as stockholders to ratify or approve transactions. *Ballantine* § 124, at 395 (suggesting that interested votes counted to ratify a self-interested contract between a director and a company); *Clark* § 5.3, at 179 (indicating that older case law enabled interested stockholders to ratify a transaction, rendering the transaction valid, and not necessarily void, but somewhat contradictorily left the transaction open to attack by dissenting stockholders on fairness grounds); *Hornstein* § 439, at 545 (interested vote counts towards ratification but ratification by interested votes will not be given as much weight by the courts); 2 *Morawetz* § 622, at 588-89 (quoting an 1877 case in which the accused wrongdoer appears to have controlled a majority of the voting shares for the proposition that "'[t]o hold that a corporation could gratuitously condone or release . . . a fraud, by anything short of unanimous consent, would be monstrous; for it would be in effect to hold that president or director who can control a majority vote in the corporation may rob or despoil it with impunity. . . .'") (*quoting Hazard v. Durant*, 11 R.I. 195 (1877)); *see also* Note, "Shareholders Ratification of Directors' Fraudulent Acts," 53 *Harvard L. Rev.* 1368, 1371 & n.17 (1940) (hereinafter "Shareholders Ratification") (noting that the defrauding defendants in *Hazard* "did control a majority of the stock" and suggesting that the *Hazard* rule has little force "unless the majority of the stock is controlled by the 'despoiling' directors").

[81]*Kahn v. Lynch Communication Systems, Inc.* Del. Supr., 638 A.2d 1110, 1117 (1994); *In re Wheelabrator Technologies, Inc. Shareholders Litig.*, 663 A.2d at 1203, 1205.

[82]*Michelson v. Duncan*, 407 A.2d at 224; *see also Saxe v. Brady*, 184 A.2d at 610.

[83]*Michelson*, 407 A2.d at 224 (citation and quotations omitted). Indeed, our courts have considered a disinterested, uncoerced vote in favor of a transaction as substantive evidence

allowing litigation to proceed in which the plaintiffs are permitted discovery and a possible trial, at great expense to the corporate defendants, in order to prove to the court that the transaction was so devoid of merit that each and every one of the voters comprising the majority must be disregarded as too hopelessly misguided to be considered a "person of ordinary sound business judgment."[84] In this day and age in which investors also have access to an abundance of information about corporate transactions from sources other than boards of directors, it seems presumptuous and paternalistic to assume that the court knows better in a particular instance than a fully informed corporate electorate with real money riding on the corporation's performance.

Finally, it is unclear why it is in the best interests of disinterested stockholders to subject their corporation to the substantial costs of litigation in a situation where they have approved the transaction under attack. Enabling a dissident who failed to get her way at the ballot box in a fair election to divert the corporation's resources to defending her claim on the battlefield of litigation seems, if anything, contrary to the economic well-being of the disinterested stockholders as a class. Why should the law give the dissenters the right to command the corporate treasury over the contrary will of a majority of the disinterested stockholders? The costs to corporations of litigating waste claims are not trifling.

Although there appears to be a trend in the other direction,[85] binding case law still emphasizes the ease with which a plaintiff may state a waste claim and the difficulty of resolving such a claim without a trial.[86] As in this case, proxy statements and other public filings often contain facts that, if true, would render waste claims wholly without merit. Plaintiffs' lawyers (for good reason) rarely put such facts in their complaints and it is doubtful that the court can look to them to resolve a motion to dismiss a waste claim even where the plaintiff has not pled that the facts in the public filings are not true.[87] Given this reality and the teaching of prior cases, claims with no

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disproving the wasteful nature of the transaction. *See, e.g.*, *Saxe*, 184 A.2d at 611-12.

[84]*Michelson*, 407 A.2d at 224. Admittedly, some distinguished commentators have a more jaded view of stockholders' ability to reject transactions not in their best interests. *See Clark* § 5.4, at 182 ("To summarize about the shareholder approval procedure as a way of policing basic self-dealing transactions: It would be perverse for the legal system to have many such matters taken to the shareholders; folly to expect the shareholders to pass upon them in a careful, well informed way; and wrong to hold them to the consequences of their failing to do so.").

[85]*Lewis v. Vogelstein*, 699 A.2d at 339; *Steiner v. Meyerson*, mem. op., 1995 Del. Ch. LEXIS 95; *In re 3Com Corp. Shareholders Litig.*, mem. op. at 10-14.

[86]*Michelson v. Duncan*, 407 A.2d at 223 ("[c]laims of gift or waste of corporate assets are seldom subject to disposition by summary judgment"); *see also Haft v. Dart Group Corp.*, Del. Ch., C.A. No. 13736, 1994 Del. Ch. LEXIS 200, at *7-8, Allen, C. (Nov. 14, 1994).

[87]*Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, Del. Supr., 691 A.2d 609, 613 (1996), emphasizes the limited circumstances in which it is appropriate to consider matters outside the pleadings on a Rule 12(b)(6) motion. It is unlikely that a proxy

genuine likelihood of success can make it to discovery and perhaps to trial. To the extent that there is corporate waste in such cases, it appears to be some place other than in the corporate transactions under scrutiny.

For all these reasons, a reexamination of the waste vestige would seem to be in order.[88] Although there may be valid reasons for its continuation, those reasons should be articulated and weighed against the costs the vestige imposes on stockholders and the judicial system. Otherwise, inertia alone may perpetuate an outdated rule fashioned in a very different time.[89]

5. Does Count II State A Claim That The Proxy Statement And Therefore The Vote On The Merger Were Tainted By Material Misdisclosures?

[31-32] The Republic directors had a duty to disclose all material information to the Republic stockholders when they sought stockholder approval of the Merger.[90] "The materiality standard requires directors to disclose all facts which, under all the circumstances, would have assumed actual significance in the deliberations of [a] reasonable shareholder."[91]
[33] In defending against this Rule 12(b)(6) motion, the plaintiff relies upon only one aspect of the Proxy Statement that it asserts is materially misleading: the Proxy Statement's discussion of the Loan Agreement.[92] The

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statement is integral to a waste claim simply because the plaintiff also pleads a disclosure claim and relies on the proxy statement in that respect.

[88]This could be a part of an overdue clarification of the now "tortured" state of Delaware's law on the burden-shifting effect of disinterested shareholder approval. *Solomon v. Armstrong*, mem. op. at 23, 1999 Del. Ch. LEXIS 62, at *33; *see also In re Wheelabrator*, 663 A.2d at 1204-05.

[89]*See Onti, Inc. v. Integra Bank*, Del. Ch., Cons. C.A. No. 14514, mem. op. at 55, 1999 Del. Ch. LEXIS 130, at *73, Chandler, C. (May 26, 1999, rev. July 1, 1999) (*citing* Oliver Wendell Holmes, *The Path of Law* 187 (1921)). A perceptive student noted in 1940 that the blanket proposition that "fraud cannot be ratified" by even disinterested stockholders lacked an adequate rationale. The student feared, however, that "[f]requent reiteration of the statement may induce blind faith in the wisdom of its application, and the oversimplified formula — that shareholders may not ratify directors' frauds — may become an unyielding major premise in the law of corporate powers." *Shareholders Ratification*, 53 *Harv L. Rev.* at 1375. These fears seem to have been borne out in the case of the waste vestige.

[90]*In re Santa Fe Pacific Shareholder Litig.*, 669 A.2d at 66.

[91]*Id.* (quotations and citations omitted).

[92]At oral argument, the plaintiff abandoned its argument that the Proxy Statement is deficient because it does not disclose that the funds forwarded to AutoNation under the Loan Agreement would not have to be repaid if the Merger was consummated. This concession was wise because the Proxy Statement made adequate disclosure that the funds forwarded to AutoNation under the Loan Agreement would not have to be repaid if the Merger was approved. Republic was buying all of AutoNation. A reasonable investor knows that the acquiring corporation usually assumes the debts of the acquired corporation in a merger. For Republic investors who did not know that, the Proxy Statement expressly stated that "[t]he assets and liabilities . . . of AutoNation

misleading nature of the discussion rests on one alleged fact:

> That the Proxy Statement did not disclose the actual amount of funds provided from Republic to AutoNation between September 30, 1999 and the time when the Proxy Statement was mailed. According to plaintiff, this omission was material because the amount of the funds jumped from $112,900,000 as of September 30, 1996 to $247.5 million on December 31, 1996.

This allegation does not support a disclosure claim.

While it is true that the Proxy Statement did not disclose the actual amount of lending from Republic to AutoNation from September 30, 1996 onward, it did disclose other facts that informed the Republic stockholders that Republic might lend $250 million *or more* to AutoNation before the Merger closed. First, the Proxy Statement makes abundantly clear that AutoNation was a start-up with tremendous capital needs. The Proxy Statement also indicates that the costs and expenses incurred by AutoNation had been ramping up as the company brought operations on line. In that regard, the Proxy Statement set forth a schedule indicating that the first eight AutoNation megastores had been brought on line as of December 3, 1996 and that nine new stores were projected to open within the half year thereafter. A reasonable reader of the Proxy Statement could draw no other conclusion than that the AutoNation acquisition would bring with it the requirement that Republic make immediate and significant investments in that new business.

Second, the Proxy Statement indicates that Republic had provided AutoNation with $112.9 million during the period May 1996 to September 30, 1996 — the end date for Republic's last complete fiscal quarter before the proxy materials went out. The Proxy Statement also indicated that the pace of AutoNation operations would be increasing in the fall of 1996. The Proxy Statement states that the Loan Agreement was a source of additional capital for AutoNation and that "[t]he Loan Agreement will provide AutoNation with financing to fund its cash flow needs through December 29, 1996 and during the period that planned principal operations commence."[93] Therefore, it is impossible to draw the inference from the Proxy Statement that the $112.9 million was the maximum amount Republic would lend AutoNation under the Loan Agreement before the Merger vote.

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will be consolidated into the assets and *liabilities* . . . of Republic subsequent to the Effective Time [of the Merger]." P.S. at 5 (emphasis added).

[93]P.S. at 37.

Finally, the Proxy Statement included a copy of an October 31, 1996 amendment to the Loan Agreement. Among other things, the Amendment authorizes AutoNation to procure a $250 million credit facility for the purpose of funding land acquisitions. Republic agreed to guarantee AutoNation's obligations under that credit agreement. In addition, the Amendment indicates Republic's agreement to lend $150 million to AutoNation on top of the loans to it had already obligated itself to make under the Loan Agreement. These funds were to help finance the purchase of vehicle inventories — a purpose consistent with the schedule of megastore openings set forth in the Proxy Statement. Thus the Amendment's express terms committed Republic to provide up to $400 million in additional financing before December 31, 1996.

[34] Perhaps it would be have been clearer for the Proxy Statement to have indicated the total amount of financing Republic was obligated to provide AutoNation before the Merger closed. But that omission was not material in the overall mix of what was disclosed about the increasing cost of AutoNation's capital needs, Republic's provision of $112.9 million in capital as of September 30, 1996, the terms of the Loan Amendment, and Republic's commitment to finance AutoNation's operations until the Merger closed.[94] A reasonable investor had all the information she needed to determine that the Merger was obligating Republic to acquire a risky start-up company with large capital costs.

Because this is the only flaw asserted in the complaint, dismissal of Count II is required.

III. Conclusion

For the foregoing reasons, the defendants' motion to dismiss under Chancery Court Rule 23.1 is DENIED, but the defendants' motion to dismiss under Chancery Court Rule 12(b)(6) is GRANTED. IT IS SO ORDERED.

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[94] *Louden v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 143 (1997) (omission is material only if there is a "substantial likelihood" that the omitted fact "would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available") (citations omitted).

HFTP INVESTMENTS, L.L.C. v. ARIAD PHARMACEUTICALS, INC.

No. 17,501

Court of Chancery of the State of Delaware, New Castle

December 7, 1999
Revised December 9, 1999

On October 26, 1999, plaintiff filed an action for injunctive, declaratory, and damage relief for wrongful refusal to honor right to convert and have redeemed shares of Series C Convertible Preferred Stock. Plaintiff filed this action on October 26, 1999. Defendant filed an action against plaintiff thirteen minutes later in the United States District Court for the Southern District of New York. Defendant then filed a motion to dismiss or stay plaintiff's action in favor of its New York action.

The court of chancery, per Vice-Chancellor Jacobs, concluded that plaintiff's action and the New York action were to be deemed simultaneously filed. Thus on analysis and balance, the *forum non conviens* factors do not preponderate in favor of staying the plaintiff's action.

1. Action ⟹ 67, 69(2)
   Corporations ⟹ 503(1)

The policy prohibiting the party seeking a stay from defeating the plaintiff's legitimate choice of forum is not implicated where each party was preparing to sue the other in the forum of its choice, and because neither lawsuit was filed in reaction to the other.

2. Action ⟹ 67

Where the moving party seeks a stay rather than a dismissal, the burden on the moving party is a lesser one.

3. Action ⟹ 67
   Corporations ⟹ 503(1)

Where the actions are simultaneously filed, the moving party must show that on balance the *forum non conveniens* factors preponderate in favor of granting a stay.

4. Action ⟹ 69(2)
Corporations ⟹ 503(1)

Where two lawsuits are simultaneously filed, one in a Delaware state court and the other in a different forum, the Delaware court should decide a motion to stay the forum action as a discretionary matter, without giving deference to either party's choice of forum; the focus of the analysis should be which forum would be the more easy, expeditious, and inexpensive in which to litigate.

5. Courts ⟹ 28
Corporations ⟹ 503(1)

The court should consider the following factors in *forum non conveniens* cases where there is no issue of *prior* pendency of the same action: (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of a view of the premises; (4) whether the controversy is dependent upon the application of Delaware law which the courts of this state more properly should decide than those of another jurisdiction; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive; on balance of these factors, the *forum non conviens* factors preponderate against granting a stay.

David A. Jenkins, Esquire, of Smith, Katzenstein & Furlow, Wilmington, Delaware; and Allan M. Pepper, Esquire, and Michael Braff, Esquire, of Kaye, Scholer, Fierman, Hays & Handler, LLP, New York, New York, of counsel, for plaintiff.

Kevin G. Abrams, Esquire, and Thomas A. Beck, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Irwin H. Warren, Esquire, Richard W. Slack, Esquire, and Timothy E. Hoeffner, Esquire, of Weil, Gotshal & Manges, New York, New York, of counsel, for defendant.

JACOBS, *Vice-Chancellor*

Pending is a motion to stay this action brought by HFTP Investments, L.L.C., ("HFTP") for injunctive, declaratory, and damage relief, against the defendant, ARIAD Pharmaceuticals, Inc. ("ARIAD"). HFTP claims that ARIAD has wrongfully refused to honor HFTP's right both to convert and to have redeemed shares of ARIAD Series C

Convertible Preferred Stock (the "Preferred Stock") that HFTP acquired for $3,000,000 in 1998.

HFTP filed this action on October 26, 1999. Thirteen minutes later, ARIAD filed an action (the "New York action") against HFTP and its investment advisor, Promethean Investment Group, L.L.C. ("Promethean") in the United States District Court for the Southern District of New York (the "Southern District"). ARIAD's New York complaint asserts claims under both the Securities Exchange Act of 1934 ("Exchange Act"), and state common law, based upon the identical set of facts that will be presented to this Court. Stated differently, the defenses ARIAD will raise in this Delaware action are asserted as affirmative claims for relief in the New York action, specifically, claims for a declaratory judgment that ARIAD properly refused to convert (and, later, to redeem) HFTP's Preferred Stock, because HFTP (and Promethean) had made misrepresentations to ARIAD and had also wrongfully manipulated the price of ARIAD's stock.

Later that same day, HFTP moved for expedited proceedings in this case. The next day, ARIAD filed a motion to dismiss or stay this action in favor of its New York action. At an office conference held on October 29, 1999, this Court tentatively scheduled a trial date for January 18-21 and 24, 2000, subject to a ruling on ARIAD's motion to dismiss or stay. The parties subsequently briefed and argued that motion,[1] which will be denied for the reasons discussed below.

I. RELEVANT FACTS[2]

ARIAD is a Delaware corporation with its principal place of business in Cambridge, Massachusetts. The company's common shares are traded on the NASDAQ National Market. ARIAD develops novel and proprietary drug products based on its knowledge of the inner workings of cells and the genes involved in disease.

HFTP is a New York limited liability company engaged principally in the business of investment and financial services. Promethean (which is not a party to this action) is a New York limited liability company also principally engaged in the business of investment and financial services. Promethean is an affiliate of HFTP, and is also its investment manager.

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[1]At oral argument, counsel for ARIAD abandoned its motion to dismiss, conceding that the motion should be regarded solely as one for a stay.

[2]Set forth in this Section are the background facts describing the dispute that underlies this action and the New York action, and leading to the motion sub judice. Other facts that relate to the specific forum non conveniens factors are discussed elsewhere in this Opinion.

On November 8, 1998, HFTP and ARIAD entered into a Securities Purchase Agreement (the "Agreement") whereby HFTP acquired 3,000 shares of ARIAD Series C Preferred Stock for $3 million. The validity and enforceability of the Agreement is governed by New York law, but the terms under which the Preferred Stock may be converted into ARIAD's common stock are set forth in ARIAD's Certificate of Designations, which was filed with the Delaware Secretary of State. The Certificate of Designations provided holders of the Preferred Stock with the right to convert that stock into ARIAD common stock from and after March 1999. The conversion rate would be determined by a formula, the denominator of which (in this case) is a "floating" Conversion Price. The effect of the floating Conversion Price is that if ARIAD's common stock drops during the 22 trading day period immediately preceding the conversion, the Conversion Price would be lower and, accordingly, the number of common shares issued in the conversion would be higher. HFTP's attempt to convert a portion of its Preferred Stock under this formula is what precipitated the dispute that eventuated in this litigation and the New York action.

At some point after HFTP acquired the Preferred Stock, HFTP (and Promethean) executed a series of short sales of ARIAD common stock.[3] ARIAD claims that HFTP (and Promethean) did this on a massive scale,[4] specifically to manipulate the price of its common shares downward in order to increase the number of shares HFTP could obtain on conversion. ARIAD contends that this short selling campaign caused the price of its common stock to be severely depressed, and thereby enabled HFTP to convert its Preferred Stock for many more shares of ARIAD common than it would have received absent this scheme to artificially depress the value of the common. HFTP vigorously disputes this claim.

This state of affairs prompted ARIAD to demand that Promethean and HFTP cease their short selling activities, because they possessed material non-public information about ARIAD's ongoing financing plans, which imposed upon HFTP and Promethean a duty not to trade ARIAD's stock.[5]

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[3]A "short sale" involves a seller agreeing to sell stock it does not own and then (typically) borrowing the stock from a broker to tender to the purchaser. The seller eventually covers the short sale by returning an equivalent amount of stock to the broker. If the market price declines, the short seller profits from the short sale by being able to cover the short in the market by buying the securities at a lower price than the price for which the securities were previously sold.

[4]ARIAD contends that at one point Promethean had a short position of 2.5 million shares of ARIAD--over 10% of ARIAD's total outstanding common shares.

[5]That duty is claimed to have arisen from requests by ARIAD that HFTP waive a right of first refusal, conferred by the Purchase Agreement, regarding additional equity or debt financing that ARIAD was attempting to negotiate with potential investors during the summer of 1999. ARIAD contends that its communications to HFTP and Promethean about the progress of those financing negotiations constituted material, nonpublic information that could have affected the market price of ARIAD's common stock and hence, legally required HFTP not to trade that stock.

HFTP does not deny that it (and its affiliate, Promethean) engaged in short selling activity, but insists that that activity breached no contractual or other duty owed to ARIAD, and was lawful in all respects.

On October 12, 1999, ARIAD announced that it had entered into a letter of intent to sell ARIAD's 50% interest in the Hoechst-ARIAD Genomics Center for $40 million in cash, plus other valuable consideration. ARIAD contends that the announcement of this development generated a significant increase in ARIAD's common stock price. The announcement also created significant financial exposure for Promethean, because of Promethean's obligation to immediately cover 2.5 million ARIAD shares that it had sold short. For this reason, ARIAD contends, HFTP immediately submitted a conversion notice to ARIAD on October 13, 1999, seeking to convert 612 of its 3,000 shares of Series C Preferred Shares into 1,078,038 shares of ARIAD common stock. ARIAD refused to honor the conversion request, because the request was based on stock prices that had been artificially lowered by Promethean's allegedly illegal short sales of ARIAD common stock while in possession of material inside information.

Thereafter, on October 14 and 20, 1999, representatives of ARIAD and Promethean attempted to negotiate a repurchase by ARIAD of HFTP's Preferred Stock. During these negotiations both sides were preparing their complaints, which would be filed in their respective jurisdictions of choice. Both sides were clearly engaged in a race to the courthouse, as the complaints in both actions were filed on the same day--October 26, 1999. Although HFTP won that race (albeit only by 13 minutes), the reasons for its "victory" are hotly contested. ARIAD contends that during the negotiations HFTP fraudulently misled it into refraining from filing in order to pursue further negotiations; HFTP denies this and contends that if anyone was misled, it was HFTP. Because this dispute involves controverted facts, it cannot be resolved on the present record. The Court is therefore unable to find (as ARIAD claims it should) that ARIAD was misled--or worse, defrauded--into delaying the filing of its federal complaint.

This action and the New York action both rest upon the same facts. The main difference between the two actions is that each is the mirror image of the other; that is, ARIAD's affirmative claims in its New York action constitute its defenses (and counterclaims) to HFTP's claims in this action, and HFTP's claims in this action constitute the basis for its defenses (and counterclaims) in the New York action. The other major difference is that in its New York action, ARIAD asserts claims under the Exchange Act.

In its original Delaware complaint, HFTP asserted claims for breach of contract (based upon the Certificate of Designations, the Purchase Agreement, and common law contract principles), and also claims under the

Delaware Uniform Commercial Code and 8 Del. C. § 158. All of these claims are predicated upon ARIAD's refusal to honor HFTP's attempted conversion of its Preferred Stock. The relief HFTP requested was an order specifically enforcing HFTP's contractual right to convert. Thereafter, because ARIAD had not honored HFTP's notice of conversion by October 23, 1999, and because HFTP claimed that that failure constituted a "Triggering Event" that entitled HFTP to have its Preferred Stock redeemed under the Certificate of Designations,[6] HFTP submitted notices on November 1-3, 1999 ("Redemption Notices"), seeking the redemption of its remaining 2,388 shares of Preferred Stock for a total redemption price of $6,644,724.

ARIAD refused to honor these redemption notices as well and, as a result, HFTP amended its complaint in this action on November 8, 1999, to add new claims arising out of ARIAD's refusal to honor the notices of redemption.[7] The end result is that HFTP now seeks significant damage relief (to remedy the refusal to redeem) in addition to injunctive and specific performance relief (to remedy the refusal to convert).

In its original New York complaint, ARIAD asserted federal securities law claims under §§ 10(b) and 13(d) of the Exchange Act, as well as state law claims, seeking declarations that HFTP was not entitled to convert its Preferred Stock and that ARIAD had not acted wrongfully in refusing to convert that stock. ARIAD's federal securities claims are that HFTP and Promethean made misrepresentations that wrongfully induced ARIAD to sell Preferred Stock to them, and also engaged in unlawful manipulation, namely illegal short sales of ARIAD common stock while in possession of material non-public information about ARIAD. ARIAD's state law counts charge that the above described conduct (i) breached the Purchase Agreement by misrepresenting HFTP's and Promethean's investment intent, and (ii)

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[6]Although the buyback right that HFTP asserts is characterized as a "redemption," from a functional standpoint that right is essentially a "put."

[7]HFTP's notices of redemption, and the amendment of its Delaware complaint to assert claims based on ARIAD's refusal to honor those redemption notices, occurred after the office conference in which this Court scheduled a trial for January 2000 (subject to its ruling on this motion) in response to HFTP's asserted need for a prompt determination of its right to convert. Finding inequity in this sequence of events, ARIAD accuses HFTP of "bait and switch" tactics--inducing the Court to grant an expedited trial on the basis of the need for equitable relief, and then marginalizing that need by later adding a redemption-based damages claim whose significantly larger dollar magnitude dwarfs the equitable claim. I find no perfidy in HFTP's amendment of its complaint, and ARIAD has failed to show how HFTP's conduct bears upon the analysis of its motion to stay. The conversion claim that prompted me to schedule an expedited trial remains unchanged. HFTP was procedurally entitled to add a claim seeking redemption, and because HFTP contends (and ARIAD does not dispute) that its redemption right flows directly from an adjudicated breach of its conversion right, it is difficult to understand how the addition of that claim would materially alter the posture of the case.

breached HFTP's implied covenant of good faith and fair dealing in connection with the Purchase Agreement.

Thereafter, on November 8, 1999--the same day HFTP amended its complaint in this action--ARIAD amended its federal New York complaint, to add new claims relating to HFTP's redemption notices, and to seek a declaration that ARIAD was and is under no obligation to honor the notices of redemption because of the above-described wrongdoing by HFTP and Promethean.

To reiterate, this and the New York action are based upon the identical set of facts, and the claims asserted in each action are the mirror image of the claims asserted in the other. The current procedural posture of the New York action is that HFTP (and Promethean) have moved to dismiss the federal securities law claims on the ground that they are not legally cognizable under the Exchange Act. Insofar as the record discloses, neither side has sought expedited proceedings in the New York action. In this Delaware action ARIAD has moved for a stay of all proceedings, contending that the Delaware claims are subsumed within the claims being asserted in the New York action, and that the Southern District is the appropriate forum to adjudicate those claims.

II. THE CONTENTIONS AND ISSUES

A summary of the parties' positions has proved somewhat problematic, because in certain respects those contentions resemble the proverbial two ships passing in the night. Although the arguments appear on the surface to join issue, upon closer scrutiny they either do not or they do, but only tangentially. What follows, nonetheless, is the Court's best effort to overcome these obstacles.

In fairness, the parties do frontally join issue on the key threshold question: what action--this one, the New York action, or neither--is the "first filed." Analytically, that issue is pivotal because of the onerous standard a defendant must satisfy to deprive the plaintiff (in a first-filed action) of its choice of forum. ARIAD argues that although HFTC won the race to the courthouse by 13 minutes, that was solely because of HFTC's fraudulent (or, at minimum, inequitable) conduct, for which reason the New York action should be deemed first filed. Otherwise, this Court would be rewarding conduct that should not be countenanced. Therefore, ARIAD concludes, the Court must apply the *McWane* standard under which this Court's discretion "should be exercised freely in favor of the stay where there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice,

involving the same parties and the same issues . . ."[8] ARIAD argues that its New York action satisfies these requirements.

Both parties agree that if this Delaware action is deemed to be first filed, then "a motion to stay [the Delaware action] . . . should be granted only in a rare case, after defendant has established that litigating in Delaware will cause undue hardship and inconvenience."[9] HFTP argues that this standard should govern because this lawsuit is the "first tiled" action. That is the case, HFTP claims, because (i) this action was in fact the first to be filed, (ii) ARIAD, not HFTP, was guilty of inequitable conduct, and (iii) in any event, the full array of claims that are common to both actions first appeared in HFTP's amended complaint in this action. These contentions require the Court to decide as a threshold issue which action--if any--was first filed.

Second, if the Court rejects both sides' threshold arguments and concludes that neither action is first filed (that is, if the Court determines that both lawsuits were "simultaneously filed") then additional issues arise. Both sides appear to agree that in that event the Court must employ a traditional forum non conveniens analysis of the so-called *Cryo-Maid*[10] factors. The parties differ, however, on what standard or burden of persuasion should govern that analysis. HFTP argues that to prevail on its motion, ARIAD must show that it would suffer "overwhelming hardship and inconvenience" by having to litigate in Delaware. ARIAD responds that it is not required to shoulder that heavy burden; rather it need only show that on balance the Cryo-Maid factors preponderate in favor of a stay.[11] Accordingly, the second issue is what standard or burden of persuasion applies if this action and the New York action are deemed to have been simultaneously filed.

Once the appropriate forum non conveniens burden of proof standard is determined, the third and final issue becomes: what is the proper application of that standard to the facts of this case? For the reasons next discussed, I determine that (1) both this action and the New York action should be deemed simultaneously filed; (2) as a consequence, ARIAD is not

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[8]*McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, Del. Supr., 263 A.2d 281, 283 (1970).

[9]*Acierno v. New Castle County*, Del. Supr., 679 A.2d 455, 458 (1996) (quoting *Chrysler First Business Corp. v. 1500 Locust Ltd. Partnership*, Del. Supr., 669 A.2d 104, 107 (1995)).

[10]*General Foods Corp. v. Cryo-Maid, Inc.*, Del. Supr., 198 A.2d 681, 684 (1964).

[11]ARIAD Reply Br. at 20. In its Opening Brief, ARIAD inconsistently argues that "When courts do not impose upon parties seeking a dismissal or stay the significant burden of proving inconvenience and hardship . . . [citing *supra* note 9, and *Texas Instruments, Inc. v. Cyrix Corp.*, Del. Ch., C.A. No. 13288, Mem. Op. at 1, Jacobs, V.C. (Mar. 22, 1994)--cases where the two actions were simultaneously filed], the line between the two analyses disappears and the forum non conveniens analysis essentially becomes a *McWane* analysis." ARIAD Op. Br. at 22. No authority is cited for this effort to conflate the *McWane* and *Cryo-Maid* analyses, nor is any logical argument advanced to support it. Accordingly, the Court rejects this argument and regards the position advanced in ARIAD's Reply Brief as its true position.

required to prove hardship and inconvenience, the Court is not required to give significant deference to HFTP's choice of forum, and the appropriate standard is whether, on balance, the forum non conveniens factors warrant the grant of a stay; and (3) the analysis and balance of those factors in this case do not preponderate in favor of staying this action.

III. ANALYSIS

A. Which Action (If Any) Was First Filed?

As previously noted, ARIAD argues, with considerable vehemence, that but for HFTP's inequitable conduct[12] its New York action would have been first filed, and that the Court should therefore deprive HFTP of the fruits of its misconduct and treat the New York action as first filed. I reject this argument as factually unsupported. Each side relies upon affidavits setting forth its respective version of what the other side's representatives did (and did not) say during the negotiations over HFTP's notice of conversion. I find that those affidavits create a factual dispute that cannot be resolved on this paper record. Accordingly, I decline to treat the New York action as first filed.

But, it does not necessarily follow that this Delaware action wins the "first filed" contest either. As this Court observed in *Texas Instrument, Inc.*:[13]

> It is undisputed that Cyrix had prepared its Texas petition before [Texas Instruments ("TI")] filed this Delaware action ... A standstill agreement terminated on Friday, December 10, 1993, and the following Monday each party promptly commenced suit in its chosen forum. Because Cyrix intended to file suit in all events, and because only five hours separated the filing of the two actions, Cyrix contends that this Court should treat the actions as simultaneously filed.
>
> I agree. Involved here is a race to the courthouse. That TI won that race by five hours should not, without more, impose upon the defendant the significant burden of proving inconvenience and hardship which might result in the denial of a stay that would otherwise be granted.

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[12]The word "fraud" surfaces frequently in ARIAD's brief. ARIAD's efforts to elevate HFTP's conduct to the level of fraud appear to be hyperbolic.

[13]*See supra* note 11.

[1] That reasoning is also appropriate here--indeed, even more so as only 13 minutes separated the filing of the two actions. Because each side was preparing to sue the other in the forum of its choice, and because neither lawsuit was filed in reaction to the other, the policy underlying *McWane*--to prohibit the party seeking a stay from defeating the plaintiffs legitimate choice of forum--is not implicated. Accordingly, the two actions will be treated as if they had been simultaneously filed--as indeed for all practical purposes they were.

B. The Appropriate Standard

[2] Given that ruling, the question becomes what showing must ARIAD make to prevail on its motion to stay a Delaware action in favor of an action filed simultaneously in a foreign jurisdiction. HFTP argues that the standard is that ARIAD must show "overwhelming hardship and inconvenience," citing *Ison v. E.I. duPont de Nemours & Co., Inc.*[14] and *Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership.*[15] Those cases do prescribe that standard, but only in cases where the motion is one to *dismiss* a first-filed Delaware action on forum non conveniens grounds. Neither of those cited decisions, nor any other authority cited to the Court, applies that standard to a motion to *stay* such a Delaware action. Given the profound distinction between those two remedies, that is hardly surprising. A dismissal ends a lawsuit; a stay only puts it on hold. Therefore, the burden on a party seeking to dismiss a first-filed Delaware action is and should be onerous. But where (as here) the moving party seeks a stay rather than a dismissal, the "burden on the moving party is a lesser one."[16] HFTP's argument is misconceived and must be rejected.

[3] ARIAD's position is that because neither action is "first filed," neither party's choice of forum is entitled to such deference as would result in a higher-than-normal burden of persuasion on the party seeking to stay the Delaware action. Thus, ARIAD argues, all it need show is that on balance the forum non conveniens factors preponderate in favor of granting a stay. I agree.

Although in several cases Delaware courts have found that two actions pending in different fora were simultaneously filed for purposes of a motion to stay,[17] the standard or burden of persuasion imposed upon the

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[14]Del. Supr., 729 A.2d 832, 837-38 (1999).

[15]Del. Supr., 669 A.2d 104, 108 (1995).

[16]*Life Assurance Co. Of Pennsylvania v. Associated Investors Int'l. Corp.*, Del. Ch., 312 A.2d 337, 340 (1973).

[17]*See e.g., supra* note 11; *Draper v. Paul N. Gardner Defined Plan Trust*, Del. Supr., 625 A.2d 859, 869, n.15 (1993); *In re Chambers Development Co., Inc. Shareholders Litig.*, Del. Ch.,

party seeking the stay in those circumstances was not explicitly articulated. In *Acierno*, however, the Delaware Supreme Court did determine--albeit implicitly--what that standard should be.[18] In that case New Castle County filed an action in this Court against Mr. Frank Acierno only minutes before Mr. Acierno filed an action against New Castle County, involving the same issues, in the United States District Court for the District of Delaware. This Court denied Acierno's motion to stay the Chancery action in favor of his federal action. On appeal the Supreme Court affirmed, holding that:

> "We find that the Court of Chancery properly considered the relevant factors in exercising its discretion to deny the stay. The trial court did *not* give any weight to the fact that the County's action technically was the first filed: Acierno was not required to prove hardship and inconvenience and the trial court gave no deference to the County's choice of forum. Rather, the Court of Chancery focused on the fact that the denial of a building permit is a distinctly local government issue. Given the narrow, state law issue presented, the trial court concluded that it would not be more convenient to litigate in the federal forum. The court also determined that it could provide prompt and full relief and that denial of the stay would not result in duplicative litigation because resolution of the state law issues in the state court would eliminate the need for those issues to be considered by the federal court.
>
> The Court of Chancery's analysis properly considered those factors that would make disposition of the case "easy, expeditious, and inexpensive" as well as the applicability of Delaware law. Its conclusions were sound, and its discretionary ruling will not be disturbed."[19]

[4] In my view, the quoted ruling means that where two lawsuits are simultaneously filed--one in a Delaware state court and the other in a different forum--the Delaware court should decide a motion to stay the Delaware action as a discretionary matter, without giving deference to either party's choice of forum. In balancing all of the relevant factors, the focus of the analysis should be which forum would be the more "easy, expeditious, and inexpensive" in which to litigate. That approach, which imposes no

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C.A. No. 12508, Mem. Op. at 14, Chandler, V.C. (May 20, 1993).

[18] *Supra* note 9.

[19] *Id.* at 458 (emphasis in original).

special or heightened burden of persuasion, leads straightforwardly to the following burden of persuasion: towards which of the two competing fora do the forum non conveniens factors preponderate?[20] That is the standard which will govern this motion.

C. Towards What Forum Do The Forum Non Conveniens Factors Preponderate?

[5] A decision to grant a motion to stay a Delaware action in favor of litigation pending in another forum is governed by well settled law. As our Supreme Court has stated, the Court should consider the following factors in forum non conveniens cases where there is no issue of *prior* pendency of the same action: (1) the relative ease of access to proof, (2) the availability of compulsory process for witnesses, (3) the possibility of a view of the premises, (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction, (5) the
pendency or nonpendency of a similar action or actions in another jurisdiction, and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[21]

These factors are now addressed.

1. Relative Ease of Access to Proof

Because ARIAD has its principal place of business in Massachusetts, it will bear some marginal inconvenience in producing documents in either New York or Delaware. ARIAD has not shown that from a document production standpoint, Delaware would be materially more convenient than New York. As Vice Chancellor Steele aptly observed, "[m]odern methods of information transfer render concerns about transmission of documents virtually irrelevant."[22] Accordingly, this factor is neutral--it neither favors nor disfavors either forum.

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[20]That was, in fact, the approach followed by Vice Chancellor Steele in denying the motion to stay. *New Castle County v. Acierno*, Del. Ch., C.A. No. 13302, Let. Op. at 1, Steele, V.C. (Oct. 19, 1995).

[21]*Supra* note 15 (citing *Cryo-Maid*, 198 A.2d at 684).

[22]*Asten v. Wangner*, Del. Ch., C.A. No. 15617, Let. Op. at 1, Steele, V.C. (Oct. 3, 1997). Although HFTC is located in New York, this factor focuses on hardship to ARIAD, which does not claim that the location of HFTP's document production legitimately would affect ARIAD at all.

2. Availability of Compulsory Process for Witnesses

Although HFTP's (and Promethean's) witnesses are located in New York, HFTP has represented that it will voluntarily produce them in Delaware, if necessary. Accordingly, this aspect of the problem disappears.

The remaining aspect--ARIAD's witnesses--falls into two categories: witnesses located in Massachusetts and witnesses located in New York. (Apparently, none of ARIAD's witnesses are located in Delaware.) Those witnesses who are located in Massachusetts would not be subject to compulsory process in either New York or Delaware. That leaves ARIAD's New York-located witnesses, who ARIAD describes as "[r]elevant third parties--such as brokers, stock trading specialists and expert witnesses . . ."[23] To the extent these third parties are expert witnesses, it must be presumed that they would be paid by ARIAD and consequently, are under ARIAD's control and would appear in either Delaware or New York at ARIAD's request. To the extent that these persons are fact witnesses, their testimony could be obtained by deposition. For these reasons, the unavailability of process to compel the live testimony of those witnesses in Delaware renders this factor (and any inconvenience resulting therefrom) of little significance.[24] Accordingly, if this factor favors any jurisdiction it would be New York, but only slightly.

3. Possibility of A View of the Premises

The parties agree that this factor is irrelevant and can be disregarded in the analysis.

4. The Applicability of Delaware Law

ARIAD's Certificate of Designations, which is governed by Delaware law, is at the core of HFTP's claims and certain of ARIAD's defenses in this action. ARIAD's remaining defenses in this action, and its state law defenses in the New York action, are predicated upon the Purchase Agreement, which is governed by New York law. This Court and the Southern District are both competent to decide the Delaware and New York

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[23]ARIAD Reply Br. at 25.

[24]*See e.g.*, *Kane v. Peugeot Motors of America, Inc.*, Del. Super., C.A. No. 95-C-10-259-WTQ, Quillen, J. (Dec. 9, 1995) ("[t]he significance of this factor has surely lessened over the years"); *USH Ventures v. Global Telesystems Group, Inc.*, Del. Super., C.A. No. 97-C-08-086-WTQ, Quillen, J. (May 21, 1998) ("[t]he testimony of any witnesses who are unavailable for trial could be taken by way of deposition.").

state law issues,[25] but in this case a significant part of the controversy depends upon the application of Delaware law that the courts of this state more properly should decide. Delaware has a strong interest in protecting the contractual rights of investors in corporations formed under its General Corporation Law. For that reason, Delaware courts are willing to hear, on an expedited basis, claims by preferred shareholders for equitable relief on the ground that those investors are being wrongfully deprived of their contractual right to convert their shares into common stock.[26] Indeed, it is ironic that ARIAD, despite having voluntarily chosen to incorporate in Delaware, proclaims that it is inconvenient for a Delaware court to determine ARIAD's obligations to its preferred stockholders.

I conclude that this factor weighs strongly in favor of the Delaware forum.

5. Pendency of A Similar Action In Another Jurisdiction

ARIAD contends that this factor--the pendency of its New York action--is the most important consideration; indeed, it is this factor upon which ARIAD most heavily relies. ARIAD argues that the New York action involves the same parties (plus Promethean) as this action and that it incorporates all the state law claims and defenses being asserted by both sides, plus the Exchange Act claims that are not--because they cannot be--raised in this lawsuit. This factor, ARIAD urges, merits significant weight because (i) it makes no sense to litigate claims involving the same subject matter in two courts, and only one court--the Southern District--is capable of adjudicating all of the parties' claims and defenses; and (ii) even if this lawsuit were allowed to go forward and HFTP were to prevail, any judgment of this Court in favor of HFTP could later be nullified by a decision in the New York action favorable to ARIAD, specifically, by a

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[25]ARIAD's federal law "defenses" are before the Southern District in the form of affirmative claims for declaratory and rescission relief under the Exchange Act. Only the Southern District is empowered to adjudicate those federal claims, because the Exchange Act vests the federal courts with exclusive jurisdiction over claims to enforce rights arising under that statute.

[26]*See Halifax Fund, L.P. v. Response USA, Inc.*, Del. Ch., C.A. No. 15553, Jacobs, V.C. (May 13, 1997) (specifically enforcing a contractual right to convert preferred stock, and rejecting, *inter alia*, the defense that purchasers of the convertible preferred had given assurances that they would be long term investors). In July of this year, the General Assembly amended the Delaware General Corporation Law to add a new 8 Del. C. § 111, which provides:

> §111 Interpretation and Enforcement of the Certificate of Incorporation or the By-Laws
>
> "Any action to interpret, apply, or enforce the provisions of the certificate of incorporation or the by-laws of a corporation may be brought in the Court of Chancery." [72 Del. Laws, C. 123 (July 2, 1999)].

determination that ARIAD is entitled to rescind the Purchase Agreement by reason of HFTP's wrongful misrepresentations in violation of the Exchange Act.

The first part of this argument has persuasive force. As a general matter, and all else being equal, it is sensible that the court which has before it all the claims arising out of a particular constellation of facts should be the forum that adjudicates those claims. Moreover, the Southern District--a highly distinguished court with a tradition of adjudicating securities and commercial matters--is unquestionably competent to do that. But those propositions, however unarguable they may be in the abstract, do not determine the weight this factor should be accorded in this specific case, because other variables are implicated. If (for example) the parties' overall dispute were one that could not be resolved without adjudicating the federal claims over which this Court lacks subject matter jurisdiction, that would justify according this factor heavy, if not dispositive, weight. But here, ARIAD's federal claims are cumulative, not essential. Here, an adjudication of the state law contract claims and defenses presented in this action would resolve the dispute, independent of the federal claims being asserted in the New York action. Those federal claims are but one additional ground upon which a court could deny relief to HFTP, but they are not an indispensable ground.

If ARIAD's defenses were to prevail in this action, that would likely moot its federal claims for rescission in the New York action,[27] because ARIAD's Delaware defenses involve the same issues as the claims it asserts in the New York action, and both sets of claims and defenses arise out of the same set of facts. By the same token, if this Court were to reject ARIAD's defense of fraudulent inducement, that adverse determination would have collateral estoppel effect with respect to ARIAD's claim for rescission in the New York action. Accordingly, this forum non conveniens factor does not merit the significant weight that ARIAD insists it should have.

ARIAD contends, however, that this factor should be given dispositive weight for a second reason: if the Southern District were to validate ARIAD's Exchange Act claims, that could entitle ARIAD to rescind the sale of its stock to HFTP even if this Court were to reject ARIAD's defenses. The short answer is that on this record, that contention is little more than *ipse dixit*. At oral argument counsel for ARIAD was unable to cite any federal decision where a federal court nullified, on federal securities grounds, a judgment of a state court enforcing a stockholder's right to convert its convertible preferred stock. Nor does ARIAD explain precisely

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[27]To the extent ARIAD seeks money damage relief based on its federal securities claims, any decision by this Court in its favor would not prejudice ARIAD's damages claim.

how that scenario might occur, particularly where the state court makes factual determinations that are adverse to the corporation asserting federal securities claims predicated on those same facts.

For the foregoing reasons this factor, upon which ARIAD relies so heavily, does not merit the significant (indeed, dispositive) weight that ARIAD so vociferously advocates. This factor is neutral, or at best (from ARIAD's standpoint), tilts only slightly in favor of the New York forum.

6. All Other Practical Problems That Would Make A Trial Of The Case Easy, Expeditious, and Inexpensive

This factor implicates two elements. The first is that any resolution of the New York action will very likely be delayed, because (i) that court must first decide HFTP's pending motion to dismiss the federal complaint for failure to state legally cognizable claims under the Exchange Act, and (ii) ARIAD has not (as far as this record discloses) made any effort to expedite the proceedings in that forum. The second consideration is that this action is on an expedited track and will be tried on the merits in late January 2000. Accordingly, the resolution of this dispute will be far more prompt in this forum than in the New York action. For these reasons, this factor favors the Delaware forum and militates against granting a stay.

7. Balancing The Factors

To summarize the preceding analysis: (1) two of the forum non conveniens factors (the availability of compulsory process for witnesses and pendency of other actions) favor granting a stay of this action, but only slightly, (2) two of those factors (the applicability of Delaware law and other practical considerations) weigh heavily against granting a stay, and (3) the remaining factors are either neutral or irrelevant. Balancing these factors as thus weighted, I conclude, in the exercise of discretion, that the forum non conveniens factors preponderate against granting a stay.

IV. CONCLUSION

For the foregoing reasons ARIAD's motion to stay is denied. IT IS SO ORDERED.

IN RE LUKENS INC. SHAREHOLDERS LITIGATION

No. 16,102 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

December 1, 1999

Plaintiff shareholders served and filed an amended class action complaint against both the individual board of directors and a third party corporation. Plaintiffs allege the board of directors entered into and completed a merger in breach of their fiduciary duties and acted in a manner contrary to the interests of the plaintiff shareholders. Plaintiffs further charge the defendant third party corporation for aiding and abetting those alleged breaches.

The court of chancery, per Vice-Chancellor Lamb, dismissed the charges against both the defendant directors and the defendant third party corporation concluding that the facts alleged in the complaint do not state a basis upon which the court could either rescind the transaction or enter an award for money damages against the director defendants.

1. Corporations ⟸ 512, 513
   Pleading ⟸ 49, 72
   Pretrial Procedure ⟸ 687

In considering a motion to dismiss a complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief could be granted, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint. DEL. CH. CT. R. 12(b)(6).

2. Corporations ⟸ 512, 513
   Pleading ⟸ 49, 72
   Pretrial Procedure ⟸ 681

In deciding a motion to dismiss under Rule 12(b)(6), the court accepts all the facts and reasonable inferences as true, but the court accepts neither inferences nor conclusions of fact unsupported by allegations of specific facts. DEL. CH. CT. R. 12(b)(6).

3. Corporations ⚿ 512, 513
Pleading ⚿ 49, 72
Pretrial Procedure ⚿ 679

In deciding a motion to dismiss under Rule 12(b)(6), a trial court need not blindly accept as true all allegations, nor must draw all inferences from them in plaintiff's favor unless they are reasonable inferences. DEL. CH. CT. R. 12(b)(6).

4. Corporations ⚿ 512, 513
Pleading ⚿ 49, 72
Pretrial Procedure ⚿ 679

In deciding a motion to dismiss under Rule 12(b)(6), the court may consider, for certain purposes, the content of documents that are integral to or are incorporated by reference into the complaint.

5. Corporations ⚿ 372, 512, 513, 513.1
Pleading ⚿ 49, 72

Any claim that adequately alleges solely a violation of the duty of care and does not also allege the existence of circumstances constituting an exception to an exculpatory provision as set forth in a corporation's charter must be dismissed.

6. Corporations ⚿ 312(1), 512, 513, 513.1

Plaintiffs failed to state a cognizable claim of bad faith misconduct or disloyalty where the complaint does not allege that a majority of the director defendants either stood on both sides of the merger or were dominated and controlled by someone who did.

7. Corporations ⚿ 307, 310, 310(1), 320(1)

A payment of a substantial golden parachute to a member of a board of directors does not implicate the board of directors duties of loyalty or good faith.

8. Corporations ⟹ 307, 310, 310(1)

Revlon duties refer only to a director's performance of his or her duties of care, good faith, and loyalty in the unique factual circumstance of a sale of control over a corporate enterprise.

9. Corporations ⟹ 307, 310, 310(1)

Although courts may use the term *Revlon* duties to categorize certain claims, there are no distinct *Revlon* duties.

10. Corporations ⟹ 307, 310, 310(2)

A director's duty in conducting a sale of corporate control is to seek out, in a manner consistent with his or her trial of duties, the best value reasonably available to the stockholders.

11. Corporations ⟹ 307, 310, 310(2)

A corporate board's failure to obtain the best value for its stockholders may be the result of illicit motivation, personal interest divergent from shareholder interest, or lack of due care.

12. Corporations ⟹ 307, 310, 310(1)

Rather than adding to or intertwining a corporate board's triad of district duties, heightened judicial scrutiny is warranted because a court evaluating the propriety of a change of control or a takeover defense must be mindful that a board may be acting primarily in its own interest, rather than those of the corporation and its shareholders.

13. Corporations ⟹ 307, 310, 310(1), 310(2), 314(1), 320(8), 512, 513, 513.1

If a complaint merely alleges that the directors were grossly negligent in performing their duties in selling the corporation, without some factual basis to suspect their motivations, any subsequent finding of liability will depend on finding breaches of the duty of care, not loyalty or good faith.

14. Corporations ⚷ 307, 310, 310(1), 310(2), 372

Where the factual basis for a claim solely implicates a violation of the duty of care, the protections of a charter provision may properly be invoked and applied.

15. Corporations ⚷ 307, 310, 310(1), 310(2)

In the context of an entire fairness analysis, disclosure claims do not necessarily arise only under the duty of care.

16. Corporations ⚷ 314(1), 372

Exculpatory charter provisions, enacted pursuant to section 102(b)(7) of the Delaware General Corporation Law, may be properly invoked and applied when the factual basis within a complaint solely implicates a violation of the duty of care. DEL. CODE ANN. tit. 8, § 102(b)(7) (1998).

17. Corporations ⚷ 314(1), 372

Under section 102(b)(7) of the Delaware General Corporation Law, where a complaint adequately alleges an entire fairness claim (implicating, at least initially, elements of good faith, loyalty, and care), the burden will be on a director defendant to show his or her entitlement to the immunizing effect of the charter provision. DEL. CODE ANN. tit. 8, § 102(b)(7) (1998).

18. Corporations ⚷ 307, 310, 310(1), 372, 512, 513, 513.1

If a complaint adequately alleges bad faith or disloyalty, or some other exceptional circumstance under section 102(b)(7) of the Delaware General Corporation Law, or if the nature of the alleged breach of duty is unclear, the complaint will not be dismissed on a motion made under Rule 12(b)(6) on the basis of an exculpatory charter provision. DEL. CODE ANN. tit. 8, § 102(b)(7) (1998); DEL. CH. CT. R. 12(b)(6).

19. Corporations ⚷ 307, 310, 310(1), 310(2), 314(1), 372, 512, 513, 513.1

The function of section 102(b)(7) of the Delaware General Corporation Law is to render duty of care claims not cognizable and to preclude plaintiffs from pressing claims of breach of fiduciary duty, absent

the most basic factual showing (or reasonable basis to infer) that the directors conduct was the product of bad faith, disloyalty or one of the other exceptions listed in the statute. DEL. CODE ANN. tit. 8, § 102(b)(7) (1998).

20. Corporations ⚷ 512, 513, 513.1

Dismissal is proper where no exception is alleged.

21. Corporations ⚷ 512, 513, 513.1

Director defendants are entitled to dismissal at this stage of the process without having to engage in discovery or shoulder the burden of proving that they acted loyally and in good faith.

22. Corporations ⚷ 307, 310(1), 512, 513, 513.1

A claim of aiding and abetting will survive a motion to dismiss only where the plaintiff pleads the following elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach, and (4) damages.

23. Corporations ⚷ 312(3), 512, 513, 513.1

The knowing participation component needed for a claim of aiding and abetting, though it need not be pleaded with particularity, must be reasonably inferred from the facts alleged in the complaint.

24. Corporations ⚷ 307, 310, 310(1)

Failure to challenge the validity of golden parachute agreements does not establish complicity with director defendant breaches of duty.

25. Corporations ⚷ 307, 310, 310(1), 320

An offeror may attempt to obtain the lowest possible price for stock through arm's-length negotiations.

26. Corporations ⚷ 307, 310, 310(1)

Where director defendants are unaware of meetings to negotiate agreements that fail to protect shareholders, no conspiracy is implicated.

27. Corporations ⚿ 307, 310, 310(1)

A cognizable claim for breach of the duty of disclosure rests on finding that the nondisclosed information is material and would have assumed actual significance in the deliberations of the reasonable shareholder.

28. Corporations ⚿ 307, 310, 310(1)

When a proxy statement does not explain why a board of directors chose not to take a particular course of action, the omitted information is not considered material and therefore does not breach the duty of disclosure.

29. Corporations ⚿ 307, 310, 310(1)

Directors are not required to engage in self-flagellation by disclosing their alleged breaches of duty; where the sale process is described in detail in the proxy statement; added information explaining why the director defendants did not take other steps or follow another process was not required.

30. Corporations ⚿ 307, 310, 310(1)

To survive a motion to dismiss, challenges to proxy statement disclosure must be based on the alleged omission or misrepresentation of a material fact.

31. Corporations ⚿ 137

In some circumstances, the fully-informed vote of stockholders authorizing and approving a merger extinguishes the well-pleaded claims resting solely on alleged breaches by a board of directors of their duty of care.

32. Corporations ⚿ 137, 307, 310, 310(1)

In the appropriate case, a fully informed vote of stockholders approving a merger will extinguish a claim for breach of fiduciary duty stemming from a board of directors' failure to reach an informed business judgment in authorizing that transaction.

33. Corporations ⚷ 137, 307, 310, 310(1)

Where the defensive measures had already worked their effect before the stockholders had a chance to vote, the vote does not ratify the board's conduct in erecting defensive measures against a bidder.

34. Corporations ⚷ 320(5)

Plaintiff's claims were sufficiently extinguished where, when stockholders ratified the merger in question, there was an active bidding process, no measures precluded any participant from bidding, and the merger agreement presented to the stockholders represented the highest offer made by anyone.

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Irving Morris, Esquire, and Karen Morris, Esquire, of Morris & Morris, Wilmington, Delaware; and Aaron Brody, Esquire, of Stull, Stull & Brody, New York, New York, of counsel, for plaintiff Carrie Anne Polonetsky.

Joseph A. Rosenthal, Esquire, and Carmella P. Keener, Esquire, of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware; and Andrew L. Barroway, Esquire, Marc A. Topaz, Esquire, and Gregory M. Castaldo, Esquire, of Shiffrin Craig & Barroway, Bala Cynwyd, Pennsylvania, of counsel, for plaintiff Michael Abramsky.

Steven J. Rothschild, Esquire, Robert S. Saunders, Esquire, and James L. Love, Esquire, of Skadden, Arps, Slate, Meagher & Flom, LLP, Wilmington, Delaware, for defendant Lukens Inc. and director defendants.

Charles F. Richards, Jr., Esquire, and Megan S. Greenberg, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant Bethlehem Steel Corporation.

LAMB, *Vice-Chancellor*

I. INTRODUCTION

On January 5, 1998, Lukens, Inc. ("Lukens" or the "Company") announced that Bethlehem Steel Corporation had agreed to pay $30 per share (consisting of a combination of cash and stock) in exchange for all of the Lukens common stock. This announcement followed an initial agreement between Lukens and Bethlehem to merge at a price of $25 per share and a subsequent proposal from a third party to pay $28 per share. The Lukens stockholders voted to approve the Lukens/Bethlehem transaction, which was consummated on May 29, 1998.

Three stockholder actions were filed in December 1997 and January 1998. I entered an order consolidating them for all purposes in March 1998. At that time, plaintiffs filed a consolidated class action complaint. They amended that pleading on May 26, 1998, only days before the stockholder vote. That complaint alleged breaches of fiduciary duty by the Lukens board of directors (essentially a *Revlon* claim that the directors failed to seek the best value reasonably available for Lukens) and claimed that Bethlehem is liable for aiding and abetting those alleged breaches. That complaint made no claim that the proxy materials sent to stockholders in connection with the proposed merger were false or misleading in any respect. Plaintiffs never sought any form of injunctive relief in connection with the transaction.

In June 1998, the defendants moved to dismiss the complaint. After briefing and oral argument on those motions, I allowed plaintiffs to file the Second Amended and Supplemental Consolidated Class Action complaint (the "Complaint") on May 28, 1999. The defendants then renewed their motions and the parties provided supplemental briefing regarding the matters newly alleged. The issue presented may be expressed as follows: does a stockholder complaint challenging the conduct of a board of directors in relation to a completed merger transaction state a claim upon which relief may be granted where (i) the complaint does not include any well-pleaded allegations of fact indicating that a majority of the directors were not independent and disinterested or that their actions were taken in bad faith or in breach of their duty of loyalty, (ii) rescission of the transaction is unavailable as a matter of law, (iii) the pertinent certificate of incorporation contains a provision, authorized by Section 102(b)(7) of the Delaware General Corporation Law ("DGCL"), protecting the directors from liability for monetary damages for breach of the duty of care, and (iv) the stockholders authorized and approved the transaction on the basis of proxy materials not alleged to be false or misleading in any material respect?

I conclude that the facts alleged in the complaint here at issue, taken as true, do not state a basis upon which I could ever either rescind the transaction or enter an award of money damages against the director

defendants. For that reason, I will grant the motion to dismiss the claims against the director defendants. I will also dismiss the claim of aiding and abetting made against Bethlehem as unsupported by the well-pleaded allegations of the Complaint. Finally, I will dismiss the claims against Lukens, as there is no basis alleged on which to recover from Lukens separately from the claim against the director defendants.

II. BACKGROUND[1]

A. The Parties

Defendant Lukens, a Delaware corporation, was a holding company whose subsidiaries manufactured various steel products. The ten individual defendants, R. William Van Sant, T. Kevin Dunnigan, Ronald M. Gross, W. Paul Tippett, Michael O. Alexander, David B. Price, Jr., Joab L. Thomas, Rod Darnmeyer, Sandra L. Helton and William H. Nelson, III, comprised the Lukens Board of Directors at the time of the merger (the "Director Defendants"). Van Sant was Chairman of the Board and Lukens's CEO and president for the five years preceding the merger. The Complaint does not allege that any of the other Director Defendants was employed by Lukens or was associated with it other than as a director.

Defendant Bethlehem Steel, a Delaware corporation, manufactures and sells a wide variety of steel mill products and produces and sells coal and other raw materials.

Plaintiffs Carrie Ann Polonetsky, Wretha Evelyn Walker and Michael Abramsky were the beneficial owners of Lukens common stock at the times relevant to this action. They brought suit on their own behalf and on behalf of all holders of Lukens common stock, excluding the defendants, at the relevant times.

B. Events Preceding the First Announcement of the Merger

Sometime in 1996 or early 1997, the Director Defendants began an inquiry into selling Lukens or merging it with another company. Although the Complaint lists over sixty companies in the steel industry that may have

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[1]The facts presented here are those alleged in the Complaint. I will not refer to the proxy statement, which is attached to the Complaint, as proof of the matters reported therein, but only to determine what was, in fact, disclosed. *In re Santa Fe Corp. Shareholders Litig.*, Del. Supr., 669 A.2d 59, 69 (1995). I also take note of the Lukens certificate of incorporation, *see In re Wheelabrator Technologies Inc. Shareholders Litig.*, Del. Ch., Consol. C.A. No. 11495, mem. op. at 21-22, Jacobs, V.C. (Sept. 1, 1992), and the merger agreements, both of which can be examined by the Court "to establish formal, uncontested matters." *Santa Fe*, 669 A.2d at 70.

had an interest in buying Lukens, the Director Defendants conducted actual negotiations only with Allegheny Ludlum Corporation and Bethlehem.[2]

At the 1997 stockholders meeting, the Lukens stockholders approved proposals (not supported by the Lukens board of directors) to remove the Company's poison pill and to declassify its board. The Director Defendants did not take steps to implement these proposals and later renewed the Company's poison pill. The Complaint quotes letters from several dissatisfied stockholders and implies that a proxy contest at the 1998 annual meeting was a possibility. Part of the stockholders' dissatisfaction stemmed from high compensation to management despite poor results.

On December 15, 1997, after allegedly discontinuing negotiations with Allegheny, Lukens announced that its board had accepted an offer from Bethlehem. Prior to executing the agreement with Bethlehem, the Lukens board acted to render the renewed poison pill inapplicable to the transaction.

C. The Merger Agreement

The merger agreement announced on December 15, 1997, provided that Bethlehem would pay a combination of cash and shares of Bethlehem common stock having a total value of $25 per share for 100% of Lukens's common stock. In the merger, each Lukens shareholder would have the right to elect to receive the consideration in cash, subject to a maximum total cash payout equal to 62% of the total consideration. Including the assumption of about $250 million in debt, the deal was valued at roughly $650 million.

Bethlehem agreed to pay all sums payable under management's "golden parachutes" agreements, including a payment of over $20,000,000 to defendant Van Sant. The Complaint does not allege that there was any reason to doubt the validity or legal enforceability of those contracts. Rather, in highly colorful language, the Complaint alleges the following:

> [T]he Director Defendants, with Bethlehem's urging and cooperation, structured [the merger agreement] to favor Lukens' management that had done Bethlehem's bidding by rewarding them in honoring their "golden parachutes" from Lukens in full. In addition, Bethlehem agreed to pay all sums

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[2]The Complaint does not allege any facts regarding the Director Defendants' efforts from the time they decided to inquire into selling the Company until just before they accepted the Bethlehem $25 per share offer. Of course, I do not thereby assume that the board did nothing for a year. Moreover, the proxy statement reports that in the weeks leading up to the $25 offer by Bethlehem, Allegheny made several offers at lower prices. While I do not rely, at this juncture, on facts disclosed in the proxy statement for their truth, I note that there clearly is no explicit challenge to any of the board's efforts preceding the $25 offer, except as described elsewhere in this Opinion.

> payable to those members of management who benefit from "change of control" provisions in their agreements with Lukens, a total of $56,000,000. . . .

The Complaint mentions certain aspects of the merger agreement, including a $13.5 million termination fee, but focuses principally on terms *not* included in the agreement. I note, however, that the merger agreement included a "no solicitation" clause, thus preventing the Lukens board from soliciting a competing takeover offer. The no solicitation clause was connected to the customary "fiduciary out," allowing the board to adequately inform itself and take action on any unsolicited "superior proposal" from a third party. Upon receipt of a superior proposal, the Lukens board was, however, obliged to notify Bethlehem in writing of the terms and conditions of that proposal and could not accept the superior proposal until the fifth business day following Bethlehem's receipt of that written notice.

The Complaint does not directly challenge the validity of any of these provisions. Instead, the Complaint attacks the Director Defendants' decision enter into the merger agreement and alleges that the board's failure to include to certain other provisions in the Agreement (described below) constituted a breach of the Director Defendants' fiduciary duties.

D. Allegheny Makes a Superior Offer

On December 22, 1997, just one week after the Bethlehem transaction was disclosed, Allegheny publicly announced that it had offered in a letter to Lukens's board to pay $28 per share, entirely in cash, to purchase 100% of Lukens's common stock. Including the assumption of debt, Allegheny's proposal was worth $715 million. Pursuant to the merger agreement, Lukens informed Bethlehem of the competing offer.

Allegheny also announced its willingness "to enter into a merger agreement substantially identical" to the merger agreement. Comp. ¶34. This offer presumably included Allegheny's willingness to honor the validity of the golden parachutes.

On December 30, 1997, the Lukens board publicly announced its determination that the Allegheny proposal, presenting a 12% higher premium than that offered by Bethlehem, was a "superior proposal." The Complaint states that upon receiving the superior offer, the Lukens board "did not open up the sale of Lukens to a fair and competitive bidding process or consider the sale of assets piecemeal."

Lukens publicly announced on January 5, 1998 that it had entered into a revised merger agreement with Bethlehem in which Bethlehem agreed to pay a combination of cash and stock valued at $30 per share. The revised

merger agreement reflected the higher value of the consideration, but was, in other respects, unchanged. In particular, the termination provisions of the revised agreement were no more preclusive of third party competing offers than at first. Despite this fact, no further offers were made.

E. The Bethlehem-Allegheny Transaction

Bethlehem and Allegheny had different interests in acquiring Lukens. Allegheny was most interested in owning Lukens's stainless steel operations while Bethlehem particularly sought Lukens's plate steel business. According to the Complaint, the Director Defendants knew of these differing interests since the early negotiations during 1997.

The Complaint alleges that after the revised merger agreement was executed, Bethlehem "began secret discussions with Allegheny regarding a proposed carve-up of Lukens." These secret negotiations culminated almost a month later with an agreement providing that, after the merger became effective: (1) Allegheny would purchase Lukens's stainless steel operations from Bethlehem for $175,000,000; (2) Bethlehem would, for twenty years, provide stainless steel conversion services to Allegheny; and (3) Allegheny would supply stainless steel hot rolled bands to Bethlehem for reprocessing.

The Bethlehem-Allegheny transaction effectively ended the bidding for Lukens and is the source of some of the claims of breach of fiduciary duty leveled against the Director Defendants. The Complaint criticizes the Director Defendants' response to the "carve up," alleging that they should have refused to go forward with the merger in order to "seek to extract the complete value of Lukens from both Bethlehem and Allegheny." Further, it is alleged that the Director Defendants' failures to act "enabled Bethlehem to scuttle an active bidding contest," thus causing Lukens's stockholders to receive less than they would have received "had an open and fair sale process for Lukens taken place."

The Complaint also contains the quite unusual and unsupportable allegation that, by negotiating the "carve-up," Bethlehem violated its *fiduciary* duties to Lukens or Lukens's stockholders, as follows: "Bethlehem, once it positioned itself as the successful purchaser of Lukens, had the fiduciary obligation not to act in any way to adversely affect Lukens and its stockholders."

F. Lukens Stockholders Vote in Favor of the Merger

On April 27, 1998, Lukens distributed to its stockholders a proxy statement in connection with the May 28, 1998 meeting at which they were asked to approve the merger. The Complaint does not identify any specific

aspect of the proxy statement that it claims is false or misleading. Instead, the Complaint lists ten rhetorical questions relating to the conduct of the sale process by the Director Defendants and alleges that the answers to these questions are absent from the proxy statement and material to the stockholders' deliberations. For example, the Complaint alleges that the proxy materials do not explain "why the Director Defendants had not attempted to canvass the market;" "why the Bethlehem bid had been accepted while Allegheny was still an active bidder;" "why there had been no consideration given to a piecemeal sale of assets;" and "why the Director Defendants took no action . . . when the collusive agreement was publicly announced."

At the scheduled meeting, the Lukens stockholders approved the merger with Bethlehem and the transaction was consummated the following day.

III. DISCUSSION

A. Standard on a Motion to Dismiss

[1-4] In considering a motion to dismiss a complaint under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[3] Although "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true."[4] That is, "[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences."[5] Moreover, the court may consider, for certain purposes, the content of documents that are integral to or are incorporated by reference into the complaint, e.g., in this case, the actual disclosures made in the proxy statement and the provisions of the Lukens certificate of incorporation.[6]

B. The Parties' Contentions

The plaintiffs seek a declaration that the merger was "entered into and completed in breach of the fiduciary duties of the Director Defendants" and an order rescinding the merger or, if not possible, awarding rescissory

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[3]*Grobow v. Perot*, Del. Supr., 539 A.2d 180, 187 & n.6 (1988).
[4]*Id.*
[5]*Id.*
[6]See *In re Santa Fe Pac. Corp. Shareholder Litig.*, Del. Supr., 669 A.2d 59, 69-70 (1995).

damages. In this connection I note that, although the original and first amended complaints were filed prior to the stockholders meeting and the consummation of the merger, the plaintiffs never sought to enjoin the transaction. In addition, plaintiffs seek an order requiring the Director Defendants, Lukens and Bethlehem "to account for their wrongdoing" and to pay damages in an amount to be determined by the Court.

Count I of the complaint alleges that the Director Defendants breached their fiduciary duties by: (1) approving of and entering into the merger agreements, both of which contained "provisions designed to dissuade" other proposals, without determining whether doing so was in the best interest of Lukens stockholders; (2) failing to consider the effect that approving the merger would have "on Lukens' ability to obtain better offers"; (3) failing to take steps to ensure that the stockholders would receive the highest price reasonably available in the sale of Lukens; (4) failing to insist on provisions "to affirmatively protect Lukens from collusion" between Bethlehem and competing bidders; (5) tacitly accepting the Bethlehem-Allegheny transaction; and (6) issuing a materially misleading and incomplete proxy statement in connection with the merger. Count II alleges that Bethlehem knew of the Director Defendants' fiduciary obligations to Lukens's stockholders and acted and urged the Director Defendants to act contrary to those obligations. Further, by executing the merger agreement, Bethlehem allegedly "caused the Director Defendants to violate their fiduciary duties of loyalty and due care" and thereby is liable to plaintiffs for aiding and abetting the Director Defendants' breaches.

The Director Defendants argue that dismissal is proper because: (1) rescission of the merger is unavailable because it is either barred by laches or otherwise impractical; (2) an award of money damages is barred by Article Thirteenth of Lukens's Charter, which eliminates directorial liability in accordance with 8 *Del. C.* § 102(b)(7); (3) the Director Defendants' actions were either not subject to "*Revlon* duties" or, in the alternative, the Complaint fails to allege breach of such duties; and (4) the stockholders' ratification of the merger extinguishes any claims against the Director Defendants. Bethlehem argues that; (1) the Complaint fails adequately to allege any breach of duty by the Director Defendants; (2) the Complaint does not include facts establishing that Bethlehem "knowingly participated" in any breach of fiduciary duty; and (3) the plaintiffs were not damaged by any purported breach of fiduciary duty.

C. What Type of Breaches of Duty, if Any, Are Adequately Alleged Against the Director Defendants?

[5] I first note that plaintiffs' demand for rescission of the transaction is plainly futile. Even disregarding plaintiffs' failure to pursue injunctive relief prior to the shareholder vote, *although that option was readily available*, it goes without saying that at this juncture it is "impossible to unscramble the eggs."[7] Money damages being the only possible form of relief available, the question necessarily arises whether that form of relief is barred by Lukens's exculpatory provision. The presence of the section 102(b)(7) provision in the Lukens charter thus causes me to inquire, at the threshold, into the nature of the breaches of fiduciary duty alleged in the Complaint. Any claim that adequately alleges *solely* a violation of the duty of care and does not also allege the existence of circumstances constituting one of the exceptions to that exculpatory provision must be dismissed. *See* discussion *supra* Part III.E.

The well-pleaded allegations of the Complaint typify only a claim of negligence or gross negligence. For example, the Complaint accuses the Director Defendants of failing to act, as follows: to determine the interests of other potential acquirers; to consider the value of a break-up of the Company in numerous sale transactions instead of the sale of the Company as a whole; to include provisions in the merger agreement that protected Lukens and its stockholders from collusion among Bethlehem and other interested bidders; to use "the leverage provided by the Allegheny offer to seek to modify or eliminate the termination fee or any other provisions" of the merger agreement; to negotiate directly with Allegheny with respect to raising its offer; to adequately canvass the market; and so on.

[6] Little or nothing in the Complaint speaks in terms of bad faith misconduct or disloyalty. To begin with, the Complaint contains only the most meager allegations about who the Director Defendants are. Paragraph 11 states that "Alexander, Dammeyer, Dunnigan, Gross, Helton, Nelson, Price, Thomas and Tippett are directors of Lukens and along with Van Sant comprise all of the members of the Lukens's Board of Directors ('the Board')." Paragraph 12 then alleges that Van Sant was Lukens's Chairman and CEO for five years before the merger. What is missing is any allegation of fact that a majority of the Director Defendants either stood on both sides of the merger or were dominated and controlled by someone who did. Indeed, only Van Sant (who, as Lukens's Chairman and CEO, was paid a sizeable severance benefit package in the merger) is even alleged to have an

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[7] *Gimbel v. Signal Cos., Inc.*, Del. Ch., 316 A.2d 599, 603, *aff'd*, Del. Supr., 316 A.2d 619 (1974) (citation omitted).

interest in the merger different than that of the Lukens stockholders as a whole.

Notwithstanding this paucity of particularized factual allegations tending to show that a majority of the Director Defendants lacked independence, plaintiffs offer several reasons why, they say, a sufficient predicate exists to support a claim of bad faith misconduct or disloyalty. First, they point to evidence of stockholder dissatisfaction with the Director Defendants during 1997, due to the Company's poor performance, and the possibility of a proxy contest at the 1998 annual stockholder meeting. From this, they infer that the Director Defendants' conduct in negotiating the sale of Lukens was improperly motivated, as shown by the Director Defendants' alleged decision to "single[] out Bethlehem and Allegheny . . . for merger discussions." They then allege in a wholly conclusory fashion that "[d]riving the Director Defendants' adamant goal to make a deal with Bethlehem was not what was in the best interest of Lukens stockholders, but, rather, avoiding an upcoming Lukens's annual meeting at which they would have to report and account for their mismanagement resulting in over two consecutive years of losses and face a possible proxy contest." Second, the Complaint makes the absurdly complicated and ineffective allegation that "the Director Defendants, with Bethlehem's urging and cooperation, structured both [merger agreements] to favor Lukens' management that had done Bethlehem's bidding by rewarding them in honoring their 'golden parachutes' from Lukens in full." Incongruously, the Complaint nowhere alleges facts showing that any of the employment contracts between Lukens and its managers, or the change of control provisions of those contracts, were invalid or otherwise unenforceable.

Neither of plaintiffs' arguments supports a conclusion that the Complaint states a claim for a breach of the duty of loyalty or actions taken other than in good faith. As to the first contention, there is no logical force to the suggestion that otherwise independent, disinterested directors of a corporation would act disloyally or in bad faith and agree to a sale of their company "on the cheap" merely because they perceived some dissatisfaction with their performance among the stockholders or because of the possibility that a third of their number might face opposition for reelection at the next annual stockholders meeting. Plainly, there is no allegation of an improper entrenchment motive in these facts. On the contrary, by approving the merger agreements, the Director Defendants affirmatively agreed to give up their directorial positions. Moreover, the timing of events alleged in the Complaint is out of sequence. The Complaint alleges that the Lukens board decided to explore a sale of the Company "in 1996 or early 1997" -- some months before the two shareholder proposals were approved at the April 1997 annual meeting and even longer before the August and December 1997

letters expressing stockholder dissatisfaction. These facts negate any claim that the Director Defendants rushed to scuttle the ship before being forced to walk the plank, as plaintiffs suggest.

The process pursued by the Director Defendants that is reflected in the Complaint, considered as a whole and taking as true the well-pleaded allegations of fact, provides no support for any inference of bad faith or disloyalty. According to the Complaint, the Director Defendants pursued merger discussions for a year or more before agreeing to a merger on a price term ($25 per share in cash and securities) that, although not the best value ultimately attainable, is not alleged to have been inadequate or unfair. One week after Lukens announced this transaction, Allegheny, conclusively undeterred from bidding, first publicly announced an offer to buy Lukens for $28 per share in cash and stated that it would be willing to enter into a merger agreement substantially identical to the one signed by Lukens and Bethlehem. Plaintiffs do not allege that this $28 proposal was inadequate or unfair. Finally, the Complaint alleges that the Director Defendants asked Bethlehem to respond to this offer and that Bethlehem then agreed to pay $30 per share.

The Complaint studiously avoids alleging that the revised merger agreement contained any terms or provisions more likely to stifle competition than at first. Rather, the Complaint makes the odd and unlikely charge that the Director Defendants breached their fiduciary duties by their failure to use the leverage provided by the Allegheny $28 bid to "seek to modify or eliminate the termination fee or any other provisions of the Agreement, including the no-shop provision, or add[] terms that would have precluded any subsequent sale of Lukens' assets without Lukens stockholders benefiting therefrom." Experience teaches (contrary to this claim) that when a merger partner agrees to top a competing bid and, in doing so raises its own bid by 20%) the terms of the merger agreement are apt to be strengthened in its favor, not weakened so as to offer it less protection.[8]

[7] As to the claim based on the fact that Bethlehem agreed to pay management's "golden parachutes," I can only say that the plaintiffs' allegations stop short of the goal line. The only director alleged to benefit under these payments was Van Sant. Without alleging that Van Sant dominated or controlled a majority of the board, there is no basis to say that the board as a whole lacked independence.[9] Thus, the payment of a substantial golden parachute to Van Sant does not implicate the Director

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[8]Although it does not bear on my decision, I note that the proxy statement reports that, as part of the negotiations over the amended merger agreement, Bethlehem tried unsuccessfully to secure an increase in the amount of the termination fee.

[9]*See generally Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984).

Defendants' duties of loyalty or good faith.[10] More importantly, the Complaint does not challenge the validity or enforceability of the "golden parachute" contracts and acknowledges that Allegheny "was prepared to enter into a merger agreement *substantially identical*" (emphasis added) to the Bethlehem merger agreement. I infer from this that Allegheny was also willing to honor the golden parachute payments. In the circumstances, there is simply no basis for inferring that directorial approval of a transaction providing for their payment was the product of disloyalty or bad faith.[11]

D. The Presence of a "*Revlon*" Claim Does Not Necessarily Implicate the Duty of Loyalty

Anticipating that the Complaint might not adequately allege facts sufficient to survive a motion to dismiss, plaintiffs argue that a properly alleged claim that the Director Defendants' decisions are to be examined under the heightened standard described in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[12] inherently implicates the duty of loyalty. Thus, they argue, the section 102(b)(7) charter provision cannot operate at this juncture to require dismissal of the action.

Plaintiffs claim that when so-called "*Revlon* duties" are alleged, the duties of care, good faith and loyalty become "intertwined" so that directorial failure to obtain the highest price, even if solely due to gross negligence, amounts to a breach of the duty of loyalty. Plaintiffs cite the Supreme Court's opinions in *In re Santa Fe Pacific Corp. Shareholder Litig.*,[13] *Mills Acquisition Co. v. Macmillan, Inc.*[14] and several other cases as holding that a properly alleged *Revlon*-based claim *necessarily* implicates the duty of loyalty. In *Santa Fe*, the Supreme Court stated that director duties in situations implicating the teachings of *Revlon* and *Unocal Corp. v. Mesa Petroleum Co.*[15] "do not admit of easy categorization as duties of care or loyalty."[16] The plaintiffs cling to this statement in arguing that by merely alleging that the Director Defendants' conduct should be reviewed under

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[10]*See In re The Walt Disney Co. Deriv. Litig.*, Del. Ch., Consol. C.A. No. 15452, mem. op. at 30, Chandler, C. (Oct. 7, 1998).

[11]*See, e.g. Golden Cycle, LLC v. Allan*, Del. Ch., C.A. No. 16301, mem. op. at 28-29, Lamb, V.C. (Dec. 10, 1998) (holding that although the plaintiff, who was the losing bidder in a sale of corporate control, indicated its intent to litigate the validity of certain stock option and compensation packages benefiting the director defendants, the board was not sufficiently conflicted to implicate the entire fairness standard).

[12]Del. Supr., 506 A.2d 173 (1986)

[13]Del. Supr., 669 A.2d 59, 67 (1995).

[14]Del. Supr., 559 A.2d 1261, 1284 (1989).

[15]Del. Supr., 493 A.2d 946 (1985).

[16]*Santa Fe*, 669 A.2d at 67.

Revlon and its progeny, it is impossible to conclude that the Complaint alleges only breaches of the duty of care.

[8-9] This argument is not an accurate depiction of the law and misplaces the effect of *Revlon*. Although an important comment on the need for heightened judicial scrutiny when reviewing situations that present unique agency cost problems, *Revlon* did not fundamentally alter Delaware's corporate law.[17] "*Revlon* duties" refer only to a director's performance of his or her duties of care, good faith and loyalty in the unique factual circumstance of a sale of control over the corporate enterprise.[18] Although this court and the Supreme Court may use the term to categorize certain claims, "there are no special and distinct '*Revlon* duties.'"[19]

[10-11] A director's duty in conducting a sale of corporate control is to seek out, in a manner consistent with his or her triad of fiduciary duties,[20] "the best value reasonably available to the stockholders."[21] A corporate board's failure to obtain the best value for its stockholders may be the result of illicit motivation (bad faith), personal interest divergent from shareholder interest (disloyalty) or a lack of due care.[22]

[12-13] Rather than adding to or "intertwining" a corporate board's triad of distinct duties, as plaintiffs argue, the *Revlon* case, like *Unocal* before it, indicates that heightened judicial scrutiny is warranted, because "a court evaluating the propriety of a change of control or a takeover defense must be mindful of 'the omnipresent specter that a board may be acting primarily in its own interest, rather than those of the corporation and its shareholders.'"[23] If a complaint merely alleges that the directors were grossly negligent in performing their duties in selling the corporation, without some factual basis to suspect their motivations, any subsequent finding of liability will,

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[17]*Barkan v. Amsted Indus., Inc.*, Del. Supr., 567 A.2d 1279, 1286, n.2 (1989) ("Because the rule in *Revlon* is derived from fundamental principles of corporate law and flows directly from precedents such as *Unocal*, its announcement did not produce a seismic shift in the law governing changes of corporate control").

[18]*See Barkan*, 567 A.2d at 1286 (citing *Unocal*, 493 A.2d at 954-55 and *Revlon*, 506 A.2d at 180).

[19]*Macmillan*, 559 A.2d at 1288.

[20]*Cede & Co. v. Technicolor, Inc.*, Del. Supr., 634 A.2d 345, 361 (1993).

[21]*Paramount Communications, Inc. v. QVC Network, Inc.*, Del. Supr., 637 A.2d 34, 48 (1994).

[22]*See, e.g., Macmillan*, 559 A.2d at 1279-82 (holding that the defendant directors breached their duties of loyalty *and* care by being "torpid, if not supine, in [their] efforts to establish a truly independent auction," free of manipulation by interested persons, where the defendant directors actions "materially contributed to the unprincipled conduct of those upon whom [they] looked with a blind eye").

[23]*Barkan*, 567 A.2d at 1286 (quoting *Unocal*, 493 A.2d at 954).

necessarily, depend on finding breaches of the duty of care, not loyalty or good faith.[24]

In light of the foregoing, assuming that the Director Defendants' actions are to be reviewed under *Revlon*'s heightened scrutiny,[25] the Complaint does not adequately allege that they acted in bad faith or disloyally. Thus, if the Director Defendants breached their "*Revlon* duties," they breached their duty of care and nothing more.[26]

E. Article Thirteenth of the Lukens Charter, Enacted Pursuant to Section 102(b)(7) of the DGCL, Requires Dismissal of the Duty of Care Claims Alleged in the Complaint

[14] It remains to address the effect of the exculpatory charter provision found in Article Thirteenth of Lukens's Charter (the "§ 102(b)(7) Provision").[27] Because it appears, after careful examination of the

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[24]*See, e.g.*, *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985) (finding that the board of directors violated its duty of care in evaluating a merger proposal and recommending it for shareholder approval).

[25]The parties have spent a great deal of time arguing about whether *Revlon* duties apply. I find that, assuming that *Revlon* is implicated, the Complaint must still be dismissed. I nevertheless note that although there is no case directly on point, I cannot understand how the Director Defendants were *not* obliged, in the circumstances, to seek out the best price reasonably available. The defendants argue that because over 30% of the merger consideration were shares of Bethlehem common stock, a widely held company without any controlling shareholder, *Revlon* and *QVC* do not apply. I disagree. Whether 62 % or 100% of the consideration was to be in cash, the directors were obliged to take reasonable steps to ensure that the shareholders received the best price available because, in any event, for a substantial majority of the then-current shareholders, "there is no long run." *TW Servs., Inc. v. SWT Acquisition Corp.*, Del. Ch., C.A. Nos. 10427, 10298, mem. op. at 20, Allen, C. (Mar. 2, 1989). I do not agree with the defendants that *Santa Fe*, in which shareholders tendered 33% of their shares for cash and exchanged the remainder for common stock, controls a situation in which over 60% of the consideration is cash. The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering *Revlon*. I take for granted, however, that a cash offer for 95% of a company's shares, for example, even if the other 5% will be exchanged for the shares of a widely held corporation, will constitute a change of corporate control. Until instructed otherwise, I believe that purchasing more than 60% achieves the same result.

[26]*In re J. P. Stevens & Co., Inc.*, Del. Ch., 542 A.2d 770 (1988), Chancellor Allen examined the different ways in which *Revlon* could be viewed. After discussing the facts of *Revlon* which indicated that the Revlon directors were conflicted (thus of divided loyalties) and the alternative view of the case, namely that *Revlon* set out "rules about the kind of agreements that may not be entered during" the sale of corporate control, "even by a disinterested, fully functioning board", the Chancellor indicated his understanding that *Revlon* is best explained as a breach of the duty of loyalty case. *Id.* at 778-81. I note my general agreement that the heightened scrutiny set out in *Revlon*, as well as *Unocal*, is best rationalized as resting on "the omnipresent specter that a board may be acting primarily in its own interests." *Unocal*, 493 A.2d at 954. Where a plaintiff does not adequately implicate any such directorial conflict, heightened judicial scrutiny will not often result in a greater likelihood of liability than if the business judgment presumption applied from the outset.

[27]Article Thirteenth provides:

Complaint, that "the factual basis for a claim *solely* implicates a violation of the duty of care . . . the protections of such a charter provision may properly be invoked and applied."[28] Therefore, on the basis of that charter provision, I will dismiss any and all claims predicated on the Director Defendants' alleged failure to exercise due care in their conduct of the process of selling Lukens, including their alleged failure to take steps to prevent the Bethlehem-Allegheny "carve up" transaction.

I do not read the Supreme Court's recent opinion in *Emerald Partners v. Berlin*[29] to preclude dismissal of plaintiffs' duty of care claim. In that case, the Court of Chancery granted summary judgment for the defendants, on the ground that the complaint attacking a merger between a corporation and its controlling stockholder did not sufficiently plead an entire fairness claim. The Supreme Court reversed, concluding that the entire fairness claim was adequately pleaded and that the summary judgment record did not provide a sufficient factual basis to determine whether or not the burden of proof on that issue had been shifted to the plaintiffs.[30]

[15] Next, and most pertinent to the analysis here, the Supreme Court overruled the decision of the trial court to examine the disclosure claims distinct and apart from the entire fairness analysis and to dismiss the disclosure claims on the basis of a section 102(b)(7) charter provision. The Supreme Court concluded that, in the context of an entire fairness analysis, disclosure claims are not easily categorized as arising under only the duty of care, holding that "[s]ince we conclude that the disclosure claims here alleged are not so categorized, the analysis falls short."[31]

The Supreme Court went on to state that a section 102(b)(7) provision is "*in the nature of* an affirmative defense. . . . [Defendants] will normally bear the burden of establishing each of its elements."[32] Plaintiffs argue that this assignment of an evidentiary burden to defendants precludes a Rule 12(b)(6) dismissal in this case, irrespective of whether the Complaint alleges

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No director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty by such a director as a director. Notwithstanding the foregoing sentence, a director shall be liable to the extent provided by applicable law (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for payment of unlawful dividends or approval of illegal stock purchases or redemptions prohibited pursuant to Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which such director derived an improper personal benefit.

[28] *Emerald Partners v. Berlin*, Del. Supr., 726 A.2d 1215, 1224 (1999).

[29] *Id.*

[30] *Id.* at 1222-23 (citations omitted).

[31] *Id.* at 1223.

[32] *Id.* at 1223-24 (emphasis added) (citations omitted).

any breach of duty fitting one of the exceptions to the § 102(b)(7) Provision. According to plaintiffs, the § 102(b)(7) Provision can only be raised as an affirmative defense and the Court can only determine its applicability on the basis of a well-developed factual record.

[16] Nothing in the *Emerald Partners* opinion requires such a narrow or crabbed reading of section 102(b)(7) charter provisions.[33] Indeed, the *Emerald Partners* court explicitly recognized that "where the factual basis for a claim *solely* implicates a violation of the duty of care . . . the protections of such a charter provision may properly be invoked and applied." Moreover, the context of this statement, juxtaposed as it is to the language (quoted above) assigning a burden of proof to the person seeking exculpation, strongly suggests its applicability in the context of a motion to dismiss where *only* duty of care claims are alleged.

[17-18] Thus, I read *Emerald Partners*'s treatment of 8 *Del. C.* § 102(b)(7) to mean that where a complaint adequately alleges an entire fairness claim (implicating, at least initially, elements of good faith, loyalty and care), the burden will be on a director defendant to show his or her entitlement to the immunizing effect of the charter provision. Similarly, if a complaint adequately alleges bad faith or disloyalty, or some other exceptional circumstance under 8 *Del. C.* § 102(b)(7),[34] or if the nature of the alleged breach of duty is unclear,[35] the complaint will not be dismissed on a motion made under Rule 12 (b)(6) on the basis of an exculpatory charter provision.[36]

[19-21] Here the Complaint alleges, if anything, only a breach of the duty of care. The function of the § 102(b)(7) Provision is to render duty of care claims not cognizable[37] and to preclude plaintiffs from pressing claims of breach of fiduciary duty, absent the most basic factual showing (or reasonable basis to infer) that the directors' conduct was the product of bad

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[33]Like Vice Chancellor Strine, in *In re General Motors Class H Shareholders Litig.*, Del. Ch., 734 A.2d 611, 619 at n.7 (1999), I do not read Emerald Partners to preclude "a Rule 12(b)(6) dismissal of claims that the directors breached their fiduciary duty of care on the *basis* of an exculpatory charter provision so long as dismissal on that *basis* does not *thereby* preclude plaintiffs from pressing well-pleaded allegations that the directors breached their fiduciary duties of loyalty and good faith."

[34]*See, e.g., Leslie v. Telephonics Office Technologies, Inc.*, Del. Ch., C.A. No. 13045, mem. op. at 23, Allen, C., (Dec. 30, 1993) (refusing to bar the plaintiffs claims on account of a § 102(b)(7) provision where the complaint alleges an "intentional scheme to siphon off the company's assets").

[35]*See, e.g., Sanders v. Wang*, C.A. No. 16640, mem. op. at 28, Steele, V.C. (Nov. 8, 1999).

[36]*Accord General Motors*, 734 A.2d at 619, n.7.

[37]*John Hancock Capital Growth Management, Inc. v. Aris Corp.*, Del. Ch., C.A. No. 9920, mem. op. at 4, Jacobs, V.C. (Aug. 24, 1990) (stating that claims of directorial gross negligence are "not cognizable" where a § 102(b)(7) provision applies).

faith, disloyalty or one of the other exceptions listed in the statute.[38] Dismissal is proper where no exception is alleged.[39] Further, *Emerald Partners* supports the conclusion that the Director Defendants are entitled to this dismissal at this stage of the process, without having to engage in discovery or shoulder the burden of proving that they acted loyally and in good faith.[40]

F. Can the Aiding and Abetting Claim Against Bethlehem Survive?

[22] Generally, where allegations of aiding and abetting are made, a claim will survive a motion to dismiss only where the plaintiff pleads the following elements: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) knowing participation in that breach."[41] The courts of this state have added a fourth requirement -- the necessity of alleging damages.[42]

[23] Knowing participation, though it need not be pleaded with particularity, must be reasonably inferred from the facts alleged in the complaint.[43] For example, the Complaint's conclusory allegation that Bethlehem "approved and urged" the Director Defendants to enter into the Merger Agreements does not satisfy this pleading burden.[44]

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[38]*In re Dataproducts Corp. Shareholders Litig.*, C.A. No. 11164, mem. op. at 11-12, Jacobs, V.C. (Aug. 22, 1991) (stating that where plaintiffs do not allege facts that "even inferentially" suggest bad faith or harmful intent, those claims are "precluded" by the § 102(b)(7) provision).

[39]*See In re Wheelabrator Technologies, Inc., Shareholders Litig.*, Del. Ch., C.A. No. 11495, mem. op. at 22-23, Jacobs, V.C. (Sept. 1, 1992) (taking judicial notice of a corporate charter even though it was not mentioned in the complaint and then dismissing the duty of care claims to the extent they sought monetary damages, based on the § 102(b)(7) provision contained in that charter); *Goodwin v. Live Entertainment, Inc.*, Del. Ch., C.A. No. 15765, Strine, V.C., mem. op. at 10 (Jan. 22, 1999), (claim for breach of the fiduciary duty of care barred by exculpatory charter provision), *aff'd*, Del. Supr., No. 72, 1999, 1999 WL 624128 (Jul. 23, 1999) (ORDER).

[40]In *Levy v. Stern*, C.A. No. 11955, Balick, V.C. (Apr. 19, 1996), *rev'd*, Del. Supr., 687 A.2d 573, No. 211, 1996, 1996 WL 742818, Walsh, J. (Dec. 20, 1996) (ORDER), this court granted summary judgment to the defendants, stating that the plaintiffs failed to develop claims they sought to allege falling within one of the exceptions to the exculpatory provision applicable in that case. Justice Walsh, writing for the Supreme Court, reversed the lower court's ruling because the summary judgment record was improperly limited by defendants' abuse of the discovery process. 1996 WL 742818, at *3-4.

[41]*Santa Fe*, 669 A.2d at 72.

[42]*See Gilbert v. El Paso Co.*, Del. Ch., 490 A.2d 1050, 1057 (1984), *aff'd*, Del. Supr., 575 A.2d 1131 (1990).

[43]*Weinberger v. Rio Grande Indus., Inc.*, Del. Ch., 519 A.2d 116, 131 (1986).

[44]*Santa Fe*, 669 A.2d at 72 (holding that the conclusory statement that the alleged aider and abettor "had knowledge of" the director defendants' fiduciary duties and "knowingly and substantially participated and assisted" in the alleged breaches did not state a claim).

Plaintiffs argue that Bethlehem "knowingly participated" in the alleged breaches of duty, first, by agreeing to pay the golden parachutes and second, by making an initial offer that they knew was "grossly underpriced." Neither of these claims warrants much discussion.

[24] First, there is no allegation of fact in the Complaint that the golden parachute payments were not valid obligations of the Company. If Bethlehem acquired Lukens, it would become legally bound to honor valid obligations such as the golden parachutes. The fact that Bethlehem chose not to challenge the validity of the agreements clearly does not establish Bethlehem's complicity with the Director Defendants' alleged breaches of duty.

[25] Second, as to the claim that Bethlehem's offer was "grossly underpriced," no particularized facts are alleged to support this conclusory assertion. Moreover, it should be obvious that "an offeror may attempt to obtain the lowest possible price for stock through arms'-length negotiations."[45] The only allegation that the negotiations were not at arms' length relates to the golden parachute payment, which, as discussed above, neither raises a question as to the Director Defendants' self-interest nor implicates Bethlehem in any "conspiracy" to breach fiduciary duties.[46]

[26] Finally, the plaintiffs argue that Bethlehem's willingness to negotiate agreements that failed to protect Lukens stockholders from the Bethlehem-Allegheny "carve up" transaction somehow establishes knowing participation in the alleged breaches. I might be concerned if the Director Defendants knew of Bethlehem's contacts with Allegheny. However, the Complaint plainly states that Bethlehem engaged in "secret" negotiations with Allegheny. This fact also refutes any conspiracy theory.

For all these reasons, the aiding and abetting claim against Bethlehem will be dismissed.

G. Does the Complaint Allege Breach of the Duty of Disclosure?

The Complaint does not identify any misrepresentation in the proxy statement. Instead, it lists ten questions that the plaintiffs argue should have been answered in the proxy statement.[47] The questions posed relate to *why* the Director Defendants failed to do things, such as: canvass the market,

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[45] *Gilbert*, 490 A.2d at 1058.

[46] *Id.*

[47] For the most part, these questions pertain to the Director Defendants alleged breaches of duty. To the extent that the failure to answer these questions is allegedly due solely to the directors' lack of care, and not in any way motivated by bad faith, disloyalty or misconduct, such claims can also be dismissed because of the presence of the § 102(b)(7) Provision. *See* discussion *infra* Part III.E; *Arnold v. Society for Savings Bancorp, Inc.*, Del. Supr., 650 A.2d 1270, 1287 (1994).

prevent the Bethlehem-Allegheny Transaction, consider a piecemeal sale of the Company's assets, negotiate directly with Allegheny, and use the added leverage provided by Allegheny's $28 proposal to amend the terms of the merger agreement. The omission of this information is alleged to have rendered the proxy statement materially incomplete or misleading.

[27] A cognizable claim for breach of the duty of disclosure rests on finding that the non-disclosed information is material.[48] "What the standard ... contemplate[s] is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[49]

[28] The information allegedly omitted here was plainly not material. The proxy statement discusses a year-long process of inquiring into and eventually negotiating a merger transaction. It provides a detailed, nearly daily account of how events unfolded from early December 1997 until the signing of the revised merger agreement on January 5, 1998. None of this is challenged in the Complaint. What the proxy statement does not do is explain why the board chose *not* to take particular courses of action. Of course, requiring disclosure of every material event that occurred *and* every decision not to pursue another option would make proxy statements so voluminous that they would be practically useless.[50]

[29] In addition, the questions posed by the plaintiffs, by and large, do no more than reflect the plaintiffs' substantive allegations of wrongdoing. It is well understood that directors are not required to engage in "self-flagellation" by disclosing their alleged breaches of duty.[51] Plaintiffs claim that these questions do not require admissions of wrongdoing, but rather information about the *process* of selling the Company. I disagree. As explained above, that process is described in considerable detail in the proxy statement. To have added information explaining why the Director Defendants did not take other steps or follow another process was not required.

[30] In sum, it is not enough simply to pose questions that are not answered in the proxy statement.[52] To survive a motion to dismiss,

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[48] *Rosenblatt v. Getty Oil Co.*, Del. Supr., 493 A.2d 929, 944 (1985).

[49] *Id.* (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[50] *See TCG Sec., Inc. v. Southern Union Co.*, Del. Ch., C.A. No. 11282, mem. op. at 18, Chandler, V.C. (Jan. 31, 1990) ("a reasonable line has to be drawn or else disclosures in proxy solicitations will become so detailed and voluminous that they will no longer serve their purpose").

[51] *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 145 (1997); *Margolies v. Pope & Talbot, Inc.*, Del. Ch., C.A. No. 8244, mem. op. at 18, Hartnett, V.C. (Dec. 23, 1986).

[52] As pointed out by the defendants, some of the questions actually are answered, at least in general terms. For example, while the plaintiffs ask for disclosure answering why the market was not canvassed, the proxy statement states that the Lukens board "engaged in exploratory discussions ... with certain third parties" regarding possible business combinations. While this does not

challenges to proxy statement disclosure must be based on the alleged omission or misrepresentation of a material fact. The questions posed in the Complaint do not meet this test of materiality

H. Did Shareholder Ratification of the Merger Extinguish the Claims?

[31] The defendants argue strenuously that the approval of the merger by a majority of Lukens public stockholders extinguished any claims resting solely on alleged breaches of the duty of care.[53] The issue is whether that conclusion can be squared with the Supreme Court's decision in *In re Santa Fe Pacific Corp. Shareholder Litig.*[54] Although the matter is hardly free from doubt, I conclude that, in the circumstances presented in this case, the vote of the Lukens stockholders authorizing and approving the merger extinguished the well-pleaded claims in the Complaint.

[32] In *Smith v. Van Gorkom*, the Supreme Court said that "a discovered failure of the Board to reach an informed business judgment in approving the merger constitutes a voidable, rather than a void, act."[55] The Court went on to say that "the settled rule in Delaware is that 'where a majority of fully informed stockholders ratify action of even interested directors, an attack on the ratified transaction normally must fail.'"[56] In that case, the Court refused to recognize the ratifying effect of the vote because it concluded that the proxy materials sent to stockholders were false and misleading. Nevertheless, *Smith v. Van Gorkom* clearly stands for the proposition that, in the appropriate case, a fully informed vote of stockholders approving a merger will extinguish a claim for breach of fiduciary duty stemming from a board of directors' failure to reach an informed business judgment in authorizing that transaction.

[33] The Supreme Court revisited the issue of ratification in *Santa Fe*. There, the complaint challenged defensive actions taken unilaterally by a board of directors in the context of a hotly contested hostile contest for corporate control. At the end of the day, the disfavored suitor withdrew, and the stockholders were asked to approve the merger agreement the board had negotiated with its chosen partner. The Supreme Court refused to find that the vote approving the merger ratified the board's conduct in erecting defensive measures against the other bidder. The problem lay in the

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specifically constitute a canvassing of the market, it leads to the inference that the Lukens board took steps to inform itself of Lukens's market value.

[53] *See Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 889 (1985).

[54] Del. Supr., 669 A.2d 59 (1995).

[55] 488 A.2d at 889.

[56] *Id.* at 890 (quoting *Gerlach v. Gillam*, Del. Ch., 139 A.2d 591, 593 (1958)).

incongruity between the proposal voted on (the merger agreement) and the subject matter of the claimed breaches of fiduciary duty (defensive measures that precluded stockholder consideration of a competing bid). As the Supreme Court said:

> In voting to approve the Santa Fe-Burlington merger, the Santa Fe stockholders were not asked to ratify the Board's unilateral decision to erect defensive measures against the Union Pacific offer. The stockholders were merely offered a choice between the Burlington Merger and doing nothing. The Santa Fe stockholders did not vote in favor of the precise measures under challenge in the complaint. Here, the defensive measures had already worked their effect before the stockholders had a chance to vote. . . .
>
> Since the stockholders of Santa Fe merely voted in favor of the merger and not the defensive measures, we decline to find ratification in this instance.[57]

The Supreme Court further justified this result by stating that it "would frustrate the purposes underlying *Revlon* and *Unocal*" to permit "the vote of a majority of the stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control."[58]

[34] The question I must answer is whether *Santa Fe* precludes a finding of ratification in a case, such as this, where there was an active bidding process, no measures precluded any participant from bidding, and the merger agreement presented to stockholders represented the highest offer made by anyone. I conclude it does not.

Unlike the situation in *Santa Fe*, the proposition voted on by the Lukens stockholders fairly framed the question whether or not to ratify the job done by the Lukens directors in managing the bidding process. As it affects the final proposal, the crux of the claim made against the Director Defendants is that they failed to takes steps to protect against the Bethlehem-Allegheny "carve up." This failure is alleged to have deprived the Lukens stockholders of the opportunity to receive the highest and best value for their shares.[59] But that deal was well-known to the stockholders when they voted and was itself contingent on their approval of the

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[57] *Santa Fe*, 669 A.2d at 68.

[58] *Id.*

[59] Of course, there was a rights plan and the merger agreement did contain a termination fee. But neither of these measures is alleged to have precluded Allegheny or anyone else from bidding. Indeed, Allegheny made its $28 bid while both of these measures were in place.

Bethlehem merger proposal. In a very clear and real sense, the vote to approve the Bethlehem merger proposal represents a decision that it was better to approve that transaction (*notwithstanding* the known possibility that the "carve up" deprived Lukens's stockholders of some incremental value) than to reject the $30 proposal and either "do nothing" or remarket the Company in a way that prevented collusion among bidders.

This analysis sufficiently distinguishes this case from *Santa Fe* to require a different result. Ultimately, the only well-pleaded allegation in the Complaint is the "*Revlon*" claim that the Director Defendants dropped the ball by failing to protect against the "carve up." Unlike the situation in *Santa Fe*, it would not "frustrate the purposes underlying *Revlon* and *Unocal*" to "[p]ermit[] the vote of a majority of stockholders on a merger to remove from judicial scrutiny" this sort of duty of care based claim.[60] Indeed, one is prompted to ask what purpose would be served by a rule that allowed the Lukens stockholders both to approve the $30 proposal (knowing of the "carve up") and to maintain an action against their directors for failing to do better.

Finally, I note that a large majority of the putative plaintiff class (alleged to include all Lukens stockholders other than the Director Defendants) both voted in favor of the merger and received the benefits of it. Even if this case were to continue, plaintiffs would confront substantial obstacles in continuing the action on behalf of those persons.[61]

IV. CONCLUSION

For all of the foregoing reasons, the defendants' motions to dismiss shall be GRANTED and the Plaintiffs' Second Amended and Supplemental Consolidated Class Action Complaint shall be DISMISSED, with prejudice, costs to the defendants. IT IS SO ORDERED.

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[60] *Santa Fe*, 669 A. 2d at 68.

[61] *Kahn v. Household Acquisition Corp.*, Del. Supr., 59 A.2d 166, 176-77 (1991).