

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

57

August 28, 2000

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RE: Harry Lewis v. Milton H. Ward, et al.
Civil Action No. 15255
Date Submitted: April 25, 2000

Gentlemen:

Pending are motions to dismiss the derivative complaint and to stay discovery. This is the Court's decision on those motions. My apologies to counsel for the delay in issuing this Letter Opinion.

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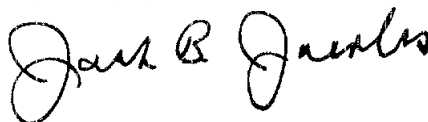
‘The basis for the motion to dismiss is that Amax Gold, Inc., the company that is the beneficial plaintiff in this action, was acquired in a merger in which Kinross Gold Corporation, through a subsidiary, became the sole shareholder of Amax Gold, Inc., and the shareholders of Amax Gold, Inc. became shareholders of the acquiring corporation. Under Delaware law the effect of such a merger is normally to deprive a shareholder of the merged corporation of standing to maintain the derivative action. Lewis v. Anderson, Del. Supr., 477 A.2d 1040 (1984). The defendants contend that the Kinross Merger had that effect here and as a result, dismissal of this action is required.

Unless this case falls within one of two exceptions articulated in Lewis v. Anderson ~~supra~~ the defendants are correct and that they have pled facts that bring this case within the exception “where the merger itself is the subject of a claim of fraud, being perpetuated merely to deprive the plaintiff of derivative standing.” Id., 477 A.2d at 1046, n. 10. On that basis, the plaintiffs contend, the motion to dismiss must be denied, as also should be the defendants’ pending motion to stay the plaintiffs’ discovery.

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The difficulty with the plaintiffs' position is that the complaint does not plead facts from which it could be reasonably inferred that the defendants perpetrated the merger merely to deprive the plaintiff of derivative standing. Because the plaintiffs' brief suggests that the plaintiffs may be able to plead such a claim, however, the defendants' motion to dismiss will be granted with leave to amend. Because the case will be dismissed subject to the filing of an amended pleading, there is at present no procedural basis for the plaintiffs to go forward with discovery. Accordingly, the defendants' motion to stay discovery is granted pending the filing of an amended complaint. IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink that reads "Jack B. Jacobs". The signature is written in a cursive, slightly slanted style.

cc: Register in Chancery