IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE CIRILLO FAMILY TRUST,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	No. 130, 2019
	)	
v.	)	Court Below:
ARAM MOEZINIA, LEWIS TEPPER,	)	Court of Chancery of the
MARK WALTER, and DAVA	)	State of Delaware
PHARMACEUTICALS, INC.,	)	C.A. No. 10116-CB
	)	
Defendants-Below,	)	
Appellees.	)	

<u>APPELLANT'S OPENING BRIEF</u>

May 6, 2019

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff-Below, Appellant The Cirillo Family Trust (the "Cirillo Trust") filed this action against defendants Aram Moezinia, Lewis Tepper and Mark Walter (the "Director Defendants"), the last directors of Dava Pharmaceuticals, Inc. ("Dava"), and against Dava (collectively, with the Director Defendants, "Defendants"). In this action, the Cirillo Trust sought to redress breaches of fiduciary duty committed by the Director Defendants, and other issues against Dava, in connection with the acquisition (the "Merger") of Dava by an affiliate of Endo Pharmaceuticals, Inc. ("Endo"). In connection with that Merger, The Cirillo Trust (the only stockholder capable of asserting appraisal rights) received a Notice of Appraisal Rights dated July 3, 2014 (the "Notice") that contained *no* financial information on Dava and also failed to supply other information required by Delaware law to allow the Cirillo Trust to decide whether to accept the merger consideration or seek appraisal of its stock.

The Cirillo Trust filed suit, seeking a quasi-appraisal remedy for the breaches of fiduciary duty. After discovery, defendants moved for summary judgment, while the Cirillo Trust moved to amend its complaint to add additional claims uncovered during discovery. On July 11, 2018, the Court of Chancery issued its opinion and order (the "July Opinion" or "Op.") (Trans. ID 62229260),[1] granting defendants' motion for summary judgment and granting in part and denying in part the Cirillo Trust's motion to amend. The Court of Chancery determined that summary judgment was proper because the Director Defendants were not self-interested or lacked independence with respect to the Merger (Op. 27),[2] and (b) "the undisputed factual record shows that DAVA's directors reasonably relied, in good faith, on the advice of outside legal counsel with respect to the preparation of the notice even though, unbeknownst to the directors, that advice was seriously flawed." (Op. 2-3).

The Court denied most of the Motion to Amend either as futile or as moot. It did allow a proposed amendment against two of the Director Defendants in their capacity as officers (the "Officers' Claim"). Because of the Court's factual determinations in the July Opinion, the Cirillo Trust determined that it could not survive a further motion for summary judgment on the Officers' Claim, and thus agreed, on December 3, 2018, to an order entering summary judgment on that sole remaining claim (the "December Order") (Trans. ID 62715134).

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[1] Copies of the July Opinion (Ex. A), the December 3, 2018 Stipulation and Order Granting Summary Judgment ("December Order") (Ex. B), and the February 22, 2019 Final Order ("Order") (Ex. C) are attached.

[2] The Court of Chancery's misunderstanding of the Cirillo Trust's argument here is set forth below.

This is an appeal from the July Opinion, which was incorporated in the Final Order (the "Order") (Trans. ID 62994859) entered by the Court of Chancery on February 22, 2019.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in determining that the Director Defendants were not self-interested in connection with the Notice of Appraisal Rights and that the Director Defendants relied in good faith upon their outside counsel with respect to the preparation and content of that Notice even though that Notice was admittedly materially deficient under Delaware law. Because the Director Defendants had a self-interest in seeing that the Cirillo Trust did not demand appraisal, they thus had a self-interest in not including any relevant information in the Notice.

2. While the Court of Chancery did not reach the issue, this Court should determine that the obligations of a corporation and its fiduciaries to supply a complete and accurate Notice of Appraisal Rights under Delaware law are the same. Specifically, the requirements of Delaware law that the directors of a Delaware corporation are obligated to supply to the stockholders sufficient information to allow those stockholders to make an informed judgment as to whether to seek appraisal should also be requirements of the corporation. This is especially true where, as here, holding otherwise can prevent a stockholder who, although receiving an inadequate Notice of Appraisal Rights, has no remedy for that failure.

STATEMENT OF FACTS

A. The Parties

As of the Merger, the Cirillo Trust held 1,626 shares of Dava's common stock; it did not vote in favor of the merger. (Op. 4; A0414)[3].

Dava had three directors as of the Merger: Aram Moezinia, Lewis Tepper and Mark Walter; all were named as defendants. Aram Moezinia was a founder of Dava who served as a director and officer until the Merger. (Op. 4). As explained further below, Mr. Moezinia's brother, Henry (or Henri) Moezinia, was involved with one of the lenders to Dava which secretly (that is, not known by the stockholders generally) received warrants to purchase half of Dava's equity at extraordinarily low prices (the "Warrants"). (A0415). Mr. Moezinia also played a critical role in suspicious contracts Dava entered into with foreign entities through which more than $25 million was paid out of Dava on the close of the Merger. (A0415).

Lewis Tepper also was a founder of Dava and served as General Counsel from the company's formation until the Merger. (Op. 4). Mr. Tepper is a graduate of NYU law school (A0256 at 5), and worked as a lawyer at Skadden Arps (A0256 at 6) and as an investment banker at Credit Suisse First Boston (A0256 at 6). Mr. Tepper was not a member of the board of directors of Dava at the time of the issuance

[3] "A__" references are to the Appendix to Appellant's Opening Brief filed with this brief.

of the Warrants but had a relationship with one of the recipients of the Warrants. In addition, Messrs. Tepper and Moezinia had a close business relationship for years. (A0416).

Mark Walter also was one of the founders of Dava, through Guggenheim Capital Company, LLC ("Guggenheim"), of which he was the chief executive officer. (Op. 4). An affiliate of Guggenheim was one of the lenders who received the Warrants. Mr. Walter apparently took his position as a director lightly as he allowed a Guggenheim executive to act as his proxy at Dava board meetings. (Op. 4-5; A0416-A0417).

Prior to the merger, Dava was a privately held company specializing in generic pharmaceuticals. (Op. 3). Upon consummation of the merger, Dava became an indirect wholly-owned subsidiary of Endo. (Op. 3-4). Accordingly, Endo, in its capacity as the successor entity, became responsible for Dava's obligations to its former stockholders. (A0417).

On August 6, 2014, the merger closed based on defective (improperly dated) written consents that subsequently were validated by the Court of Chancery pursuant to 8 *Del. C.* § 205. (A0417; Op. 14). Endo acquired Dava for $575 million in cash with additional, contingent payments of up to $25 million to be paid upon the occurrence of certain sales milestones. (Op. 7). At the Merger consideration of $706 per share, the Cirillo Trust's 1,626 shares were valued at approximately $1,148,000.

(A0105). As explained further below, Defendants refused to pay this Merger consideration to the Cirillo Trust until told to do so by the Court. (A1030-A1031).

B. The Massive Dilution Secretly Authorized by Dava's Directors

On February 3, 2006, Dava obtained a loan from Wachovia Bank, National Association ("Wachovia") that was due in 2007 or 2008 (the "Wachovia Loan"). (Op. 5). Dava defaulted on the loan when it was due, but Wachovia worked with Dava to get the loan current. (Op. 5). In early 2012, Wachovia began to get more concerned but did not demand immediate repayment of the loan. (Op. 5). Although under no immediate pressure to do so, Dava's directors supposedly approached people they knew to have them buy the Wachovia Loan from Wachovia (which eventually became Wells Fargo). (Op. 5). The Director Defendants used the Wachovia Loan as an excuse to appropriate to themselves and their affiliates much of the value of Dava at the expense of the other stockholders, including the Cirillo Trust.

Late in 2012, the Director Defendants attempted to refinance the Wachovia Loan but made no effort to shop the deal widely.[4] (A0419; A0212 at 54; A0272-0273 at 72-74, 76; A0144 at 53-54). Instead, Mr. Moezinia approached only "people that I knew" and Mr. Walter appears to have been interested in including only

[4] For example, Anthony Cirillo, the trustee for the Cirillo Trust, was never approached about the refinancing transaction although he previously had invested with or loaned money to officers or directors of Dava. (A0419).

affiliates of Guggenheim. Thus, the purchasers of the Wachovia loan all ended up being individuals or entities that were affiliated with the Director Defendants. (Op. 6).

In late 2012, the Wachovia Loan was purchased, for $22.5 million, by HLAM5 Pharma Investors, LLC ("HLAM5") (the "Debt Purchase"). The purchase price represented a substantial discount to the outstanding loan balance– $49 million. (Op. 5). One of Mr. Moezinia's friends, Enrique Lerner, was a principal of HLAM5. (A0419; A0141 at 44; A0144 at 53-54). Henry (or Henri) Moezinia, Aram Moezinia's brother, was involved with HLAM5 or with one of HLAM5's affiliates. (A0420; A0483). Shortly after the completion of the Debt Purchase, HLAM5 (or one of its affiliates) assigned 60% of the Wachovia Loan to Tonelle International Ltd. ("Tonelle"), a British Virgin Islands entity related to HLAM5, and the remaining 40% to GPI 3, a recently-created affiliate of Guggenheim. (ABMSJ 10). Tonelle then assigned its interests to Evansic International Limited ("Evansic"), an affiliate of HLAM5 based in Panama. (A0420).[5] HLAM5 and its affiliates, Tonelle, Evansic, and GPI 3, are collectively referred to as the "New Lenders."

After the Debt Purchase, the New Lenders approached Dava to negotiate the restructuring of the Wachovia Loan; because affiliates of the directors were on the

[5] Other documents indicate that Evansic received this assignment directly from HL Asset Management (Suisse) SARL, undoubtedly an affiliate of HLAM5. (A0420).

other side of these negotiations, the negotiations were full of conflicts. (Op. 6; A0420-A0421). Enrique Lerner (who was a close friend and associate of Mr. Moezinia), and Mr. Walter's fellow executive at Guggenheim, John Griffin, participated on behalf of the New Lenders (A0146 at 62; A0275 at 81), while Messrs. Klein, Moezinia, and Tepper negotiated on behalf of Dava. (A0146 at 61; A0275 at 81; A0420-A0421). These obvious conflicts of interest were never addressed by Dava's board although it was apparent that Guggenheim stood on both sides of the transaction and Mr. Moezinia was negotiating with a close associate who appears to have been representing Mr. Moezinia's brother. (A0421).[6]

The terms of the restructuring benefitted the New Lenders far more than Dava: 1) the Wachovia Loan was restructured so that it was no longer in default (again, a default that Wachovia had not been pressing), but the outstanding balance of the loan was not reduced; 2) effective January 17, 2013, the New Lenders were issued Warrants to purchase 50% of Dava on a fully diluted basis, at an exercise price of $8 per share; 3) the New Lenders received an upfront payment of $1 million; and 4) both Mr. Griffin and Mr. Lerner became directors of Dava. (Op. 6).[7]

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[6] Actually, there is no evidence that the Dava board ever approved the issuance of the Warrants.

[7] In May 2013, Mr. Griffin was awarded options to purchase 7,000 shares of Dava's stock at one cent per share and, in December 2013, Dava paid him a $450,000 consulting fee. (A0422). Through one of HLAM5's affiliates, Mr. Lerner was paid a $345,000 success fee by Dava in January 2013. (A0422).

The directors at the time (who included two of the three Director Defendants) knew at the time they issued the Warrants to the New Lenders that Dava's business prospects were improving rapidly, and thus they must have known that the Warrants were issued at an extremely undervalued price. For example, Dava's sales in the second half of 2012 nearly doubled its sales in the first half of 2012. (A0422). The directors also knew that Dava had substantial pricing power due to a shortage of methotrexate, Dava's primary drug product, and accordingly would be able to raise its prices to capitalize on the decreased supply. (A0422-A0423). In addition, the directors knew that sales for 2013 and 2014 were going to improve because Dava had confirmed a substantial number of purchase orders. (A0423). Thus, revenue and cash flow for Dava were expected to increase substantially in the upcoming years. (A0423). Finally, only a short time later Dava repurchased the stock of one of its founders, John Klein, for $76.08. (A0426-A0427). Accordingly, the Director Defendants must have expected that the Warrants (which were issued extremely cheaply) would increase substantially in value and they and their affiliates would be able to reap the benefits of this increase in value at the expense of the other stockholders (including the Cirillo Trust). (A0423).

Although the issuance of the Warrants diluted the existing stockholders by 50%, no fairness opinion was ever sought or received in connection with the transaction and no procedures were implemented to ensure this conflicted transaction was fair to Dava's non-affiliated stockholders. (A0423-A0424).[8]

And the affiliates of the Director Defendants received an enormous number of Warrants. GPI 3, an affiliate of Guggenheim, and therefore an affiliate of Messrs. Walter and Griffin, received Warrants for 119,817.80 shares, or roughly 20% of Dava's fully diluted stock. (A0424).

Evansic received Warrants for 195,492.20 shares. (A0425). Evansic also obtained 44,308.41 shares of Dava stock directly from Mr. Tepper, stock that was issued to Mr. Tepper on January 25, 2013 and transferred to Evansic on May 5, 2014, just before the announcement of the Merger. (A0425; A0477). Because these shares were worth roughly $31 million as of May 5, 2014, Mr. Tepper must have had a significant relationship with Evansic. (A0425). Mr. Moezinia also had a significant relationship with at least one of HLAM5, Tonelle, and/or Evansic, through his brother Henry (or Henri) Moezinia. (A0425; A0482-A0486).

[8] In 2013, the Director Defendants took action to protect those stockholders who were also employees of Dava, primarily Lewis Tepper. (Op. 7). The Director Defendants granted 77,069 stock options to Dava's employees (58,425 of which went to Mr. Tepper) at a weighted-average exercise price of either one cent per share or $6.37 per share. (A0426). Regardless of the correct price, these stock options were issued at only a fraction of Dava's fair market value at the time. (A0426). This is evidenced by Mr. Klein's stock having been repurchased for $76.08 in March 2013, which is right around the time that these stock options were issued. (A0426-A0427). Because the Cirillo Trust was not an employee, it received no benefit from the issuance of these options.

Financially, the New Lenders benefitted greatly from the Debt Purchase. They were paid the entire outstanding principal of the loan – $49 million – and also received $11 million in interest payments, $4.5 million in pre-payment penalties, and, upon the closing of the Merger, approximately $210 million for the Dava stock which they received upon exercising their Warrants. (A0426). Thus, the New Lenders invested $22.5 million and, within 18 months, received in return approximately $275 million. (A0426; A0568; A0575-A0577).

None of these transactions were revealed to Dava's minority stockholders, including the Cirillo Trust.

C. The Director Defendants Execute Unfair Contracts With Affiliated Entities

In late 2012 and early 2013, Dava entered into contracts with two foreign entities, Renovatio Pharma Ltd. ("Renovatio") and Chemo LifeSciences Limited ("Chemo"). (ABMSJ 20). These contracts are highly suspect because it does not appear that any Dava director approved them and the Director Defendants did not appear to know much about the contracts during their deposition testimony. (A0430; A0147 at 66-67; A0297-A0298 at 170-173; A0209 at 42-43; A0223 at 97-99; A0225-A0226 at 107-110). Despite the Director Defendants' lack of familiarity with these contracts, Chemo and Renovatio were paid $9,515,000 and $16,110,540, respectively. (A0430; A0568).

The suspicious nature of these transactions is increased because it does not appear that either Renovatio or Chemo is a real operating entity; neither maintains a website discussing services they provide, and Chemo was incorporated only shortly before it entered into the transaction with Dava. (A0430; A0578-A0579). In addition, the persons signing on behalf of these entities seem to be professional directors supplied by a foreign entity connected to Landmark Fiduciare (A0580-A0584), an entity which shares an address with HL Asset Management (an affiliate of HLAM5), and Enrique Lerner, the former director of Dava and close friend of Aram Moezinia. (A0585-A0587; A0430). Renovatio also appears to have some relationship to Evansic, as both of those entities used the same attorney, Warren Gleicher, and both entities used persons who were supplied by Helvetica Directors to sign their papers in connection with Dava. (A0431; A0589-A0590; A0687). At oral argument on defendants' motion for summary judgment, the Cirillo Trust explained, and provided a demonstrative of, what it knew about this tangled web of interconnecting companies, most of which were foreign entities. (A1024-A1025; A1112-A1113). It is difficult to believe that this tangled web reflects innocent behavior.

Aram Moezinia is also closely related to Renovatio because he testified that Renovatio invested with him in an entity, Dava Partners, LLC, which is the same entity through which Mr. Moezinia and his family members held their stock in Dava.

(A0431; A0146 at 62-63). Renovatio also purchased a majority stake in Gastroenterology, LLC, a former subsidiary of Dava that was formed at the behest of Mr. Moezinia and Mr. Klein that was later managed by Mr. Tepper through a consulting agreement with Aston Partners. (A0431; A0165 at 143).

Thus, it appears that these contracts are an effort by the Director Defendants to siphon assets away from Dava, and to entities with which they were affiliated.

D. The Notice of Appraisal Rights

On July 3, 2014, Dava sent the Notice to the Cirillo Trust informing it that the Merger was approved by written consent (the Cirillo Trust apparently was the only Dava stockholder entitled to receive the Notice). (Op. 12; A0431; A0433; A0704-A0738). The Notice also apprised stockholders of their ability to seek appraisal pursuant to 8 *Del. C.* § 262. (A0433; A0704-A0738). However, the Notice did not adequately inform the Cirillo Trust of any of the information necessary to determine whether to seek appraisal or accept the merger consideration. (A0433).

As the Court of Chancery held:

> The notice contained two undisputed legal deficiencies. First, the statement in the notice that DAVA had obtained stockholder approval of the merger technically was inaccurate because the written consents of the nine largest stockholders were not dated properly, rendering them invalid under Section 228 as it was written at the time.[9] Second, the

[9] The Court of Chancery remedied this first legal deficiency by granting Dava's motion to have the Court judicially validate this defective corporate act through 8 *Del. C.* § 205. The Cirillo Trust does not appeal from that decision.

> notice did not contain legally required information that would allow a stockholder to make an informed decision whether to pursue appraisal.

(Op. 1-2).

In its Opinion, the Court of Chancery explained the basis for the second "undisputed legal deficiency" (Op. 25):

> Whenever directors communicate publicly or directly with stockholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. It follows *a fortiori* that when directors communicate publicly or directly with shareholders about corporate matters the *sine qua none* of directors' fiduciary duty to shareholders is honesty.

Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998). *See also In re Solera Holdings, Inc. S'holder Litig.*, 2017 WL 57839, at *9 (Del. Ch. Jan. 5, 2017) ("Under Delaware law, when directors solicit stockholder action, they must 'disclose fully and fairly all material information within the board's control.'") (citation omitted).

With respect to Notices of Appraisal Rights, the requirement that full material information be supplied applies to both public and private companies. *Erickson v. Centennial Beauregard Cellular, L.L.C.*, 2003 WL 1878583, at *7 (Del. Ch. Apr. 11, 2003). Of course, the importance of this disclosure requirement is greater with privately-held corporations, such as Dava, because publicly-traded companies have substantial public disclosure requirements, plus (frequently) analyst's reports scrutinizing their financial data and information. On the other hand, privately-held companies' financial information is largely unknown, except to insiders.

Accordingly, stockholders of private companies are reliant upon their directors to disclose the company's financial condition in situations such as existed here. *See Erickson*, 2003 WL 1878583, at *7 ("concerns regarding the disclosure of [the company's] business and operations are legitimate" because it "was a private company" and "[t]he shareholders did not have access to the same level of information generally afforded to shareholders of public companies").

And the omissions here were material. The Notice contained no financial information of Dava, and thus the Cirillo Trust had no way to determine (in the short time frame provided by Section 262) what it should do once it received the Notice. The Notice provided essentially nothing to help the Cirillo Trust decide what to do--no income statement or balance sheet, no description of Dava's business or operations, no disclosure about Dava's plans or prospects, no explanation of how the merger price was determined, nothing on projections or forecasts of Dava's future business, and nothing on any valuation of Dava. (*See* Op. 12). The Notice also had no information regarding recent sales of Dava's stock or the number of shares outstanding as of the Merger, and no information concerning the massive dilution through which the New Lenders gained control of Dava and appropriated much of Dava's value for themselves. (A0434-A0435).

The Chancellor repeatedly found as much. "As the court expressed at an earlier hearing, the Notice was totally bereft of information required under Delaware law to permit a stockholder to decide whether to seek appraisal in lieu of accepting the Merger consideration." (Op. 30). At that earlier hearing, the Court stated:

> I read the notice that was provided to the stockholder in this case, and there is, if not zero, as close to zero as you could get by way of information that would be relevant to allow somebody to make a determination as to whether or not to seek appraisal. For example, you will not find in the notice a financial analysis supporting the basis for the merger price. You won't find any projections. You won't find any discussion of the prospects of the business. You won't find any elaboration upon the process by which the board reached the conclusion that it did that this was an appropriate price in recommending that the merger occur.

(Op. 30, n.120) (citation omitted).

The Cirillo Trust does not believe that this absence of information was an accident, but instead was a deliberate attempt to avoid having the Cirillo Trust file an appraisal action, where it would learn about the massive dilution it suffered as a result of the conduct of the Director Defendants, and would uncover the suspicious contracts with Renovatio and Chemo.[10] If the Cirillo Trust had been given the

[10] The Director Defendants may also have been trying to cover up their successful efforts to defraud some of the minority stockholders by buying back their stock at a small fraction (approximately 10%) of the price that had recently been offered by a legitimate third-party acquiror. (A0427-A0429). By October 16, 2013, Dava received a preliminary indication of interest from MacAndrews & Forbes for $475 million. Although this indication of interest was non-binding, it nonetheless provided a benchmark for the value of Dava that greatly exceeded the price offered to these minority stockholders (including the Cirillo Trust). Because the Cirillo Trust did not sell its stock then, it had no claim about this fraud, but its disclosure in an appraisal proceeding could have led to the affected stockholders learning about it. This is another example of the directors' lack of interest in the small stockholders.

necessary information in the Notice, it would have been in a better position to decide to seek appraisal of its stock.

The evidence below showed that Mr. Tepper and Dava's outside counsel tried to prevent the Cirillo Trust from being able to exercise its appraisal rights. They attempted to have Mr. Cirillo, as trustee for the Cirillo Trust, sign the written consent approving the merger without informing him that by doing so the Trust would be waiving its right to appraisal. (Op. 35). Mr. Tepper and outside counsel also attempted to prevent Mr. Cirillo from reading the merger agreement. (A0438; A0358 at 54-55; A0740). In communications with outside counsel, Mr. Tepper discussed his inability to "control" Mr. Cirillo and stated that "it wasn't easy to get him to sign things." (A0438; A0880-A0886; A0359 at 57). In other communications, Mr. Tepper informed outside counsel that he was "trying to play it cool" during his dealings with Mr. Cirillo. (A0438; A0889; A0289-A0290 at 137-141). However, it is inexplicable on any ground other than self-interest why Mr. Tepper would be anything other than completely forthright with someone to whom he owed fiduciary duties. When Mr. Cirillo inquired how his stake in Dava had been diluted, Mr. Tepper avoided disclosing the identities of the Warrant recipients, which would have revealed the self-interested nature of their issuance. Instead, Mr. Tepper only talked about the mechanics of how the stock was diluted. (A0438; A0894-A0898; A0291 at 145-147).

Dava's outside counsel also asked Mr. Tepper about the possibility of not sending Mr. Cirillo a notice of appraisal at all: "I don't know him as well as you, but I worry that if we send him a notice of appraisal rights etc, that it might be "putting the gun in his hands," adding "I don't know how knowledgeable he is." (Op. 10-11; A0899-A0903). Mr. Tepper never expressed disagreement with proceeding in that manner, or expressed any dispute with describing the statutorily-mandated Notice as equivalent to "putting the gun in his hands." (A0439). This exchange takes on increased importance because this proposal to pursue a course of conduct in contravention of Mr. Tepper's fiduciary duties is being propounded by the same counsel whose advice (as explained below) is being used as a shield by the directors to prevent the Cirillo Trust from having any valid cause of action as a result of the obvious and material deficiencies in the Notice.

Despite the significance of a merger in the existence of a corporation, the Director Defendants never discussed the Notice or its contents. (Op. 12). Two of the directors – Messrs. Moezinia and Walter – deferred to Mr. Tepper (who also was Dava's General Counsel) in connection with the Notice (Op. 12-13), which means that they relied upon Mr. Tepper to get the Notice right. Indeed, Mr. Walter testified at his deposition that there was the first time he had seen the Notice. (A0436). Mr. Tepper signed the Notice but had no questions about it, never asked outside counsel whether the Notice comported with the requirements imposed under Delaware law, did not truly understand the function of the Notice, and never discussed with outside counsel what, if any, financial information should be included in the Notice. (Op. 12-13). Mr. Tepper also never inquired into outside counsel's experience with issuing a notice of appraisal rights in Delaware. (A0280 at 104; A0281 at 108; A0282 at 110-111). Instead, Mr. Tepper operated under the assumption that Dava's outside counsel would handle the substance and procedure of the Notice in an appropriate manner – an assumption that turned out to be incorrect and deprived the Cirillo Trust of information that it was entitled to receive.

E. The Lawsuit

The initial complaint in this action only raised a claim with respect to the obviously inadequate Notice. However, upon reviewing the written consents by which the Merger was approved, the Cirillo Trust realized that they were defective under Delaware law, because they were undated or improperly dated. The Court of Chancery later agreed, determining that the written consents "did not comply with certain requirements of Delaware law at that time because they were not properly dated." (Op. 8-9).

On April 25, 2016, while discovery was still in its beginning stages, defendants filed a motion for summary judgment, attempting to cut off most additional discovery (Op. 16). The Court held that motion in abeyance until the completion of fact discovery. (Op. 16).

On December 23, 2016, defendants filed another motion for summary judgment, despite knowing that the Cirillo Trust intended to move to amend its complaint (Op. 16, 49, n.175). The Cirillo Trust did move to amend, seeking to add (a) a claim against the directors arising out of the issuance of the Warrants, (b) a claim against the directors alleging that the Notice failed to disclose material information relating to the issuance of the Warrants and the stock options granted to Dava's employees, (c) a claim against Messrs. Moezinia and Tepper based on their breaches of fiduciary duty as officers, and (d) a claim against Dava (and other entities) for their failure to pay the Merger consideration to the Cirillo Trust, because the trust would not sign a letter of transmittal that included a release of any claims the trust had against any of the defendants here (along with other entities) (Op. 13-14, n.59). Of course, granting such a release would have prevented the Cirillo Trust from bringing any of its claims here.

After briefing, the Court held oral argument on September 7, 2017. (A0904-A1060). At that argument, the Court appeared to want to find a way to allow the Cirillo Trust to have a cause of action over the obviously deficient Notice:

- *See, e.g.*, A0912 (in response to defendants' counsel's statement that "I don't think there is a remedy at this juncture," the court asked "Why can't the company be the defendant under a quasi-appraisal theory?")

- A0914-A0915 ("But there's still a breach, and how can it be there's no remedy for that breach? I mean, Mr. Cirillo received bupkes by the way of information on whether to decide whether to seek an appraisal. How can there not be a remedy for that?")

- A0915-A0916 ("And the problem I have here—and you have got to help me out with it—is Delaware law so cold that even though something clearly wrong happened here, apparently because a very reputable law firm doesn't read a lot of Delaware cases in the merger context about the information that shareholders are entitled to, that there's really no relief for that?")

- A1055-A1056 ("But there's something odd to me about the idea that even if I accept your 102(b)(7) and 141(e) defenses on your summary judgment motion—and maybe you will prevail on those. I don't know. I'm not passing judgment on any claims today. And I may change my mind about any of the tentative things I am saying now—but it doesn't make sense that there's no remedy for that problem.")

At the same argument, the Court told Dava that it really needed to pay the Merger consideration to the Cirillo Trust "pronto," believing that it was being withheld to put improper pressure of the trust. *See, e.g.*, A1030 ("I have yet to hear something approaching anything appropriate for withholding his money. You will get to that, I presume. But that really tries the Court's patience. I have enough problems to solve not to solve things that should be obvious, which he should get his money and he should get it pronto.") Dava thereafter paid the Merger consideration to the Trust, thus mooting this claim. (Op. 51).

After the argument, the Court of Chancery requested supplemental briefing from the parties on the issue of whether a corporation, in addition to its directors, owes a duty under Delaware law to disclose all material information to its stockholders so that they can make an informed decision whether to seek appraisal or accept the merger consideration. The parties briefed this issue (which the Court later described as "appears to be one of first impression"), but the Court did not decide the issue because it found that the Cirillo Trust had not asserted a claim against the successor entity to Dava. (Op. 47 n.168). Despite not deciding the issue, the Court explained that "defendants have the better argument" there. (*Id.*).

F. The Court's decision on the motions

On July 11, 2018, the Court of Chancery issued its opinion granting summary judgment to the Director Defendants. First, it judicially validated under Section 205 of the DGCL the "defective corporate act" of the improper written consents. The Cirillo Trust does not appeal from that ruling.

Second, it determined that, because the Director Defendants were not self-interested in the Merger, they did not breach their duties of loyalty with respect to the issuance of the Notice. In doing so, the Court focused solely on whether the self-interested conduct set forth by the Cirillo Trust affected the *Merger* (and determined that it did not), and ignored the trust's argument that this conduct affected the *Notice* because it gave the Director Defendants a self-interested reason to keep the Cirillo Trust in the dark about what had been going on at Dava. (Op. 27-29). The Court also determined that the breach of fiduciary duty claim should be dismissed because it found that "DAVA's directors reasonably relied, in good faith, on the advice of outside legal counsel with respect to the preparation of the notice even though, unbeknownst to the directors, that advice was seriously flawed." (Op. 2-3).

The Court of Chancery also largely denied the Cirillo Trust's motion to amend, determining that all but one of the requested amendments were futile or moot. (Op. 41). The Chancellor determined that it would be futile to allow the Cirillo Trust to add a claim for improper dilution arising out of the issuance of the Warrants because it was a derivative claim, which the trust lost standing to bring as a result of the Merger. The Cirillo Trust does not directly appeal from this determination (although, as explained below, this claim could be valued as part of any quasi-appraisal remedy). The Court also held that it would be futile to allow the Cirillo Trust to expand its claims relating to the Merger to demonstrate that the Notice improperly failed to disclose information relating to the Warrant issuance, again improperly focusing on the difference between that issuance and the *Merger* rather than on whether the directors were self-interested in the contents of the *Notice*. (Op. 42). On the one amendment that survived—against Messrs. Moezinia and Tepper in their capacity as officers of Dava—the Cirillo Trust later agreed to the entry of judgment against it because, based on the Court's determinations on the motion for summary judgment, it determined that that claim could not survive a summary judgment motion. The trust does not appeal from this later determination (because a successful appeal on the issues it does raise will grant it the necessary relief).

ARGUMENT

I. The Court of Chancery erred in finding that the Director Defendants were not self-interested in connection with the Notice of Appraisal

A. Question presented

Did the Court of Chancery commit error in determining that the Director Defendants were not self-interested in connection with the Notice of Appraisal Rights and in determining that the Director Defendants relied in good faith upon their outside counsel with respect to the preparation and content of that Notice? This issue was preserved for appeal. (A0458-A0459).

B. Scope of review

The Court of Chancery's grant of summary judgment here is a legal determination, which is reviewed *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008). The Court of Chancery's factual findings are accorded a high level of deference and are set aside if they are "clearly wrong and the doing of justice requires their overturn." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005) (citations omitted). However, because the Court of Chancery here did not focus on the actual argument made by the Cirillo Trust, no deference should be afforded to its factual findings.

C. Merits of Argument

From its statements in the Opinion and during argument, the Court of Chancery understandably was quite dissatisfied with the contents of the Notice sent to the Cirillo Trust (*see, e.g.*, Op. 30: "the Notice was totally bereft of information required under Delaware law to permit a stockholder to decide whether to seek appraisal in lieu of accepting the Merger consideration."). And, based on its comments at oral argument on the Director Defendants' motion for summary judgment, it was searching to find a way to allow the Cirillo Trust to obtain relief from the consequences of the improper Notice (*see, e.g.*, A0914-A0915: "But there's still a breach, and how can it be there's no remedy for that breach?"). There are at least two theories through which the Cirillo Trust could obtain a remedy here. The Court of Chancery erred in denying one of them, and never reached the merits of the other theory.

The Court of Chancery determined that the Director Defendants conduct here was not a breach of their duty of loyalty, and thus dismissed the trust's claim predicated on that breach. The same erroneous factual finding caused the Court to determine that the Director Defendants could be protected under Section 141(e) because they relied on the advice of Dava's outside counsel in connection with the Notice. The Court of Chancery erred in doing so.

1. The Court of Chancery did not analyze the Cirillo Trust's actual argument

As explained above, in its Opinion the Court of Chancery focused solely on whether the self-interested conduct of the Director Defendants set forth by the Cirillo Trust affected the *Merger* (and determined that it did not), and thus ignored the trust's actual argument--that this self-interested conduct affected the *Notice* because it gave the Director Defendants a selfish reason to keep the Cirillo Trust in the dark about what had been going on at Dava. (Op. 27-29).

The Director Defendants had good reason not to want the Cirillo Trust to discover what they had been up to prior to the Merger (the secret self-interested dilution, the attempts to defraud stockholders, and suspicious payments to off-shore entities that appeared to be affiliated with the directors). Thus, these directors had good, self-interested reasons to attempt to persuade the Cirillo Trust to vote in favor of the Merger, discuss whether they could avoid sending a Notice at all, and, when that did not succeed, send a Notice that would leave the recipient with no reason to demand appraisal. But by focusing on whether the Director Defendants were interested in the *Merger* with Endo (which we agree they were not), rather than on the *contents of the Notice* (which they were), the Court was able to determine that the directors did not breach their fiduciary duties.

The Court of Chancery's improper focus on whether the Director Defendants were interested in the Merger caused it to make another error when it found that including in the Notice information about the Warrant issuance and resulting massive dilution may have been relevant to the Cirillo Trust in connection with its assertion of an improper dilution claim but was irrelevant to a determination whether to seek appraisal. (Op. 46). To the contrary, if the Cirillo Trust had been informed in the Notice that the Director Defendants had negotiated with their affiliates (and only with their affiliates) over the Wachovia Loan, and that this self-interested negotiation resulted in a dilution that reduced by half the amount of consideration the Cirillo Trust would receive in the Merger, that is the sort of red flag that would have increased the likelihood that the Trust would have sought appraisal of its shares. *See Turner v. Bernstein*, 776 A.2d 530, 532 (Del. Ch. 2000) (stockholders are entitled to receive material information "from the company's directors and are not required to make the decision whether to accept the immediate benefits of the merger consideration or to explore the more uncertain appraisal trail merely because, lacking such material information, they suspect that the transaction may be unfair").

Because the Director Defendants had an interest in the contents of the Notice they should have been required under Delaware law to take real steps to ensure that Dava's outside counsel included in the Notice all information to which stockholders are entitled. Instead, they did nothing.

2. Because of the Director Defendants' self-interest in the Notice, their failure to follow Delaware law as to its contents was a breach of their fiduciary duty of loyalty

Because of this self-interest in the contents of the Notice, the Director Defendants failure to include in that Notice the information required under Delaware law is a breach of their duty of loyalty. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). And once that breach of loyalty determination is made, then some remedy must be provided. *See Shawe v. Elting*, 157 A.3d 152, 159 (Del. 2017) (observing the well-accepted maxim that '"equity will not suffer a wrong without a remedy"') (citation omitted). The remedy sought by the Cirillo Trust for these breaches of loyalty was a quasi-appraisal action. *See, e.g.*, *Berger v. Pubco Corp.*, 976 A.2d 132, 145 (Del. 2009); *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 314 (Del. Ch. 2005) ; *Nebel v. Southwest. Bancorp, Inc.*, 1995 WL 405750, at *7 (Del. Ch. July 5, 1995) .

And in such a quasi-appraisal action, the issuance of the Warrants, if improper, would have been the type of claim that could be valued as part of that action. *See, e.g.*, *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 1994 WL 198726, at *3 (Del. Ch. May 16, 1994) ("[B]reach of fiduciary duty claims that do not arise from the merger are corporate assets that may be included in the determination of fair value. . . . Although those claims may not be litigated in this proceeding, I see no reason why petitioners should be precluded from introducing evidence as to their value.") (citation omitted); *Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 312-13 (Del. Ch. 2006) ("[I]n appraising Delaware Radiology, it is relevant to consider the value of claims belonging to the entity, as they are an asset of the firm that is part of its value.") (citation omitted); *In re Radiology Assocs., Inc. Litig.*, 1990 WL 67839, at *13 (Del. Ch. May 16, 1990) (claims "that are derivative in nature and precluded for lack of standing, may be considered in the appraisal phase of this litigation") (citation omitted).

There is another reason why the issuance of the Warrants should have been included in the Notice. Because a notice of appraisal must contain trading information on the Company's stock, for a private company such as Dava a massive dilution of the Company's stock at very cheap prices is sufficiently equivalent to a "trading price" that it should be disclosed to stockholders. *See Gilliland v. Motorola, Inc.*, 859 A.2d 80, 88 (Del. Ch. 2004) (stockholders' "interests demand protection and support a finding . . . that a notice given pursuant to section 262 must contain, at a minimum, summary financial and trading data and reference to the publicly available sources from which more complete information is available"). Because Dava, as a privately-held company, does not have the same information readily available to stockholders as a public company does, it was even more critical that the Director Defendants disclose the dilution because it represented such a stark change in the level of stock ownership in Dava. Absent disclosure from the Director Defendants, there are no alternative sources from which this information could have been obtained.

3. The Director Defendants' self-interest in the Notice precluded a finding, on summary judgment, that they could rely on Section 141(e) to avoid liability

The Court of Chancery's incorrect focus on whether the Director Defendants were self-interested in the Merger also infected its determination that those directors could use the protections of Section 141(e) because they relied on outside counsel to draft and send the Notice. This also was error.

The protections of Section 141(e) certainly are useful where only the directors' duty of care is implicated, because reliance upon the advice of counsel can show that the directors were acting in good faith -- behavior that the law should encourage. But that same deference should not be given where the directors have a self-interest – here, an incentive to provide a bland notice of appraisal--and thus an incentive not to ask questions of outside counsel. By focusing only on the Director Defendants' self-interest in the Merger, the Court was able to conclude that only the duty of care was implicated and, because the Director Defendants relied on outside counsel for the preparation of and the disclosures contained in the Notice, they did not act in bad faith. (Op. 30-31).

Section 141(e) does not automatically insulate directors from liability where a duty of loyalty is involved. *See Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 751 (Del. Ch. 2007). The Court of Chancery in *Valeant* observed that, while reliance on experts is "a pertinent *factor* in evaluating whether corporate directors have met a standard of fairness in their dealings with respect to corporate powers, its existence is not outcome determinative of entire fairness." *Id.* (citation omitted; internal quotation marks omitted). The Court explained that "[t]o hold otherwise would replace th[e] court's role in determining entire fairness . . . with that of various experts hired to give advice to the directors in connection with the challenged transaction…." *Id.*

Valeant is not alone in making this distinction. *See, e.g.*, *Owen v. Cannon*, 2015 WL 3819204, at *30-31 (Del. Ch. June 17, 2015) (despite defendants' claims of reliance on experts the evidence demonstrated that the transaction was not the product of fair dealing); *Encite LLC v. Soni*, 2011 WL 5920896, at *22 (Del. Ch. Nov. 28, 2011) ("The Director Defendants' generalized contentions that they relied on expert counsel . . . are also insufficient to establish fair dealing. . . . [T]he advice given by counsel is relevant to the issue of fair dealing, a question of process.").

Thus, the Director Defendants' self-interest should prevent them from relying on Section 141(e) as a bar to their liability.

II. A Delaware corporation and its fiduciaries should have the same obligations to stockholders with respect to a Notice of Appraisal Rights

A. Question Presented

Does a Delaware corporation and its fiduciaries have the same obligation to supply a complete and accurate Notice of Appraisal Rights to allow the stockholders to make an informed judgment as to whether to seek appraisal? If so, may a corporation be held liable for failing to provide a notice of appraisal rights containing the legally required disclosures, especially where, as here, holding otherwise can prevent a stockholder who, although receiving an inadequate Notice of Appraisal Rights, has no remedy. This issue was preserved for appeal. (A1064-A1067; A0412-A0413).

B. Scope of Review

The Court of Chancery's determination regarding the disclosure requirements under Section 262(d)(2) are conclusions of law, which are reviewed *de novo*. *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011). This should be true even more so because the Court of Chancery never actually decided this issue.

C. Merits of the Argument

On January 26, 2018, following oral argument on defendants' motion for summary judgment and the Cirillo Trust's motion to amend its complaint, the Court of Chancery asked the parties to brief the following questions: 1) "whether the notice obligation in 8 *Del. C.* § 262(d)(2) includes the obligation to disclose 'the available material facts that would enable [a stockholder] to make an informed decision . . . whether to accept the merger consideration or demand appraisal'" and 2) "which entity (or entities) may be liable for a violation of the statutory notice obligation in 8 *Del. C.* § 262(d)(2)." (A1069) (citation omitted). The parties briefed these questions fully, but in its Opinion, the Court of Chancery did not decide the issue because "the Trust has not attempted to assert a claim against the successor entity under Section 262." (Op. 47 n.168). This issue should have been decided and the directors' disclosure obligations also should be requirements of the corporation under Section 262.[11]

Section 262 (d)(2) states that, before a merger, "a constituent corporation" or, after a merger, "the surviving or resulting corporation" shall provide notice of a merger to stockholders and apprise them of their right to seek appraisal of their shares. Various opinions of the Court of Chancery have found that the notice of appraisal sent to stockholders must contain financial and trading information as well as citations to publicly available sources through which stockholders can obtain additional public information to enable them to exercise knowledgeably their decision whether to seek appraisal. *See Gilliland*, 873 A.2d at 308 (discussing the

[11] While true that the Cirillo Trust had not then attempted to add a claim against Dava (or its successor entity) with respect to that entity's responsibility for sending a full and complete Notice of Appraisal Rights, had the Court determined that such a cause of action existed, the trust would have done so. This unusual state of affairs occurred because it was the Court's request that the parties brief this issue.

information that must be included in a notice of appraisal). While these duties have been imposed on directors of Delaware corporations, corporations should have a similar obligation.

As Section 262(d)(2) explains, it is the corporation that is responsible for sending the appraisal notice to its stockholders. It would be an odd result if directors of corporations had a fiduciary requirement to include certain information within a notice of appraisal but the corporation itself only had the obligation to include *less* information in the same notice. A far more rational result is to require the notice to contain all required information, and to make the corporation and the directors separately responsible for that requirement.

Construing Section 262 in this manner makes sense from a policy perspective because it enables stockholders who have received a deficient notice of appraisal to have a viable remedy in situations such as the one faced by the Cirillo Trust. In most situations in which a deficient notice of appraisal is sent to the stockholders, it is likely that the directors will be exculpated from liability because of the protections afforded by a Section 102(b)(7) clause in the certificate of incorporation.[12] Where the notice of appraisal is produced by counsel – presumably the situation in the overwhelming majority of cases – this will enable the directors to raise the reliance

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[12] We presume that the self-interest of the Director Defendants here in trying to ensure that their behavior never was investigated in an appraisal action is the minority situation.

on counsel defense under Section 141(e). Thus, in the absence of some avenue to assert a claim against the corporation the stockholders receiving an improper notice – even one that provides them with no useful information – will have no remedy.

Thus, the factual scenario presented by this case provides a paradigmatic situation justifying the application of a statutory duty regarding notice provided by a corporation that is identical to that imposed on directors of those corporations. Were it otherwise, the stockholders would be entitled to receive from the corporation a Section 262(d)(2) notice that includes all the legally required financial, trading, and pricing information but would have no realistic ability to enforce that right because the Director Defendants would be protected by the one-two punch of Sections 102(b)(7) and 141(e). This inequitable scenario should not be countenanced by Delaware courts which are designed to offer fora for redress from faithless fiduciaries.

The language of Section 262 does not dictate a contrary conclusion. If solely complying with the statute were sufficient, then Delaware law would not have evolved to require that corporations' notices of appraisal should include: the background and terms of a merger; the value of the corporations, including recent historical financial data and data concerning future business prospects; the process employed by the board in reaching its determination supporting the merger; and disclosure of any potential conflicts of interest that may animate a stockholder's decision whether the procedure employed by the board is sufficient to achieve a merger price that roughly resembles fair value. *See, e.g.*, *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) ("[A] stockholder deciding whether to seek appraisal should be given financial information about the company that will be material to that decision."); *Nagy v. Bistricer*, 770 A.2d 43, 48 (Del. Ch. 2000) (finding that the notice of appraisal failed to "[include] financial information regarding either [constituent corporation]," "describe the process by which the Merger Agreement had been negotiated," and disclose defendants' "interests in" the one constituent corporation).

The Director Defendants argued in the Court of Chancery (and we presume that they will argue here) that that the statutory requirement imposed on corporations under Section 262 only requires the corporation to apprise stockholders of their right to seek appraisal, the effective date of the merger, and to give stockholders a copy of the current appraisal statute. (A1083-A1084). Defendants do acknowledge that "Delaware Courts have imposed additional common law disclosure requirements upon corporate fiduciaries" but argue that these "are independent of the statutory requirements under Section 262 (d)(2)." (A1083) (emphasis omitted). Accordingly, Defendants concluded that the obligation to provide this additional, admittedly material, information springs solely from the directors' common law obligations.

Adopting the Defendants' argument would produce an awkward and inequitable result. It would allow for the existence of a statutory obligation on the corporation that, frequently, would not be accompanied by any viable means of enforcement. The facts of this case highlight the inequity that results from using the Defendants' approach. Allowing a claim against the responsible corporation for the issuance of a deficient notice of appraisal would provide stockholders with a remedy where they otherwise would be deprived of the ability to hold fiduciaries accountable for their faithless conduct. It also would provide an additional incentive for counsel (who could be sued by the responsible corporation) to carefully craft notices of appraisal and ensure that the contents of those notices contain all the legally required information.

And no Delaware case supports the distinction that Defendants sought (and will presumably seek) to draw. The cases Defendants relied upon below, *Gilliland v. Motorola, Inc.*, 859 A.2d 80 (Del. Ch. 2004) and *Nebel v. Southwest Bancorp, Inc.*, 1995 WL 405750, at *6 (Del. Ch. July 5, 1995) do not hold otherwise.

Nebel involved a notice of merger that was attached to a copy of the appraisal statute that "was incomplete and included provisions from the appraisal statute of another state." *Nebel*, 1995 WL 405750, at *2 (citation omitted). The Court of Chancery noted the plaintiffs' claim that the notice failed to "disclose information essential to reaching an informed decision as to value." *Id.* at *5. The Court of

Chancery concluded that the inclusion of the wrong appraisal statute was a material disclosure violation, but observed that the claim pertaining to the failure to release any information regarding value was not supported by existing case law because a corporation does not need to "disclose to its shareholders all of the information that it furnished to its valuation advisors in connection with the transaction." *Id.* (citation omitted). Therefore, in *Nebel* the Court of Chancery did not distinguish between the requirement to provide financial information and the procedural failure to comply with one of the statutory requirements, i.e., providing a correct copy of the appraisal statute. *Nebel* therefore did not address the issue here--whether the corporation has an obligation to provide a sufficient Section 262 (d)(2) notice that contains financial, trading, and price computation information.

In *Gilliland v. Motorola, Inc.*, 859 A.2d 80 (Del. Ch. 2004) the notice provided to stockholders contained "the statutorily mandated information about the mechanics of perfecting a demand for appraisal and no other information relating to the value of the merged entity…." *Id.* at 82. The Court grappled with the issue as to whether a corporation can satisfy its disclosure obligations when there is sufficient publicly available information available, but the corporation does not take steps to apprise stockholders "where and how to obtain more detailed information." *Id.* The Court concluded that the disclosures were deficient. The Court made a distinction between the express statutory obligation to apprise stockholders of their right to seek appraisal, the effective date of the merger, and to provide a copy of the current appraisal statute, on the one hand, and the common law fiduciary duty of providing substantive financial information. *Id.* at 86. Although the Court did reference this distinction, the language was dicta. Nor did the Court address the issue of whether the corporation has a duty to provide such information to stockholders in a notice of appraisal. It appears that the Court was not focused on any differences between the information that a corporation as opposed to its fiduciaries must include in a notice of appraisal.

This Court's decision in *Zirn v. VLI Corp.*, 681 A.2d 1050, 1059 (Del. 1996) also provides no support for the proposition that a corporation does not have an obligation to disseminate a notice of appraisal that contains substantive financial information. *Zirn* involved the issue of whether omitting a portion of patent counsel's advice was a material non-disclosure by a majority stockholder who was the acquirer in a short-form merger. The Supreme Court reiterated the well-established obligation of the acquirer as the majority stockholder to make a full and complete disclosure of all material facts relevant to a decision whether to accept the merger consideration or seek appraisal. *Id.* at 1059.

When examining the disclosures made in connection with the merger, the Court observed that a Section 262 (d)(2) notice is "primarily intended to notify the stockholders of action being taken by the parent corporation and to apprise the stockholders of their appraisal remedy" but highlighted that there is a tension between the "summary nature of the section 253 procedure and the supplementary duties provide by common law." *Id.* *Zirn* repeats the well-accepted proposition that fiduciaries have a fiduciary duty of full disclosure, but it says nothing of the obligations of a corporation with respect to its statutory requirements.

CONCLUSION

While the Court of Chancery appeared sympathetic to the dilemma in which the Cirillo Trust found itself (a dilemma it did not create), it did not provide any remedy for the admittedly improper Notice. This Court should determine that the Trust is entitled to some remedy—whether against the Director Defendants or against Dava (or its successor). Accordingly, the Order of the Court of Chancery should be reversed and this case remanded for further proceedings.

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