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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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NATURE OF PROCEEDINGS

Plaintiff-Below, the Cirillo Family Trust ("Plaintiff" or the "Trust"), filed this lawsuit following an arms'-length merger that yielded a tremendous return for the stockholders of DAVA Pharmaceuticals, Inc. ("DAVA" or the "Company"). The Trust itself received a return of more than 450% on its original investment. Every single stockholder except the Trust approved the transaction.

Although it received what it now alleges was a defective notice of its appraisal rights, the Trust never complained or sought to enjoin the transaction before it closed. Nor did it seek appraisal. Instead, the Trust filed this action, initially on behalf of a potential class. After the Court of Chancery denied class certification, the Trust pursued the case on its own, even though its stock was worth only approximately $1.14 million at the transaction price. After more than four years of contentious litigation, including a summary judgment ruling in favor of the Defendants-Below on each of the then-pending claims, the Trust capitulated on a final cause of action. This appeal followed.

The Trust's appeal fails from two fundamental flaws before even reaching the merits. *First*, the appeal depends on allegations that the Trust was never granted leave to assert, and it never appealed the Court of Chancery's denial of leave to amend the operative complaint. *Second*, the appeal raises a new claim

(never raised below) against an entity that the Trust dropped as a defendant during the litigation.

Even if this Court reaches the merits, no factual or legal basis exists to reverse the Chancellor's well-reasoned summary judgment opinion. The Court of Chancery's factual conclusions regarding the interests of the individual defendants and their reliance on counsel were the product of a logical and deductive reasoning process. The Court of Chancery's refusal to expand the appraisal-related disclosure obligations of Delaware corporations beyond the plain language of Section 262 was legally correct.

SUMMARY OF ARGUMENT

1. Denied. The Trust's argument that Aram Moezinia, Lewis Tepper and Mark Walter (the "Director Defendants") were self-interested in connection with the Notice of Appraisal Rights relies on allegations that the Court of Chancery denied the Trust leave to assert, and the Trust never appealed that ruling. Op. 41-42; OB at 24. Even if those allegations were properly before this Court, the Court of Chancery correctly held that the Director Defendants were not self-interested in connection with the Merger and related Notice of Appraisal Rights and that the Director Defendants relied in good faith upon their outside counsel in connection with the Notice. Op. 27-29, 36-39.

2. Denied. The Trust's plea that the Supreme Court create a new, quasi-appraisal cause of action against Delaware corporations (as opposed to errant fiduciaries) is not properly before this Court. The Trust never sought to file a quasi-appraisal claim against DAVA (or its indirect parent). Op. 47 n.168. If the Supreme Court determines that it should address this issue, it should decline to impose new, appraisal-related disclosure obligations on Delaware corporations beyond those specified in 8 *Del. C.* § 262.

COUNTERSTATEMENT OF FACTS[1]

A. The Parties

DAVA was a generic pharmaceutical manufacturer headquartered in New Jersey and incorporated under Delaware law. Op. 3. Prior to the Merger, DAVA was a closely-held corporation with 31 stockholders. *Id.* Plaintiff allegedly held 1,626 shares of DAVA common stock (which comprised approximately 0.27% of the Company's slightly more than 600,000 shares outstanding). *Id.* at 4.[2] The Director Defendants served as DAVA's directors at the time of the Merger. *Id.*

B. The Merger

In the fall of 2013, DAVA began considering various strategic options. Op. 7. This process concluded on June 24, 2014 when DAVA's board of directors (the "Board") unanimously approved, and DAVA entered into, an Agreement and Plan of Merger (the "Merger Agreement") between DAVA and Generics International (US), Inc., an affiliate of Endo Pharmaceuticals, Inc. ("Endo"), pursuant to which Endo's affiliate agreed to acquire all of the outstanding shares of DAVA common stock. *Id.*

Dechert LLP ("Dechert") acted as DAVA's legal counsel, and Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") acted as Endo's legal counsel in

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[1] "A__" and "B__" references are to the Appendices. "Op. __" refers to the Court of Chancery's July 11, 2018 opinion.

[2] Non-party Anthony Cirillo is the trustee of the Trust. *Id.*

connection with the Merger. *Id.* at 7-8. Dechert is a prominent international law firm with significant expertise in mergers and acquisitions. *Id.* at 33 n.128 (citing B0017 ¶3). Dechert had represented DAVA as its primary outside corporate counsel for the entirety of its ten-year existence, including in multiple transactions and its incorporation in Delaware. Op. 7.

Under the Merger Agreement, DAVA's stockholders were entitled to receive in the aggregate up to $600 million in consideration, comprised of $575 million in cash at closing and contingent payments of up to $25 million. *Id.* In the aggregate, the Merger consideration exceeded over $700 per share. B0542 at n.16. To this day, no stockholder other than Plaintiff has questioned the fairness of the Merger consideration. And for good reason. All stockholders (including the Director Defendants) received the same consideration for their shares, had the same incentive to maximize value, and received a substantial return on their investment. For example, the Merger consideration paid to Plaintiff (approximately $1.14 million) yielded a return of more than 450% on its original investment.[3]

[3] Plaintiff made its initial investment in DAVA through a single purpose LLC, which Cirillo testified was about $250,000, long before the Merger was even contemplated. B0294 at 34:10-35:11; B0353-B0360. Within two months of its initial investment, Plaintiff received an initial distribution that approximated the amount of its initial investment plus a 25% preferred return. *Id.* The merger consideration represented pure profit.

C. DAVA's Stockholders Overwhelmingly Approve The Merger

Consummation of the Merger required both Board and stockholder approval. Op. 7-8. Because DAVA was a privately-held company with a finite number of stockholders, and because Endo wanted to close the Merger as quickly as possible, Dechert recommended that the Company obtain stockholder approval via written consents ("Written Consents"). *Id.* at 8.

Thereafter, Dechert prepared the Written Consents. *Id.* Dechert understood that DAVA's Board was relying on it to prepare and determine the proper form of the Written Consents. A0375. No one (at DAVA, Dechert, Endo or Skadden) raised any question regarding the validity of the Written Consents. Everyone involved in the transaction treated the Written Consents as valid, including Messrs. Moezinia and Tepper, in their capacities as officers and directors of DAVA.

DAVA had a total of 600,826.58 shares of common stock outstanding at the time of the Merger. Op. 8. Because approval of the Merger did not require unanimous consent, Dechert, in consultation with Tepper, decided to seek Written Consents from the nine largest stockholders first, because they held over 95% of the total shares outstanding. *Id.* Each of these stockholders signed both the Merger Agreement and a Written Consent approving the Merger. *Id.*

After execution of the Merger Agreement, Dechert worked with Tepper to obtain the consents from the remaining, "small" stockholders (including Plaintiff),

most of whom were DAVA employees. Op. 9. In the end, Tepper and Dechert were able to obtain Written Consents from thirty of the thirty-one stockholders, representing in the aggregate 99.7% of the total outstanding shares. *Id.* The lone exception was Plaintiff. *Id.*

D. The Director Defendants Rely On Dechert Regarding The Notice

Plaintiff first learned of the Merger on June 24, 2014, the day the Merger Agreement was executed and the deal was publicly announced. Cirillo immediately emailed Tepper: "Just seen the headlines[.] I guess that's great news[.] [C]an you bring me up". B0274.

The following day (June 25), Dechert inquired about DAVA's plans regarding the stockholders who had not signed the Merger Agreement. B0045. Dechert advised Tepper that, to the extent DAVA was unable to obtain consents from any of the "small" stockholders, DAVA would be required under Sections 228 and 262 of the Delaware General Corporation Law to mail them a notice informing them of the Merger Agreement and their associated appraisal rights. *Id.*; Op. 9-10.

Tepper responded by explaining that "[m]y plan would be to send the consent and [merger] agreement to everyone and ask them to sign. . . . If you provide signature pages for all the other individuals, I will get it going. I don't assume Cirillo will exercise appraisal rights, I just can't control him. He may very

well sign though." B0044. Dechert then advised Tepper that "if Cirillo signs the shareholder consent [to] the deal, he won't have appraisal rights" but "[i]f he does not sign, we will have to send him the notice . . . . We should plan on either getting his signature or sending him the notice within 10 days of yesterday's signing." B0043. In response, Tepper asked whether the "small guys" needed to sign the Merger Agreement itself (Dechert said "no") and, if not, whether he could hold off on sending them the Disclosure Schedules to the Merger Agreement (Dechert said "yes"). B0041-B0042. At Tepper's request, Dechert then prepared the remaining signature pages and sent them to Tepper, who, in turn, forwarded them to the remaining stockholders. B0027-28 ¶¶10-12; B0034-B0072; A0362.

Tepper sent Cirillo a copy of the Merger Agreement and Written Consent on June 26, along with a request that he sign on behalf of the Trust and return the signature page at his earliest convenience. B0278; A0288. On June 30, Dechert inquired about whether Tepper had made "any progress in having Cirillo sign the stockholders' consent" and "[i]f not we [Dechert] should probably get started on preparing the notice of appraisal rights (under 228 and 262 respectively) materials for him." B0271.

Tepper responded that he had not heard back or followed up with Cirillo but was planning on sending a follow-up to the two stockholders he had not heard back from (including Cirillo) to see if it "sparks anything." B0270. Tepper then sent a

reminder to Cirillo on July 1. Cirillo replied: "Hi sorry been tending to a family issue. I will go over everything tonight when back[.] [C]an u send me info on how my 1.5 pc[t] of dava got diluted to .27 of 1 pct[?] [T]hanks". Op. 10; B0276-B0277. Tepper supplied the requested information two hours later, providing "a chronology of the dilutive events that took place at the company." Op. 10; B0276. Other than information relating to the dilution of his stockholdings, Cirillo did not request any other information or raise any questions or concerns regarding the Merger Agreement or Written Consent. B0030-31 ¶21.

On July 2, Tepper exchanged emails with Michael Rosenberg, an associate at Dechert. In one email, Rosenberg expressed concern that sending the Notice to Cirillo could be "putting the gun in his hands" and suggested that Tepper call him directly to see if that could be avoided:

> Lewis,
>
> I was thinking, and will defer to your judgment on this, that maybe it makes sense to place a call to Cirillo directly. 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." Where a simple call asking him to get on Board [sic] with the Merger and sign the Consent, might have the desired outcome. I don't know how knowledgeable he is or how adverse to us he may be at this point but it's just a thought. At worst a call can do no worse than sending him the notice, which we'd have to do anyhow without the call.
>
> What do you think?

Op. 11; B0362.

As the Court of Chancery observed, Rosenberg, not Tepper, made this comment, and Rosenberg admittedly used a poor choice of words:

> [T]he plain language of Rosenberg's message . . . indicates that the email was intended as a suggestion that a phone call could facilitate the Trust's approval of the Merger and avoid the need to send the Notice. Nothing in the email suggests that Dechert did not know how to prepare a legally compliant notice, that Tepper should have questioned Dechert's competence on that matter, or that DAVA would not provide the Trust with the Notice when required to do so. Indeed, the record bears this out—within twenty-four hours of receiving Rosenberg's email, Tepper instructed him to get the Notice "ready to go."

Op. 34-35; B0078 (Tepper's "get those notices ready to go" email at 12:15 p.m. on July 3, 2014).

Dechert had begun working internally on a draft Notice a few days earlier. On July 2, Rosenberg asked Jay Buchman, a tax specialist at Dechert, to comment on the tax aspects of a draft of the Notice that would be sent to Cirillo. B0212. The precedent notice attached to Rosenberg's email contained no financial information. B0213-B0231.[4] On July 2, 2014, Buchman provided a number of

[4] Richard Goldberg, the Dechert partner in charge of the deal, testified that, after the complaint in this case was filed, he asked Rosenberg if Rosenberg was aware that a financial statement disclosure should have been included in the Notice. According to Goldberg, Rosenberg had explained that the Dechert precedents Rosenberg had reviewed did not include financial information

comments (all tax related) regarding the Notice, none of which referenced financial information or suggested the inclusion of such information in the Notice. B0233.

Later that day, Rosenberg sent an email to Richard Goldberg, the partner in charge of the deal, enclosing a draft of the Notice for Goldberg's review and comment:

> We are still in the hopes that we don't need these, but here are drafts of the Form of Notice and Appraisal Rights and the Letter of Transmittal for you to look over. Hopefully Lewis resolves everything with Cirillo and he signs the consent.

Op. 11; B0268. The following day (July 3), Goldberg provided his comments on the draft. He raised the following points:

> This says nothing about the merger agreement terms-price, escrow, 20 m holdback. Closing conditions. Check other precedents. Do they?

Op. 11; B0267. Rosenberg responded to Goldberg:

> Of the six precedents I looked at only one goes through in any detail the specific merger terms, the rest all just attach the Merger Agreement as an Annex, which I think works a bit cleaner.

Op. 11-12; B0267. Goldberg replied with a single question:

> So they don't mention the price[?]

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disclosure, and that Rosenberg had relied on those precedents when he drafted the Notice to be sent to Cirillo. A0349.

Op. 12; B0267.[5] Following this exchange, Dechert sent the draft Notice to Tepper, who asked whether he needed to sign the Notice and whether it needed to be mailed. B0075, B0078 ("Does this need to be mailed? Or does e-mail trigger the notice period for appraisal rights?"). Dechert responded:

> I am not certain as the statute doesn't specify, but I would mail it. I can have it done here if it makes your life easier, just need addresses for . . . Cirillo.

B0075. The only other questions Tepper asked in later emails were whether the Disclosure Schedules to the Merger Agreement were included with the Notice (Dechert responded that it did not believe so, *see* B0083) and how long Plaintiff had to exercise its appraisal rights under Delaware law. Dechert responded:

> I need to read the statute again carefully but I believe they have 20 days from the mailing of the notice we sent them to file a petition for appraisal.

B0082. On July 3, 2014, Tepper instructed Dechert to "get those notices ready to go." Op. 12; B0030 ¶22.

The Notice sent to Cirillo stated that the holders of a majority of DAVA's stock had approved the Merger by Written Consent on June 24, 2014. Op. 12; B0030 ¶20; B0078. The Notice also informed Plaintiff of its appraisal rights and

[5] Goldberg explained that Dechert's practice seemed to be to attach the Merger Agreement itself to the Notice. *See* A0356. Goldberg believed attaching the Merger Agreement to the Notice was technically sufficient to notify a stockholder of the merger price. *See id.*

included a Letter of Transmittal in the event Plaintiff decided to accept the Merger consideration. Op. 12.

Dechert finalized the Notice and Letter of Transmittal and forwarded them by FedEx to Cirillo on or about July 3. "Apparently mimicking Dechert's precedents, the Notice failed to include, among other things, any financial information relating to DAVA, any description of DAVA's business and its future prospects, and any information about how the Merger price was determined or whether the price was fair to stockholders." Op. 12. The issue of whether financial information should be included in the Notice was never raised or discussed at the time, either internally at Dechert or externally with Tepper or anyone else at DAVA (or Endo). A0285; A0348; A0356-57.

DAVA's three directors never discussed the contents of the Notice amongst themselves. Op. 12. Moezinia, who is not a lawyer (B0017 ¶3), entirely deferred to Tepper, as General Counsel, and to Dechert, as DAVA's outside corporate counsel, with respect to the drafting and mailing of the Notice. Op. 12-13. He had almost no interaction with Dechert, was not copied on the email exchanges Tepper had with Cirillo and Dechert, and he played no substantive role in connection with the drafting and mailing of the Notice. B0016-B0021.

Tepper, in turn, relied on Dechert. He had no expertise in Delaware mergers and acquisitions law. Tepper asked questions regarding timing and whether the

Disclosure Schedules needed to be sent along with the Notice. Neither he nor Moezinia directed Dechert to make changes to the Notice or accompanying materials. Op. 13.

The Court of Chancery observed: "[i]t also makes eminent sense that Tepper would assign responsibility for ensuring that the Notice complied with the requirements of Delaware law to the counsel specifically retained to advice the Company on the Merger." Op. 34. Simply put, Defendants played no substantive role in determining the form and content of the Notice. That was Dechert's job. Defendants: (i) retained Dechert because they reasonably believed, based on past experience and the firm's excellent reputation, that it was competent to ensure that the Merger complied with Delaware law; (ii) relied completely (and reasonably) on Dechert with respect to the form and content of the Notice; (iii) did not challenge or question the advice they received; and (iv) believed in good faith (as did Dechert) that the Notice complied with Delaware law. *See* testimony of Messrs. Goldberg, Moezinia and Tepper cited *infra*; B0029-32 ¶¶17, 18, 20, 23; B0018 ¶¶5, 6. The Court of Chancery concluded as follows:

> In sum, the record reflects that the Director Defendants reasonably relied on DAVA's corporate counsel to prepare the Notice in accordance with the requirements of Delaware law. Nothing in the record suggests that the Director Defendants knew or should have known that Dechert was not competent to prepare the Notice or that its legal advice concerning the contents of the Notice would end up being erroneous.

Op. 36.

On July 8, Cirillo acknowledged receipt of the Notice, indicated he was reviewing it with his lawyers, and asked if he could return the signature page the next day. Op. 13; B0282. On July 10, Cirillo emailed Tepper requesting that the signature page be changed to the "Cirillo Family Trust." Op. 13; B0281. Tepper promptly made that change and forwarded a new signature page to Cirillo. *Id.* Cirillo did not ask any other questions, make any other requests for information, or raise any concerns or objections at the time regarding the Notice. B0030 ¶21.

E. Procedural History

1. Plaintiff Files An Action In The Court Of Chancery And Loses On All Claims

Despite the indications that Cirillo would sign, Plaintiff never returned a signed Written Consent or Letter of Transmittal. Op. 13. Nor did Plaintiff (i) seek to enjoin the transaction; (ii) request additional information or immediately challenge the disclosures provided by DAVA in connection with the Merger; or (iii) exercise its statutory appraisal rights. *Id.*

Instead, Plaintiff waited until after the Merger closed on August 6, 2014, and then commenced this proceeding as a putative class action. Op. 14 n.64. During the litigation, Plaintiff pursued four unsuccessful strategies:

First, Plaintiff purported to bring claims on behalf of a putative class consisting of "every DAVA stockholder except for the Director Defendants." Op. 14 n.64. The Court denied the Trust's motion for class certification for failure to satisfy the requirements of Court of Chancery Rule 23, a ruling that the Trust did not appeal. *Id.*; *see* Dkt. 89 at 8-9; A0030.

Following the denial of class certification on January 11, 2016, despite the daunting economics of continued litigation and the reality that all of the other stockholders had consented to the Merger, the Trust pressed this case.[6]

Second, Plaintiff sought to invalidate the Written Consents. Op. 14. The Company responded with a counterclaim under 8 *Del. C.* § 205 seeking judicial validation of the Written Consents. Op. 15. In connection with its summary judgment rulings, the Court granted DAVA the relief it sought in the counterclaim. Op. 22-24. Plaintiff has not appealed this ruling.[7]

Third, Plaintiff attempted to demonstrate that DAVA's directors breached their fiduciary duties by failing to include sufficient information in the Notice. Op. 14-15. On July 11, 2018, following the completion of fact discovery, the Court of Chancery granted summary judgment in Defendants' favor and dismissed

[6] The Trust ultimately received $1,336,282.41 in merger consideration (including interest). Dkt. 171; A0068; B0294 at 34:10-35:11.

[7] The Court ultimately awarded Plaintiff $70,000 in attorneys' fees for conferring a corporate benefit on DAVA in connection with this judicial validation of the Written Consents. B0683.

Plaintiff's then-current claims. Op. 39. 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, and were protected from liability under both the exculpation clause in DAVA's certificate of incorporation and 8 *Del. C.* § 141(e) since they relied in good faith on the advice of counsel in connection with the drafting and dissemination of the Notice. Op. 27-29, 36-39. The Court emphasized that the issuance of warrants a year and a half prior to the Merger in connection with the refinancing of DAVA's outstanding debt and the Merger were not part of a unitary transaction. Op. 28.

Fourth, Plaintiff moved to amend the operative complaint to add certain claims, including an "improper dilution" claim relating to events that took place a year and a half before the Merger.[8] Op. 16. The Court of Chancery rejected that approach and denied leave to assert the "improper dilution" claim because that claim was derivative and Plaintiff had lost standing to pursue the claim when the Merger closed. Op. 41-47. Ultimately, the Court of Chancery denied all but one claim in Plaintiff's motion to amend the complaint – a due care claim against Tepper and Moezinia in their capacity as officers where Sections 102(b)(7) and 141(e) would not apply – but warned that the claim would likely fail. Op. 48-50.

[8] Critically, Plaintiff never brought a quasi-appraisal claim against DAVA or Endo, or moved to add such a claim.

Instead of heeding the Court's warning and dropping the case, Plaintiff asserted the one claim the Court permitted it to pursue. December 3, 2018 Stipulation and Order Entering Summary Judgment ("December Order") attached as Exhibit B to Appellant's Opening Brief. After attempting and failing to obtain discovery on allegations related to the disallowed "improper dilution" claim (and unrelated to the sole remaining claim), Plaintiff agreed to the entry of summary judgment in favor of Defendants. *Id.*

2. Plaintiff Files This Appeal

Plaintiff appealed certain summary judgment rulings in the July 11 Opinion, but it did not challenge the Court's decision with respect to the motion to amend. Plaintiff's brief describes many irrelevant allegations that took place years before the Merger or preparation of the Notice. It also includes many errors that Defendants raised with the Court of Chancery. For example:

Plaintiff asserts in conclusory fashion that DAVA's directors "used the Wachovia Loan as an excuse to appropriate to themselves and their affiliates much of the value of DAVA at the expense of other stockholders, including the Cirillo Trust" (OB at 7) by, among other things: (i) not shopping around for the best refinancing terms possible; (ii) failing to ask Plaintiff to participate in the refinancing; (iii) only dealing with people that Mr. Moezinia knew; and (iv) agreeing to issue warrants to the new lenders (all of which Plaintiff alleges –

incorrectly – were "individuals or entities that were affiliated with the Director Defendants"). OB at 8; *see also* OB at 7-13.

There are good and sufficient responses and defenses to each of these allegations, a number of which are squarely contradicted by the discovery record. For example, (i) the Wachovia loan had been in default for close to four years (A0144; A0264); (ii) in late 2012, DAVA was in significant distress (as evidenced by, among other things, Wachovia's willingness to sell its $50 million loan for $22.5 million);[9] (iii) Wachovia wanted out of the loan (and was threatening to foreclose, which would have forced DAVA into bankruptcy) but ultimately agreed to accept more than a 50% haircut on the outstanding principal despite DAVA's improved business outlook; (iv) DAVA received a valuation as of December 7, 2012 from an independent valuation firm (ValueScope), opining that DAVA's equity was worthless;[10] and (v) the Wachovia transaction, refinancing and issuance of warrants were approved by DAVA's board, comprised at the time of Messrs.

[9] DAVA's 2012 year-end audited financial statements revealed that as of December 31, 2012, DAVA had a working capital deficiency of approximately $24.365 million and a total stockholders' deficiency of $86.228 million. *See* B0496, B0500. The $22.5 million purchase price was the product of an arm's-length negotiation between Wachovia and the new lenders. A00273-274, A0291. DAVA was not even a party to the Loan Purchase Agreement. B406-B0436.

[10] Applying standard valuation methodologies, ValueScope valued DAVA's enterprise value at $30 million, less $84.421 million in debt and accrued settlement obligations. DAVA's equity value was thus, in ValueScope's opinion, deeply in the red as of December 2012. B0463-B0464.

Moezinia, Walter and John Klein.[11] But the Court need not delve into these details. Plaintiff did not appeal the Court of Chancery's decision on the motion to amend.

[11] Mr. Klein was not self-interested in the Wachovia transaction, refinancing and issuance of warrants, nor does Plaintiff allege otherwise. Mr. Moezinia was not self-interested due to his alleged "friendship" with Enrique Lerner. *See* B0540-B0547.

ARGUMENT

I. THE DIRECTOR DEFENDANTS WERE NOT SELF-INTERESTED IN CONNECTION WITH THE NOTICE OF APPRAISAL RIGHTS

A. Question Presented

Did the Court of Chancery correctly reject the claim that the Director Defendants were self-interested in the preparation of the Notice of Appraisal Rights and did it correctly conclude that the Director Defendants relied in good faith upon their outside counsel to prepare the Notice?

B. Scope of Review

The Court of Chancery's factual determinations, including those facts relating to the Directors Defendants' motives, are reviewed for clear error. *See Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012).

C. Merits of Argument

1. Plaintiff's Factual Assertion That The Director Defendants Were Self-Interested Never Became Part Of An Operative Complaint, And Plaintiff Did Not Appeal The Denial Of Leave To Amend

The Trust contends that the Director Defendants failed to include information in the Notice concerning the issuance of warrants to the Director Defendants (which became valuable after the Merger) and the challenged dilution because they were self-interested. *See* OB at 26-28. Critically, however, the Trust never presented these facts in the operative complaint before the Court on summary judgment, so they are not properly before this Court on appeal.

Plaintiff appealed from the Court's July 11, 2018 summary judgment ruling rejecting the allegations set forth in the then-operative complaint, Plaintiff's Verified Amended Class Action Complaint filed on February 23, 2015 (Dkt. 22) (the "Amended Complaint"). *See* A0006. The Amended Complaint alleges generally that the Notice was inadequate but makes no allegation that the Director Defendants were self-interested. *See* B0001-B0015. The Amended Complaint contains no facts or allegations relating to the warrants or the dilution events at DAVA. *See id.*

On January 13, 2017, the Trust sought leave to amend its complaint. In connection with that motion, the Trust filed its Proposed Verified Second Amended Complaint (Dkt. 130). *See* A0052; B0366-B0404. The Proposed Second Amended Complaint pled facts concerning the issuance of the warrants and the allegedly improper dilution for the first time. *Compare* Dkt. 22 *with* Dkt. 130; *see also* Op. 41-42 (noting that the Proposed Second Amended Complaint alleged that warrants were issued to the directors at below fair market value and that the Notice was improper in failing to disclose those warrants).

The Court of Chancery rejected the Trust's attempt to add allegations relating to the dilution and the warrants because the claims were derivative and the Trust lost standing as a result of the Merger. Op. 24, 41-45. The Court permitted

one technical amendment, but the Trust stipulated to and has not appealed from the entry of judgment against it on that claim. *See* OB at 24.

The Trust did ***not*** appeal the Court of Chancery's decision to deny leave to amend the Complaint.[12] If the Trust had attempted to appeal that portion of the Court of Chancery's ruling, the Trust would have addressed Court of Chancery Rule 15(a) in its Opening Brief. The Trust would have also addressed the appropriate standard of review applicable to the Court of Chancery's denial of leave to amend. Finally, the Trust would have argued the Court of Chancery's denial of leave to amend should be reversed. The Trust never did any of these things.

Because the Trust failed to appeal the Court of Chancery's decision to deny leave to amend the Complaint, this Court should not address that issue. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 n.1 (Del.

[12] The Trust included allegations concerning the dilution events and the warrants in its Verified Second Amended Complaint on August 14, 2018 (*see* A0074), even though the Court of Chancery denied leave to amend related to those subjects. Op. 45 ("It likewise would be futile to grant leave to amend Count II to add allegations that the Notice improperly failed to disclose information relating to the issuance of the Warrants and the Stock Options."). This was impermissible, so the allegations should have no force or effect.

2000) ("Appellants did not appeal from the dismissal of this claim, . . . so it will not be addressed.").

Because Plaintiff's entire argument concerning the Director Defendants' alleged self-interest depends on allegations Plaintiff was denied leave to assert, they are not before the Court. *See, e.g., Del. Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997) (concluding that "if [] discovery material does not find acceptance in the trial record, it forms no part of the record on appeal"); *In re Viking Pump, Inc.*, 148 A.3d 633, 677 (Del. 2016) (concluding that where an issue "has only been obliquely raised on appeal by one party . . . [it] has not been adequately raised on appeal and has been waived"); *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue for appeal.") (quoting *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)).

2. The Court of Chancery Properly Concluded That The Directors Were Not Self-Interested In Connection With The Notice

Even if the Court were to consider the factual allegations concerning the warrant and dilution events, it should affirm the Court of Chancery's conclusions regarding the Director Defendants' motives.

The Court of Chancery considered the extensive factual record and concluded that the Director Defendants were not self-interested. Op. 28-29. The

Merger was an arm's-length transaction with a third party. *Id*. The Director Defendants had the same financial incentive as any other stockholder in DAVA: to maximize the consideration received in the Merger. Their shares would be cashed out at exactly the same price that every other DAVA stockholder, including the Trust, would receive. Op. 29.

The Trust contends that DAVA's directors were self-interested because they received warrants issued in connection with a debt purchase in January 2013. Op. 6.[13] But the strategic review that led to the Merger did not begin until much later that year, the fall of 2013, and the Merger itself did not close until later the following year, August 2014. Op. 28. Citing the step-transaction doctrine,[14] the Court concluded that issuance of the warrants constituted a "transaction unrelated to the Merger." Op. 27-28 & n.114. The Court of Chancery further observed that the Trust itself conceded that the issuance of the Warrants "clearly was not" a preliminary step as part of the Merger. Op. 28 (citing Tr. 55-56 (Sept. 7, 2017)).

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[13] This is a false assertion. None of the directors received warrants. A company affiliated with one of the directors (Walter) *did* receive warrants as one of the new lenders that replaced Wachovia. The directors' interests (including Moezinia's and Klein's) were diluted to the same extent as the Trust. Op. 6; B0540-B0547.

[14] *See Noddings Inv. Grp., Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *6 (Del. Ch. Mar. 24, 1999) ("The [step transaction] doctrine treats the 'steps' in a series of formally separate but related transactions involving the transfer of property as a single transaction, if all the steps are substantially linked. Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan.") (citation omitted).

Plaintiff intimates that the Director Defendants failed to disclose the dilution and the warrants because they did want to disclose facts that might reveal their supposed misconduct. OB at 17-18. But there is nothing in the record suggesting that the Director Defendants harbored some ill-motive that led them to exclude references to those events. On the contrary, the record confirms that the Director Defendants disclosed these facts immediately when Cirillo asked about them. On July 1, 2014, before he even received the Notice, Cirillo wrote Tepper to ask how the Trust's "1.5pc [percent] of dava [sic] got diluted to .27 of 1pct." Op. 10. Later that day, Tepper provided the Trust with "a chronology of the dilutive events that took place at the company." *Id;* B0276.

In sum, the Court of Chancery correctly rejected any suggestion that the Director Defendants omitted information from the Notice because they had self-interested motives. The Trust comes nowhere close to identifying evidence sufficient to demonstrate that the Court of Chancery's findings regarding the Director Defendants' motives constituted clear error.[15]

[15] On review, this Court determines "whether the findings and conclusions of the Court [of Chancery] are supported by the record and are the product of an orderly and logical deductive process. If they are, whether or not reasonable people could differ on the conclusions to be drawn from the record, this Court must affirm." *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991) (citation omitted).

Accordingly, *Valeant Pharmaceuticals International v. Jerney*, 921 A.2d 732 (Del. Ch. 2007) and other authorities cited by Plaintiff are inapplicable. *Valeant* involved an entire fairness challenge to executive compensation decisions that were concededly self-interested. *Valeant*, 921 A.2d at 736. *Owen* involved an entire fairness challenge to a transaction approved by concededly conflicted directors. *Owen v. Cannon*, 2015 WL 3819204, at *29-32 (Del. Ch. June 17, 2015). *Encite* is also inapplicable. It stands only for the proposition that a defendant cannot invoke outside counsel's opinion as conclusive evidence of substantive fairness, a defense that has not even been raised here. *Encite LLC v. Soni*, 2011 WL 5920896, at *22 (Del. Ch. Nov. 28, 2011).

3. The Director Defendants Reasonably Relied On Outside Counsel

Even if the Director Defendants were self-interested in connection with the Merger and related Notice (they were not), the Court of Chancery's factual conclusion that they reasonably relied on outside counsel, who prepared the Notice and determined what DAVA needed to include in the Notice, should be affirmed.

8 *Del. C.* § 141(e) provides that a director should exercise "reasonable care" in selecting professionals, including its outside counsel. Pursuant to that statute, a director is "fully protected in relying in good faith" on "information, opinions, reports or statements" of experts that he or she "reasonably believes" fall within the scope of their "professional or expert competence." *Id.* The statute insulates a

director from personal liability if he or she was financially disinterested, acted in good faith, and relied on advice of counsel reasonably selected in authorizing a transaction. *Gagliardi v. TriFoods, Int'l, Inc.*, 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996).

The Court of Chancery correctly found that the Director Defendants satisfied each of these elements here: (a) the Director Defendants had the same financial interests as the other DAVA stockholders, namely to maximize the value of their shares; (b) there was no question ever raised with respect to their independence; and (c) they acted in good faith in selecting and reasonably relying upon DAVA's long-time corporate counsel, Dechert, with respect to preparation and dissemination of the Notice. Op. 37-38; *see also Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994) (finding that, even apart from Section 141(e), the fact that a corporate board relied upon experienced counsel "evidence[d] good faith and the overall fairness of the [deal] process").

In support of its conclusions, the Court of Chancery noted that DAVA had used Dechert as its primary outside counsel since its inception in 2004. Furthermore, none of the Director Defendants was an expert in Delaware mergers and acquisitions law. After reviewing the facts, including Dechert's professional reputation and extensive excerpts of deposition testimony submitted by the parties, the Court of Chancery concluded that it was reasonable for the Director

Defendants to believe that Dechert was competent to provide legal advice in connection with the Merger and to rely on Dechert to ensure compliance with the associated legal requirements, including 8 *Del. C.* § 262. Op. 32-33.

Tepper served as the Company's General Counsel from its inception until the Merger's consummation. The Court of Chancery concluded that the other Director Defendants reasonably relied on Tepper to draft and disseminate the Notice. Op. 34 (concluding that "it is logical that Walter and Moezinia would look to Tepper as the Company's General Counsel to oversee the legalities of providing notice of a transaction to stockholders"). The Chancellor further determined that it made "eminent sense that Tepper would assign responsibility for ensuring that the Notice complied with the requirements of Delaware law to the counsel [Dechert] specifically retained to advise the Company on the Merger." *Id*.

The Trust raises an e-mail written by an associate at Dechert, Michael Rosenberg, who suggested to Tepper that he might wish to call Cirillo directly to seek the Trust's approval for the Merger, because otherwise, simply sending the Notice would be "putting the gun in his hands." OB at 19; Op. 11; B0362. After reviewing all of the evidence, the Court of Chancery correctly observed that the Dechert associate authored the message, not Tepper. Op. 34. Moreover, even though the language of the message was inflammatory, it merely "suggested that a phone call could facilitate the Trust's approval of the Merger and avoid the need to

send the Notice." *Id.* Just a day later, Tepper instructed Dechert to "get those notices ready to go." Op. 12; B0030 ¶22.

After carefully reviewing the facts, the Court of Chancery correctly found that the exculpatory provisions in DAVA's certificate of incorporation[16] and 8 *Del. C.* § 141(e) applied. Op. 26-35; Op. 39 ("[G]iven the factual record before the court, the Director Defendants did not breach their duty of loyalty as a matter of law, so their good-faith reliance on Dechert insulates them from monetary liability.").

The Trust has offered no basis for this Court to diverge from these findings of fact. *See Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 438-39 (Del. 2000) (stating that it is appropriate to uphold the lower court's factual findings if they "are supported by the record and the conclusions are the product of an orderly and logical deductive process . . . whether or not [the Supreme Court] would have come to the same conclusions").

The Trust apparently hopes to convince this Court to adopt and apply an unprecedented higher and unbounded duty for directors to double-check the work of their outside counsel. *See* OB at 28 (requesting the Court to impose a rule that

[16] DAVA's certificate of incorporation contains a Section 102(b)(7) exculpatory provision. The Trust concedes this point, going so far as to state that any alleged violation of the duty of care relating to the Notice was exculpated by this provision. OB at 35.

the Director Defendants should be required to "take real steps to ensure that [] outside counsel include[s] in the Notice all information to which stockholders are entitled."). This would contravene both the language and spirit of the statute, which is designed to provide "full[] protect[ion]" for fiduciaries and requires only that outside counsel be "selected with reasonable care" and that the fiduciaries "reasonably believe[]" that outside counsel is acting within the bounds of their "professional or expert competence." 8 *Del. C.* § 141(e); *see also In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 60 (Del. 2006) (emphasizing that a "narrow reading of [Section 141(e)] would eviscerate its purpose, which is to protect directors who rely in good faith upon information presented to them from various sources").

II. PLAINTIFF NEVER SOUGHT TO BRING A QUASI-APPRAISAL CLAIM AGAINST THE CORPORATION, BUT EVEN IF IT HAD, THE CLAIM WOULD FAIL

A. Question Presented

Does 8 *Del. C.* § 262 identify all disclosure obligations of Delaware corporations in connection with appraisal rights, or should the Court impose additional, common law obligations on corporations that mimic those owed by the corporations' fiduciaries?

B. Scope of Review

Whether the Trust properly asserted and preserved a claim against DAVA and/or Endo (as opposed to the Director Defendants) turns first on the events giving rise to the purported claim; and second on whether the claim was preserved. *See Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004) (setting forth the standard of review for a statute-of-limitations question). The first stage of the inquiry involves findings of historical fact, which this Court reviews under the deferential clear error standard of review. *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012). The second stage of the inquiry involves *de novo* review of any questions of law. *USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 766 A.2d 462, 468 (Del. 2000); *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008). To the extent this Court concludes that it should reach the ultimate issue concerning the scope of disclosure requirements under Section 262(b)(2) as

applied to DAVA and/or Endo, it should review that question of law *de novo*. *Burrell*, 953 A.2d at 960.

C. Merits of Argument

1. Plaintiff's Request That The Court Extend The Law Of Appraisal Rights Is Not Properly Before This Court

a. Plaintiff Did Not Raise And Preserve Its Request To Extend The Law Of Appraisal Rights Before The Court of Chancery

The Trust had a number of opportunities to assert a claim against DAVA or Endo for disseminating a deficient Notice of Appraisal Rights.[17] But it never did so.

Plaintiff filed its initial Verified Class Action Complaint on September 11, 2014 (Dkt. 1); its Verified Amended Class Action Complaint on February 23, 2015 (Dkt. 22); its Proposed Verified Second Amended Complaint on January 13, 2017 (Dkt. 130); and its Verified Second Amended Complaint on August 14, 2018 (Dkt. 192). *See* A0001-A0094.

[17] The Trust's Opening Brief is not clear as to whether this purported claim or contention would be brought against DAVA or Endo, the entity that became DAVA's indirect parent after the Merger. *See, e.g.*, OB at 34 n.11.

Nowhere in any of these proposed or operative complaints did the Trust ever raise a claim alleging that either DAVA or Endo bore responsibility for the contents of the Notice. The Trust concedes as much. OB at 34 n.11 (conceding that it is "true that the Cirillo Trust had not [] 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").

Plaintiff's only excuse for failing to assert the claim against either DAVA or Endo is that "the [T]rust would have done so" "had the Court determined that such a cause of action existed." OB at 34 n.11. Apparently, Plaintiff believes it can by wait for the Court to identify and articulate legal claims and then assert them. This would turn fundamental principles of the litigation process on their head.

A plaintiff bears responsibility for investigating claims prior to commencing an action and including any non-frivolous claims it wishes to assert. *Halpern Family Prop. Inv., L.P. v. Anderson,* 2011 WL 3568342, at *1 (Del. Super. June 13, 2011) ("It is axiomatic that a plaintiff is the master of his complaint."); *Amalgamated Bank v. Yahoo! Inc.,* 132 A.3d 752, 797 (Del. Ch. 2016) ("A plaintiff generally is master of its complaint and can choose what it wants to plead."). To adopt the Trust's position and allow this new claim to proceed now—even though it was never asserted and never ultimately decided by the Court of Chancery for that precise reason—would transform the Court of Chancery from an

institution that adjudicates claims and defenses asserted by the parties into a forum that effectively provides legal advice to plaintiffs. That cannot be the law. *Bruno v. W. Pac. R.R. Co.*, 1984 WL 19477, at *2 (Del. Ch. Feb. 8, 1984) (finding that a request for the Court to opine on an issue outside the record asks "the Court to give legal advice which it cannot do" and stating that the Court would consider the issue only if a party "files an appropriate pleading to bring this issue properly before the Court"); *see* DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT R 3.10 (2008) ("A judge should not practice law."); *State v. Miller*, 2007 WL 2069821, at *1 (Del. Super. July 17, 2007) ("The Court cannot and will not give [a party] legal advice or guidance.").

The Trust had every opportunity to assert this claim in its three complaints. The Trust could have also attempted to preserve the issue following the Court of Chancery's July 11, 2018 Opinion. The Chancellor granted the Trust leave to amend its Complaint in some very limited respects without addressing whether the Complaint could be amended to include this new claim (because the Trust had never requested permission to do so). *See* Op. 40-51. Rather than ask the Court to clarify its opinion or request Defendants' consent to add the claim given footnote 168 of the July 11 Opinion, the Trust failed to take any steps to preserve this purported new claim.

Instead, the parties negotiated a stipulation which permitted the Trust to file a second amended complaint which did not raise any claim against DAVA or Endo. *See* July 18, 2018 Stipulation and [Proposed] Implementing Order, Dkt. 189. B0594-B0596; A0073. It is simply too late for the Trust to assert a claim in this Court that it never asserted or sought leave to assert below.

b. The Court of Chancery Properly Declined To Address Plaintiff's New Claim, A Decision That This Court Should Follow

Pursuant to Delaware Supreme Court Rule 8, this Court will consider "[o]nly questions fairly presented to the trial court." Del. Sup. Ct. R. 8. "We place great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal they did not fully present below." *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017).

Rule 8 contains a "narrow exception," which allows for review even when the question was not presented below "when the interests of justice so require." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017). But that narrow exception applies only "if [the Supreme Court] finds that the trial court committed plain error." *Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012).

The error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (explaining that the error must be a "material defect [] which [is] apparent on the face of the record; which [is] basic, serious and fundamental in [its] character, and which clearly deprive[s] an accused of a substantial right, or which clearly show[s] manifest injustice"); *see also Lum v. State*, 2018 WL 4039898, at *1 (Del. Aug. 22, 2018) ("Plain error is just that, an error so obvious and fundamental that it would be unjust not to take into account on appeal.").

Here, the record does not reflect plain error. In fact, the Trust does not even attempt to argue that the Court of Chancery committed plain error. Instead, the Trust argues that this Court should modify the law by extending a common law rule applicable to fiduciaries to a non-fiduciary corporation.

After the close of discovery and after substantial briefing on summary judgment, the Court of Chancery invited the parties to submit supplemental authority, but the Court of Chancery ultimately concluded that the question was merely an academic one. *See* Op. 47 n.168 ("Because the trust has not attempted to assert a claim against the successor entity under Section 262, [] the court expresses no definitive conclusion on this issue, which appears to be one of first impression."). The record is undeveloped, and the Chancellor was never afforded

an opportunity to reach a thoughtful ruling on this subject. The interests of justice militate against review of this novel issue.

2. Even If Plaintiff's Request To Extend Corporate Appraisal Obligations Were Properly Before The Supreme Court, It Lacks Merit

Section 262(d)(2) requires that a "constituent corporation" inform any stockholders entitled to appraisal rights "of the approval of the merger," inform them that "appraisal rights are available" and provide them "a copy of" the appraisal statute. The constituent corporation or the surviving or resulting corporation must also inform eligible stockholders of the "effective date of the merger" either prior to or after the consummation of the transaction. Section 262(d)(2) does not impose any additional notice requirements on stock corporations, and there are no other statutory notice obligations aside from those set forth in Section 262.

The Notice challenged here complied with all three disclosure requirements applicable under Section 262(d)(2). The Notice (i) informed stockholders of the Merger's approval; (ii) informed stockholders of their appraisal rights; and (iii) attached a copy of Section 262. On July 3, 2014, DAVA's counsel sent Cirillo the Notice confirming that the Merger had been approved by written consent. Op. 12. In accordance with the appraisal statute, "before the effective date of the" Merger,

the "constituent corporation" (here, DAVA) gave notice that the Merger "was approved pursuant to § 228 . . ." *Id.; see* 8 *Del. C.* § 262(d)(2).

Plaintiff would have this Court supplement this statutory disclosure regime by imposing a new common law requirement on corporations. But asking the Court to impose a new rule extending the General Assembly's carefully crafted legislative scheme invites impermissible legislation from the courts. *Williams v. Geier*, 671 A.2d 1368, 1385 n.36 (Del. 1996) (noting that "[d]irectors and investors must be able to rely on the stability and absence of judicial interference with the State's statutory prescriptions."); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 542 (Del. 1996) ("*Arnold IV*") ("If a monetary damage remedy is to be permitted against the corporate defendants in these circumstances, consideration of such a remedy is the province of the General Assembly. . . . It is not within the province of the courts to legislate a cause of action and a remedy under these circumstances.").

Plaintiff intimates that imposing this new disclosure duty on Delaware corporations would mimic a disclosure requirement already imposed on corporate fiduciaries as a matter of common law. But Delaware precedent "draw[s] a distinction between disclosure required under the Delaware General Corporation Law and the common law." Op. 47 n.168. *See Nebel v. Southwest Bancorp, Inc.*, 1995 WL 405750, at *6 (Del. Ch. July 5, 1995). *See also Gilliland v. Motorola,*

Inc. 859 A.2d 80, 86 (Del. Ch. 2004) ("*Gilliland I*") (distinguishing a "common law fiduciary duty of providing substantive, financial information relating to the value of the company" from the "statutory duty to apprise the stockholders of their right to an appraisal, the effective date of the merger, and to provide a copy of section 262.").

In *Gilliland I*, the Court of Chancery underscored this distinction. 859 A.2d at 86 (noting the "two-fold" disclosures, in particular the "statutory duty [] mainly to notify the stockholders of the merger and of their appraisal remedy" and the "common law fiduciary duty of providing substantive, financial information relating to the value of the company".

The entities obligated to act under Section 262(d)(2) are liable for any statutory violations. They are not fiduciaries and do not owe duties imposed on fiduciaries by the common law. *See Zirn v. VLI Corp.*, 681 A.2d 1050, 1059 (Del. 1996) (distinguishing statutory requirements for a "Notice of Merger filed pursuant to 8 *Del. C.* §§ 253 and 262" from "supplementary duties provided by common law").

3. Appropriate Remedies Were Available To The Trust

In an attempt to convince this Court to take the dramatic step of extending the law applicable to notices of appraisal rights, Plaintiff paints itself as having suffered a grievous wrong in need of a remedy. *See* OB at 42. As an initial matter,

there is nothing inequitable about the operation of DAVA's Section 102(b)(7) provision or Section 141(e). Furthermore, adequate and appropriate remedies were available to the Trust.

After the Company issued the Notice, Plaintiff did not seek to enjoin the transaction during the thirty-four days before closing. Nor did Plaintiff request additional information or immediately challenge the disclosures provided by the Company. If Plaintiff had done so, DAVA's directors would have identified the disclosure problem and would have supplemented the Notice.

Instead, Plaintiff waited to seek post-closing damages. Plaintiff knew that DAVA's directors might be exculpated, even if the Court ultimately determined that DAVA's directors breached their duty of care, but it made a tactical choice to take action after there was no possibility of a disclosure-based cure. *Arnold IV*, 678 A.2d at 5426) ("While section 102(b)(7) and charter provisions adopted thereunder will leave stockholders without a monetary remedy in some instances, they remain protected by the availability of injunctive relief.").

Plaintiff now finds itself in the same predicament faced by the plaintiff in *Arnold v. Society for Savings Bancorp, Inc.*, 1995 WL 376919 (Del. Ch. June 15, 1995) ("*Arnold III*"). Following an arm's-length, third-party merger, a Section 102(b)(7) provision shielded the target's directors from liability. *Id.* at *1. Arguing that exculpation would otherwise leave it without a remedy, the

stockholder pursued a quasi-appraisal claim against the surviving corporation and its parent. The Court of Chancery dismissed the claim. *Id.*

The Delaware Supreme Court affirmed, after noting that "the absence of a remedy for monetary damages is directly attributable" to the stockholders' decision to adopt a Section 102(b)(7) provision and emphasized the availability of an injunction or corrective disclosures at an earlier stage of the proceedings. *Arnold IV*, 678 A.2d at 541-42. Indeed, as the Court of Chancery acknowledged, plaintiff knowingly forfeited any post-closing quasi-appraisal damages remedy by choosing to invest in a company with a 102(b)(7) provision in its certificate of incorporation. *Arnold III*, 1995 WL 376919, at *8 ("The stockholders of [the corporation] gave up their right to compensation for good faith breaches of duty by their directors. That was their choice.").

The Trust complains that its holdings were diluted prior to the merger. OB at 17. But the Trust learned that its holdings were diluted (and why) before it even received the Notice. Op. 10; B0276. It also obtained a copy of the Merger Agreement. Op. 10; B0278. Finally, it received the Notice thirty-four days before closing. Dkt. 173; A0069; B0566; *see* OB at 22 ("On July 8, Cirillo acknowledged receipt of the Notice, indicated he was reviewing it with his lawyers, and asked if he could return the signature page the next day."). The Trust never requested more information, never sought an injunction and never demanded appraisal.

Now, having failed to request additional information, seek an injunction or exercise its right to appraisal, the Trust seeks a remedy for its own failure to seek other relief that was plainly available. The Trust should not be granted relief from its own strategic decisions. *See Arnold IV*, 678 A.2d at 542 ("[E]quitable remedies not involving monetary damages are also permitted. Thus, an injunction or corrective disclosure was an available remedy at an early stage of these proceedings. The mere fact that these remedies were found unavailing does not mean that there should now be a finding of money damages against the corporate defendants."); *Williams*, 671 A.2d at 1385 ("The remedy is not to ask this Court to fashion some *ad hoc* 'relief' for [the stockholder]. If we were to engraft here an exception to the statutory structure and authority in order to accommodate [plaintiff stockholder's] objection to this result, we would be engaging in impermissible judicial legislation.").

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Chancery's rulings below.

/s/ A. Thompson Bayliss
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