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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SANTOSH GEORGE KOTTAYIL, individually and as Trustee of the SANTOSH GEORGE KOTTAYIL TRUST U/A/D DECEMBER 19, 2007; TED KOTTAYIL MANI; THURUTHEL VARKEY MANI; and SUMA KRISHNAN, *Plaintiffs/Appellants/Cross-Appellees*,

v.

INSYS THERAPEUTICS, INC., a publicly traded Delaware corporation, *Defendant/Appellee,*

INSYS PHARMA INC., fka Insys Therapeutics, Inc.; JOHN N. KAPOOR, individually and as Trustee for, and on behalf of, the JOHN N. KAPOOR TRUST DATED 9/29/89; MICHAEL L. BABICH and JANE DOE BABICH, husband and wife; BRIAN TAMBI and JANE DOE TAMBI, husband and wife; STEVE MEYER and JANE DOE MEYER, husband and wife; and RAO AKELLA and JANE DOE AKELLA, husband and wife, *Defendants/Appellees/Cross-Appellants.*

No. 1 CA-CV 15-0765
FILED 8-29-2017

Appeal from the Superior Court in Maricopa County
No. CV2009-028831
The Honorable John Christian Rea, Judge

AFFIRMED

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MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Patricia K. Norris[1] and Judge Paul J. McMurdie joined.

J O N E S, Judge:

¶1 Appellants George Kottayil, Ph.D., individually and as trustee of the Santosh George Kottayil Trust, together with family members Ted Kottayil Mani, Thuruthel Varkey Mani, and Suma Krishnan (collectively, Kottayil) appeal, and Cross-Appellants Insys Pharma, Inc., John N. Kapoor, Ph.D., individually and as trustee of the John N. Kapoor Trust, Michael Babich, Brian Tambi, Steve Meyer, and Rao Akella cross-appeal, the judgment entered following a bench trial upon claims arising

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[1] The Honorable Patricia K. Norris, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

from Kottayil's involvement as an employee, officer, and shareholder of Insys Pharma, Inc.[2] For the following reasons, we affirm.

FACTS[3] AND PROCEDURAL HISTORY

¶2 In September 2009, Kottayil filed the underlying lawsuit after his ownership interest in Insys was virtually eliminated in a reverse stock split (the 2009 Reverse Stock Split). The matter proceeded to a bench trial beginning in December 2014, wherein the trial court considered whether the members of Insys's Board of Directors, which included Kapoor,[4] Babich, Tambi, Meyer, and Akella (collectively, the Director Defendants), violated their fiduciary responsibilities to Kottayil, a minority shareholder, in approving the 2009 Reverse Stock Split and an earlier debt-to-equity conversion (the 2008 Conversion).[5] The facts adduced at trial are as follows:

¶3 Insys is a Delaware corporation with its principal place of business located in Chandler, Arizona. Insys was formed in late 2002 by Kapoor and Kottayil, with the understanding that Kapoor would provide the funding and Kottayil would handle the operations and provide the science. Insys's original focus was on discovering, developing, and commercializing products and delivery systems to improve the clinical outcome of existing drugs, including those used to treat chemotherapy-induced nausea and vomiting, pain management, and central nervous

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[2] In October 2010, the original corporation, then known as Insys Therapeutics, Inc., entered into a merger agreement with NeoPharm, Inc. Thereafter, Insys Therapeutics changed its name to Insys Pharma, and NeoPharm changed its name to Insys Therapeutics. However, all actions relevant to this appeal were taken by the original corporation. For ease of reference, we refer to that corporation simply as Insys. When necessary, we refer to the merged corporation as New Insys.

[3] We review the facts in the light most favorable to upholding the trial court's judgment. *Great W. Bank v. LJC Dev., L.L.C.*, 238 Ariz. 470, 473 n.1, ¶ 1 (App. 2015) (citing *Bennett v. Baxter Grp.*, 223 Ariz. 414, 417, ¶ 2 (App. 2010)).

[4] Kapoor was sued individually and as trustee of the John N. Kapoor Trust, the controlling stockholder of Insys. For ease of reference, these parties are collectively referred to as Kapoor.

[5] Although other claims and counterclaims were presented to the trial court, they are not relevant to the issues presented on appeal.

system disorders. Both men served on the Board of Directors, and Kottayil acted as the corporation's president. Initially, Kottayil received 106,250 shares, equal to 12.5% of Insys. Pursuant to an Equity Incentive Plan (EIP), Kottayil was granted the opportunity to earn an additional 12.5% if, within three years, he: (1) diligently pursued licensure of a Misoprostal product to treat periodontitis; and (2) secured for Insys a patent application for a "thermo vaporizing device." The parties also entered into a stockholders' agreement governing the terms and conditions of their ownership of Insys common stock. Kapoor made his first $1 million loan to the corporation, with the understanding that he would make additional loans as needed to continue operations, and Insys began operations.

¶4 Over the first three years, Kapoor loaned Insys a total of $3.7 million while Insys focused on developing a sublingual fentanyl, a testosterone gel, and a room-temperature-stable "hard gelatin" formulation of dronabinol. By the end of the three-year term, Kottayil had not completed the conditions outlined in the EIP, so he entered into an agreement with Kapoor granting him an additional 5% ownership interest in Insys in exchange for a waiver of any claim to the other 7.5% available under the EIP. In July 2005, Kottayil projected that the hard-gel dronabinol would be approved by the U.S. Food and Drug Administration (FDA) for launch by October 2006 and the sublingual fentanyl would follow soon thereafter. Kapoor gave the go-ahead for both projects and loaned Insys an additional $12.3 million. Insys also continued to explore other delivery methods for dronabinol.

¶5 In September 2006, Insys applied to the FDA for approval of the hard-gel dronabinol. At the time, Kottayil predicted Insys would receive approval for the product within a year and projected it would launch by the end of 2007.

¶6 While development of sublingual fentanyl continued, Insys began preparing for an initial public offering (IPO) in early 2007. Insys acknowledged in its Form S-1 Registration Statement to the Securities and Exchange Commission (SEC) that its success was "highly dependent" on the success of the hard-gel dronabinol and sublingual fentanyl projects. The IPO preparations included significant changes in Insys's corporate structure; Kottayil was asked to resign from the Board and his position as president of Insys to make room for additional, independent participants. He thereafter assumed the role of Chief Scientific Officer (CSO).

¶7 In April 2007, the FDA advised Insys of thirty-eight major deficiencies in its request for approval of the hard-gel dronabinol. In

response, Kottayil expressed confidence that the FDA's concerns would be addressed satisfactorily and would not inordinately delay the product's approval. At the same time, Insys had completed two Phase 1 clinical trials of sublingual fentanyl with positive results. Insys management described the event as "a tremendous milestone" that added "significant value" to the company and reported that Phase 3 trials would begin in October 2007. Insys thus continued to pursue an IPO, and, in late 2007, underwriters estimated the company was worth between $150 and $200 million.[6]

¶8 Kapoor loaned Insys an additional $22 million between May 2007 and February 2008. In August 2007, Kottayil was removed as CSO and appointed Executive Vice President of Technology, but he made little, if any, contribution to Insys thereafter. By May 2008, with the assistance of an outside consultant obtained by Insys, the problems with the application for the hard-gel dronabinol were downgraded to minor deficiencies, and commercial production began in preparation for launch. Kapoor loaned Insys an additional $3.1 million.

¶9 Meanwhile, the financial market continued to decline, and all efforts to obtain alternate financing were unsuccessful. To permit Insys to continue operations, Kapoor agreed to convert a significant portion of the more than $40 million debt owed to him by Insys into equity. As part of this 2008 Conversion, Insys engaged Wealth & Tax Advisory Services, Inc. (WTAS) to value the company. After discussing revenue and expense projections with Insys management, WTAS applied an income approach with a discounted cash flow analysis to reach a per-share value of $1.73. The Board then approved the 2008 Conversion at that price. After Kottayil executed a consent and waiver to the transaction, almost fourteen million additional shares were issued to Kapoor. Following the Conversion, Kottayil continued to own the same number of shares as before the Conversion, but his percentage of stock ownership decreased to approximately 4.83%.

¶10 Soon thereafter, two other companies announced the launch of the same dronabinol product Kottayil had begun working on six years earlier. In August 2008, Insys terminated Kottayil and reduced its workforce to a total of thirteen employees. The following month, the IPO was officially abandoned. Insys reported that although it needed capital, funding options had further declined because of general market conditions

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[6] During the IPO preparations, Kottayil, with Insys's permission, transferred a portion of his shares to Ted Mani, Thuruthel Mani, and Krishnan.

in 2008, and the company suggested a potential liquidity event could occur in early 2009.

¶11 Despite these concerns, Insys continued operations. Kapoor loaned the corporation an additional $4 million between January and May 2009. In May 2009, the FDA advised the hard-gel dronabinol would likely never be approved, but Insys was already poised to seek FDA approval of other dronabinol delivery methods, including a soft-gel capsule, spray, syrup, injection, and inhaler. Additionally, anecdotal evidence from the Phase 3 sublingual fentanyl trials indicated the product was efficient, effective, and produced few side effects compared to similar products, and several companies expressed interest in working with Insys to develop and expand their products. Based upon this information, Insys predicted FDA approval of sublingual fentanyl in mid-2011. Thus, Insys remained largely optimistic about its ability to "ride out" the recession.

¶12 But by June 2009, Insys was again in immediate need of additional funding, and Kapoor advised he would not continue to contribute unless he owned Insys in its entirety. Having failed to obtain an alternate source of financing, the Director Defendants unanimously approved a 1.5-million-to-1 reverse stock split of Insys's common stock.[7] Kottayil was notified that, as a result of the 2009 Reverse Stock Split, he was left with a fractional share which, pursuant to Insys's amended certificate of incorporation, had been cancelled. However, Insys, through Kapoor, would pay "fair market value," or ten cents per share, of Kottayil's pre-transaction ownership interest. Under this arrangement, Kottayil would have received a total payout of $143,858.30.

¶13 Kottayil objected to the 2009 Reverse Stock Split, begged Kapoor to rescind the transaction, and, later, requested information to support the ten-cent share price. Insys did not produce a formal valuation to support this price. In fact, when asked by another employee if a valuation would be performed prior to cancellation of the shares, Babich advised "[w]e will probably just use .10 cents or so," which is what Kapoor later testified he "felt the company was worth." Insys later attempted to justify the price by emphasizing that the company had not generated any revenues as of that date, had no expectation of doing so for at least two more years, owed over $20 million to Kapoor, had recently shut down

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[7] A reverse stock split reduces the total number of a corporation's shares "by calling in all outstanding shares and reissuing fewer shares having greater value." Black's Law Dictionary (10th ed. 2014).

certain research and development operations to decrease costs, and had been unable to raise the capital necessary to continue operations in light of Kapoor's purported refusal to continue his funding. Nonetheless, shortly after receiving Kottayil's complaint, Insys offered to: (1) rescind the 2009 Reverse Stock Split as to Kottayil; and (2) grant Kottayil the right to purchase additional shares at ten cents each. Kottayil declined the offer to regain his ownership interest in Insys and elected instead to pursue his lawsuit.

¶14 During the subsequent litigation, the FDA approved and New Insys successfully launched both the soft-gel dronabinol and sublingual fentanyl — nearly a decade after Insys's inception and not before Kapoor infused an additional $42 million into the corporation. New Insys completed its IPO in May 2013, offering four million shares, of approximately twenty million outstanding, at eight dollars per share. By March 2014, the estimated worth of New Insys was almost $1.7 billion.

¶15 Following a twenty-day trial beginning in December 2014, the trial court found in favor of the Director Defendants as to Kottayil's claims for breach of fiduciary duty arising out of the 2008 Conversion, but in favor of Kottayil regarding his claims arising out of the 2009 Reverse Stock Split. The court determined Insys was worth $151.5 million at the time of the 2009 Reverse Stock Split and awarded Kottayil the value of his 4.83% ownership interest — $7,317,450 — plus interest and costs. The court denied Kottayil's request for enhanced damages and attorneys' fees. Kottayil timely appealed, and Appellees timely cross-appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)[8] and -2101(A)(1).

DISCUSSION

I. The Trial Court Did Not Err by Dismissing Kottayil's Fraud Claims.

A. Kottayil's Fraud and Breach of Fiduciary Duty Claims Were Not Duplicitous.

¶16 Kottayil argues the trial court erroneously dismissed his fraud claim as duplicative of his claim for breach of fiduciary duty. We review an order granting a motion to dismiss *de novo*. *Cafe Valley, Inc. v. Navidi*, 235

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[8] Absent material changes from the relevant date, we cite a statute's current version.

Ariz. 252, 254, ¶ 6 (App. 2014) (citing *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012)).[9]

¶17 Under Delaware law,[10] claims that merely "recast[] claims for a breach of fiduciary duty under the heading of [] fraud" are subject to dismissal as unnecessary and duplicitous. *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 643 (Del. Ch. 2013) (applying the reasoning set forth in *Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1235-37 (Del. Ch. 2001), *rev'd on other grounds*, 817 A.2d 149 (Del. 2002), that a common law fraud claim based upon an "implied false representation of fact [arising from an unfair corporate transaction] . . . strain[s] the tort of fraud for no useful purpose," to preclude claims of constructive fraud that do not form the basis of "a separate, independent tort"). However, claims of fraud and breach of fiduciary duty, even when premised upon the same general course of conduct, do not always subsume each other. Success upon a common law fraud claim requires proof of the additional elements of the defendant's intent to induce action by the plaintiff and plaintiff's reasonable reliance upon the representations; it does not require proof of a fiduciary or special relationship. *See In re Wayport Litig.*, 76 A.3d 296, 315, 327 (Del. Ch. 2013) (discussing the elements of breach of fiduciary duty and common law

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[9] Because the appellate standard of review is a matter of procedure, *State v. Forde*, 233 Ariz. 543, 575-76, ¶ 146 (2014) (citations omitted), it is governed by Arizona law, *see Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 206 (1992) ("Procedural matters are generally governed by the law of the forum state.") (citing Restatement (Second) Conflict of Laws § 122 (1971)).

[10] None of the parties assert error as to the trial court's choice of law in this matter. Because the parties have treated all issues as arising under Delaware law, and there is a basis to do so, we likewise apply Delaware substantive law throughout. *See Aztar Corp. v. U.S. Fire Ins.*, 223 Ariz. 463, 469 n.4, ¶ 18 (App. 2010) (finding the parties' failure to assert a choice of law issue waived the issue on appeal) (citations omitted); *Bryant v. Silverman*, 146 Ariz. 41, 44 n.2 (1985) (declining to consider the application of law of states potentially implicated by a dispute but not identified or argued by the parties); Restatement (Second) Conflict of Laws § 302(2) (1971) ("The local law of the state of incorporation will be applied to determine [issues involving the rights and liabilities of a corporation], except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties . . . ."), *cited with approval by Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 500-01 (1996).

fraud); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 132 (Del. Ch. 2004) (sustaining fiduciary duty and common law fraud claims with the success of those claims against the particular defendants "critically hing[ing] on the complaint's ability to plead scienter against the various defendants as to various time periods").

¶18 Therefore, pursuant to Delaware law, where proof of different facts is required under the particular circumstances of a case, common law fraud and breach of fiduciary duty claims may be maintained simultaneously. *See, e.g.*, *Metro Commc'n*, 854 A.2d at 146, 153. Whether a fraud claim is duplicitous of one for breach of a fiduciary duty requires a careful examination of the allegations of the complaint. *See, e.g., Parfi*, 794 A.2d at 1235 (considering the specific allegations of the complaint in determining the minority shareholder failed to state a separate fraud claim).

¶19 Kottayil argues his fraud claim differed materially from his breach of fiduciary duty claim and the Director Defendants would be liable for their misconduct even absent a fiduciary relationship. We agree.

¶20 Kottayil alleged the Director Defendants breached their fiduciary duties in connection with the 2008 Conversion and the 2009 Reverse Stock Split by: (1) failing to disclose and/or concealing material facts regarding the proposed transactions; (2) failing to give Kottayil appropriate notice; (3) approving a stock price that did not represent the fair value of the shares; (4) failing to establish a committee of independent board members, to employ an independent appraiser, or to seek advice from independent counsel; (5) falsely representing they had performed due diligence; and (6) failing to advise Kottayil of certain rights as a minority shareholder.

¶21 In contrast, to support his separate fraud claim, Kottayil alleged the Director Defendants had promised him he would continue to maintain his equity interest in Insys "at not less than 12.73% if he worked and developed products for the Company." He further alleged the Director Defendants made this promise knowing it to be false and to induce Kottayil to continue to work and create value for Insys — right up until the "path to profits was clear," at which time they, instead, "wrongfully diluted . . . and then wrongfully eliminated" Kottayil's interest in and association with Insys "pursuant to the Defendant Kapoor's preexisting plan." Kottayil also alleged he reasonably relied upon those false representations and suffered damages as a result.

¶22 As the foregoing summary demonstrates, Kottayil alleged elements necessary to separate his claim for breach of fiduciary duty from a claim of common law fraud — that the Director Defendants acted with the requisite scienter and he reasonably relied upon their misrepresentations to his detriment. Moreover, the promise of a continued ownership interest, if proven to have been false at the time of its making and reasonably relied upon by Kottayil, is actionable notwithstanding the speaker's status as a fiduciary. Kottayil's claim of fraud was not premised upon equitable considerations that overlapped those embodied within the fiduciary duty claims, as was the case for the fraud claims dismissed in *Wayport*, *Parfi*, and *Carsanaro*. Accordingly, we conclude Kottayil did not present a duplicitous claim, and the trial court should not have dismissed count three of the Second Amended Complaint on the basis of duplicity.

B. Kottayil Ultimately Failed to State a Claim for Fraud.

¶23 Appellees argue we should nonetheless affirm the trial court's dismissal of Kottayil's fraud claim because he failed to plead his fraud claim with sufficient particularity, given he did not allege "a consequent and proximate injury" arising from the purportedly fraudulent conduct. *See* Del. R. Civ. P. 9(b) (requiring that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . be stated with particularity"); *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) (citing *Nutt v. A. C. & S., Inc.*, 466 A.2d 18, 23 (Del. Sup. Ct. 1983)); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992) (including "damage to the plaintiff as the result of [his] reliance" as an element of a common law fraud claim) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)). The sufficiency of Kottayil's pleading under Delaware law[11] presents a question of law, which we review *de novo*. *See Coleman*, 230 Ariz. at 356, ¶ 8.

¶24 Kottayil based his fraud claim upon allegations that the Director Defendants falsely represented to Kottayil that he had, and would continue to maintain, a substantial equity interest of not less than 12.73% if he continued to work for and develop products for Insys. The damage sought in relation to this conduct was the fair value of 12.73% of Insys's stock "at the highest intervening value of that Company through the date of entry of judgment." However, as Appellees correctly note, Kottayil did not allege his reliance upon the purported misrepresentations caused him

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[11] Although Appellees cite Arizona cases in support of their argument, Delaware also requires a plaintiff to prove the fraudulent representation caused the plaintiff's damages. *Compare Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 156, ¶ 53 (App. 2009) (citations omitted), *with Browne*, 583 A.2d at 955.

to lose his interest in Insys. Rather, Kottayil asserted his acts in reliance upon those representations resulted in his "creating value for the Company." Because Kottayil did not allege, nor describe with the requisite particularity, how his continued employment and professional efforts on Insys's behalf caused the damages he alleged — namely, the loss of his ownership interest — he failed to state a claim for fraud. The record therefore reflects dismissal of Kottayil's fraud claim was appropriate, and we find no error. *See also Hannosh v. Segal*, 235 Ariz. 108, 111, ¶ 4 (App. 2014) ("We can affirm the trial court's dismissal [of a complaint for failure to state a claim upon which relief may be granted] if correct for any reason.") (citing *Dube v. Likins*, 216 Ariz. 406, 417 n.3, ¶ 36 (App. 2007)).

II. The Trial Court Did Not Err in Concluding the 2008 Conversion was Entirely Fair.

¶25 Delaware applies an "entire fairness" standard when reviewing whether corporate action taken at the direction of interested parties violates fiduciary duties to other shareholders. *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012) (citations omitted). That standard places the burden of persuasion on defendants to show the transaction was entirely fair. *Id.* The Delaware Supreme Court has described "the dual aspects of entire fairness" as follows:

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (citations omitted); *see also Ryan v. Tad's Enters.*, 709 A.2d 682, 689 (Del. Ch. 1996) (holding that, under the entire fairness standard, "the Court will carefully scrutinize the board's actions to ascertain whether the board instituted measures to ensure a fair process, and whether the board achieved a fair price for the disinterested stockholder minority") (citation omitted).

¶26 However, the two prongs — process and price — are inextricably intertwined, as the duty to deal fairly prohibits a process that

"permit[s] or facilitate[s] the forced elimination of the minority stockholders at an unfair price." *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 899 (Del. Ch. 1999) (quoting *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1335 (Del. Ch. 1987)). Thus, "[t]he doctrine of entire fairness does not lend itself to bright line precision or rigid doctrine." *Nixon v. Blackwell*, 626 A.2d 1366, 1381 (Del. 1993)). Rather, application of the entire fairness test requires examination of the totality of circumstances surrounding the transaction. *See Weinberger*, 457 A.2d at 711 ("[T]he test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.").

¶27 Although Kottayil has not argued on appeal that the trial court's factual findings are unsupported by the record, he nevertheless argues the court misapplied the entire fairness standard in concluding the Director Defendants did not breach their fiduciary duties with respect to the 2008 Conversion. In doing so, Kottayil first argues the court did not make findings regarding several factors that indicated the Conversion was not procedurally fair. These factors include: (1) the composition and independence of the Board; (2) whether the Board engaged a special committee or independent advisors; (3) the timing and initiation of the transaction; (4) whether the minority shareholders' position was adequately represented; and (5) whether the Board and the shareholders were provided meaningful and necessary disclosures.

¶28 Under Delaware law, however, perfection is neither "'possible, [n]or expected' as a condition precedent to a judicial determination of entire fairness." *Cinerama*, 663 A.2d at 1179 (quoting *Weinberger*, 457 A.2d at 709 n.7). Thus, no one factor is dispositive. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117-20 (Del. 1994) (recognizing the appointment of a special committee does not necessarily make the procedure fair); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 65 (Del. Ch. 2013) ("The failure to condition the deal on a vote of the disinterested common stockholders is likewise not evidence of unfairness; it simply deprives the defendants of otherwise helpful affirmative evidence of fairness."); *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 751 (Del. Ch. 2007) (declining to defer the court's duty to determine the fairness of a transaction to an expert hired to give advice); *Jackson Nat'l Life Ins. v. Kennedy*, 741 A.2d 377, 391 n.29 (Del. Ch. 1999) (noting failure to provide notice "will not alone be dispositive of a breach of a fiduciary duty of loyalty, but will be weighed with all other evidence offered that the disputed transaction was structured to deny [the shareholder] the fair opportunity to exercise its rights"); *Equity-Linked Inv'rs, L.P. v. Adams*, 705 A.2d 1040, 1056-57 (Del. Ch. 1997) (acknowledging

the board failed to negotiate with shareholders before approving a transaction, but nonetheless concluding the board acted reasonably); *Cinerama*, 663 A.2d at 1142 (stating reliance upon experts is only one factor in evaluating fair process).

¶29 Nor does Kottayil cite any authority suggesting the trial court committed reversible error when it did not make findings on all possible factors. Even Delaware courts constrain themselves to discussion of only relevant factors. *See, e.g., Gesoff v. IIC Indus.*, 902 A.2d 1130, 1145 (Del. Ch. 2006) (declining to provide "[a] comprehensive discussion of all the possible ways to prove fair dealing" and focusing, instead, on the factors "of importance in this case"). The Director Defendants requested findings of fact and conclusions of law, *see* Ariz. R. Civ. P. 52(a), and both parties collectively submitted over five hundred pages of proposed findings for the court's consideration. Had the court been persuaded by Kottayil's position, it need only have adopted the corresponding findings he presented. Because the court elected not to do so, "we must presume that the court found either that the refused requested findings were not warranted by satisfactory evidence or were immaterial." *Golden Eagle-Bobtail Mines, Inc. v. Valley Nat'l Bank*, 60 Ariz. 400, 406 (1943) (quoting *Walker v. Smith*, 42 P.2d 768, 769 (N.M. 1935)).

¶30 Although we generally review the application of law to facts *de novo*, *see, e.g., Trust v. Cty. of Yuma*, 205 Ariz. 272, 274, ¶ 7 (App. 2003) (citing *Hobson v. Mid-Century Ins.*, 199 Ariz. 525, 528, ¶ 6 (App. 2001)), Kottayil essentially asks this Court to reconsider the weight and relevance the trial court assigned to the factors it considered in evaluating fair process. Because we do not reweigh evidence on appeal, our review is limited to whether the court's findings support its conclusions. *CSA 13-101 Loop, L.L.C. v. Loop 101, L.L.C.*, 233 Ariz. 355, 364, ¶ 29 (App. 2013) (noting that where a dispute goes "merely to the weight the trial court should have given [certain evidence,] . . . we will not reweigh the evidence on appeal as long as substantial evidence supports the trial court's ruling") (citing *Sholes v. Fernando*, 228 Ariz. 455, 460, ¶ 15 (App. 2011)); *accord Cinerama*, 663 A.2d at 1180 ("That entire fairness determination, incorporating questions of credibility and based on . . . days of live testimony and extensive expert witness presentations, must be accorded substantial deference on appellate review.") (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985)).

¶31 Regarding process, the trial court found that, prior to initiating the transaction, Insys retained an independent company, WTAS, to perform a valuation, and Insys adopted the valuation obtained through that process. At the time, "the most optimistic projections predicted that

the first revenue was years ahead," and "between the date of value and any revenue lay hurdles like FDA approval[,] . . . DEA scheduling considerations[,] . . . and practical manufacturing issues to produce a stable, marketable product." Kottayil argues the timing of the transaction is suspicious given its proximity to discussions questioning Kottayil's contributions to Insys. However, the court rejected the suggestion that the 2008 Conversion was approved as part of a "secret plan" to squeeze Kottayil out of Insys. Moreover, the court found Kottayil was given sufficient information to understand the nature and effect of the 2008 Conversion before knowingly and voluntarily consenting to the transaction and waiving his right of first refusal in the event of the issuance of shares.

¶32 Kottayil further argues the trial court erred in failing to consider that two of the four directors who approved the 2008 Conversion were not independent or disinterested and that the Board members were not fully informed about the transaction. The court made no such findings, and we do not presume them to be true. *See supra* ¶ 29. Rather, the court specifically found the information Kottayil believes should have been provided to the Board members was immaterial to their decision to approve the Conversion. And it is likely the court did not find the directors' interests a relevant factor because, notwithstanding any alleged misconduct, the Conversion had "legitimate business advantages," particularly given Insys's need for cash and inability to obtain alternate financing. *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 599 (Del. Ch. 1986) (rejecting the conclusion that a merger constituted a breach of fiduciary duty even where it was pursued "because it suited [the majority shareholder]'s plans" and "not because the board determined that this was a particularly propitious moment to sell," because there was "no persuasive indication . . . that from the minority's point of view [it was] a particularly poor time to liquidate their investment"); *Adams*, 705 A.2d at 1057 (considering the overall goal of the board "to try to find a way to finance further research and development in order to attempt to benefit the residual owners of the firm" in evaluating whether the board's actions were reasonable).

¶33 In attacking the fairness of the price, Kottayil argues the evidence establishes WTAS was not independent. But the trial court specifically rejected this contention, finding "little evidence of improper manipulation" in WTAS's valuation.

¶34 Kottayil also argues the trial court erred when it "uncritically accepted" WTAS's valuations of Insys.[12] This assertion is likewise unsupported by the record. To the contrary, the court acknowledged WTAS used an income approach with a discounted cash flow analysis based upon revenue and expense projections provided by Insys management — the same methodology and inputs used in a prior valuation performed by a different company. When that method resulted in a value nearly double the figure reached in March 2007, Insys's Chief Financial Officer, Mark Schonau, a non-party whom the court determined had "no apparent personal motivation to manipulate the value," questioned the accuracy of the valuation. The court accepted the testimony of a WTAS representative that revisions between draft and final valuations were generally not uncommon and were specifically appropriate in this case, where multiple companies had provided valuations, "because you want to make sure that valuation providers use similar methodologies and that the value changes make sense from valuation date to valuation date." According to the representative, in the process of trying to reconcile WTAS's draft valuation with the most recent valuation prepared by another company, Schonau "realiz[ed] he could not support the long-term margin projection that he had given . . . previously." Based on Schonau's conversation with the WTAS representative, WTAS "understood that [its] original draft projections were not what [Insys] management actually believed in," and WTAS revalued Insys using figures Insys was "willing to own up to."

¶35 Thus, the record reflects the trial court carefully considered the circumstances surrounding the WTAS valuations, accepted the methodology and inputs as reasonable, and specifically rejected Kottayil's assertions that the figures were improperly influenced by Insys management. These findings support the court's conclusion that the price of the 2008 Conversion was fair. Considering the findings as a whole, we

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[12] Kottayil also argues the trial court erred because "[i]t failed to evaluate the influence of . . . unfair process on price." For this reason, Kottayil asserts the court erred in considering the fair value of Insys within a "range of fairness." However, because we find no error in the court's conclusion that the process was entirely fair, *see supra* ¶¶ 31-32, we need not address this contention.

cannot say the court abused its discretion in concluding the 2008 Conversion was entirely fair.[13]

III. The Trial Court Did Not Err by Concluding the Director Defendants Breached Their Duties in Connection with the 2009 Reverse Stock Split.

¶36 Applying the same entire fairness standard, the trial court found the 2009 Reverse Stock Split deficient "both procedurally and in price." In their cross-appeal, Appellees argue the court abused its discretion in concluding the Director Defendants breached fiduciary duties in connection with the 2009 Reverse Stock Split by failing to offer a fair price.[14]

A. The Trial Court's Finding that Insys was Not Insolvent Is Supported by Reasonable Evidence.

¶37 Appellees first argue the trial court abused its discretion in concluding Insys was solvent and, because Insys was insolvent as a matter of Delaware law, any amount over zero dollars would have been entirely fair. Whether a corporation is solvent presents a question of fact. *See Hay v. Duskin*, 9 Ariz. App. 599, 602-03 (1969). We defer to the court's factual findings because in this case, where the court is the trier of fact, it is in the "best position to weigh the evidence, observe the parties, judge the

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[13] Because the claim for misconduct in connection with the 2008 Conversion is affirmed on its merits in Appellees' favor, we need not address Appellees' arguments that those claims were barred by the statute of limitations, nor their argument — raised for the first time on appeal — that Kottayil lacked standing to contest what they assert is a derivative claim.

[14] Kottayil argues that, because Appellees do not specifically contend the trial court erred in concluding the 2009 Reverse Stock Split was procedurally deficient, Appellees cannot prevail. We disagree. First, the entire fairness doctrine does not easily accommodate an argument regarding procedural waiver, given the doctrine's two prongs are inextricably entwined and not subject to a bright-line test. *See supra* ¶ 26. Second, Arizona courts "prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) (citing *Clemens v. Clark*, 101 Ariz. 413, 414 (1966)). We choose to do so here.

credibility of witnesses, and make appropriate findings," *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002) (citation omitted), and we will reverse only if a finding is clearly erroneous, *see Vortex Corp. v. Denkewicz*, 235 Ariz. 551, 558, ¶ 21 (App. 2014) ("In reviewing the trial court's valuation determination, we will abide by the trial court's factual findings unless they are clearly erroneous.") (citation omitted).

¶38 In *North American Catholic Educational Programming Foundation v. Gheewalla*, the Delaware Supreme Court held "insolvency may be demonstrated by either showing (1) 'a deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued in the face thereof,' or (2) 'an inability to meet maturing obligations as they fall due in the ordinary course of business.'" 930 A.2d 92, 98 (Del. 2007) (citing *Prod. Res. Grp. v. NCT Grp.*, 863 A.2d 772, 782 (Del. Ch. 2004); *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 789 (Del. Ch. 1992); and then *McDonald v. Williams*, 174 U.S. 397, 403 (1899)). Appellees assert Insys was insolvent under either test.[15] We disagree.

¶39 The mere fact that Insys's balance sheet reflected total assets of $8.5 million and total liabilities of $26.8 million (including almost $22 million in debt owed to Kapoor) does not equate to a finding under the first test of *North American Catholic* that there is "no reasonable prospect that the business can be successfully continued." *Id.*; *see also In re Teleglobe Commc'ns Corp.*, 392 B.R. 561, 599-601 (D. Del. 2008) (rejecting the argument that the "no reasonable prospect that the business can be successfully continued" prong "adds an unreasonable qualifier to the basic definition of insolvency"). Indeed, Insys's negative equity is only marginally relevant given the company's status as a start-up. *See U.S. Bank Nat'l Ass'n v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930, 948 (Del. Ch. 2004) ("The defendants are clearly right to argue that having liabilities in excess of the book value of assets is not dispositive of the issue of whether a company is insolvent. If it were, many start-up companies would be insolvent."), *vacated and remanded on procedural grounds*, 875 A.2d 632 (Del. 2005). Furthermore, "as long as [Insys] was actually receiving funding from [Kapoor], there were reasonable prospects that the business . . . could be continued." *Teleglobe*, 392 B.R. at 600. The record supports the trial court's

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[15] Appellees also argue the trial court failed to apply either of the *North American Catholic* tests. This contention is not supported by the record. Although the court did not explicitly identify the two tests, its findings evidence application, and rejection, of both.

conclusion that Insys could continue successfully, as it had from its inception, with Kapoor's ongoing financial support.

¶40 As to the second *North American Catholic* test, the record supports the rejection of Appellees' assertion that Insys "did not have sufficient revenue to meet expenses." On this point, Appellees argue Insys could not meet its maturing financial obligations because Kapoor "was the sole funding source" and was not obligated to continue funding the company, as well as the fact that Insys did not expect to imminently generate revenue. Although Kapoor may not have been obligated to continue funding the corporation, the evidence suggests Kapoor could and would do so, as long as he believed Insys had value. *See Teleglobe*, 392 B.R. at 603 (considering past contributions and "professed intentions to continue support" and concluding "it was inappropriate for the Plaintiffs' expert to exclude from consideration the funding that actually occurred simply because it was not mandatory") (citing *Iridium Operating, L.L.C. v. Motorola, Inc.*, 373 B.R. 283, 297 n.5 (S.D.N.Y. 2007)). The evidence also supports the trial court's finding that Kapoor "strongly held that belief" that Insys would ultimately succeed. Indeed, between May 2008 and July 2009, Kapoor loaned Insys over $10.5 million — including $2 million within two weeks of the 2009 Reverse Stock Split — despite product setbacks, failed fundraising efforts, and deteriorating market prospects.

¶41 Kapoor's efforts to obtain control over a larger share of the stock also evidences his belief that he would ultimately recoup his investment. In March 2009, just a few months prior to the 2009 Reverse Stock Split, Kapoor told a reporter he "believe[d] in the company and [] believe[d] in the products." We defer to the trial court's finding that Kapoor's "opinion of the prospects and potential of Insys and the value of its products was far more optimistic than that portrayed" at trial, given the credibility of that opinion against the backdrop of his "unquestioned experience, success, and business acumen." *See supra* ¶ 37; *Gentile v. Rossette*, 2010 WL 2171613, at *11 (Del. Ch. May 28, 2010) (accepting, as evidence of the corporation's value, that "an officer of the Company and its controlling shareholder, one who should be expected to know the value of his enterprise — kept injecting his own — rapidly dwindling — funds" into the corporation, and noting that "[u]nless he believed in [the company's] future,[] this would have been a course of conduct approaching the irrational," particularly for someone with an extensive business

background).[16] Furthermore, we reject Appellees' arguments that these facts are irrelevant to this case; to the contrary, they related directly to Insys's ongoing business model whereby Kapoor served as the sole source of funding.

¶42 Moreover, though Insys undoubtedly faced problems with the dronabinol project, the fentanyl project looked to be a promising source of revenue; Insys had successfully completed a proof of concept study, was in the midst of safety and efficacy studies that, thus far, had returned positive results, and bragged about the progress and promise of the product "publicly [and] at every opportunity." Under these circumstances, the possibility of ultimate success, though not guaranteed, continued to be very real — unlike the companies described in the cases cited by Appellees. *See In re Vision Hardware Grp.*, 669 A.2d 671, 672, 676 (Del. Ch. 1995) (addressing the valuation of a financially strapped company "on the brink of bankruptcy and without ability to refinance its debt"); *Trados*, 73 A.3d at 76-77 (reviewing the value of common stock of a company that "had no economic value," did not have "a reasonable prospect of generating value for the common stock," could not raise funds, and "did not have a realistic chance" of recovering).

¶43 Although Appellees offered other evidence suggesting Insys was in a more precarious financial state, the trial court rejected that position. Because the findings regarding solvency are supported by substantial evidence and corroborate the court's determination that Insys was not insolvent, we find no error in the court's ultimate conclusion that the 2009 Reverse Stock Split "was deficient both procedurally and in price," and, therefore, violated the entire fairness standard.

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[16] Unpublished decisions of Arizona courts are not precedential and may only be cited in certain circumstances. *See* Ariz. R. Sup. Ct. 111(c). However, a "party may cite a decision of a tribunal in another jurisdiction, as permitted in that jurisdiction," so long as the decision does not pertain to Arizona substantive law. Ariz. R. Sup. Ct. 111(d). Delaware does not prohibit citing unreported opinions as precedential authority. *See* Del. R. Sup. Ct. 14(b)(vi)(B)(2), (g)(ii); Del. R. Ch. Ct. 171(i) ("Examples of key authorities to consider [in submitting a compendium of authorities] include the principal Delaware decisions (whether reported or unreported) . . . .").

B. The Trial Court Did Not Abuse Its Discretion by Valuing Insys at $151.5 Million at the Time of the 2009 Reverse Stock Split.

¶44 Appellees argue the trial court's finding that Insys was worth $151.5 million at the time of the 2009 Reverse Stock Split is not supported by the evidence and, therefore, is clearly erroneous. We review the court's factual findings and ultimate valuation for an abuse of discretion. *See supra* ¶ 37.

¶45 Under Delaware law, "the scope of recovery for a breach of [a fiduciary] duty . . . is not to be determined narrowly." *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 466 (Del. Ch. 2011) (quoting *Thorpe ex rel. Castleman v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996)). Certainty in damages is not required "where a wrong has been proven and injury established." *Id.* (citation omitted). The strict imposition of penalties under Delaware law is purposeful and "designed to discourage disloyalty." *Thorpe*, 676 A.2d at 445. Therefore, the trial court acts within its discretion if it "has a basis to make a responsible estimate of damages" after resolving uncertainties against the wrongdoer. *Reis*, 28 A.3d at 466 (citations omitted); *see also Golden Telecom, Inc. v. Global GT L.P.*, 11 A.3d 214, 219 (Del. 2010) ("As long as [the trial court's factual findings] are supported by the record, we will defer to the [court]'s factual findings even if we might independently reach a different conclusion.") (citing *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 35 (Del. 2005)).

¶46 Here, the trial court awarded Kottayil the value of his proportionate share of Insys immediately prior to the 2009 Reverse Stock Split. In attempting to determine that value, the court noted that an expert would typically take objective data regarding Insys's history of revenue, the size and performance of the overall market, and Insys's relative market share, and then use his professional judgment to project the other factors relevant to an approved valuation method, such as a discounted cash flow analysis.[17] But because there was "very limited objective data available for

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[17] The discounted cash flow analysis "assigns a value to an enterprise by adding (1) an estimation of net cash flows that the company will generate over a period of time to (2) a terminal value equal to the future value, as of the end of the projection period, of the company's cash flows beyond the projection period." *Highfields Capital, Ltd. v. AXA Fin., Inc.*, 939 A.2d 34, 53 (Del. Ch. 2007) (citing *ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 917 (Del. Ch. 1999)).

valuation," an expert valuation would be based almost entirely upon subjective assumptions and predictions, now tainted by hindsight bias. Thus, the court concluded there was no reliable way to calculate a fair value for Insys, as of June 2009, based upon traditional methods.[18]

¶47 Under these circumstances, the trial court determined the best approach was to "define a range," and, in doing so, "consider the strong hope and commitment held by Dr. Kapoor, recognize that the lack of investors was due more to the general depressed economy than the true intrinsic value of Insys, and give due weight to optimistic state of development in 2009 of [the sublingual fentanyl]." *See Trados*, 73 A.3d at 78 ("The value of a corporation is not a point on a line, but a range of reasonable values.") (quotation omitted). The court adopted the discounted cash flow valuations performed by unrelated third parties between 2004 and 2009 for Insys's internal planning purposes to set the lower end of the range at $53.2 million. The court then set the high end of the range at $151.5 million based upon IPO valuations, and ultimately calculated Kottayil's damages based upon the highest value within the range.[19]

¶48 Appellees' principal argument is that the trial court erred in considering the IPO valuation as part of the range of value. They first assert the court should not have considered a 2008 letter to the SEC from Insys's counsel (the Cooley Letter) attempting to explain the difference between the August 2007 valuation of $19.4 million and the IPO underwriters' valuation of $164 to $187 million; Appellees contend the Cooley Letter does

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[18] The trial court's conclusion is highlighted by the expert testimony presented at trial. Focusing on the value of Insys's intangible assets — the pharmaceutical products still in development in early 2009 — Kottayil's expert applied an adjusted book value method and estimated the fair market value at $41.46 per share. Using the same information, Appellees' expert performed a discounted cash flow analysis resulting in a per-share price of $0.07. Even the professional valuations performed between 2004 and 2009 widely varied.

[19] We reject any suggestion by Appellees that the trial court erred in fashioning a valuation method different from those traditionally employed. The court adequately explained why the expert testimony attempting to apply traditional methods was unreliable — resulting in a one-billion-dollar discrepancy between the parties' asserted values — and acted within its discretion in fashioning an appropriate remedy.

not contain sufficient information regarding the underlying methodology and calculations to assess its reliability. We disagree.

¶49 The Cooley Letter noted the August 2007 valuation was based upon a discounted cash flow analysis, one of many approved valuation methods. *See, e.g.*, *In re Appraisal of Metromedia Int'l Grp.*, 971 A.2d 893, 899 (Del. Ch. 2009) (citations omitted). The Letter then described, in detail, the specific adjustments to the same discounted cash flow analysis occasioned by the 2008 Conversion, the elimination of illiquidity and minority discounts, and the advancement of certain products that resulted in the higher IPO valuation. Although the Cooley Letter did not provide a step-by-step analysis, it contained sufficient information for the trial court to determine whether the method, inputs, and resulting calculations were reliable. Additionally, the Letter cannot be considered in a vacuum; other materials regarding the IPO valuation were admitted into evidence and provide the basis for the opinions regarding Insys's value expressed therein. Any alleged inadequacies within the Cooley Letter are relevant to its weight, not admissibility. *Cf. State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 300, ¶ 33 (App. 2014) (holding that "flaws in a methodology . . . may be relevant to 'the weight, not the admissibility, of the evidence'") (quoting *United States v. Bonds*, 12 F.3d 540, 559 (6th Cir. 1993)).

¶50 Finally, questions regarding the valuation of a company's stock are not "purely a matter for experts," and "pre-litigation valuations" by the company or its directors, officers, or shareholders are both relevant and helpful to "the determination of the fair value" of the company. *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 552 (Del. Ch. 2014).[20] The information contained in the Cooley Letter came directly from Insys executives, and Insys was clearly satisfied with the contents of the Cooley Letter when it was transmitted to the SEC underscoring the difficulty in valuing a development-stage company and its variable product advancements. *See* 15 U.S.C. § 78ff(a) (punishing a person "who willfully and knowingly makes, or causes to be made, any statement [to the SEC]

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20 Appellees argue the principles of *Dole Food* apply only where the views are of "financial professionals who make investment decisions with real money," 114 A.3d at 557, and not where the IPO fails. We disagree. Although Inysys's IPO failed and thus was never "forged in the crucible of objective market reality," *see id.* at 559 (citations omitted), the IPO valuation remains a valuable data point, evidencing a price even Insys's highest executives believed other people should be willing to pay for the stock based upon their belief and understanding regarding future revenues. *See infra* ¶ 52.

. . . which statement was false or misleading with respect to any material fact"). That confidence in the IPO valuation bolsters its relevance and probative value on the issue of the corporation's stock price.

¶51 Appellees also argue that an IPO valuation is generally not reliable evidence of value outside the IPO context, and the IPO valuation is not reliable in the immediate case because it is "out of line" with the more traditional valuations performed between 2005 and 2008. Appellees have not established an abuse of discretion on these bases.

¶52 First, Appellees do not provide any authority suggesting IPO valuations cannot assist in determining the fair value of a corporation. To the contrary, in the unpublished case cited by Appellees for this proposition, the trial court used the same management projections contained in the IPO valuations in conducting its own valuation, suggesting such information remains useful to the extent it reflects management's views about the future performance of the company. *See Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *6, 10-11, 18-19 (Del. Ch. Aug. 19, 2006); *see also Golden Telecom*, 11 A.3d at 217-18 (rejecting a request to adopt a "bright line rule" binding a corporation to any particular information it has distributed to shareholders and emphasizing the flexible nature of the process to determine fair value). Although the IPO valuation was excluded from consideration by various experts involved in evaluating Insys, the trial court here specifically found the "projections, assumptions, and analysis" underlying the IPO valuation "came directly from Insys." On this record, we cannot say the court abused its discretion in considering the information contained within the Cooley Letter. *See Golden Telecom*, 11 A.3d at 219 (deferring to the trial court's resolution of "inconsistencies in data advocated by a company").[21]

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[21] In their reply brief, Appellees cite *Eyler v. Comm'r*, 88 F.3d 445 (7th Cir. 1996). In *Eyler*, the Seventh Circuit accepted many of the same arguments Appellees make here in concluding the estimated price range for an anticipated IPO was not conclusive evidence of the corporation's value. 88 F.3d at 452-54. *Eyler* is materially distinguishable, however, in that the proponent of the IPO valuation in that case had the burden of proving the value of the stock in order to escape liability from excise taxes. *Id.* at 451. Here, the trial court had broad discretion to determine the amount of damages under Delaware law, where the scope of recovery "is not to be determined narrowly," certainty in damages is not required once

¶53 Second, Appellees' contention that the IPO valuation is "out of line" is not supported by the record. Although they cite to several valuations completed between 2005 and 2008, ranging from $15 to $70 million, as substantially less than that proposed in the IPO valuation, four other valuations introduced into evidence valued Insys at between $154.1 and $263.5 million. And in July 2008, Insys's chief financial officer suggested that $212 million was not a *high enough* price for a potential offering. Moreover, as Kottayil correctly notes, some of the valuations cited by Appellees included discounts that are inappropriate to a fair value analysis. *See Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1145 (Del. 1989) (prohibiting consideration of minority and marketability discounts in the appraisal process because they deprive the minority shareholder of the "full proportionate value of his shares," impose "a penalty for lack of control," and "unfairly enrich[] the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder"). Considering all the valuations in evidence, the high end of the range ultimately selected by the trial court falls squarely in the middle of those proffered.

¶54 Furthermore, a transaction determined not to be entirely fair may result in an award "that differs from what an appraisal would generate." *Reis*, 28 A.3d at 463, 468; *see also Ryan*, 709 A.2d at 699. Indeed, Appellees could have obtained an independent valuation of Insys immediately preceding the 2009 Reverse Stock Split, in compliance with their fiduciary obligation to determine a fair price for the transaction. Such a valuation would have stood as the most reliable evidence available and served as an obvious and straightforward mathematical basis for the trial court's analysis, while rendering any consideration of the IPO valuations unnecessary. To the extent such evidence is lacking, Delaware law dictates Appellees, as the wrongdoers, bear any negative consequences arising from the absence of timely or reliable information. *See Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 221 (Del. 2005) ("Having failed to present any reliable evidence to enable the Court of Chancery to carry out its statutory obligation to engage in an independent valuation exercise, [the corporation] cannot now credibly argue that the Court erred by resorting to a valuation approach necessitated by [its] own failure.") (internal quotation and citation omitted). Under the circumstances presented here and created

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the fact of damage is proven, and the finder of fact must resolve uncertainties against the wrongdoer. *See supra* ¶ 45.

by Appellees' own misconduct, we cannot say the IPO valuation is irrelevant.

¶55 Appellees further argue the IPO valuation is not reliable because it reflected Insys's circumstances eighteen months before the 2009 Reverse Stock Split and before the IPO was abandoned and operations were reduced. To be sure, the circumstances that existed during the summer of 2007 do not match those of January 2009. However, the trial court recognized those differing circumstances and still found the declining promise of the dronabinol products was "more than offset" by advances in the fentanyl project. Appellees argue that "[o]ther than anecdotal reports, there was no 'evidence of promise'" for the sublingual fentanyl by January 2009, and, despite the positive reports, Insys still could not attract investors. This characterization of the evidence ignores the overall climate of the inquiry, whereby the court, resolving uncertainties against the wrongdoer, presumed "the lack of investors was due more to the general depressed economy than the true intrinsic value of Insys," and, as did Kapoor, viewed Insys's state of development in 2009 optimistically. In fact, the evidence regarding sublingual fentanyl *was* optimistic; the proof of concept study had been completed successfully, and the safety and efficacy studies were positive and encouraging. Viewed in this light, the court's finding that the IPO valuation reflected a reasonable estimation of Insys's value in January 2009 is supported by reasonable evidence.

¶56 Appellees finally argue the trial court's $151.5 million valuation is unsupported by the evidence because: (1) it is nearly identical to Insys's value at the time a successful IPO was completed more than four years later, in May 2013; and (2) it is inconsistent with "insiders' view[s]" of Insys's value, as reflected by the failure of Insys's employees and consultants to take advantage of stock options in July 2008 and November 2009. Appellees cite no authority to suggest the court can properly consider either valuations occurring after the target date or an unrelated third party's decision to pass up an investment opportunity. Instead, the proper focus is upon the information "known or which could be ascertained" by the corporation on the date of the transaction. *See Tri-Cont'l Corp. v. Battye*, 74 A.2d 71, 71-72 (Del. 1950) (considering the value of shares owed to dissenting stockholders following a registered objection to a merger); *Dann v. Chrysler Corp.*, 215 A.2d 709, 714 (Del. Ch. 1965) (attributing little value to testimony "based on hindsight evidence, i.e., increase in the value of . . . stock after the event"). Perhaps Insys's management grossly overestimated Insys's worth when completing the IPO valuations in 2008 and its "insiders" underestimated Insys's worth in rejecting stock options in 2009. They would not have known this to be the case at the time, and, for

purposes of the court's later evaluations, the information is irrelevant. Moreover, the record suggests other factors may also have influenced the May 2013 offering, including the merger with NeoPharm*, see supra* n.2, and pending litigation regarding monetary liabilities and patent ownership.

¶57 Our detailed review of the record reflects the trial court applied Delaware law, "coped admirably with the evidence that was presented, and reached a reasonable valuation using the analytical tools and evidence that were available." *Dobler*, 880 A.2d at 221; *see also Golden Telecom*, 11 A.3d at 219 (upholding the trial court's valuation where the court "addressed each of the[] findings of fact and valuation methods, and . . . followed an orderly and logical deductive process in arriving at [its] conclusions with respect to the factual issues disputed on . . . appeal"). We find no abuse of discretion in the court's valuation of Insys.

IV. The Trial Court Did Not Abuse Its Discretion in Denying Kottayil's Request for Rescissory Damages.

¶58 Kottayil argues the trial court erred by denying him equitable relief and limiting his damages to the fair value of the shares at the time of the 2009 Reverse Stock Split. Whether a certain type of damage award is available to redress a party's loss presents a question of law subject to *de novo* review. *See Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 422, ¶ 8 (2002) (citation omitted). "The amount of an award for damages is a question peculiarly within the province of the trier of fact and the award will not be disturbed on appeal except for the most cogent of reasons." *Fernandez v. United Acceptance Corp.*, 125 Ariz. 459, 464 (App. 1980) (citing *Meyer v. Ricklick*, 99 Ariz. 355, 357 (1965)); *see also Tom Mulcaire Contracting, L.L.C. v. City of Cottonwood*, 227 Ariz. 533, 537, ¶ 15 (App. 2011) ("Fashioning an equitable remedy is within the trial court's discretion . . . .") (quoting *Loiselle v. Cosas Mgmt. Grp.*, 224 Ariz. 207, 210, ¶ 8 (App. 2010)).

A. Appellees' Motives Are Relevant to a Determination of Whether Equitable Damages Are Warranted.

¶59 Kottayil argues rescissory damages[22] are available anytime a fiduciary engages in self-dealing and proof of an evil mind is not required. Therefore, he contends, the trial court erred in rejecting his claim for

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[22] Rescissory damages are "the monetary equivalent of rescission," awardable when the equitable remedy of rescission is appropriate but impractical. *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 38 (Del. Ch. 2014) (citations omitted).

rescissory damages, in part, due to his failure to prove Appellees had a "long term secret plan" or "selfish, rapacious motives."

¶60 We agree with Kottayil that rescissory damages are one available remedy for breach of a fiduciary duty involving self-dealing. *See, e.g.*, *Orchard Enters.*, 88 A.3d at 38 (citing *Strassburger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000), and *Cinerama*, 663 A.2d at 1144). But the remedy for a breach of a fiduciary duty is not subject to formulaic application. Rather, the trial court's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate." *Weinberger*, 457 A.2d at 714; *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774 (Del. 2006) ("[A] *per se* rule of damages for breach of the fiduciary duty of disclosure . . . is no[t] . . . an accurate statement of Delaware law.") (citation omitted). Rescissory damages may therefore be awarded if they are "susceptible of proof and a remedy appropriate to all the issues of fairness" before the court. *Weinberger*, 457 A.2d at 714; *see also Thorpe*, 676 A.2d at 445 (emphasizing the flexible nature of a damage award for breach of a fiduciary duty); *Gesoff*, 902 A.2d at 1154 (same).

¶61 The motivations for a party's actions are relevant to the question of whether equitable damages are appropriate, and Delaware courts have limited damages to the fair value of the shares where interested parties violate a fiduciary duty but do not act with malice. For example, in *Reis*, the Delaware Chancery Court determined a reverse stock split orchestrated by the majority shareholders was not entirely fair but concluded the case "d[id] not call for a remedy other than an award of fair value" because it was convinced the "defendants did not set out to extract value rapaciously from the minority, nor did they freeze out the minority to capture the value of opportunities that the corporation was on the verge of achieving and in which the minority otherwise would have shared." 28 A.3d at 468; *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 177-78 (Del. 2002) (affirming the trial court's discretion to reject a claim for rescission, provided the court articulates and orders a reasonable alternative remedy); *In re S. Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 815-16 (Del. Ch. 2011) (considering plaintiff's conduct in determining rescissory damages were unwarranted); *Cinerama*, 663 A.2d at 1147-50 (considering motivation of corporate directors in declining to impose rescissory damages as remedy for mere negligence); *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 601 (Del. Ch. 1987) (denying equitable relief where shareholders did not prove defendants acted with an improper motive).

¶62 The record does not indicate, as Kottayil suggests, that the trial court concluded rescissory damages were *unavailable* to him; rather, the court determined enhanced damages were *inappropriate*. Under Delaware law, Kottayil's failure to prove Appellees acted with a selfish, rapacious motive is relevant to the appropriate measure of damages, and the court did not abuse its discretion in considering this information.

B. The Trial Court Did Not Abuse its Discretion in Admitting Evidence of a November 2009 Rescission Offer.

¶63 In rejecting Kottayil's claim for rescissory damages, the trial court found Kottayil's rejection of Insys's offer, early in the litigation, to rescind the 2009 Reverse Stock Split and restore Kottayil's ownership interest in Insys to be "[e]qually important" in its assessment of appropriate damages. Kottayil argues evidence of the offer and its rejection constitute compromise negotiations, which are inadmissible to prove the validity or amount of damages under Arizona Rule of Evidence 408, and, therefore, the court erred in considering this evidence.[23] *See supra* n.10; *State v. Superior Court (Ahrens)*, 154 Ariz. 574, 576 (1987) ("[R]ules of evidence are procedural in nature.") (citing *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590 (1984)).

¶64 Rule 408(a) provides:

> Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim . . . :
>
> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim.

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[23] Appellees contend that Kottayil waived this argument by failing to raise it below. This contention is without merit. The record reflects Kottayil moved to exclude the evidence of Appellees' rescission offer prior to trial for the very reasons raised on appeal. The motion was denied, and Kottayil's notice of appeal specifically references the trial court's order denying the motion *in limine*.

Whether an offer was made during settlement negotiations presents a question of fact. *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992) (citing Fed. R. Evid. 104(a), and *Mundy v. Household Fin. Corp.*, 885 F.2d 542, 546-47 (9th Cir. 1989)); *see also Hernandez v. State*, 203 Ariz. 196, 198, ¶ 10 (2002) ("In interpreting Arizona's evidentiary rules, we look to federal law when our rule is identical to the corresponding federal rule, as is true for Rule 408.") (citing *State v. Green*, 200 Ariz. 496, 498, ¶ 10 (2001)). We review evidentiary rulings for an abuse of discretion and will affirm absent clear abuse or legal error and resulting prejudice. *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cty.*, 208 Ariz. 532, 543, ¶ 33 (App. 2004) (citing *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10 (App. 2000)).

¶65 To determine whether the relevant discussions survive Rule 408, the trial court must consider the content, context, and timing of the discussions. *See Pierce*, 955 F.2d at 827 (citing *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1342-43 (9th Cir. 1987), and *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1372-73 (10th Cir. 1977)); *see also Raybestos Prods. Co. v. Younger*, 54 F.3d 1234, 1241 (7th Cir. 1995). The mere fact that the discussions occur after litigation began is not conclusive evidence of settlement negotiations. *See Pierce*, 955 F.2d at 827. Discussions "related to the dispute" may be admissible if they are made before "settlement discussions [have] crystallize[d]." *Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 783-84 (9th Cir. 2006) (concluding a memorandum related to a contract dispute was admissible because it was prepared one week prior to the initiation of settlement discussions).

¶66 The record reflects that Kottayil first expressed concern regarding the 2009 Reverse Stock Split in June 2009 and "begged [Kapoor] to reconsider" the transaction. Kapoor agreed to think about Kottayil's request. Rather than waiting for a response, Kottayil retained counsel, submitted a formal letter objecting to the Split and demanding appraisal rights, and requested the information taken into consideration by the Director Defendants in approving the transaction. Although the parties continued to exchange information, Kottayil filed suit in late September 2009. In November 2009, Kapoor offered to sell back to Kottayil the same number of shares he received in the Split at ten cents per share, as well as an unlimited number of additional shares at the same price, noting Insys would welcome the opportunity, as it was "in rather immediate need of further funding." The offer did not expressly propose a compromise of Kottayil's claims, nor did it explicitly condition the offer on the dismissal of any claim. *See Bates v. Estes Co.*, 125 Ariz. 327, 328 (App. 1980) (concluding letter should have been excluded under Rule 408 based in part upon the fact that the enforcement of appellants' rights "were made contingent upon the

meeting of their demand specified in the letter"); *see also Holmes v. Marriott Corp.*, 831 F. Supp. 691, 710-11 (S.D. Iowa 1993) (concluding an unconditional offer of reinstatement after termination was not barred by Federal Rule of Evidence 408).

¶67 Based upon these facts, the trial court could reasonably conclude the ongoing dialogue between Kottayil and Appellees constituted communications between shareholders, in furtherance of business interests, and not subject to Rule 408.[24] *See In re E. Airport Dev., L.L.C.*, 443 B.R. 823, 829 (9th Cir. 2011) (explaining that "ordinary business communications" between parties are not compromise negotiations within the meaning of Rule 408); *Big O*, 561 F.2d at 1372-73 (same). We find no abuse of discretion in the admission of this evidence.

¶68 Kottayil also disputes the trial court's finding that his rejection of the offer to buy back his shares reflected a conscious choice to pursue the risks and benefits of litigation "over the normal risks and benefits of minority stock ownership." Kottayil argues he "could hardly be faulted" for declining the offer when he believed "there would be some other way that [Kapoor] would find to completely eliminate [him] this time, on the up and up or straight." But the court rejected this explanation, correctly noting it was within Kapoor's rights, as the controlling shareholder, to freeze out minority shareholders through a reverse stock split so long as the transaction was fair. Kottayil successfully deprived Kapoor of the opportunity to exercise those rights by declining the rescission offer. The court's conclusion that Kottayil's rejection of the rescission offer reflected a "calculated decision" is supported by the evidence, and we find no error.

¶69 Kottayil also argues the trial court's rejection of his claim for rescissory damages "amounts to a ruling that [the minority shareholder's] ability to recover rescissory damages is cut off at the moment the disloyal fiduciary supposedly offers to give back what is taken" and reflects bad public policy. We do not read the ruling to reflect so broad a proposition. Rather, the court's observations regarding the parties' respective rights and responsibilities and its conclusion regarding the appropriateness of rescissory damages directly address two concerns raised by the Delaware

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[24] Although the trial court did not make express findings in this regard within its order denying Kottayil's motion to preclude this evidence, "we presume that the trial court found every fact necessary to sustain its ruling." *In re CVR 1997 Irrevocable Tr.*, 202 Ariz. 174, 177, ¶ 16 (App. 2002) (citation omitted).

Chancery Court: first, that "the plaintiff might 'sit back and test the waters,' see how the transaction plays out, and then sue for rescissory damages if the deal turned out well for the other side"; and second, that the plaintiff could receive a windfall through receipt of "elements of value" accruing after the wrongful conduct but "causally unrelated to the wrongdoing." *Orchard*, 88 A.3d at 41 (citations omitted). The court's ruling does not foreclose an award of rescissory damages following the rejection of a rescission offer under other circumstances.

C. The Decision to Deny Rescissory Damages is Supported by Reasonable Evidence.

¶70 Under Delaware law, a court has considerable discretion in determining an appropriate remedy when evaluating a transaction for entire fairness. *Reis*, 28 A.3d at 463-64 (discussing case law). The trial court's decision not to award rescissory damages is supported by reasonable evidence. The court found Kottayil did not prove the Director Defendants acted with malice and did not offer a persuasive explanation for his decision to decline the very remedy he "begged" for immediately following the 2009 Reverse Stock Split. These findings are relevant and supported by the record. Therefore, the court did not abuse its discretion by refusing to award rescissory damages.

V. Kottayil Was Not Entitled to Punitive Damages.

¶71 Kottayil argues the trial court erred by concluding Delaware law precluded an award of punitive damages.[25] "Whether punitive damages are awardable on an equitable claim is a legal issue, which we review *de novo*." *Medasys*, 203 Ariz. at 422, ¶ 8 (emphasis added) (citation omitted).

¶72 Kottayil does not dispute that: (1) had he filed suit in Delaware, the Delaware Chancery Court would have exclusive jurisdiction over the claims against corporate fiduciaries, *see* Del. Code Ann. tit. 8, § 111(b) ("Any civil action to interpret, apply or enforce any provision of [Delaware's general corporate code] may be brought in the Court of Chancery."); *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 492 (Del. 1982) (holding a claim for breach of fiduciary duty against a majority shareholder

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[25] Kottayil also argues both Delaware and Arizona law permit recovery of punitive damages for fraud. Because we conclude Kottayil failed to state a claim for fraud, *see supra* Part I(B), we need not and do not address this contention.

"lies within equity's inherent or exclusive jurisdiction"); (2) the Chancery Court lacks jurisdiction to award punitive damages absent statutory authorization, *Kaye v. Pantone, Inc.*, 395 A.2d 369, 372 (Del. Ch. 1978) (citation omitted); and (3) the availability of punitive damages presents a question of substantive law governed by Delaware law, *see supra* n.11. Nor does Kottayil address why other state courts have denied requests for punitive damages on claims for a breach of fiduciary duty arising under Delaware law. *See, e.g.*, *Buchwald v. Renco Grp.*, 539 B.R. 31, 52-54 (S.D.N.Y. 2015) (reversing an award of punitive damages in a breach of fiduciary duty action governed by Delaware law); *White v. Pottorff*, 479 S.W.3d 409, 419 (Tex. App. 2015) (same) (citation omitted); *see also U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 817 F. Supp. 2d 934, 944 (N.D. Tex. 2011) (striking demand for punitive damages for a claim alleging breach of fiduciary duty under Delaware law).

¶73 Kottayil contends these principles are inapplicable in Arizona because, unlike Delaware, our state makes no distinction between courts of equity and courts of law. *See Reese v. Rhodes*, 3 Ariz. 235, 237 (1890). This argument is unavailing in light of the Delaware Chancery Court's broad discretion to fashion an award of enhanced damages that can disgorge profits from the wrongdoer, thereby addressing Kottayil's concerns that the trial court's failure to consider punitive damages prevented it from "completely serv[ing] justice." *See, e.g.*, *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 441 (Del. 2000) (noting the court has the power to impose damages that "eliminate the possibility of profit flowing to the defendants from the breach of the fiduciary relationship") (citing *Thorpe*, 676 A.2d at 445).

¶74 Though Arizona and Delaware courts assign different labels to the task, Kottayil had the opportunity to pursue enhanced damages that would have prevented Appellees from profiting from their actions and acted to deter future misconduct. Kottayil was not entitled to separate "punitive" damages under Delaware law. Therefore, we find no abuse of discretion.

VI. Kottayil Was Not Entitled to Attorneys' Fees.

¶75 Kottayil argues the trial court abused its discretion in denying his request for an award of attorneys' fees. When fee-shifting is not mandatory, we review the decision to award or decline fees for an abuse of discretion. *See Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, 117, ¶ 20 (App. 1998) ("We will not disturb the trial court's discretionary award of fees if there is any reasonable basis for it.") (citation omitted).

¶76 Kottayil argues the trial court erred in failing to apply the "bad faith" exception to Delaware's general rule that even successful litigants retain responsibility for their own attorneys' fees and costs. This exception allows the court to award attorneys' fees to the prevailing party where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) (quoting *Brice v. State*, 704 A.2d 1176, 1178 (Del. 1998)); *accord* A.R.S. § 12-349(A) (authorizing an award of attorneys' fees in a civil action as a sanction for an attorney or party's misconduct during litigation). The exception "is not lightly invoked," *Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 839, 880 (Del. Ch. 2012) (internal quotations and citation omitted), and has been applied when litigants unnecessarily prolong or delay litigation, falsify records, or knowingly assert frivolous claims, *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (citations omitted). Application of the bad faith exception is appropriate only where "the party seeking fee shifting . . . show[s] by clear evidence that the party from whom fees are sought has acted in subjective bad faith" given the particular facts of the case. *Auriga*, 40 A.3d at 880-81 (internal quotations and citation omitted); *see also Dobler*, 880 A.2d at 229 (finding abuse of discretion in failure to apply bad faith exception given "the overwhelming evidence that the [defendants] repeatedly acted in bad faith to obstruct if not prevent a fair valuation of [the subject corporation]").

¶77 Kottayil contends the trial court's finding that Kapoor "wanted all the company, at a cheap price" and then approved a transaction that was not entirely fair is synonymous with a finding that the Director Defendants acted in bad faith. But "the bad faith exception does not apply to conduct that gives rise to the substantive claim itself." *Johnston*, 720 A.2d at 546 (citing *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1231 (6th Cir. 1984)); *see also Gatz Props. v. Auriga Capital Corp.*, 59 A.3d 1206, 1222 (Del. 2012) (concluding corporate fiduciary acted in bad faith in breaching his fiduciary obligations but also shifting fees on the separate basis of "bad faith litigation conduct" occurring "throughout the course of the trial"). Kottayil does not allege, and the court did not find, any specific instances of misconduct on the part of Appellees that were committed during the litigation. The court did not abuse its discretion in denying attorneys' fees on this basis.[26]

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[26] Kottayil also argues he is entitled to an award of fees given the "unusual circumstances" surrounding the 2008 Conversion. Because Appellees' conduct in litigating the claims relating to the 2008 Conversion

CONCLUSION

¶78 The dismissal of Kottayil's fraud claim and the judgments in favor of Appellees regarding the 2008 Conversion and in favor of Kottayil regarding the 2009 Reverse Stock Split are affirmed.

¶79 Kottayil requests an award of attorneys' fees on appeal pursuant to ARCAP 21. Rule 21 "does not provide a substantive basis" for an award of attorneys' fees. *See Assyia v. State Farm Mut. Auto. Ins.*, 229 Ariz. 216, 224, ¶ 34 (App. 2012) (citing *Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 31 (App. 2010)). Therefore, we deny Kottayil's request. Moreover, because neither party was successful on appeal, we decline to award costs. *See* A.R.S. § 12-341.

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was no different than their conduct throughout this case, we similarly reject Kottayil's alternative argument for fees.