of Midland. Three class actions were filed in the court of chancery attacking the merger proposal as grossly unfair to minority shareholders. A fourth action was filed which was purportedly on behalf of Crocker $2.1875 Cumulative Convertible Preferred stockholders asserting that the holders were entitled to vote as a separate class on the proposed merger. All but this final action were consolidated into a single class action consisting of three classes.

Negotiations resulted in the filing of the stipulation and agreement of compromise and settlement to which the plaintiff in the above fourth action, Cohn, objected, as did Linthicum and Sutton who claimed ownership of certain convertible subordinated debentures. Due to the fact that at least one of the named plaintiffs was a holder of preferred stock, the court of chancery, per Vice-Chancellor Hartnett, held that because the preferred stockholders were adequately represented at negotiations which were held to protect their interests, there was no reason why the holders of the preferred stock should not be included in the settlement, provided it was reasonable and fair to them. The court then took into consideration the complicated nature of issues involved, the difficulties the plaintiffs would face at a trial, and the expense and delay the defendants would experience, plus the poor financial condition of Crocker when it concluded that the settlement was fair and reasonable to all parties.

1. Compromise and Settlement ⟹ 2

The law favors the voluntary settlement of contested issues.

2. Compromise and Settlement ⟹ 4

The court of chancery, in its discretion, must exercise its own business judgment when determining whether a settlement in a stockholder derivative action is intrinsically fair and reasonable to all parties at interest.

3. Compromise and Settlement ⟹ 4

In a determination of the intrinsic reasonableness and fairness of a settlement in a stockholder derivative action, the court must consider the nature of the claim, the possible defenses to it, and the legal and factual obstacles to be faced by the plaintiffs at trial.

4. Compromise and Settlement ⟹ 4

In making its determination of intrinsic fairness and reasonableness, the court is not to try the issues or decide the merits of the

case because to do so would result in the loss of the judicial economy to be gained from encouraging the voluntary settlement of disputes.

5. Corporations ⟹ 393

Valid good faith exercises of business judgment which result in losses to the corporation are protected from judicial scrutiny even if the decisions made were, in fact, the wrong ones.

6. Securities Regulation ⟹ 199

Plaintiffs faced with valid good faith exercises of business judgment by corporate management are faced with the inherent difficulty of proving the element of scienter in securities law violations.

7. Compromise and Settlement ⟹ 4

Where the preferred stockholders were adequately represented and negotiations were held to protect their interests, there was no reason why the holders of the preferred stock should not have been included in the settlement, provided it was reasonable and fair to them.

Irving Morris, Esquire, and Joseph A. Rosenthal, Esquire, of Morris and Rosenthal, P.A., Wilmington, Delaware, and William Prickett, Jr., Esquire, and Elizabeth M. McGeever, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware, of counsel: Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pennsylvania; Kohn, Savett, Marion & Graf, P.C., Philadelphia, Pennsylvania; Greenfield & Chimicles, Haverford, Pennsylvania, designated lead attorneys for plaintiffs; Wolf Haldenstein Adler Freeman & Herz, New York, New York, Cooper Kirkham & McKinney, P.C., San Francisco, California, Sachnoff Weaver & Rubinstein, Ltd., Chicago, Illinois, Berger & Montague, P.C., Philadelphia, Pennsylvania, Saveri & Saveri, San Francisco, California, Wolf Popper Ross Wolf & Jones, New York, New York, Kaplan, Kilsheimer & Foley, New York, New York, Kendrick, Netter & Bennett, Los Angeles, California, Harvey Greenfield, Esquire, New York, New York, Levin & Fishbein, Philadelphia, Pennsylvania, Mordecai Rosenfeld, Esquire, New York, New York, A. Arnold Gershon, Esquire, New York, New York, Garwin, Bronzaft & Gerstein, New York, New York, attorneys for the plaintiffs.

Michael D. Goldman, Esquire, of Potter, Anderson & Corroon,

Wilmington, Delaware, of counsel: Shearman & Sterling, New York, New York, attorneys for defendant Midlank Bank plc.

Paul P. Welsh, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, of counsel: Morrison & Foerster, San Francisco, California, attorneys for the individual defendants, and for Crocker National Corporation and Crocker National Bank.

Victor F. Battaglia, Esquire, and Pamela S. Tikellis, Esquire, of Biggs & Battaglia, Wilmington, Delaware, of counsel: Silverman & Harnes, New York, New York, attorneys for objectors-Richard M. Cohn and Alan R. Kahn.

HARTNETT, *Vice-Chancellor*

A number of shareholder suits which challenge certain transactions of Crocker National Bank ("Crocker") have been consolidated and a Stipulation of Settlement has been entered into between all the plaintiffs and defendants in the consolidated actions. The plaintiffs in an action not consolidated and one other stockholder of Crocker have objected to the settlement.

A review of all of the facts and circumstances shows that this settlement is in the best interests of all those involved and that it is both fair and reasonable.

I

As of September 30, 1984, Crocker was the thirteenth largest national bank in the United States. It had outstanding over 20 million shares of common stock, over 1 million shares of $2.1875 Cumulative Convertible Preferred Stock, and $4.227 million principal amount of 5 3/4% Convertible Subordinated Debentures. All of the Crocker securities traded on the New York and the Pacific Stock Exchanges—except the $3.00 Cumulative Convertible Preferred stock, which traded on the over-the-counter market.

In 1980 an Investment Agreement was entered into between Crocker and Midland Bank, plc ("Midland") pursuant to which Midland acquired, in 1981, approximately 57% of Crocker's outstanding common stock for almost $750 million in cash. Contained in the Investment Agreement was an assurance that Midland would not exercise its majority control except as provided by the Agreement.

On December 15, 1983, Crocker announced that it was making a special charge to earnings of $107 million for the fourth quarter of 1983 because of bad loan experience. In response to this announcement five stockholder derivative suits were filed in this Court between December 20, 1983 and January 13, 1984. These suits were consolidated by Order dated February 3, 1984, into Civil Action No. 7405 under the caption: *Greenfield v. Wilcox.*

Between January 4, 1984, and March 28, 1984, six class actions were also commenced in the United States District Court for the Northern District of California alleging federal securities law violations relating to non-disclosure of Crocker's financial condition as well as corporate waste and mismanagement claims similar to those alleged in the suits filed earlier in this Court.

Counsel for the parties, after negotiations, entered into an agreement to prosecute all claims in the California Federal Court and the consolidated Delaware case was stayed on May 7, 1984. Discovery went forward in California with the review and examination by plaintiffs' counsel and experts of documents produced by defendants and obtained from third parties. Other discovery was taken—including numerous depositions. This discovery resulted in plaintiffs' filing an Amended Consolidated Complaint in the California action on June 1, 1984.

On July 13, 1984, Midland announced a proposal which would allow it to increase its ownership of Crocker common from 57% to 100% by a merger of Crocker with a wholly-owned subsidiary of Midland. Between July 17, 1984, and August 22, 1984, three class actions were filed in this Court attacking the merger proposal as grossly unfair to minority shareholders. A fourth action—*Cohn, et al v. Crocker National Corp.,* et al, Civil Action No. 7693—was filed on July 19, 1984, purportedly on behalf of holders of the Crocker $2.1875 Cumulative Convertible Preferred Stock ("Preferred Stock") asserting that the holders of the Preferred Stock are entitled to vote as a separate class on the proposed merger.

A Consolidated and Amended Complaint purporting to set forth all claims was filed on November 30, 1984 in C.A. No. 7405 *In Re Crocker Shareholders Litigation.* The *Cohn v. Crocker National Corp.,* case was not, however, consolidated with it.

Discovery was taken on the going private claims. As a result of continued arms-length negotiations between the parties a Stipulation and Agreement of Settlement was reached and was filed with the Court on February 7, 1985. A week earlier plaintiffs in the *Cohn*

case had sought a preliminary injunction to prevent the submission of any settlement proposal to this Court unless the holders of the preferred stock were given the right to vote separately on the merger. On February 7, 1985, in *Cohn v. Crocker National Corp.,* Del. Ch., C.A. No. 7693-NC, Hartnett, V.C., (Feb. 7, 1985) __A.2d __ (1985), I denied the preliminary injunction. I found that plaintiffs had shown neither a reasonable probability of success on the merits nor the likelihood of irreparable injury. I further held that because the right of the preferred stockholders to vote was questionable, the right could be compromised just as any other good faith dispute may be and that a settlement hearing was the proper time to raise the voting issue when it would be one factor in determining whether the entire settlement was fair.

For purposes of this settlement, all cases—except *Cohn v. Crocker National Corp.,* C.A. No. 7693-NC—have been consolidated into *In Re Crocker Shareholders Litigation,* C.A. No. 7405-NC, and a class action has been conditionally determined under Chancery Court Rule 23(b)(1) and (3) with classes consisting of: (1) all persons, or their successors or assigns, who own the Crocker securities listed below as of the effective time of the merger of a subsidiary of Midland with Crocker; (2) all persons who purchased the Crocker securities listed below between February 16, 1982 and December 14, 1983 ("Purchase Period") and still own such Crocker securities as of the effective time of the merger; and (3) all persons who purchased the Crocker securities listed below during the Purchase Period and sold such Crocker securities between December 15, 1983, and October 26, 1984 ("Sales Period") for less than the following amounts:

Crocker Security	Sales Price
Common Stock	$29.50
$2.1875 Cumulative Convertible Preferred Stock ($25 Face Amount)	$23.375
$3.00 Cumulative Convertible To be determined when Preferred Stock ($50 Face Amount)	To be determined when more information is available.
5 3/4% Convertible Subordinated Debentures $1,000 Face Amount)	$750.00

The terms of the originally proposed merger provided for the minority holders of common stock to receive .50 share of a new

adjustable rate preferred share ("ARPS") in lieu of each share of Crocker common stock held. The new ARPS will have a stated value of $50 per share; therefore, under the original proposed merger the minority common shareholders will have received ARPS with a stated value equivalent of $25 for each existing common share. The actual estimated value of the ARPS was, however, in the vicinity of $18-$22 per common share. The holders of the preferred stock were to receive the right to convert their preferred stock into the new ARPS in exchange for the loss of their right to convert their preferred shares into common stock.

Negotiations for the settlement have been going on for some time and the first Settlement and Merger Agreement in Principle was reached in October of 1984. Circumstances have led to changes being made to it, however. The Stipulation and Agreement of Compromise and Settlement presently before the Court was filed on February 7, 1985.

Under the Settlement, if approved, two Settlement Pools are to be established. One consists of $1 million to be paid to current holders of Crocker's preferred stock who purchased during the Purchase Period. The other Pool consists of $750 thousand, plus any amounts remaining unclaimed from the other Pool, to be distributed to those who bought Crocker securities during the Purchase Period and then sold these securities during the Sales Period. In addition, the Midland merger consideration has been raised. Each share of minority held Crocker common stock will be exchanged for .54 share of the ARPS which will have a dividend rate, dividend spread, and maximum and minimum rates designed to cause the ARPS to trade initially at $27 per present common share. The holders of the preferred stock will receive the right to convert their preferred stock into the ARPS with a correspondingly increased value.

Notice of the proposed settlement was mailed to all class members on or before April 1, 1985. Notice was also published in *The Wall Street Journal.*

Only two objections have been received regarding this settlement. The plaintiffs in Cohn filed a formal objection and appeared through counsel at the settlement hearing. A telegram was received from Edward B. and Virginia Linthicum and Robert Sutton who claim to be the owners of $274,000 face value of the 5 3/4% Convertible Subordinated Debentures. They assert that the settlement is unfair to holders of convertible securities and that post-merger conversion should be into common equity of the new corporation rather than the ARPS.

I I

[1-4] The law favors the voluntary settlement of contested issues. *Rome v. Archer,* Del. Supr., 197 A.2d 49 (1964). This Court, in its discretion, must determine whether the settlement is intrinsically fair and reasonable to all the interests by exercising its own business judgment. *Neponsit Inv. Co. v. Abramson,* Del. Supr., 405 A.2d 97 (1979). This requires more than a cursory scrutiny of the issues presented; the Court must consider the nature of the claim, the possible defenses to it, and the legal and factual obstacles to be faced by the plaintiff at trial. *Rome, supra.* The Court is not to try the issues or decide the merits of the case, however, because this would result in the loss of the judicial economy to be gained from encouraging the voluntary settlement of disputes. *Neponsit Inv. Co., supra.*

I I I

Crocker apparently became the thirteenth largest national bank in the United States by expanding through acquisitions of other banks. Some were large with numerous branch offices, depositers and assets. Others had five or fewer offices, few depositers, or less advantageous assets. This apparently led to a number of problems including branch offices which were too close together to be economical and an excessive number of unnecessary bank officers, etc., inherited from the acquired banks. All this apparently led to inefficiencies which caused Crocker not to be as profitable as other banks of similar size. This lower profitability, it is suggested, cause Crocker to be in a weak position when the difficult times for banks began in the late 1970's. The parties to the consolidated action assert that this was the major reason which caused the special charges to profits to be necessary in late 1983 and in 1984.

[5] A portion of the claims which the parties to the consolidated action seek to settle involves stockholder derivative claims of improper dealing leading to losses to the corporation. Plaintiffs' counsel in the consolidated action candidly concede that what appeared to be a strong case originally has become considerably weakened in light of discovery. At the settlement hearing they stated that after discovery they have found little or no evidence of the suspected and alleged breaches of fiduciary duty which they had thought led to Crocker's troubled financial situation. It is apparent that at trial it would have been most difficult for the plaintiffs to prove that any of the actions

which led to Crocker's losses were other than valid good faith exercises of business judgment on the part of Crocker's management and as such were protected from judicial scrutiny even if the decisions made were in fact the wrong ones. *Sinclair Oil Corp. v. Levien,* Del. Supr., 280 A.2d 717 (1971).

[6] The securities law violations present a similar barrier to the plaintiffs given the inherent difficulty in proving their elements, particularly *scienter.*

All the parties involved seem to be in agreement that the only cure for Crocker's financial problems is a merger by which Midland will become the owner of 100% of the common stock of Crocker. Midland would then be free to invest any money needed by Crocker, as it already is doing, and receive the full benefit of its investment which it cannot do while it owns only 57% of the common stock and is further bound by the Investment Agreement not to exercise control.

Midland's original merger proposal was perceived as being inadequate and negotiations between plaintiff's counsel and Midland as well as between a Special Committee of Crocker's Board of Directors and Midland led to the final merger proposal which is included as part of this settlement and is to be voted upon by Crocker shareholders on May 21, 1985 and by Midland shareholders on May 23, 1985.

I V

The only two objections to the proposed settlement have come from holders of the preferred convertible stock. They assert that it is unfair that the holders of these securities will lose their ability to convert their preferred stock into common stock because convertibility is one of the factors important in determining the value of the security. Convertibility allows the holder of preferred stock or other security with a stable dividend and a relatively stable value the opportunity to participate in the growth of the corporation by allowing conversion into common stock. This is an important prerogative and investors generally accept a significantly lower fixed dividend or interest rate in trade for rights of conversion.

The objectors also claim that the holders of the preferred stock will not receive any benefit from the Settlement.

After the merger all of the common stock of Crocker will be owned by Midland and the present holders of the preferred stock of Crocker will have only the right to convert into the new ARPS. As

stated earlier, this merger is to take place to allow Midland to freely invest cash in Crocker and receive the full benefits of its investment. It is understandable, therefore, that Midland would not desire that the rights of the holders of preferred stock to convert the preferred stock to common stock survive the merger. Otherwise the holders of convertible securities would merely continue receiving their dividends or interest payments and then, after Midland had invested great amounts of capital in Crocker and Crocker had become the highly profitable company Midland hopes to make it, they would convert into common stock and share the fruits of Midland's investment.

[7] In denying the preliminary injunction in *Cohn, supra,* I held that there was a genuine good faith dispute as to whether the holders of the preferred stock, under the terms of the contract creating the rights of the preferred stock, had a right to vote on the proposed merger and therefore any claimed right to vote as a separate class on the merger could be compromised. Although the objectors claim otherwise, the record shows that one of the named plaintiffs was a holder of preferred stock; the preferred stockholders were adequately represented and negotiations were held to protect their interests. There is therefore no reason why the holders of the preferred stock should not be included in the settlement provided it is reasonable and fair to them.

V

The objectors also claim that the holders of the preferred stock will not receive any benefit from the Settlement. I find, however, that the holders of the preferred stock will receive a substantial benefit from the Settlement.

At the time of the merger proposal in mid-1984 Crocker common stock was trading at approximately $18 or $19 per share. It might well be trading significantly lower today if there had been no merger proposal. Crocker lost $324 million in 1984 and showed a $9 million profit in the first quarter of 1985 primarily because of a large infusion of capital from Midland. The new ARPS will trade initially at $27 per present common share. This is obviously a significant increase in value to the preferred stockholders and a benefit to them because they will, after the Settlement, have the right to convert their preferred stock into ARPS having a value of $27 per share as opposed to their present right to convert their preferred shares into common stock having a value of $18 or $19 per share.

Without Midland's planned infusion of capital there is a reasonable probability that Crocker common stock will never trade high enough to make it worthwhile for the conversion rights of the preferred stock to be exercised. As a result of the merger, holders of the preferred convertible stock will lose the right to participate in Crocker's future growth, as will all the minority common shareholders, but they will receive the right to convert into a superior preferred security.

Taking into consideration the complicated nature of the issues involved and especially the great difficulties plaintiffs would face if this matter were to go to trial, as well as the expense and delay defendants would experience and the poor financial condition of Crocker, it is my business judgment that the settlement is fair and reasonable to all the parties.

V I

Plaintiff's counsel have sought and defendants have agreed to pay $1.75 million in attorneys fees and disbursements. No objection to the payment of these fees has been made.

In Delaware the determination of the reasonableness of a fee award is based primarily upon the result achieved, with additional factors being considered when pertinent. *Sugarland Industries, Inc. v. Thomas, Del. Supr.*, 420 A.2d 142 (1980).

Substantial results have been achieved in this case. Pools totaling 1.75 million are being made available to those who traded during periods when they may have been misled by challenged practices. In addition, the merger consideration has been increased by at least $2 per common share. By using the valuation of the original ARPS offered, the increase could be as much as $5 to $9 per common share. The value of the settlement therefore is in the range of $35 million to $70 million.

[10] Taking into account these results, as well as the contingency nature of the fee arrangement, the standing of plaintiff's attorneys, and the apparent time and effort expended, the requested fee appears to be reasonable.

EQUITABLE LIFE INSURANCE CO. v. YOUNG

No. 7993

Court of Chancery of the State of Delaware, New Castle

May 6, 1985

Plaintiff sought a preliminary injunction to restrain defendant from selling life insurance policies to plaintiff's policyholders within a designated geographical area. Defendant had signed an agreement which contained a covenant not to compete within the geographical region in question.

Plaintiff alleged that the defendant breached the restrictive covenant, which should be enforced as a necessary measure to protect the plaintiff's economic interests. The defendant, however, contended that the amendment should be held unenforceable.

The court of chancery, per Vice-Chancellor Berger, granted plaintiff's motion for a preliminary injunction, holding that: (1) the geographical area covered by the amendment was not overbroad; (2) the defendant's claim that he was forced to sign the amendment under duress was not adequately supported by the record; (3) the defendant's claim that the plaintiff had breached its contractual duties to the defendant was not adequately supported by the record; and (4) the plaintiff established a likelihood of success on the merits of its claim that the defendant breached the covenants contained in the amendment.

1. Injunctions ⚷ 61(2)

In an action for a preliminary injunction to enforce a covenant not to compete and to protect alleged trade secrets, the plaintiff must establish a likelihood of success on the merits, threat of irreparable harm, and that the balance of the hardship tips in its favor.

2. Contracts ⚷ 117(2), 117(5)

A covenant not to compete, which prohibits competition within the geographical area in which the defendant was employed, is not unenforceable because it is overbroad, where the plaintiff does business in the entire area and the size of that area is within the limits found acceptable in other cases.

3. Contracts ⟹ 95(3)

A defendant's allegation that he signed a covenant not to compete under duress will not render the covenant unenforceable where the record shows that the defendant remained in the employer's employ after signing the covenant without taking measures to follow up his concerns.

Arthur G. Connolly, Jr., Esquire, of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware, for plaintiff.

David J. Ferry, Esquire, of Trzuskowski, Kipp, Kelleher and Pearce, P.A., Wilmington, Delaware, for defendant.

BERGER, *Vice-Chancellor*

This is an action to enforce a covenant not to compete and to protect alleged trade secrets of plaintiff, Equitable Life Insurance Co. ("Equitable"). Defendant, Thomas L. Young ("Young"), was employed by Equitable as an insurance agent from May, 1982 until he resigned in March, 1985. Since that time, Young has been affiliated with Chubb Life America ("Chubb") selling life insurance and other forms of insurance policies. On April 9, 1985, based upon the limited record then presented to the Court, Young was temporarily restrained, among other things, from selling or attempting to sell life insurance policies to Equitable policyholders within a designated geographical area. This is the decision on Equitable's motion for a preliminary injunction.

At the time Young was first employed by Equitable in 1982, he had no prior experience in the insurance business. Equitable trained Young and provided him with a debit book containing the names, addresses, telephone numbers and, in some cases, policy information for approximately 200 Equitable customers. Equitable maintains that it treats its debit books as confidential and that the coverage page of the book "makes it clear" that it is Equitable's confidential property. Young claims that he was not told that the debit book was confidential and was not restricted in his use of the book. He took it home with him and sometimes left it in his car.

Approximately eight months after Young began working for Equitable, he and Equitable's other insurance agents were presented with an amendment to their employment agreements. Equitable explained to its agents that the amendment was drafted in response

to another agent having left Equitable and begun soliciting Equitable policyholders. The amendment was designed to prevent such a situation from recurring. It is approximately one half page in length and provides, in relevant part:

> 1. For a period of one (1) year from the date of the termination of my employment agreement, within the geographical limits of the district in which I was employed immediately prior to the termination of my employment agreement, or any other district in which I may have been previously employed, I shall not directly or indirectly do any of the following things, or aid or abet others to do so:
>
> (a) Contact any Company policyholder for the purpose of inducing or attempting to induce such policyholder to cancel, lapse or fail to renew such policyholder's policy with the Company.
>
> * * *
>
> (c) Retain in my possession or photostat or otherwise copy any of the Company's records, supplies, materials and forms. . . .

Young claims that he objected to the fact that Equitable was requiring him to sign the amendment immediately. He asked for the opportunity to review the amendment with an attorney but was denied that opportunity. Instead, he was told that if he did not sign the amendment, he might not continue to be employed. Young signed the amendment on January 7, 1983 and then made several requests for a copy of the amendment. Based upon the present record, it appears that Young was never given a copy of the amendment until after he left Equitable in March of this year.

Young submitted his resignation to Equitable on March 1, 1985 and received his last paycheck from Equitable on March 8, 1985. However, he had decided to go with Chubb on February 1, 1985. During the period from February 1, 1985 to March 8, 1985, Young sold insurance policies on behalf of Chubb to at least 25 former Equitable policyholders. During the period from March 8, 1985 through March 30, 1985, Young sold new life insurance policies to more than 20 other former Equitable policyholders.

[1] In order to prevail on its motion, Equitable must establish a likelihood of success on the merits, the threat of irreparable harm and that the balance of the hardships tips in its favor. *Gimbel v. Signal Companies, Inc.*, Del. Ch., 316 A.2d 599, *aff'd.*, Del. Supr., 316 A.2d 619 (1974). On the merits, Equitable argues that the restrictive covenants contained in the amendment to Young's em-

ployment agreement are enforceable inasmuch as they are reasonable in time and scope and are necessary to protect Equitable's economic interests. *Burris Foods, Inc. v. Razzano,* DEL. CH., C.A. No. 1077, Walsh, V.C. (July 18, 1984). Young apparently does not object to the one year time frame and the restriction itself he describes as being "extremely limited." Young does object to the geographical area covered by the amendment and also claims that the amendment is unenforceable apart from its terms because of the acts of Equitable.

[2] The district covered by the amendment covers an area of approximately 50 miles by 25 miles from the Delaware River to the east, Kennett Square, Pennsylvania to the west, Havre de Grace, Maryland to the south and the southern border of Philadelphia, Pennsylvania to the north. Young does not contend that this area is unreasonable *per se.*

Rather, he argues that while employed by Equitable, his customers were all located in a smaller area—the Brandywine Hundred district of New Castle County, Delaware. Under these circumstances, Young argues that the geographical area covered by the amendment is overbroad. Inasmuch as Equitable does business in the entire area covered by the amendment and the size of that area is within the limits found acceptable in other cases, I am not persuaded that the amendment is overbroad. *See: Faw, Casson & Co. v. Cranston,* Del. Ch., 375 A.2d 463 (1977).

In addition, Young argues that Equitable is estopped from enforcing the amendment because it was obtained under duress or, alternatively, that Equitable breached the terms of its employment agreement thereby freeing Young from any obligation to honor the amendment. On the issue of duress, Young maintains, as noted earlier, that he was forced to sign the amendment without adequate oportunity to review its contents or discuss its implications with his attorney at the risk of immediately losing his job.

[3] Although it is possible that, after trial, Young may succeed on this defense, the present record does not adequately support his claim. The amendment is approximately one half page long and is not written in hypertechnical language. Its purpose was explained to Young and the other agents at the time the amendment was presented to them and the concept of agreeing not to compete with your present employer following termination should not be that difficult to grasp for a person such as Young who has college and postgraduate degrees in business administration and industrial management respectively. More importantly, it would appear from the present record that Young did little if anything to follow up on his

concerns about the amendment during the remaining two years of his employment at Equitable. Although he states in his affidavit that he asked an Equitable representative for a copy of the amendment several times after January 7, 1983, there is no evidence that he took any formal steps to obtain a copy or that he consulted an attorney or anyone else about the fact that he signed an agreement under what he now claims to have duress.

Young's breach of contract defense suffers similar infirmities. Apparently in the fall of 1984, Equitable was purchased by American General. Following that transaction, Young's pension and other fringe benefits were modified. For example, his vacation time was reduced, he was no longer provided free medical and life insurance and his pension vesting time was increased. Young may well have considered these changes substantial and there is no reason to question his statement they prompted his decision to leave Equitable. However, the fact remains that his employment agreement did not guarantee any fringe benefits. Nor does it matter, as Young suggests, that Equitable was acquired by another company. Equitable is the party that contracted with Young; it remains in existence today; and Equitable is the party seeking to enforce its contract.

Young also argues that the evidence does not support Equitable's claim that he has violated the terms of the amendment. In making this argument, Young goes not deny that he wrote at least 55 new policies for former Equitable policyholders during February and March of this year. Rather, he contends that he did not contact those people for the purpose of inducing or attempting to induce them to cancel, lapse or fail to renew an Equitable policy. For example, he met one such person at church one day and mentioned in conversation that he was leaving Equitable and going with another company. The policyholder then asked Young to tell him about the coverage available with his new company and, after a meeting at which Young explained the benefits of the new policy, the customer decided to switch policies. Under Young's view, he is free to contact Equitable policyholders for the purpose of announcing his new position and if that contact, or a strictly social contact, leads to a discussion of new insurance coverage, he has not violated the terms of the amendment. Young goes so far as to suggest that the following note written to an Equitable policyholder does not violate the covenant:

> Dear Folks:
>
> Please note the enclosed [Equitable] policy it replaces the one I sent the other day.

> I am not any longer with Equitable. I am now with Chubbb Life and have my own agency. I sure wish you would let me talk to you. I can give you a better deal. Without cost can I have 15 min.?
>
> Best Wishes,
> Tom

Young says that the purpose of this note was to deliver an Equitable policy to the customer; not to induce the customer to switch policies.

It is true, as Young contends, that the amendment language does not explicitly prohibit him from selling new policies to Equitable customers. However, he is prohibited from directly or indirectly contacting Equitable policyholders for the purpose of having them terminate their business relationship with Equitable. In most, if not all, cases where the purpose of the contact is to sell the customer new insurance, the purpose is also, indirectly, to induce the customer to terminate Equitable policies. I am satisfied from the record that Equitable has established a likelihood of success on the merits of its claim that Young has breached the covenants contained in the amendment. Young's retention of a copy of the debit book also constitutes a violation of the amendment regardless of whether Equitable ultimately is able to prove that it adequately maintained the confidentiality of the book.

Equitable has also carried its burden as to irreparable harm. It has lost dozens of customers in a short period of time and it would be difficult, if not impossible, to prove how long those customers would have remained with Equitable but for Young's intervention. Thus, I find that money damages would not be an adequate remedy. In considering the relative hardships to the parties, Young argues that he would be effectively put out of business if he were enjoined from contacting Equitable policyholders for one year. He says this because, with the exception of the 200 customers listed in the debit book he retained, he has no way of knowing whether a potential customer is an Equitable policyholder or not. Accordingly, any general solicitation of business would place him at risk that he might be violating the terms of an injunction. Young also argues that the public interest in obtaining the best possible insurance coverage outweighs Equitable's interest in protecting its customers.

Equitable responds that it is not seeking an injunction restraining Young from contacting the general public. Equitable asks the Court to require Young to question any potential customer at the outset as to his or her present relationship with Equitable. If the customer

is an Equitable policyholder, Young would be required to explain that he is unable to do business with the potential customer.

I have some doubts about the ability of the Court to enforce such an order and I am also unsure whether such a restriction may be read into the language of the amendment. If Young contacts a person he knows to be an Equitable policyholder, he knows he is dealing with someone who feels the need for insurance coverage and he may also know details about the customers' financial position. These are competitive advantages derived from Young's association with Equitable. On the other hand, if Young contacts a member of the general public, it would appear that he is in no different position from any other insurance agent looking for business. On balance, at this preliminary stage I am not convinced that the type of restraint sought by Equitable is justified. As a result, it is unnecessary to consider the public interest argument inasmuch as general solicitation of the public at large will not be restrained.

In summary, I find that Equitable's motion for a preliminary injunction should be granted in accordance with the terms of the amendment at issue. I do not accept Young's exceedingly narrow interpretation of the requirement that he not contact Equitable policyholders for the purpose of inducing them to terminate their business relationship with Equitable. A social contact may also be motivated by business reasons and an inquiry from an Equitable policyholder may not be unsolicited if it is the result of the policyholder being informed directly or indirectly by Young that he is now affiliated with Chubb. I offer these comments in the hope that they will assist the parties in complying with the terms of the injunction with as little Court involvement as possible.

ORDER

The Court, having considered the briefs, affidavits and other submissions of the parties and arguments of counsel and having determined that a preliminary injunction should issue for the reasons set forth in the Court's opinion dated May 6, 1985;

IT IS HEREBY ORDERED this 6th day of May, 1985, that until further Order of this Court, the defendant and all persons or entities acting in concert with him are hereby enjoined from

(a) directly or indirectly contacting any persons known to be plaintiff's policyholders within the geographical limits of the district in which defendant was employed by plaintiff for the purpose of

inducing or attempting to induce such policyholders to cancel, lapse or fail to renew such policyholder's policy with plaintiff;

(b) using in any way lists of plaintiff's policyholders including the debit book or any copy thereof, which were either removed from the premises of plaintiff's business or retained by memory.

This Order is conditioned upon plaintiff posting security in the amount of $50,000 by May 7, 1985 at 5 p.m.

HUFFINGTON v. ENSTAR CORP.

Nos. 7802, 7857, & 7864

Court of Chancery of the State of Delaware, New Castle

April 16, 1985

Seven separate appraisal actions by dissenting stockholders against the corporation were consolidated by the court. All parties were now before the court seeking an order establishing the procedures to determine which shareholders are entitled to appraisal. Respondents submitted a proposed order for the procedure. Petitioner Thompson objected to the form and submitted an alternative form. Petitioner Senouf also objected to the form of the order due to the requirements of submission of the shares to the Register in Chancery for stamping as "Not Negotiable" and that her signature on her proof of claim be notarized.

The court of chancery, per Vice-Chancellor Hartnett, held that the procedure for determining which shareholders have fully complied with DEL. CODE ANN. tit. 8, § 262 and are, therefore, entitled to seek appraisal, requires the respondent to first file an information form for each shareholder and then to provide notice of the action to the shareholder by mail and publication. A non-evidentiary hearing will be held for the court to ascertain if any objections exist. An evidentiary hearing will be set to resolve any remaining objections. The court also held that the provisions for submitting the shares to be stamped by the Register in Chancery and the provision requiring signatures on the proofs of claim be notarized should be in the order.

1. Corporations ⟹ 584

The provision for submitting the shares to be stamped "Not Negotiable" by the Register in Chancery should be included in the order for a procedure to determine which shareholders are entitled to appraisal.

Lawrence A. Hamermesh, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for plaintiffs Mr. Huffington and Huffington, Inc.

Michael D. Goldman, Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware, for defendant Thomas C. Thompson.

Lawrence Ashby, Esquire, of Ashby, McKelvie & Geddes, Wilmington, Delaware; and Steven E. Jenkins, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendant Lucie Senouf.

Charles F. Richards, Esquire, and Samuel A. Nolen, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant Enstar Corporation.

HARTNETT, *Vice-Chancellor*

Seven actions for appraisal of stock of Enstar Corporation ("Enstar") have been filed with the Court. Counsel for all parties have sought consolidation of the actions and the approval of an Order establishing the procedures whereby the Court will determine which stockholders have fully complied with 8 *Del. C.* § 262 and are therefore entitled to seek appraisal.

As previously directed, the suits will be consolidated under the name: "In the Matter of the Appraisal of ENSTAR CORPORATION".

Respondents submitted a proposed Order for a procedure to determine which shareholders are entitled to appraisal. Petitioner Thomas C. Thompson objected to the form of Order and submitted an alternative form. Petitioner Lucie Senouf also objected to the form of Order and made suggestions for alternations. Both of the forms submitted, in my opinion, can be improved. This is, therefore, my suggestion outlining the form the Order should take.

I

Respondent has put forward a form of Order which has been used many times in the past. Petitioner Thompson's suggested form of Order is relatively new and has been used in only one case which is now before the Court.

The older form of Order contemplates stockholders filing their proofs of claim and then appearing at a hearing before this Court so that the respondent may raise any objections to their seeking appraisal. The new form of Order requires that respondent raise any objection it knows of prior to the proof of claim forms being sent out to shareholders, so that the shareholders may respond to the objections when filing the proof of claim.

Mr. Thompson's form of Order and accompanying Stockholder Information Form, Notices of Pendency of Action and Hearing to Determine Right to Appraisal, and Notice of Entitlement to Appraisal seem best to insure the least wasting of this Court's time while giving the shareholder a good understanding of his rights and the proceedings to determine them. Mr. Thompson's form should therefore serve as the starting point but certain changes should be made to it.

The decision in *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701 (1983) undoubtedly means that there will be more appraisal actions commenced than there have been in the recent past. This overburdened Court therefore has an interest in making sure that an appraisal proceeding is conducted with as little Court involvement in its procedural aspects as is possible. It is also the Court's desire that a beleaguered stockholder who has been forced to lose his ownership of his stock can obtain an appraisal at the least cost.

Since there are often no objections to the right of a stockholder to obtain an appraisal, it is a waste of time and burden to the stockholder to require that all shareholder seeking an appraisal appear—personally or through a representative—at a hearing only to be told that the respondent has no objection to their right to obtain an appraisal. Even where there are objections to a particular stockholder's right to obtain an appraisal, the objections are often resolved by the parties without Court intervention. If there is a real factual dispute as to a stockholder's right to an appraisal, two hearings often are necessary. The first establishes that an evidentiary hearing is required and the second is the actual hearing on the evidence. It would, therefore, be time saving to all if possible objections can be resolved by the parties without a hearing. This can occur by requiring

that the respondent state its objection and the shareholder responding to the objection in his proof of claim. It, furthermore, seems wasteful to set a time for an evidentiary hearing on objections before it is known whether any objections actually exist.

A better procedure would, therefore, seem to be to require the respondent to first file an Information Form for each shareholder on the verified list. Then the registered or certified mailing to the shareholders on the verified list and the publication of notice of this action in the Wilmington Morning News should take place. The proposed form of published notice attached to Mr. Thompson's form of Order makes provision for shareholders not on the verified list to also obtain Information Forms. Both the notice sent to the shareholders on the verified list and the published notice should state that all proofs of claim must be filed by a certain date and that a short perfunctory non-evidentiary hearing will be held on a certain time and date at which time the Court will merely ascertain if any objections exist and that it is unnecessary for a stockholder to appear at that hearing if he has filed his proof of claim. Thereafter a date will be set for an evidentiary hearing on any objections not resolved. It would seem to me that it should only be necessary to send notice of this evidentiary hearing only to those shareholders whose right to an appraisal is disputed by the respondent.

I I

[1] Ms. Senouf has objected to both of the forms of Order insofar as they require submission of shares to the Register in Chancery for stamping as "Not Negotiable".

These shares no longer represent a claim on the equity of the corporation—instead they represent the former shareholder's status as a creditor of the corporation. *Braasch v. Goldschmidt,* Del. Ch., 199 A.2d 760 (1964). A cause of action is generally assignable. 6A C.J.S., *Assignments* § 35. Thus, the cause of action in appraisal may be transferred even though the shares themselves are non-negotiable. The stamping of "Not Negotiable" on the shares is desirable to protect possible subsequent purchasers who otherwise would have no notice of this proceeding. The provision for submitting the shares to be stamped by the Register should, therefore, be in the Order.

Ms. Senouf also objects to the requirement that her signature on her proof of claim be notarized. Because our Rules relating to discovery require affidavits to be notarized, I see no reason to require that the proofs of claim also not be notarized.

Counsel are to confer and attempt to submit a proposed Order in accordance with my suggestions herein. If any substantial disagreement cannot be resolved, each side should submit a proposed order, indicating the areas of disagreement.

LEWIS v. ARONSON

No. 6919

Court of Chancery of the State of Delaware, New Castle

May 1, 1985

Plaintiff, a Meyers Parking Systems, Inc. stockholder, brought this derivative action against Meyers and its board of directors. Defendants moved to dismiss the derivative action on the grounds that plaintiff failed to make a presuit demand or to adequately demonstrate its futility. The court of chancery previously denied defendant's motion to dismiss. An order certifying an interlocutory appeal from that opinion was granted and the Delaware Supreme Court reversed and remanded to allow plaintiff to file an amended complaint.

Plaintiff in an amended complaint alleged that the Meyers board of directors engaged in corporate waste and that the employment agreement with Meyers was actually entered into as consideration in exchange for Leo Finks dropping his demand for additional compensation for relinquishing his position as chairman of the board of directors of, and retiring from, Prudential.

The court of chancery, per Vice-Chancellor Hartnett, denied defendants' motion to dismiss in holding that the amended complaint alleged sufficient specific facts to create a reasonable doubt that the board of directors was disinterested or that the transaction was otherwise a valid exercise of business judgment, so that a presuit demand on the board would likely have been futile and, therefore, excused.

1. Corporations ⟹ 206(4)

In determining demand futility, the court of chancery in the proper exercise of its discretion must decide whether under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.

2. Corporations ⟹ 206(4)

When addressing the issue as to whether a presuit demand would have been futile, if the complaint fails to contain allegations of fact which raise such a reasonable doubt as to the disinterestedness of the directors then the court must go on and determine whether the factual background alleged in the complaint creates a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment.

3. Corporations ⟹ 206(4)

In determining demand futility in derivative action, the proof of majority ownership would not strip the directors of the presumption of independence. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships, the directors are beholden to the controlling person.

4. Corporations ⟹ 206(4)

In context of issue whether, in derivative action, demand on board directors to redress alleged wrong to corporation is excused as futile, the mere allegations that the directors' participation in, and approval of, the alleged wrongs, as well as being required to sue themselves, are clearly insufficient to excuse demand.

5. Corporations ⟹ 206(4)

For purposes of determining demand futility in a shareholder's derivative action, directorial interest exists whenever divided loyalties are present.

6. Corporations ⟹ 211(5)

In order to excuse, as futile, prederivative suit demand on board of directors to redress alleged wrong to corporation, a plaintiff charging domination and control of one or more directors need only allege facts; he need not plead evidence.

7. Corporations ⟹ 312(7)

The test for finding waste of corporate assets is whether the corporation has received a consideration so inadequate that no person of ordinary, sound business judgment would deem it worth that which the corporation paid.

8. Corporations ⟹ 206(4)

Allegations which raise a reasonable doubt as to whether a transaction constitutes a waste of corporate assets in turn create a reasonable doubt that the transaction was the product of a valid exercise of business judgment.

9. Pleading ⟹ 354(12)

A complaint may not be dismissed for failure to state a claim unless it appears with reasonable certainty the plaintiff would not be entitled to relief under any set of facts which could be proven to support the claim.

Joseph A. Rosenthal, Esquire, and Norman M. Monhait, Esquire, of Morris and Rosenthal, P.A., Wilmington, Delaware, and Bizar & D'Alessandro, New York, New York, for plaintiff.

Peter M. Sieglaff, Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware, and Allan M. Pepper, Esquire, and Michael D. Braff, Esquire, of Kaye, Scholer, Fierman, Hays & Handler, New York, New York, for defendants.

HARTNETT, *Vice-Chancellor*

This is a stockholder's derivative suit brought by a shareholder on behalf of the stockholders of Meyers Parking System, Inc. ("Meyers"). Plaintiff made no demand on the Board of Meyers prior to instituting this action pursuant to Chancery Court Rule 23.1 and defendants moved to have the suit dismissed because of the failure to make a demand or to adequately demonstrate its futility. That motion was denied in *Lewis v. Aronson,* Del. Ch., 466 A.2d 375 (1983). An Order certifying an interlocutory appeal from that Opinion was granted, and the Delaware Supreme Court reversed and remanded to allow plaintiff to file an amended complaint. *Aronson v. Lewis,* Del. Supr., 473 A.2d 805 (1984). Plaintiff then filed an amended complaint making many new factual allegations and defendants again filed a motion to dismiss for failure to make a presuit

demand. Defendants also now contend that the complaint should be dismissed because it does not state a claim upon which relief can be granted. The motions to dismiss must be denied because plaintiff has now alleged sufficient particularized facts to show that a presuit demand would have been futile.

I

[1] The Supreme Court in *Aronson, supra,* made it clear that the determination of whether a presuit demand would have been futile must rest upon the factual allegations of the complaint. The Court stated:

> ". . . in determining demand futility the Court of Chancery in the proper exercise of its discretion must decide whether, under the particularized facts alleged, a *reasonable doubt* is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."

Aronson, supra, 473 A.2d at 814 (emphasis added). Thus in considering a motion to dismiss for failure to make a presuit demand, the Court first must carefully review the Complaint to see if the plaintiff has alleged facts which, if true, raise a reasonable doubt that a majority of the directors were independent and disinterested in the challenged transaction so that they could have fairly considered a presuit demand.

[2] If the Complaint fails to contain allegations of fact which raise such a reasonable doubt as to the disinterestedness of the directors then the Court must go on and determine whether the factual background alleged in the complaint creates a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment.

After careful review of the Amended Complaint I am convinced that, although it is a close call, plaintiff has borne his burden and has shown that a reasonable doubt exists both that a majority of directors were disinterested and that the transaction was the product of a valid exercise of business judgment.

I I

Meyers was a wholly-owned subsidiary of Prudential Building Maintenance Corp. ("Prudential") until January 1, 1979, when the Meyers shares were spun-off to Prudential shareholders. At this time, Leo Fink had an employment agreement with Prudential. It provided,

that, upon retirement, he would act as a consultant to Prudential for ten years. Mr. Fink retired in April of 1980 and the consultant provision became operable. Meyers subsequently entered into a service sharing agreement with Prudential, whereby Meyers would reimburse Prudential for 25% of the fees paid to Mr. Fink in return for a share of his consulting services. The amounts paid under the services sharing agreement in 1980 and 1981 were $48,332 and $45,832 respectively.

As of January 1, 1981, when Mr. Fink was 75 years of age, he and Meyers entered into an additional employment contract which is challenged in this suit. It is for five years and is thereafter automatically renewable for one-year periods—indefinitely. It calls for payment of $150,000 per year plus a bonus of 5% of Meyers' pretax profits over $2,400,000. Mr. Fink may terminate the agreement at any time, but Meyers may not do so except upon six months' notice. At termination, Mr. Fink is to become a consultant to Meyers. He is to be paid $150,000 per year for the first three years, $125,000 for the next three years, and thereafter $100,000 per year for life. There are also death benefits included. The agreement further provides that Mr. Fink's compensation is not to be affected by any inability to perform services for Meyers. In return, Mr. Fink agreed to devote his best efforts and substantially his entire business time to advancing Meyers' interests.

At the time the Board of Directors approved this agreement, it also approved interest-free demand loans to Mr. Fink totalling $225,000. These loans have since been repaid with interest.

It is these transactions which plaintiff challenges in this suit.

III

In the original complaint plaintiff alleged that the later services agreement constituted a waste of corporate assets because the amounts to be paid are grossly excessive and because Mr. Fink performs little or no services for Meyers and cannot be expected to provide such services because of his age. It was also alleged that his pre-existing consulting agreement with Prudential prevented him from providing his best efforts and substantially all of his business time to Meyers as is called for in the challenged agreement. The amended complaint adds that Mr. Fink lives in Florida while Meyers' principal business office is in New York and its business is conducted in states other than Florida. It is also alleged that Mr. Fink is receiving double compensation for the same work because he receives compensation from Prudential and Meyers pursuant to the earlier services sharing

agreement and also receives compensation under the challenged employment contract with Meyers.

The original complaint merely alleges that Mr. Fink owned 47% of Meyers' stock and dominated and controlled the Board because he designated its members. The amended complaint states that Mr. Fink owns or controls more than 50% of the outstanding stock of Meyers through ownership by himself and by members of his family.

The amended complaint also alleges that all the members were placed upon the Board of Directors by Mr. Fink or by ISS-International Service Systems A/S ("ISS"), which purchased 500,000 shares of Prudential pursuant to a tender offer in 1978. Through other purchases it acquired a 32.8% ownership of the outstanding stock of Prudential.

After the spin-off of Meyers, ISS and Mr. Fink and his family entered into a voting and option agreement as to Prudential and a voting and first refusal agreement as to Meyers. It is alleged that the agreements resulted in interlocking Boards of Directors for the two companies with each Board consisting of three groups of directors—one designated by Mr. Fink, another by ISS, and a third agreed upon by Mr. Fink and ISS.

Some five months after these agreements were entered into, plaintiff alleges ISS purchased 300,000 shares of Mr. Fink's Prudential stock for $3 per share and Mr. Fink purchased 350,000 shares of Meyers' stock from ISS for $4.25 per share. The option agreement as to Prudential stock would have allowed ISS to purchase the stock on January 12, 1983, for $5 per share, above the average closing price of the stock on the last ten business day of November of 1982. Plaintiff also now alleges that the employment agreement with Meyers was actually entered into to compensate Mr. Fink for the loss of the price he would have obtained had the sale of his Prudential shares been pursuant to the option. Plaintiff also now alleges that the Meyers' employment contract is in consideration for Mr. Fink's dropping his demand for additional consideration for relinquishing his position as Chairman of the Board of Directors of, and for retiring from, Prudential.

I V

Plaintiff first argues that the factual allegations in the amended complaint sufficiently raise a reasonable doubt that the Board was disinterested and therefore a presuit demand would have been futile and was therefore excused. Although Mr. Fink is the only director

who is financially involved in the transaction, plaintiff cites Mr. Fink's alleged control of more than 50% of the common stock of Meyers and his alleged designation of the directors—as well as his future ability to designate directors because of his control of these shares.

[3] In its decision in *Lewis v. Aronson, supra,* the Supreme Court stated that even proof of majority ownership would not, in the demand context, strip the directors of the presumption of independence. ". . . [I]t is not enough to charge that a director was nominated or elected at the behest of those controlling the outcome of a corporate election." *Id.*, 473 A.2d at 816. Independence relates to the "care, attention and sense of individual responsibility" in the performance of the duties of a director. *Id.* "There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person." *Id.*, 473 A.2d 815. Plaintiff's allegations as to Mr. Fink's stock ownership and designation of the directors are therefore still insufficient to create a reasonable doubt as to the directors' disinterestedness.

[4] Likewise, the mere allegations that the directors' participation in, and approval of, the alleged wrongs—as well as being required to sue themselves—are clearly insufficient to exercise demand.

V

[5] Plaintiff has, however, plead allegations which demonstrate relationships which caused the directors to have divided loyalties. Directorial interest exists whenever divided loyalties are present. *Pogostin v. Rice,* Del. Supr., 480 A.2d 619, 624 (1984); *Weinberger v. UOP, Inc.,* Del. Supr., 457 A.2d 701, 710 (1983); *Aronson, supra,* 473 A.2d 805, 912.

Mere allegations that ISS designated the members of the Board of Meyers are, of course, no more sufficient for the purpose of excusing the failure to make a presuit demand than are allegations of designation by Mr. Fink and no facts are alleged which would indicate that the directors would lose positions with Meyers, ISS, or Prudential if they failed to follow the orders either of ISS or of Mr. Fink. See *Kaufman v. Belmont,* 479 A.2d 282, 288 (1984).

The amended complaint, however, does allege that the members of the Board of Meyers had a personal interest in the challenged transaction because of their relationship with Meyers, Prudential, or ISS. These alleged relationships are:

Aronson ..... President of Meyers
Burnham ..... Director of Prudential
Deems ..... Director of Prudential
Fink ..... Employment Contract at Issue
Gerber ..... Vice President and House Counsel of Prudential Has Employment Agreement given at "Influence of Fink"
Glueck ..... Senior Office of Meyers, Financial Dealings with Meyers
Goldschmidt ..... Executive Vice President of ISS, Director or Prudential
Kronovet ..... Counsel to Prudential and to Meyers
Schlageter ..... Financial Dealings with Meyers
Andreassen ..... Chairman of the Board of Prudential President of ISS

Mr. Fink undeniably had a personal interest in the challenged transaction. The other inside directors, Aronson, Glueck, and Kronovet, are alleged to be beholden to Mr. Fink because of their positions as officers or counsel to Meyers. Mr. Glueck and Mr. Schlageter are alleged to be beholden to Mr. Fink because of their financial dealings with Meyers. None of these four directors is alleged, however, to have received a benefit from Mr. Fink's employment contract. They did not stand on both sides of the challenged transaction and the fact that they hold positions with the company of which Mr. Fink controls more than 50% of the common stock is no more disqualifying than is the fact that he designated them as directors.

Plaintiff has, however, alleged that Mr. Fink was seeking compensation from ISS and Prudential for the sale of his Prudential stock at far below the option price and for his relinquishment of the Chairmanship of the Board and retirement from Prudential. It is alleged that he dropped these demands after being assured of the employment contract from Meyers. If this is true then both ISS and Prudential received a benefit from Mr. Fink being given the contract by Meyers. Therefore, the directors and officers of Prudential and ISS who were also directors of Meyers stood on both sides of the transaction. A question of the disinterestedness of Burnham, Deems, Gerber, Goldschmidt, Kronovet, and Andreassen, as well as Mr. Fink therefore arises. Because they are seven members of a ten-member board, demand would have to be excused if plaintiff's allegations are sufficient to raise a reasonable doubt as to the disinterestedness of the seven.

[6] The Delaware Supreme Court stated in its *Aronson* decision that ". . . the plaintiff need only allege facts; he need not plead evidence." *Aronson, supra,* 466 A.2d at 816. Plaintiff has not plead any facts as to when and how Mr. Fink demanded additional compensation from ISS and Prudential. No letters or conversations are pointed to. To require plaintiff to do so, however, would be to require him to plead evidence. Defendants have argued that these transactions are too far apart in time to be reasonably linked together to indicate a scheme. The sale of stock occurred in June of 1979, Mr. Fink's retirement was in April of 1980 (although it had been scheduled to begin at the end of the year), and the Meyers' employment contract became effective on January 1, 1981. The negotiations on the contract, however, may well have been going on at the same time as negotiations for Mr. Fink's retirement from Prudential. Additionally, it is possible that Mr. Fink was using his continued position with Prudential to attempt to extract further compensation for the sale of stock less than a year before.

Although it is a close call, the factual allegations of the amended complaint are therefore sufficient to raise a reasonable doubt as to the disinterestedness of a majority of the directors of Meyers.

V

As indicated, I have found that plaintiff has alleged sufficient facts which, if true, show that a majority of the board of Meyers were sufficiently interested in the transaction so as to have made a presuit demand futile. It is therefore unnecessary to consider whether the challenged transaction could not have been the product of the valid exercise of business judgment. Notwithstanding this, it seems advisable to address plaintiff's allegations of waste.

[7] When it is shown that any consideration for a contract has been received by a corporation, the test for finding waste of corporate assets is whether the corporation has received a consideration so inadequate that no person of ordinary, sound business judgment would deem it worth that which the corporation paid. *Saxe v. Brady,* Del. Ch., 184 A.2d 602 (1962). In *Findanque v. American Maracaibo Co.,* Del. Ch., 92 A.2d 311 (1952), a consulting contract given to a retired president and director was found to constitute a waste of corporate assets because the payments were almost entirely compensation for past services. Commenting on the relation of the holding in *Findanque* to the case at hand, the Supreme Court stated that the recipient of the contract in *Findanque* to the case at hand, the Supreme

Court stated that the recipient of the contract in *Findanque* was a 70-year-old stroke victim, the agreement did not spell out his duties, the consulting salary was equal to his salary before retirement, and there was no provision for the possibility of incapacitation and inability to perform the duties of a consultant. See *Aronson, supra.*

The original complaint in this case alleged that the amounts to be paid to Mr. Fink were grossly excessive and that Mr. Fink performs little or no services and cannot be expected to because of his age. It was also alleged that the consulting agreement with Prudential prevented Mr. Fink from fulfilling his contract with Meyers to spend substantially all of his business time working for Meyers. The Delaware Supreme Court held that these allegations were insufficient to raise a reasonable doubt that defendants could have exercised their business judgment in approving the contract.

The amended complaint raises several new allegations of fact concerning the contract and the services to be performed under it. It is now alleged that payment under the earlier Prudential-Meyers services sharing agreement constitutes full payment for Mr. Fink's services to Meyers and the challenged Meyers' contract is therefore for an inadequate consideration. It is also now alleged that Mr. Fink lives in Florida while Meyers' principal offices are in New York and the business of Meyers is conducted in states other than Florida. It is now further alleged that the challenged contract calls for payments even if Mr. Fink should be unable to perform any services. There are also allegations that the contract is actually in consideration for Mr. Fink's retirement from Prudential and for his ceasing to demand additional severance payments in compensation for his sale to ISS of Prudential stock at less than the eventual option price.

[8] Allegations which raise a reasonable doubt as to whether a transaction constitutes a waste of corporate assets in turn create a reasonable doubt that the transaction was the product of a valid exercise of business judgment. See *Lewis v. Hett,* Del. Ch., C.A. No. 6752-NC, Berger, V.C. (September 4, 1984).

Although plaintiff still does not allege that Mr. Fink is in anything but good health, the challenged contract does guarantee payment of the full salary regardless of ability to perform services. When coupled with the facts that Mr. Fink may terminate the agreement at any time while Meyers must give six months notice and upon termination of employment a consulting agreement to continue for life goes into effect, the allegations that Mr. Fink resides in Florida, far from the locations of the conduct of Meyers' business and is already receiving compensation from Meyers through the services

sharing agreement with Prudential, suggest that the services Mr. Fink might render to Meyers, pursuant to the challenged contract, are so grossly inadequate that no ordinary person of sound business judgment would deem it worth that which the corporation paid. See *Saxe, supra,* and *Findanque, supra.* It therefore appears that plaintiff has, if only barely, alleged facts sufficient to create a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment and therefore should bear the further scrutiny of the Court. The allegations that the contract was actually entered into to compensate Mr. Fink for benefits he gave to Prudential and to ISS to strengthen the allegations of waste and further raises a reasonable doubt that the directors could have validly exercised their business judgment as to the contract.

VI

[9] Defendants have also moved to dismiss this action for failure to state a claim upon which relief can be granted. The standard to be applied in considering a motion to dismiss under Rule 12(b)(6) differs from that which is used to consider a motion to dismiss brought under Rule 23.1. To survive a motion to dismiss for failure to make a presuit demand the complaint must allege specific facts creating a reasonable doubt that the board can objectively review a demand. *Aronson, supra.* On the other hand, a complaint may not be dismissed for failure to state a claim unless it appears with reasonable certainty that plaintiff would not be entitled to relief under any set of facts which could be proven to support the claim. *Fish Engineering Corp. v. Hutchinson,* Del. Supr., 162 A.2d 722 (1960); *Michelson v. Duncan,* Del. Supr., 407 A.2d 211 (1979).

As indicated above, I have found that the plaintiff has now alleged sufficient facts to create a reasonable doubt that the directors validly exercised their business judgment. Such a finding necessarily constitutes a finding that plaintiff has alleged enough facts to defeat a Rule 12(b)(6) motion to dismiss.

VII

In conclusion, the amended complaint alleges—if only barely—sufficient specific facts to create a reasonable doubt that the Board of Directors was disinterested or that the transaction was otherwise a valid exercise of business judgment so that a presuit demand on the board would likely have been futile and therefore excused. The Motions to Dismiss are therefore denied. IT IS SO ORDERED.

LEWIS v. LFC HOLDING CORP.

No. 7974

Court of Chancery of the State of Delaware, New Castle

April 4, 1985

Plaintiff, Lewis, filed a class action to enjoin defendant, LFC, from proceeding with a tender offer for all shares of Levitz. All parties agree that Pennsylvania law governs. The complaint alleges that a management group of Levitz, acting together with a controlling stockholder of Levitz, an investment banking firm and a corporate investor, are attempting to freeze out shareholders of Levitz at an unfair price by using a manipulative tender offer. Levitz was not named as a defendant in the suit. Plaintiff, on the same day the complaint was filed, sought and obtained an *ex parte* order for expedited discovery. The defendant immediately attempted to vacate the discovery order and moved to dismiss this action. In order to allow the plaintiff to obtain evidence to support his motion for a preliminary injunction, the court of chancery, per Vice-Chancellor Berger, permitted the plaintiff to take limited discovery.

The court of chancery, per Vice-Chancellor Berger, held that as a general rule the directors and controlling stockholders of a corporation are accountable as fiduciaries. However, the plaintiff acknowledged that there appears to be no Pennsylvania case law recognizing fiduciary duties in the context of a tender offer. The court held that since the legal issue of whether a director and controlling stockholder owes other stockholders a fiduciary duty has not been adjudicated in Pennsylvania, the plaintiff could not meet his burden for a preliminary injunction by establishing probability of success on the merits of matters of fact and law.

1. Injunctions ⟹ 136(3), 137(1), 137(2), 137(4), 151

A preliminary injunction will not issue unless plaintiff establishes a probability of success on the merits, irreparable injury, and that the harm to plaintiff if injunctive relief is denied will be greater than that which defendant will suffer if the injunction is granted.

2. Corporations ⟹ 180, 307

Directors and controlling stockholders of a corporation are accountable as fiduciaries as a general rule.

3. Corporations ⟹ 316(3)

Absent special circumstances, a director or controlling stockholder owes no fiduciary duty to the selling individual stockholder.

4. Injunction ⟹ 137(4)

At the preliminary injunction stage, the plaintiff has the burden of establishing probability of success on the merits both as a matter of fact and law.

5. Corporations ⟹ 187

Absent a finding of inadequate or inaccurate disclosures, stockholders generally should be allowed to decide for themselves whether to tender or not.

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BERGER, *Vice-Chancellor*

Plaintiff, Harris Lewis ("Lewis"), filed this purported class action to enjoin defendant, LFC Holding Corp. ("LFC"), from proceeding with a tender offer for all the shares of Levitz Furniture Corp. ("Levitz") at $39 cash per share. The offer commenced on March 11, 1985, and originally was due to expire on April 5, 1985. The complaint alleges that a management group consisting of three inside directors of Levitz, acting together with a substantial beneficial stockholder of Levitz, an investment banking firm and a corporate investor is attempting to freeze out the public stockholders of Levitz at an unfair price through this coercive and manipulative tender offer.

The complaint was filed on March 19, 1985 and names as defendants Robert M. Elliott ("Elliott"), George H. Bradley ("Bradley") and John W. Duall ("Duall") (collectively the "management group"); J. A. Pritzker ("Pritzker") who allegedly controls 22.5%

of the common stock of Levitz; Drexel Burnham Lambert, Inc. ("Drexel") and one of its senior officers; Citicorp Capital Investors, Ltd. ("CCIL") and one of its senior officers; and LFC. Levitz, a Pennsylvania corporation engaged in the retail sale of home furnishings, is not a party to this action.

As sometimes happens in injunctive actions of this nature, plaintiff sought and obtained an *ex parte* order for expedited discovery on the same day that the complaint was filed. Upon learning of the complaint and discovery order, defendants immediately attempted to vacate the discovery order and moved to dismiss or stay on various grounds including lack of personal jurisdiction, failure to join indispensable parties and *forum non conveniens*. Given the time constraints involved, resolution of these potentially dispositive preliminary motions prior to the initiation of any discovery would have effectively prevented plaintiff from obtaining evidence to support his motion for a preliminary injunction. Accordingly, plaintiff was allowed to take limited discovery with the understanding that all the pending motions would be considered at the same time.

The Court's decision to allow expedited discovery and hear this matter should not be relied upon as precedent in any future case. Several factors, set forth in the corporate defendants' motion to dismiss or stay, strongly suggest that it would be more appropriate for plaintiff to litigate his claims in another forum. Two prior filed actions are currently pending in the Circuit Court of Dade County, Florida. Those actions, representing the same plaintiff class, raise substantially the same claims as those presented here. In addition to all the defendants named in this action, the Florida actions include Levitz, the target of the tender offer, as a defendant. Levitz' headquarters are in Florida and two of the three management group defendants are residents of Florida. Thus, Florida would be more convenient in terms of access to documents and at least some of the key witnesses. It seems that the only reason for pursuing this litigation in Delaware is that it is apparently more difficult in the Florida courts to obtain expedited discovery and an accelerated preliminary injunction hearing date than it is in this Court. I am not at all sure that under a similar set of facts I would agree again to schedule a preliminary injunction hearing. *See: McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engi neering Co.*, Del. Supr., 263 A.2d 281 (1970). However, having allowed the matter to proceed this far, I feel constrained to decide the preliminary injunction motion.

[1] It is settled law that a preliminary injunction will not issue unless plaintiff establishes a probability of success on the merits, irreparable injury and that the harm to plaintiff if injunctive relief

is denied will be greater than that which defendant will suffer if the injunction is granted. *Gimbel v. Signal Companies, Inc.*, Del. Ch., 316 A.2d 599, *aff'd.*, Del. Supr., 316 A.2d 619 (1974).

The events leading up to the tender offer may be summarized as follows. Approximately one year ago, Pritzker approached Elliott about the possibility of acquiring the outstanding stock of Levitz. Following several discussions and a June 1, 1984 press release on the subject, Dalfort Corporation ("Dalfort"), an affiliate of a company wholly-owned by certain Pritzker interests, submitted a written merger proposal to a special meeting of the Levitz' Board of Directors held on June 28, 1984. Under the Dalfort proposal, each Levitz share would be exchanged for a combination of $20 in cash, five-year equity participation certificates entitling the holder to receive a portion of Levitz' pre-tax earnings above a certain level, and certain Dalfort convertible preferred stock. The offer contemplated a 5% participation in the surviving corporation by Levitz' management.

At the meeting, an ad hoc committee the ("Committee") consisting of four non-management members of the Board was formed. The Committee was assigned to evaluate and make recommendations with respect to the Dalfort offer as well as any other offers that might be forthcoming. After the Committee negotiated several changes in the Dalfort offer, including a provision permitting the Board to consider and support any other acquisition proposal, the Board approved the offer conditioned upon receipt of a fairness opinion, among other things.

On August 7, 1984, Drexel, the firm retained by the Committee as its financial adviser, reached a preliminary conclusion that it could not issue a fairness opinion as to the Dalfort offer. The Committee was unsuccessful in its efforts to negotiate a higher offer and on August 13, 1984 Levitz and Dalfort issued a joint press release stating that Drexel was unable to issue a fairness opinion. The press release also indicated that the Pritzker interests, holding approximately 22.5% of the outstanding Levitz stock, would consider selling their holdings at a higher price than that offered by Dalfort.

Levitz received several acquisition inquiries and one other offer during the next two and one-half months. The offer, from Alger Associates, Inc. ("Alger"), was for a combination of cash and subordinated debentures valued by Alger at approximately $37 per Levitz share. Drexel advised the Committee that it would be unable to provide a fairness opinion as to the Alger offer and, on October 16, 1984, the Board followed the Committee's recommendation and rejected the offer. Of the several inquiries, none suggested a possible price above $38.50 per share and none developed into firm offers.

In late September, 1984, CCIL began looking into the possibility of a leveraged buyout of Levitz. After discussing its interest with Elliott, CCIL contacted Drexel to discuss financing. Drexel's possible involvement in an acquisition offer created a conflict of interest inasmuch as another of Drexel's offices was advising the Committee. On October 10, 1984 Drexel advised the Committee of its interest in working with CCIL and the Committee, after determining that it would be in the best interests of the Levitz stockholders, released Drexel.

On November 6, 1984 a merger proposal from CCIL, Drexel and the management group was presented to the Levitz Board. After evaluation and negotiations, the Committee recommended and the Board approved the CCIL/Drexel merger proposal at a price per share of $39 in cash, subject to receipt of a favorable opinion of an investment banker. Dean Witter Reynolds, Inc. ("Dean Witter") was retained by the Committee on November 12, 1984 to render a fairness opinion on the CCIL/Drexel merger.

On November 29, 1984 Dean Witter orally advised the Committee of its preliminary opinion that $39 was fair from a financial point of view. After receiving the unanimous recommendation of the Committee, the Levitz Board approved the CCIL/Drexel merger at its December 13, 1984 meeting. Pursuant to the merger agreement, a wholly-owned subsidiary of LFC (which was to be owned by CCIL, the management group and Drexel) would be merged with and into Levitz. The management group abstained from voting on the merger agreement.

On February 12, 1985, Dean Witter advised the chairman of the Committee that it might be unable to reaffirm the preliminary fairness opinion orally given to the Committee in November. Dean Witter's reasons were not based upon any unusual developments at Levitz but rather on the recent rise in the stock market and in the price/earnings multiples of companies Dean Witter deemed comparable to Levitz as well as recent declines in prevailing interest rates. In response to this information, CCIL, Drexel and members of the management group considered their alternatives if Dean Witter declined to provide a fairness opinion. The alternatives discussed were terminating the merger agreement, seeking a second fairness opinion or commencing a tender offer at the merger price of $39 per share.

At about the same time, Pritzker came back into the picture. Pritzker approached Drexel about the possibility of the Pritzker interests participating in the acquisition with CCIL, Drexel and the

management group. Following discussions among the interested parties, it was agreed that the Pritzker interests would acquire 20% of the outstanding common stock of LFC for $3 million and that, upon consummation of the merger, LFC would retain a corporation controlled by the Pritzker interests as a consultant for three years and pay $4 million for its advisory services.

At a meeting held on March 4, 1985, the Levitz Board was advised of Dean Witter's position on the fairness opinion as it was conveyed to the Committee a few weeks earlier. The Board then placed a call to Dean Witter and was told that Dean Witter would not reaffirm its prior opinion that $39 per share was a fair price. The Board was then advised that LFC was prepared to make a tender offer for all of Levitz' outstanding stock at $39 per share.

Drexel's counsel told the Board that, as conditions precedent to the proposed tender offer, the Board would have to either support the offer or remain neutral and the parties would have to reach a mutually satisfactory resolution of any disputes over the fees due to Drexel under the merger agreement. After extensive discussions with counsel as to Levitz' obligations under the merger agreement, the Board agreed to pay Drexel $4.75 million under certain circumstances as a compromise of Drexel's $6 million claim. The parties agreed to terminate the merger agreement upon commencement of the tender offer and the Board agreed to remain neutral as to the tender offer. The resolution relating to the tender offer as well as the minutes of the March 4th meeting indicate that the Board considered Dean Witter's inability to provide a fairness opinion as well as the events of the proceeding nine months and decided that it was in Levitz' best interests to give its stockholders an opportunity to decide for themselves whether they want to receive the $39 per share.

The Offer to Purchase (the "Offering Circular") was distributed on March 11, 1985. In response to plaintiff's non-disclosure claims, but without conceding their validity, LFC issued a Supplement to the Offering Circular on April 3, 1985. The Supplement extends both the withdrawal date and expiration date of the tender offer until midnight on April 10, 1985. It includes, among other items not relevant to this decision, a detailed description of the two Florida actions as well as this one, the press release issued on March 15, 1985 disclosing Levitz' fiscal year 1985 and 4th quarter financial results and information in addition to that contained in the Offering Circular as to estimated real estate values.

The parties agree that Pennsylvania law governs at least as to defendants' fiduciary obligations, if any. Plaintiff argues that the

management group defendants and Pritzker, as officers and directors and controlling stockholder respectively, owe fiduciary duties to the Levitz stockholders in connection with the tender offer. These defendants allegedly breached their fiduciary duties by commencing a tender offer at an unfair price and failing to disclose all germane facts in the Offering Circular. Plaintiff contends that the corporate defendants are liable for these same wrongs as co/conspirators or aiders and abettors.

On the issue of price, plaintiff says that Dean Witter's unwillingness to provide a fair opinion clearly establishes that the price is unfair. As to the disclosures, plaintiff's briefs focus on four purported deficiencies: (1) failure to include fiscal year 1985 financial results; (2) failure to disclose the "true value" of Levitz' real estate holdings; (3) misrepresentation in disclosing the basis for LFC's purported belief that the tender offer price is fair; and (4) misrepresentation in disclosing the nature of Pritzker's relationship to LFC. At argument, plaintiff asserted that information contained in an LFC private placement memorandum is material and was omitted from the Offering Circular and that the Offering Circular is misleading because it fails to state that the Levitz Board agreed to remain neutral on the tender offer in order to avoid Drexel's fees.

[2,3] Based upon the authorities cited by the parties and the record, I find that plaintiff has not satisfied his burden of establishing a likelihood of success on the merits. There is no question but that directors and controlling stockholders of Pennsylvania corporations are accountable as fiduciaries as a general rule. *See, e.g. Selheimer v. Manganese Corporation of America,* Pa. Supr., 224 A.2d 634 (1966) (directors liable for mismanagement and waste of corporate assets); *Seaboard Industries, Inc. v. Monaco,* Pa. Supr., 276 A.2d 305 (1971) (officers liable for diversion of corporate opportunity); *Weisbecker v. Hosiery Patents, Inc.,* Pa. Supr., 51 A.2d 811 (1947) (complaint alleging majority stockholders froze out minority at grossly inadequate price through dissolution states a claim). However, plaintiff acknowledges that there appears to be no Pennsylvania case law recognizing fiduciary duties in the context of a tender offer. The only cases cited to this Court relating to the purchase of stock hold that, absent special circumstances, a director or controlling stockholder owes no fiduciary duty to the selling individual stockholder. *See, e.g. Binns v. Copper Range Co.,* Pa. Supr., 6 A.2d 895 (1939); *Howell v. McClosky,* Pa. Supr., 99 A.2d 610 (1953).

[4] Plaintiff argues that the absence of any Pennsylvania authority on point should not deter the Court from concluding that a

Pennsylvania court would apply the law of a neighboring state, such as Delaware, where these issues have been judicially determined. *See, e.g. Lynch v. Vickers Energy Corp.*, Del. Supr., 383 A.2d 278 (1977); *Joseph v. Shell Oil Co.*, Del. Ch., 482 A.2d 335 (1984). While this approach seems reasonable, at the preliminary injunction stage, plaintiff has the burden of establishing probability of success on the merits both as a matter of fact and law. *Allied Chemical & Dye Corporation v. Steel & Tube Co.*, Del. Ch., 122 A.142 (1923). Where, as here, the Court is called upon to interpret the law of another jurisdiction and in that jurisdiction the legal issues have not been adjudicated, it is difficult to see how plaintiff can meet the second half of that standard. *See: National Education Corporation v. Bell & Howell Company*, et al., Del. Ch., C.A. No. 7278, Brown C. (August 25, 1983) (in case of uncertainity as to the legal position advanced by plaintiff, preliminary injunction denied).

Even assuming that Delaware law would be applied by a Pennsylvania court, the evidence of record does not establish that plaintiff has a reasonable probability of success on the merits. Virtually all of plaintiff's disclosure claims have been mooted by the Supplement. Without ruling on materiality or the adequacy of previous disclosures, the Court notes that the stockholders now have Levitz' fiscal year 1985 results as well as the real estate values found in LFC's private placement memorandum. In its description of this action, the Supplement also puts the stockholders on notice of plaintiff's claims that (i) the Pritzker consulting arrangement is a sham designed to conceal the fact that the Pritzker interests are receiving a $2.45 per share premium and (ii) the statement that LFC believes the $39 per share price to be fair is false. Moreover, as to these last two claims, the evidence does not establish that plaintiff's suspicions are likely to be borne out.

This leaves the two claims advanced at argument. It is true that neither the Offering Circular nor the Supplement states that, as a condition to making the tender offer, Drexel insisted that the dispute over fees to be paid pursuant to the merger agreement be resolved. However, the record does not support plaintiff's characterization that the Levitz Board was "extorted" into remaining neutral on the tender offer in order to avoid a threatened law suit over the fees. Without such a connection, there is no basis to impugn the Board's decision to remain neutral and the omitted information does not appear to be material.

[5] Finally, plaintiff's argument that various bits of information from the private placement memorandum should have been included