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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ELLIOT M. FOX, Plaintiff, v. JAMDAT MOBILE, INC., et al., Defendants and Respondents; v. NECA-IBEW PENSION FUND, Intervener and Appellant.	B212672 (Los Angeles County Super. Ct. No. BC344364)

APPEAL from the judgment of the Superior Court of Los Angeles County. William F. Highberger, Judge. Affirmed in part and reversed in part.

Coughlin Stoia Geller Rudman & Robbins, Randall J. Baron, Kevin K. Green and David T. Wissbroecker, for Plaintiff and Intervenor-Appellant.

Fenwick & West, Kevin P. Muck, Felix S. Lee and Christine A. Vogelei, for Defendants and Respondents.

Appellant NECA-IBEW Pension Fund (the Fund) intervened in a stockholder's action filed by Elliott M. Fox (not a party to this appeal) against respondents JAMDAT Mobile, Inc. (JAMDAT), Paul A. Vais, J. William Gurley, Mitch Lasky, Henk B. Rogers and Michael M. Lynton (collectively the individual defendants). Respondents' demurrer to appellant's complaint was sustained without leave to amend. The principal issue is whether Fund's complaint which consists of a single cause of action states facts sufficient for a cause of action for breach of fiduciary duties. We find that it does as to the individual defendants and therefore reverse the judgment as to those defendants. We affirm the trial court's ruling as to JAMDAT.

FACTS

1. Introduction

This proposed class action on behalf of holders of JAMDAT common stock arises out of the acquisition of JAMDAT by Electronic Arts, Inc. (EA) for $27 per share. Both the acquisition process and the price are alleged to have been unfair.[1]

JAMDAT publishes wireless entertainment applications, including games, ring tones, images and other entertainment applications in the United States and internationally. JAMDAT, a Delaware corporation, is headquartered in Los Angeles. At the time of its acquisition by EA, JAMDAT was still growing, with an internal growth rate in excess of 30 percent, and earned cash at a rate that allowed EA to recoup the purchase money for JAMDAT in a relatively short period of time.

There were more than 24.8 million shares of JAMDAT common stock at the time of the acquisition. The price paid by EA, $27 per share, was only 18.6 percent over JAMDAT's public trading price on the day before the acquisition by EA was announced and it was below JAMDAT's highest share price of $32.50 during the 60 days preceding the acquisition.

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[1] Our factual recitation is based on the allegations in the complaint. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Ins.* (1998) 68 Cal.App.4th 445, 459.)

Respondent Lasky was JAMDAT's Chief Executive Officer and Chairman of the Board of Directors. Respondents Vais, Gurley and Lynton were directors of JAMDAT. Vais was also a vice president of Apax Managers, Inc., which owned 15.03 percent of JAMDAT stock. Gurley was a managing member of Benchmark Capital Management Co. IV, which owned 10.15 percent of JAMDAT's stock. Respondent Rogers sold a leading wireless publisher, Blue Lava Wireless, to JAMDAT for $137 million; Blue Lava's principal asset was a 15-year worldwide license to the wireless rights for Tetris, one of the most popular games ever made. As a part of this deal, Rogers became a director of JAMDAT. These five individuals constituted the entire board of directors.

Appellant Fund is a shareholder of JAMDAT.

EA owns a valuable stable of video games. The merger of EA and JAMDAT allowed EA to take advantage of both JAMDAT's proprietary technology for mobile game deployment and its expansive mobile game catalog, which included Tetris.

2. August-September 2005

Lasky met for the first time with EA's vice president of corporate development, Owen Mahoney, on August 29, 2005 to discuss the acquisition of JAMDAT by EA. Lasky and Mahoney continued this discussion in September. At the end of September, Lasky met with EA's chief executive officer to discuss the more detailed specifics of an acquisition.

In September, Lasky also entered into discussions with Yahoo about the possible acquisition of JAMDAT by Yahoo.

JAMDAT entered into confidentiality agreements with Yahoo and EA respectively in September and early in October. At the time of the EA agreement, Mahoney asked Lasky whether JAMDAT would enter into an exclusivity agreement with EA; such an agreement, which was eventually concluded, prevented JAMDAT from negotiating with any other potential buyers. At this point, Lasky had not informed the full board of directors that he was contemplating the sale of JAMDAT.

3. October 2005

On October 7, 2005, Lasky disclosed for the first time to the full board that he had been talking to EA and Yahoo about a possible sale of JAMDAT. Lasky did not tell the board, however, about the confidentiality agreements with EA and Yahoo, nor did he disclose that he was considering giving EA exclusivity.

On October 19, 2005, JAMDAT hired Credit Suisse First Boston (Credit Suisse) as its financial advisor in connection with the sale of JAMDAT. Credit Suisse agreed to work on a contingency basis, i.e., Credit Suisse would be paid only if it offered a fairness opinion or if a transaction was consummated. Credit Suisse would be paid $1.5 million if it stated that a proposed acquisition was fair, or 1 percent of the overall acquisition price if there was one. The incentive for Credit Suisse obviously was to recommend an acquisition since only then would Credit Suisse be paid. This was not disclosed in the proxy statement.[2]

Even though JAMDAT's board delegated to Credit Suisse the sole responsibility to negotiate with prospective buyers, Lasky continued to be the sole negotiator with EA with whom he continued to deal with directly. As the complaint puts it: "Thus, it is no surprise at all that the Acquisition [by EA] included a guaranty of continued employment for Lasky, and the opportunity to roll over his equity into EA." In fact, Lasky was employed by JAMDAT after the acquisition.

4. The First Offers

On October 25, 2005, EA offered to buy JAMDAT for $25 per share. At the same time, EA made clear that it would continue to negotiate only on an exclusive basis.

The next day, Yahoo offered $22 to $26 per share. Yahoo's offer was contingent only upon the completion of due diligence; Yahoo did not request exclusivity.

On October 27, 2005, Credit Suisse reported that it had contacted Microsoft, Viacom and News Corp., all of whom were interested in JAMDAT.

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[2] We will return to the proxy statement, which was issued in January 2006.

On the same day, Lasky persuaded the board to reject Yahoo's bid. Although Lasky pressed for giving EA exclusivity, the board did not go along with this. Credit Suisse backed Lasky.

JAMDAT entered into a confidentiality agreement with News Corp. on November 1, 2005.

5. Yahoo and EA

During November 2005, Yahoo and EA continued on their respective paths. Yahoo carried on with its due diligence and prepared a draft agreement, which it submitted to JAMDAT. Toward the end of the month, Credit Suisse informed the board that a higher offer was expected from Yahoo and that it was nearing the end of its due diligence.

EA, on the other hand, continued to insist on exclusivity and made no other overt moves. Early in November, Lasky told JAMDAT's board that his real reason for engaging in a "one-sided negotiating position with EA" was that EA had promised Lasky and other members of management "lucrative compensation packages that included continued employment and the opportunity to roll over their holdings in [JAMDAT] into EA post-Acquisition."

In the middle of the month, Lasky, without board approval, negotiated the terms of an exclusivity agreement with EA. Also toward the end of November, Lasky informed the board that EA had started due diligence.

On November 21, 2005, JAMDAT's board instructed Credit Suisse to inform Yahoo that it had to respond with a new offer within a matter of hours. Yahoo explained that it could not make a revised offer until its executive committee met on November 23, 2005. The proxy statement represented that Yahoo had declined to make a higher offer, while the truth was that Yahoo had asked for more time.

6. JAMDAT Shares Appreciate; EA gets Exclusivity

At the end of November 2005, Credit Suisse reported to JAMDAT's board that a $5 appreciation in JAMDAT's shares, if it proved to be sustained, would affect Credit Suisse's analysis of the fairness of EA's proposal.

Rather than losing the EA deal by virtue of the rise in JAMDAT stock, JAMDAT's board now authorized Lasky to sign an exclusivity agreement with EA. "Thus, even though Yahoo had not been allowed the necessary time to make a revised offer, and several other entities stood poised to make competing bids for [JAMDAT], the Board authorized Lasky to enter into an exclusivity agreement with EA and effectively end any semblance of a competitive bidding process." The agreement "ensured that [JAMDAT] would be sold only to EA, and on terms preferable to EA." The period of exclusivity ended on December 8, 2005.

7. The "Force the Vote" Provision

A "force the vote" provision in a merger agreement requires the board of directors to submit to shareholder vote the proposed merger, even if the board itself no longer wants the merger. (The effect of such a provision is to hamper merger discussions with other entities because, until the shareholder vote is taken, it is not known whether the merger that is subject to the vote will or will not take place.) JAMDAT's board initially decided against a "force the vote" provision (because of its effect on other parties such a Yahoo) but such a provision was in fact included in the EA-JAMDAT agreement. We discuss the shareholder vote below.

8. The JAMDAT Board Votes

On December 8, 2005, the board voted to approve the merger agreement with EA for $27 per share. At least four of the five directors "were encumbered by disabling conflicts of interests" when they cast their votes. Those conflicts are set forth in section 10, post.

9. The Voting Agreements

The board also approved Voting Agreements with three board members (Lasky, Vais and Gurley) who together controlled 28.6 percent of JAMDAT stock. The voting agreements issued irrevocable proxies to EA which ensured that at least 28.6 percent of JAMDAT shares would be voted for the acquisition. After the Voting Agreements were signed, the board of directors and management held 50.15 percent of JAMDAT stock, thus "the Acquisition itself became a *fait d'accompli* because the Board and management held voting control over [JAMDAT]."

10. What the Directors Gained

In addition to Lasky continuing his employment, the EA acquisition enabled Lasky, Vais and Gurley to monetize their holdings of JAMDAT shares, i.e., their holding became liquid while before the merger their holdings were not liquid. This was also true of Rogers, who in addition to the 16.3 percent interest in JAMDAT stock, also held 1 million shares that would have been tied up in escrow for another three years.

11. The Proxy

The complaint: "The Proxy failed [to] disclose or did so in a misleading fashion material information that shareholders needed to know before being asked to vote in favor of the Acquisition." The complaint alleges that the proxy failed to disclose the following:

- the Acquisition was a *fait d'accompli* because certain members of the Board and company management held voting control of the Company and had issued irrevocable proxies to EA;
- the Voting Agreements entered into by Apax and Benchmark were executed by Vais and Gurley, as principals of Apax and Benchmark, and thus effectively bound those directors to vote their shares in favor of the Acquisition;

- the Board had approved the Voting Agreements without any substantial discussion;
- defendants had contracted around the so-called fiduciary out provision in the Merger Agreement by entering into the Voting Agreements and agreeing to a force-the-vote provision in the Merger Agreement;
- the Board had discussed and rejected a force-the-vote provision;
- the Merger Agreement contained a force-the-vote provision despite that fact that such a provision was discussed and supposedly rejected by the Board;
- the Board did not establish a special committee of independent directors to consider and vote on the Acquisition;
- the fact that Vais, Gurley and Rogers were materially interested in the Acquisition;
- the amount of the "customary fee" Credit Suisse received for its services and the amount of that fee that was contingent upon the Acquisition being consummated;
- information concerning the "various alternatives" to the Acquisition that the Board purportedly considered;
- the number and type of "various additional parties" that the Company contacted and entered into confidentiality agreements with in October and November of 2005, which included Yahoo, Viacom, Microsoft and News Corp.;
- the range of possible prices contained in the expressions of interest received by JAMDAT from Yahoo ("Company A" in the Proxy) on October 26, 2005, and November 3, 2005;
- Credit Suisse never made a counteroffer to Yahoo;
- the Board did not wait to receive a "best and final" offer from Yahoo before entering into the exclusivity agreement with EA;
- Credit Suisse had given Yahoo an ultimatum to respond within "hours" with a revised bid;
- the Board was concerned that the recent run-up in the Company's stock price might impinge on Credit Suisse's ability to opine that the Acquisition was fair;

- the Company continued to receive inquiries from potential buyers throughout the exclusivity period granted to EA;
- whether any executive signing non-competition agreements received separate consideration for entering into those agreements;
- whether any shareholder entering into the Voting Agreements, including, but not limited to, defendants Lasky, Vais and Gurley, received separate consideration for entering into those agreements;
- whether growth rates were incorporated into Credit Suisse's Selected Companies Analysis and Discounted Cash Flow analyses in connection with its fairness opinion;
- sufficient information concerning Credit Suisse's Selected Companies Analysis, including the companies selected for comparison, summary data (highs, lows and medians) for their valuation metrics, and how the selections of the reference ranges of the metrics were made (including any supporting analytical detail);
- sufficient information concerning Credit Suisse's Selected Acquisitions Analysis, including the transactions selected for comparison, summary data (highs, lows and medians) for their valuation metrics, that valuation data points were not available for the majority of the acquisitions selected, and how the selections of the reference ranges of the metrics were made (including any supporting analytical detail);
- sufficient information concerning the current and anticipated future amounts of the Company's deferred tax assets and how Credit Suisse incorporated them into its Discounted Cash Flow Analysis;
- sufficient information concerning the treatment of licensing costs and synergies by Credit Suisse in its Discounted Cash Flow Analysis;
- sufficient information concerning the selection of the references ranges of the Weighted Average Cost of Capital made by Credit Suisse in its Discounted Cash Flow Analysis (including any supporting analytical detail); and

- the true value of the Company's assets.

PROCEDURAL HISTORY

The original complaint was filed by Elliot M. Fox in December 2005, before the acquisition was finalized. The trial court denied Fox's application for a temporary restraining order barring the acquisition, which then took place.

Fox filed an amended complaint in March 2007. Respondents demurred, contending that: (1) the claim based on the breach of the duty of care was precluded by Delaware law; (2) the complaint failed to state facts showing that the duty of loyalty was breached; and (3) the action was barred by the affirmative defense of shareholder ratification. The trial court, per the Hon. Wendell Mortimer, Jr., overruled the demurrer, ruling that the complaint pleaded facts that supported a claim for "breach of loyalty."

Fox moved for class certification but this was denied without prejudice in March 2008.

Appellant Fund was permitted to intervene per a stipulation, and it then filed a complaint in intervention that it contends "closely tracked Fox's amended complaint." Respondents demurred to Fund's complaint, acknowledging that "in virtually all respects" Fund's complaint is "identical to the amended complaint filed by Fox." Respondents again relied on the defense of shareholder ratification. Their demurrer asserted that under "Delaware law, a fully informed shareholder vote approving a transaction ratifies all actions taken by the Company's directors in furtherance of that transaction." The demurrer also asserted that Fund's complaint was defective in that it did not adequately allege a breach of the duty of loyalty.

The second demurrer, which was brought against Fund's complaint, was heard by the Hon. William F. Highberger, who sustained the demurrer on September 19, 2008. There were three components to the trial court's ruling. As to the claims against the individual directors, the breach of duty of care was barred by "the provisions of JAMDAT's certificate of incorporation and applicable Delaware law. (8 Del. C. § 102(b)(7); *Malpiede v. Townson*, 780 A.2d 1075, 1093-94 (Del. 2001)." The breach of

the duty of loyalty claim was barred by the doctrine of shareholders' ratification. Finally, as to the claims against the corporation, the trial court concluded that under Delaware law a corporation does not owe a fiduciary duty to its shareholders. (See *Alessi v. Beracha* (Del.Ch.2004) 849 A.2d 939, 950.) Leave to amend was denied.

A final judgment against Fund was entered on October 21, 2008.

DISCUSSION

As did the trial court, we discuss the claims against the individual directors separately from those claims against JAMDAT. We start our analysis with a few general principles applicable to demurrers and our standard of review. First, as long as a complaint consisting of a single cause of action contains any well-pleaded cause of action, a demurer must be overruled even if a deficiently pleaded claim is lurking in that cause of action as well. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1046; see 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 957, pp. 371-372.) Second, if a cause of action names two or more defendants, the sufficiency of the complaint against one defendant does not immunize the plaintiff against a properly imposed demurrer by another defendant who may separately demur. (See *Majestic Realty Co. v. Pacific Lighting Corp* (1974) 37 Cal.App.3d 641, 653; 5 Witkin, *supra*, Pleading, § 962, pp. 374-375.) Third, a demurrer accepts as true all well pleaded facts and those facts of which the court can take judicial notice but not deductions, contentions, or conclusions of law or fact. (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 538.) Fourth, the standard of review of a ruling sustaining a demurrer without leave to amend is de novo. Whether leave should have been granted is considered under the abuse of discretion standard, although error is shown if there is any reasonable probability an amendment curing the defect can be made. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Fifth, a demurrer that is sustained on an erroneous ground will nevertheless be upheld on appeal if as a matter of law the complaint fails to state a cause of action. This is a variation of

the rule that the appellate court reviews the trial court's *decision* not its rationale. (*Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1326-1327.)

A.
The Claims Against the Individual Directors

1. The Doctrine of Shareholder Ratification Does Not Bar Fund's Claims

The trial court concluded that the doctrine of shareholder ratification precluded Fund's claims against the individual directors for breach of the duty of loyalty. The parties agree that this case is governed by Delaware law. We concur that under California's internal affairs doctrine substantive Delaware law governs.[3]

On January 27, 2009, some four months after the trial court's ruling here, the Delaware Supreme Court handed down its decision in *Gantler v. Stephens* (Del.2009) 965 A.2d 695 (*Gantler*).[4] After disposing of issues not germane to the case before us, the court turned to the *Gantler* trial court's ruling that the subsequent approval by a rate of a disinterested majority of the shareholders legally ratified the decision of the board of directors to reclassify certain shares of the corporation as preferred, rather than common, stock. (*Id.* at pp. 701, 712.) (The decision of the board of directors was flawed because the majority of the board lacked independence.)

The Supreme Court in *Gantler* commenced its analysis of the ratification issue with the observation that under "current Delaware case law, the scope and effect of the

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[3] " 'The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs-matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands.' [Citations.]" (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 442.)

[4] In its ruling on the demurrer, the trial court correctly relied on the opinion of the Court of Chancery of Delaware in *Gantler v. Stephens*, 2008 WL 401124 (Del.Ch.2008) in support of its shareholder ratification analysis. It was only after the ruling on the present demurrer that the Delaware Supreme Court in *Gantler* reversed the Chancery Court.

common law doctrine of shareholder ratification is unclear, making it difficult to apply that doctrine in a coherent manner." (*Gantler, supra*, 965 A.2d at p. 712.) The court noted that shareholder ratification has appeared in the Delaware cases in two settings. There is "classic" ratification where shareholders approve board action that, legally speaking, could be accomplished without any shareholder approval. But shareholder ratification has also been applied in cases where an informed shareholder vote is statutorily required for the transaction " 'to have legal existence.' " (*Id.* at p. 713.) Ratification in the "classic" setting is a sound concept because it " 'involves the voluntary addition of an independent layer of shareholder approval.' " (*Ibid.*) This feature is obviously missing in cases where the shareholder vote is required.

The court then concluded:

> "To restore coherence and clarity to this area of our law, we hold that the scope of the shareholder ratification doctrine must be limited to its so-called 'classic' form; that is, to circumstances where a fully informed shareholder vote approves director action that does *not* legally require shareholder approval in order to become legally effective. Moreover, the only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve. With one exception, the 'cleansing' effect of such a ratifying shareholder vote is to subject the challenged director action to business judgment review, as opposed to 'extinguishing' the claim altogether (*i.e.*, obviating all judicial review of the challenged action)." (Fn. omitted.) (*Gantler, supra*, 965 A.2d at p. 713.)

Without expressly conceding that *Gantler* forecloses the shareholder ratification defense in this case, respondents inferentially admit this to be true. As Fund points out, 8 Delaware Code section 251(c) requires that a merger must be submitted to the stockholders for a vote. Thus, under *Gantler*, because our case does not involve classic ratification, the defense of shareholder ratification does not apply. It follows that the court's ruling in sustaining the demurrer on that ground was in error.

2. The Cause of Action Sufficiently Alleges a Breach of the Duty of Loyalty

Although *Gantler* disposes of the availability of the doctrine of shareholder ratification, it does not address one way or the other the adequacy of Fund's allegations

that defendants breached the fiduciary duty of loyalty. We observe the trial court did not base its ruling on any deficiencies in pleading the elements of the cause of action. Instead, the court's decision on the duty of loyalty claim was founded solely on the shareholder ratification defense.

In keeping with the rule that, if an order sustaining a demurrer is correct on any theory, the appellate court must affirm the trial court's decision (*Boon v. Rivera, supra,* 80 Cal.App.4th at pp. 1326-1327), respondents argue on appeal that the complaint did not adequately allege breach of the duty of loyalty either as to the proxy disclosures, or the terms of the merger agreement or the process leading to the execution of that agreement. We disagree.

The complaint contains detailed allegations to support its claim that the merger agreement and process leading up to it violated the directors' duty of loyalty. First, it alleges that additional information should have been given to stockholders. Second, it alleges that the voting agreements – which committed 28.6 percent of JAMDAT stock to voting for the acquisition by EA -- were part of the larger scheme that sought to render the acquisition inevitable. One aspect of this specific scenario was that another 21.55 percent of stock was held by the board of directors and management, which brought the committed pro-acquisition vote to 50.15 percent of JAMDAT stock. In other words, the voting agreements were one aspect of Lasky's (and three other board members') plan to sell JAMDAT to EA, no matter what, and without regard to the interests of the other shareholders in achieving a higher price for their shares. Third, the Fund alleges that the directors should have disclosed additional details regarding the negotiation process.

In response to the Fund's argument that these allegations are sufficient to withstand demurrer, respondents point to language in the proxy statement which they contend adequately disclosed the process. Assuming without deciding that the proxy statement could be judicially noticed, the flaw in respondents' approach is to convert a process designed to test the legal sufficiency of the complaint, i.e., a general demurrer, into a comparison of Fund's and respondents' evidence with a view of showing that respondents come off better in this department than Fund. Respondents insist the

disclosures are adequate but that is beyond the scope of a demurrer. It raises a factual question. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Ins.*, *supra*, 68 Cal.App.4th at p. 459; see generally 5 Witkin, Cal. Procedure, *supra*, Pleading, § 947, p. 360 [The demurrer tests the pleading alone and not the evidence or other extrinsic matters.].) A general demurrer cannot be used to resolve contested questions of fact. It is a contested question of fact whether the disclosures in the proxy statement were adequate and complete.

Respondents argue that the trial court could take judicial notice of the proxy statement under Evidence Code section 452, subdivision (h), "facts and propositions" not reasonably subject to dispute. From this, they argue, the trial court must ignore conclusory factual allegations in the complain that conflict with those facts judicially noticed. Respondents are correct in their statement of the law. (*Williams v. Southern California Gas. Co* (2009) 176 Cal.App.4th 591, 598; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 440, at pp. 572-574; see Code Civ. Proc., § 430.30.) Although some aspects of a proxy statement may be the proper subject of judicial notice – for example whether or not a proxy statement contained a disclosure –the doctrine is not so broad to allow judicial notice of those "facts" in a proxy statement that are themselves in dispute. (See *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.) Because, as we observe in the text, the allegations concerning the breach of the duty of loyalty are not limited to matters contained in the proxy statement, we need not decide whether judicial notice was or was not proper in ruling on the demurrer.

Respondents also misconstrue Fund's theory, as alleged in its complaint, about the role of Credit Suisse in the acquisition. Fund's theory is that the role designed for Credit Suisse by Lasky and his associates was both to provide the cover of respectability and to channel the transaction toward EA. As to the latter, among other things Credit Suisse was employed to keep Yahoo at bay, especially as November neared its end and Yahoo was getting closer to completing due diligence and making a better offer. The complaint alleges that the proxy statement represented that, as of November 21, 2005, Yahoo had declined to make a higher offer, while the truth was that Yahoo had asked for more time.

Contrary to respondents' claim, Fund's theory as to Credit Suisse was not that Credit Suisse had provided insufficient data or that its compensation was inappropriate , but that, among other things, Credit Suisse was being used to keep Yahoo out and bring EA in. In addition, Fund's theory about Credit Suisse is that it was used to contact other prospective buyers, which created the illusion that Lasky and the board were actually looking for the best offer, while they were in fact committed to EA.

Respondents claim that Fund has failed to plead "particularized facts to show that the directors 'knowingly and completely' disregarded their duty to obtain the best terms reasonably available, or designed the transaction to benefit themselves at the expense of other shareholders." There is no merit to this contention. The complaint very clearly sets forth a course of conduct spanning more than half a year during which respondents allegedly did all they could to lock up the acquisition by EA and to foil all attempts by others, including most prominently Yahoo, to acquire JAMDAT. As an example, in setting forth respondents' conflicts of interest, the complaint specifically describes how Lasky's, Vais's, Gurley's and Rogers's stock holdings in JAMDAT were monetized by the EA acquisition and that Lasky and others secured for themselves employment with EA after the acquisition.

We do not agree with respondents that the complaint's allegations as to the inadequacy of the merger price of $27 are conclusory. Not only does the complaint allege that JAMDAT's highest price 60 days before the acquisition was $32.50, an allegation which is certainly not conclusory, but the complaint provides further background on this issue by alleging that JAMDAT was still growing at the rate of 30 percent. In other words, JAMDAT was more promising than the EA price of $27 per share reflected.

Finally, respondents dispute that they were motivated by self-interest, specifically by the JAMDAT shares they were able to monetize. Respondents state that any merger would have had the same result. Perhaps this is so. But the issue on a demurrer is not who is right on the facts but rather whether the complaint states facts sufficient to constitute a cause of action. The allegations of the complaint must be accepted as true in

ruling on a demurrer (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Ins., supra,* 68 Cal.App.4th at p. 459), and on this issue, as well as others, the complaint speaks quite clearly.

3. Whether the Complaint also Alleges a Breach of the Duty of Care Cannot be Decided on Demurrer in this Setting

As we have already observed, if a single cause of action properly alleges a claim, a demurrer cannot be interposed on the ground that also within the cause of action is a failed effort to allege another claim. (*Kong v. City of Hawaiian Gardens Redevelopment Agency*, *supra*, 108 Cal.App.4th at p. 1046.) Thus, respondents may very well be correct, as the trial court concluded, that the Fund's claim for breach of duty of care against the directors is barred by JAMDAT's certificate of incorporation and applicable Delaware law. (See 8 Del. C. § 102(b)(7); *Malpiede v. Townson*, *supra,* 780 A.2d at pages 1093-1094.) However resolution of this point of law must await some future procedural device, such as a motion for summary adjudication. (See *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854 [where cause of action alleges more than one distinct act, each of which constitute a cause of action, defendant may move for summary adjudication as to each act].) As the single cause of action alleged in the Fund's complaint adequately alleges a cause of action for breach of the duty of loyalty, that it may also contain some defective allegations concerning a purported duty of care claim is, at this juncture, legally beside the point.

B.
The Claims Against JAMDAT

Respondent JAMDAT argues that the demurrer must be sustained as to it because the Fund's complaint for breach of fiduciary duties does not allege a cause of action against the corporation. We agree. JAMDAT correctly points out that, under *Alessi v. Beracha, supra,* 849 A.2d at page 950, a Delaware corporation does not owe a fiduciary duty to its shareholders. Each defendant in a complaint against multiple defendants may

jointly and severally demurrer on the ground that the complaint does not state a cause of action as to that demurring defendant. (See *Majestic Realty Co. v. Pacific Lighting Corp.*, *supra*, 37 Cal.App.3d at p. 653; 5 Witkin, *supra*, Pleading, § 962, pp. 374-375.) The Fund does not even address the point in its briefs. Accordingly any further argument is waived. (*Maintain Our Desert Environment v Town of Apple Valley* (2004) 124 Cal.App.4th 430, 439.) The demurrer was properly sustained as to JAMDAT.

DISPOSITION

The judgment is reversed as to defendants Paul A. Vais, J. William Gurley, Mitch Lasky, Henk B. Rogers and Michael M. Lynton. The judgment is affirmed as to defendant JAMDAT Mobile Inc. Appellant is to recover its costs on appeal as against the individual defendants. Respondent JAMDAT is to recover its costs against appellant.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

ELLIOT M. FOX, Plaintiff, v. JAMDAT MOBILE, INC., et al., Defendants and Respondents; v. NECA-IBEW PENSION FUND, Intervener and Appellant.	B212672 (Los Angeles County Super. Ct. No. BC344364) ORDER FOR PARTIAL PUBLICATION AND MODIFICATION OF OPINION NO CHANGE IN JUDGMENT

THE COURT:

GOOD CAUSE APPEARING, the opinion filed on May 21, 2010, is modified as follows, including a change in certification from nonpublication to partial publication:

1. On the cover page, second paragraph which reads

Coughlin Stoia Geller Rudman & Robbins, Randall J. Baron, Kevin K. Green and David T. Wissbroecker, for Plaintiff and Intevenor-Appellant.

Should read as follows:

Robbins Geller Rudman & Dowd LLP, Randall J. Baron, Kevin K. Green and David T. Wissbroecker, for Intervener and Appellant.

2. Parts A.2, A.3 and B of our Discussion at pages 14-18 is ordered not to be published.

There is no change in the judgment.

BIGELOW, P. J. RUBIN, J. FLIER, J.